Date and Time: Friday, October 13, 2023 3:49:00 PM CST

Job Number: 207978340

Documents (100)

1. [Cal. E. Labs., Inc. v. Gould, 896 F.2d 400]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

2. [Austin v. McNamara, 731 F. Supp. 934]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

3. [Boczar v. Manatee Hosp. & Health Sys., Inc., 731 F. Supp. 1042]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

4. [St. Paul v. FMC Corp., 1990 U.S. Dist. LEXIS 18142]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

5. [Wabash Publ'g Co. v. Flanagan, 1990 U.S. Dist. LEXIS 2102]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

6. *Py Small Boats, Inc. v. International Marine Marketing Corp., 1990 U.S. Dist. LEXIS 3906*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

7. *Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

8. *General Aviation, Inc. v. Garrett Corp., 743 F. Supp. 515*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

9. *Perfumer's Workshop, Ltd. v. Roure Bertrand du Pont, Inc., 737 F. Supp. 785*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

10. *In re Workers' Compensation, 130 F.R.D. 99*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

11. *American Medical Transport, Inc. v. Curtis-Universal, Inc., 154 Wis. 2d 135*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

12. *Biljac Assocs. v. First Interstate Bank, 218 Cal. App. 3d 1410*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

13. *Mylan Lab., Inc. v. Akzo, N.V., 1990 U.S. Dist. LEXIS 3521*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

14. *First & First, Inc. v. Dunkin' Donuts, Inc., 1990 U.S. Dist. LEXIS 7432*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

15. *Berman v. Riverbay Corp., 1990 U.S. Dist. LEXIS 3372*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

16. [Oberndorf v. Denver, 900 F.2d 1434]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

17. [Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

18. [Blue Cross & Blue Shield Ass'n v. Group Hospitalization & Medical Services, Inc., 744 F. Supp. 700]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

19. [United States v. Rockford Memorial Corp., 898 F.2d 1278]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

20. [United States v. Western Elec. Co., 900 F.2d 283]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

21. [Rural Tel. Service Co. v. Feist Publications, Inc., 737 F. Supp. 610]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

22. *Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

23. *Now Plastics, Inc. v. HPT Plastics, Inc., 1990 U.S. Dist. LEXIS 3942*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

24. *Juster Assoc. v. Rutland, 901 F.2d 266*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

25. *Primo Constr., Inc. v. Swig Weiler & Arnow Management Co., 160 A.D.2d 379*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

26. *Turnbull & Turnbull v. ARA Transportation, Inc., 219 Cal. App. 3d 811*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

27. [Transnor (Bermuda), Ltd. v. BP North America Petroleum, 738 F. Supp. 1472]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

28. [Delaware & H. R. Co. v. Conrail, 902 F.2d 174]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

29. [Cal. v. Am. Stores Co., 495 U.S. 271]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

30. [United States v. Syufy Enterprises, 903 F.2d 659]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

31. [Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

32. Lawline v. The American Bar Ass'n, 738 F. Supp. 288

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

33. Soap Opera Now, Inc. v. Network Pub. Corp., 737 F. Supp. 1338

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

34. Beauford v. Helmsley, 740 F. Supp. 201

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

35. DeSantis v. Wackenhut Corp., 793 S.W.2d 670

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

36. IT & E Overseas, Inc. v. RCA Global Communications, Inc., 747 F. Supp. 6

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

37. [Alpert v. Boise Water Corp., 118 Idaho 136]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

38. [Northwest Medical Laboratories, Inc. v. Blue Cross & Blue Shield, Inc., 310 Ore. 72]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

39. [Texaco, Inc. v. Hasbrouck, 496 U.S. 543]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

40. [In re Bulk Popcorn Antitrust Litig., 1990 U.S. Dist. LEXIS 16333]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

41. [International Travel Arrangers v. NWA, Inc., 1990 U.S. Dist. LEXIS 11723]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

42. [Kansas v. Utilicorp United, Inc., 497 U.S. 199]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

43. *Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

44. *Austin v. Blue Cross & Blue Shield, 903 F.2d 1385*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

45. *Energy Productivity Sys. v. Public Serv. Co., 1990 U.S. Dist. LEXIS 20798*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

46. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

47. *Pharmaceutical & Diagnostic Services, Inc. v. University of Utah, 801 F. Supp. 508*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

48. *Sun Dun, Inc. v. Coca-Cola Co., 740 F. Supp. 381*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

49. *Thompson v. Metropolitan Multi-List, Inc., 1990 U.S. Dist. LEXIS 14487*

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

50. *Town Sound & Custom Tops, Inc. v. Chrysler Motor Corp., 743 F. Supp. 353*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

51. *United States v. Baker Hughes, Inc., 908 F.2d 981*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

52. *Market Force, Inc. v. Wauwatosa Realty Co., 906 F.2d 1167*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

53. Redwood Theatres, Inc. v. Festival Enterprises, Inc., 908 F.2d 477

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

54. New England Motor Rate Bureau v. FTC, 908 F.2d 1064

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

55. Rafferty v. NYNEX Corp., 744 F. Supp. 324

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

56. New York v. Cedar Park Concrete Corp., 741 F. Supp. 494

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

57. Bi-Rite Oil Co. v. Indiana Farm Bureau Coop. Ass'n, 908 F.2d 200

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

58. *Cheshire v. Coca-Cola Bottling Affiliated, Inc., 758 F. Supp. 1098*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

59. *In re Beef Industry Antitrust Litigation, 907 F.2d 510*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

60. *In re Wyoming Tight Sands Antitrust Cases, 1990 U.S. Dist. LEXIS 12165*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

61. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

62. *Guthrie v. Genesee County, 494 F. Supp. 950*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

63. *Advanced Health-Care Servs. v. Radford Community Hosp., 910 F.2d 139*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

64. Jennings v. Emry, 910 F.2d 1434

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

65. Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

66. Scales v. Vill. of Camden, 1990 U.S. Dist. LEXIS 11194

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

67. Health First, Inc. v. Bronson Methodist Hosp., 1990 U.S. Dist. LEXIS 11007

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

68. Beard v. Parkview Hosp., 912 F.2d 138

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

69. *Alcon Labs., Inc. v. Allergan, Inc., 1990 U.S. Dist. LEXIS 13348*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

70. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

71. *California State Bd. of Optometry v. FTC, 910 F.2d 976*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

72. *Broad. Music, Inc. v. Hearst/ABC Viacom Entm't Servs., 746 F. Supp. 320*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

73. *Vernon v. S. Cal. Edison Co., 1990 U.S. Dist. LEXIS 18286*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

74. *Eureka Urethane, Inc. v. PBA, Inc., 746 F. Supp. 915*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

75. *In re Wyoming Tight Sands Antitrust Cases, 1990 U.S. Dist. LEXIS 13576*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

76. *Desai v. Impacta, S.A., 1990 U.S. Dist. LEXIS 11892*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

77. *Musick v. Burke, 913 F.2d 1390*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

78. *Alpha Lyracom Space Communs. v. Communications Satellite Corp., 1990 U.S. Dist. LEXIS 11964*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

79. *Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

80. *Consolidated Gas Co. v. City Gas Co., 912 F.2d 1262*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

81. *Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

82. *Yamaha Store of Bend, Inc. v. Yamaha Motor Corp., 310 Ore. 333*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

83. *Concord v. Boston Edison Co., 915 F.2d 17*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

84. *Guralnick v. Supreme Court of New Jersey, 747 F. Supp. 1109*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

85. *Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co., 747 F. Supp. 1292*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

86. *Pacificorp v. Portland Gen. Elec. Co., 1990 U.S. Dist. LEXIS 12925*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

87. *Automotive Electric Service Corp. v. Association of Automotive Aftermarket Distributors, 747 F. Supp. 1483*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

88. *Rebel Oil Co. v. Atlantic Richfield Co., 133 F.R.D. 41*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

89. *Finnegan v. Campeau Corp., 915 F.2d 824*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

90. [Lincoln Nat'l Life Ins. Co. v. Silver, 1990 U.S. Dist. LEXIS 13669]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

91. [Hinkleman v. Shell Oil Co., 1990 U.S. Dist. LEXIS 21022]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

92. [Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

93. [Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp., 1990 U.S. Dist. LEXIS 13882]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

94. [Whirlpool Corp. v. U.M.C.O. Int'l Corp., 748 F. Supp. 1557]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

95. Anaheim v. Southern California Edison Co., 1990 U.S. Dist. LEXIS 18215

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

96. J.V.B. Enterprises, Inc. v. Marshall, 1990 Minn. App. LEXIS 1073

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

97. King Provision Corp. v. Burger King Corp., 750 F. Supp. 501

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

98. All-Tone Communications, Inc. v. American Information Technologies Corp., 1990 U.S. Dist. LEXIS 18757

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

99. Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

100. *Cranfill v. Scott & Fetzer Co., 752 F. Supp. 732*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Dec 14, 1984 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law

LexisNexis®

Cal. E. Labs., Inc. v. Gould

United States Court of Appeals for the Ninth Circuit

September 13, 1989, Argued and Submitted ; February 16, 1990, Filed

Nos. 88-15014, 89-15226

Reporter

896 F.2d 400 *; 1990 U.S. App. LEXIS 2198 **; 13 U.S.P.Q.2D (BNA) 1984 ***; 1990-1 Trade Cas. (CCH) P68,923

California Eastern Laboratories, Inc., a California Corporation, Plaintiff-Appellee, v. Harry J. Gould, an individual dba as Meade Laboratories, Defendant-Appellant. Harry J. Gould, an individual dba Meade Laboratories, Plaintiff-Appellant, v. California Eastern Laboratories, Inc., a California Corporation, et al., Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the District of Arizona, Charles L. Hardy, District Judge, Presiding, D.C. No. CV-85-0251-CLH.

Core Terms

patent, shop, district court, antitrust

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

Review of a grant of summary judgment is de novo. The reviewing court can affirm the trial court's finding only if, viewing the evidence in the light most favorable to the non-moving party, it concludes that there are no genuine issues of material fact.

Business & Corporate Compliance > ... > Patent Law > Ownership > Employee Inventions & Shop Rights

Patent Law > Ownership > General Overview

HN2[] **Ownership, Employee Inventions & Shop Rights**

The doctrine of shop rights has its origins in equity. A shop right is an employer's nonexclusive right to use an employee's patented process or invention that was developed during the employee's hours of employment. The right is based on the employer's presumed contribution to the invention through materials, time, and equipment.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN3[] **Standards of Review, De Novo Review**

A court reviews de novo a district court's dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

HN4[] **Public Enforcement, State Civil Actions**

Arizona ***antitrust law*** is interpreted in accordance with federal law pursuant to *Ariz. Rev. Stat. § 44-1412*.

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Patent Law > ... > Damages > Collateral Assessments > General Overview

HN5[] **Collateral Assessments, Attorney Fees**

35 U.S.C.S. § 285 authorizes the court to award reasonable attorneys' fees in an exceptional case. *Section 285* applies only to infringement actions.

Counsel: K. R. Reed, Scottsdale, Arizona, for the defendant-appellant.

Mark S. Ostrau, Wilson, Sonsini, Goodrich and Rosati, Palo Alto, California, for the plaintiff-appellee.

Judges: Herbert Y. C. Choy, William C. Canby, Jr., and William A. Norris, Circuit Judges.

Opinion by: CANBY

Opinion

[*401] CANBY, Circuit Judge:

Harry Gould appeals the decisions in two cases that have been consolidated on appeal. In the first case, the district court held that California Eastern Laboratories (CEL) has a shop right in a patent owned by Gould. In the second, the court dismissed counts in Gould's complaint which charged CEL with violations of the antitrust laws, *15 U.S.C. §§ 1* and *2* and *Ariz.Rev.Stat. §§ 44-1402* and 1403. Gould also seeks attorneys' fees pursuant to *35 U.S.C. § 285*. We affirm the decisions of the lower court in both actions and deny attorneys' fees.

FACTUAL BACKGROUND

These disputes arose out of a series of contracts entered into by Gould with a number of companies that now are **[**2]** owned in whole or part by CEL. In April 1982, Gould entered into a contract with Neil Smith, who was doing business as Phoenix Microwave, to design a low noise amplifier module (LNA), a device which is useful in Television Receive Only amplifiers (TVRO's). In July 1982, Gould entered into a contract with CEL to do further work and testing to ready the LNA for market. Several days later, on July 21, 1982, CEL purchased all of the business and assets of Phoenix Microwave, including the Gould LNA design.

Two months later, Gould filed an application for a patent covering the improvements he had developed while designing LNA's. The patent, U.S. Patent No. 4,480,240 (240), issued in October 1984. On July 20, 1984, an application for the second patent in suit, covering additional improvements in LNA's, was filed. The application **[*402]** bore Gould's name, but was prepared by a CEL subsidiary. That patent, U.S. Patent No. 4,631,494 (494), issued in December 1986.

The cases represented by these appeals began with an action brought by CEL to settle ownership of the two patents at issue. **[***1985]** In that case (No. 85-251), the district court ruled on cross-motions for summary judgment that Gould **[**3]** was the proper owner of both patents but that CEL retained a "shop right" in each.

Following the summary judgment order, Gould sought to assert a counterclaim against CEL for violations of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* & *2*, seeking treble damages under section 4 of the Clayton Act, *15 U.S.C. § 15*. He also sought to assert comparable claims under state law. The district court denied Gould leave to file his counterclaim. Gould subsequently brought the same claims in the form of a new and separate action (No. 87-1162) against CEL and its subsidiary Microwave Systems Engineering, Inc. (MSE). CEL and MSE immediately responded by moving to dismiss Gould's complaint pursuant to *Fed.R.Civ.P. 12(b)(6)*. The district court granted the motion with leave to amend. Gould thereafter filed his First Amended Complaint, which CEL and MSE again moved to dismiss. The district court dismissed counts 2 and 3 without leave to amend. After the district court certified that its order was final pursuant to *Fed.R.Civ.P. 54(b)*, Gould filed his appeal.

Gould initially filed an appeal of the partial summary judgment ruling in case No. 85-251 in **[**4]** the Court of Appeals for the Federal Circuit. The Federal Circuit transferred the appeal to this court to consolidate the shop right issue with those issues raised in the appeal of the dismissal of Gould's claims in No. 87-1162.

ANALYSIS

A. *Shop Rights to Patents Nos. 240 and 494*

HN1[] This court reviews a grant of summary judgment *de novo.* *Ashton v. Cory, 780 F.2d 816, 818 (9th Cir. 1986)*. We can affirm the trial court's finding that CEL has a shop right in Gould's patents only if, viewing the evidence in the light most favorable to Gould, we conclude that there are no genuine issues of material fact. *Id.*

HN2[] The doctrine of shop rights has its origins in equity. A shop right is an employer's nonexclusive right to use an employee's patented process or invention that was developed during the employee's hours of employment. The right is based on the employer's presumed contribution to the invention through materials, time, and equipment. *See* *U.S. v. Dubilier Condenser Corp., 289 U.S. 178, 188-89, 77 L. Ed. 1114, 53 S. Ct. 554 (1933)*. **[**5]**

Gould concedes that Phoenix Microwave obtained shop rights to both patents through Gould's work under contract in 1982. Those rights passed to CEL when it purchased the entire business and assets of Phoenix Microwave in July 1982. *See* *PPG Industries, Inc. v. Guardian Industries Corp., 597 F.2d 1090, 1094* (6th Cir.), *cert. denied*, *444*

U.S. 930, 62 L. Ed. 2d 187, 100 S. Ct. 272 (1979); *Neon Signal Devices v. Alpha-Claude Neon Corp., 54 F.2d 793, 796 (D.C.Pa. 1931)*; *Gate-Way, Inc. v. Hillgren et al., 82 F. Supp. 546, 555 (S.D.Cal. 1949)*, *aff'd per curiam*, *181 F.2d 1010 (9th Cir. 1950)*.

Gould presented no evidence in the record to show that CEL did not purchase all of Phoenix Microwave. He argues simply that CEL did not continue the Phoenix Microwave business because it distributed the assets to various existing subsidiaries. This argument attempts to make from the formalities of modern business organization a distinction that is unsuited to the equitable origins of the shop right concept. Gould presents no authority suggesting that the particular form of incorporating the purchased company into **[**6]** the CEL structure is germane.

> Unassignable licenses may sometimes be invoked by persons who are not exactly identical with the licensees. A railroad company which was formed by the consolidation of prior railroad companies, may invoke the licenses which were given **[*403]** to either of its constituent corporations. . . .

Gate-Way, Inc. v. Hillgren, 82 F. Supp. at 554-55 (quoting 1 *Walker on Patents*, 437 (6th ed.)).

Gould also attempts to invalidate CEL's shop right by arguing that CEL was involved in a fraudulent application for the second patent, No. 494, and thus has "unclean hands." Gould has offered no authority to support his claim that fraud in a later patent application invalidates a pre-existing shop right. The fact that fraud could invalidate the later patent itself is of no assistance to Gould. He owns the patent. To the extent that fraud may vitiate the patents, it would also make shop rights unnecessary. CEL could manufacture at will.

B. *Gould's Antitrust Claim*

Gould argues that the district court erred in dismissing his antitrust complaint for failure to state a claim under *Rule 12(b)(6)*. **[**7]** ***HN3***[] We review de novo a district court's dismissal pursuant to *Rule 12(b)(6)*. *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 732 (9th Cir. 1987)*. **[***1986]**

Gould relies on *Walker Process Equipment Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)*, to establish his antitrust claim. In *Walker Process* the Supreme Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2* of the Sherman Act provided the other elements necessary to a *§ 2* case are present." *Id. at 174*. Gould's attempt to fit this case into a *Walker Process* action fails. *Walker Process* was an infringement action based on a claim that the defendants had sought to enforce the patent as a means to restrain competition. This case, on the other hand, began as a declaratory judgment action to determine actual ownership of the patent. This is not the kind of anticompetitive enforcement at which the antitrust laws are aimed. Gould has not alleged that CEL actually attempted to enforce the patents. Moreover, since the district court **[**8]** determined that the patents belong to Gould, CEL cannot enforce them. Without some effort at enforcement, the patent cannot serve as the foundation of a monopolization case. Gould has offered no other sufficient basis for his antitrust claim on this appeal. We accordingly conclude that the district court was correct in granting CEL's motion to dismiss Gould's antitrust claims.

HN4[] Arizona ***antitrust law*** is interpreted in accordance with federal law. *See* *Ariz.Rev.Stat.Ann. § 44-1412*; *Johnson v. Pacific Lighting Land Co., 817 F.2d 601, 604 (9th Cir. 1987)*, *cert. denied*, *484 U.S. 1062, 108 S. Ct. 1020, 98 L. Ed. 2d 985 (1988)*. Therefore, for the reasons stated above, we also uphold the district court's dismissal of Gould's state claims.

C. *Attorneys' Fees*

35 U.S.C. § 285 ***HN5***[] authorizes the court to award reasonable attorneys' fees in an "exceptional case." Gould has not prevailed on any issue entitling him to fees. *Section 285*, moreover, applies **[**9]** only to infringement actions. The alleged fraud here is unconnected to any infringement claim. Gould's request for fees is denied.

CONCLUSION

The judgments of the district court are AFFIRMED.

Austin v. McNamara

United States District Court for the Central District of California

February 20, 1990, Decided

Case No. CV 88-04268 RG (Kx)

Reporter

731 F. Supp. 934 *; 1990 U.S. Dist. LEXIS 3550 **; 1990-1 Trade Cas. (CCH) P69,023

GEORGE M. AUSTIN, M.D., Plaintiff, v. JAMES V. McNAMARA, M.D., JAMES R. SAINT JOHN, M.D., RICHARD B. BROWN, M.D., PAUL J. SCHWEINFURTH, M.D., THOMAS JONES, M.D., SANTA BARBARA COTTAGE HOSPITAL, SANTA BARBARA COTTAGE HOSPITAL, INC., and DOES 1 through 5, inclusive, Defendants

Subsequent History: **[**1]** As Amended, February 20, 1990.

Core Terms

Hearings, immunity, neurosurgeons, patients, staff privileges, Staff, cases, clinical privileges, monitoring, recommendations, due process requirement, summary judgment, admits, antitrust liability, final report, reinstatement, neurosurgery, conditions, notice, substandard, revocation, voted, legislative history, healthcare, Health Care Quality Improvement Act, conspiracy, effective, reviewers, alleges, qualify

LexisNexis® Headnotes

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN1[] Antitrust Actions, Facilities

Under *Fed. R. Civ. P. 56(c)*, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN2[] Private Actions, State Regulation

The incentive and protection for physicians engaging in effective professional peer review comes in the form of immunity from damages under federal and state law for qualifying review bodies and individuals associated with, or assisting, the professional review action. *42 U.S.C.S. § 11111(a)(1)*. The court must first determine that the professional review action itself complies with the due process requirements outlined in *§ 11112(a)* before the review body and the individuals assisting in the process can be granted the immunity from federal antitrust liability that *§ 11111(a)(1)* promises.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

HN3[] Antitrust & Trade Law, Exemptions & Immunities

See *42 U.S.C.S. § 11151(9)*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN4[] Antitrust & Trade Law, Exemptions & Immunities

In order to satisfy the due process requirements as outlined in *42 U.S.C.S. § 11112(a)(1)-(4)*, the defendant must first show that the professional review actions were taken in the reasonable belief that the action was in the furtherance of quality health care. *42 U.S.C.S. § 11112(a)(1)*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN5[] **Antitrust & Trade Law, Exemptions & Immunities**

Defendants must next demonstrate that there was a reasonable effort to obtain the facts of the matter before the professional review actions were undertaken. *42 U.S.C.S. § 11112(a)(2)*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN6[] **Antitrust & Trade Law, Exemptions & Immunities**

42 U.S.C.S. § 11112(a)(3) requires that the professional review actions comply with the due process requirements of adequate notice and hearing in order to merit immunity.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN7[] **Antitrust & Trade Law, Exemptions & Immunities**

In order to merit immunity, the professional review actions must be taken in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the due process requirements. *42 U.S.C.S. § 11112(a)(4)*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN8[] Antitrust & Trade Law, Exemptions & Immunities

See 42 U.S.C.S. § 11112(a).

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

HN9[] Antitrust & Trade Law, Exemptions & Immunities

The immunity provided by 42 U.S.C.S. § 11111(a)(1) can be forfeited if the health care entity fails to report any disciplinary action taken against a physician resulting from a professional review action. 42 U.S.C.S. § 11111(b).

Administrative Law > Judicial Review > Reviewability > Standing

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > Professional Review

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN10[] Reviewability, Standing

The details of any professional review action that adversely affects the clinical privileges of a physician for a period of longer than 30 days must be reported to the Board of Medical Examiners. 42 U.S.C.S. §§ 11133(a)(1)(A); 11133(a)(3)(A)-(C); 11134(a).

Counsel: David M. Harney, Thomas Kallay and Carol Cloke of Harney & Packer, for Plaintiff George M. Austin, M.D.

Marvin A. Bauer and Jeanette Nelson of Bauer, Harris & McEvoy, for Defendant James V. McNamara, M.D.

James Herzog and David R. Fisher of Law Offices of James P. Herzog, for Defendant Thomas Jones, M.D.

Keith M. Crouch of George McDonald & Associates, for Defendant Richard B. Brown, M.D.

Curtis E. Aldendifer and Jeffrey C. Moffat of Bonne, Jones, Bridges, Mueller, O'Keefe & Hunt, for Defendant James R. Saint John, M.D.

Michael A. O'Flaherty and Lynn Ovando of O'Flaherty & Belgum, for Defendant Paul J. Schweinfurth, M.D.

Catherine Kunkel-Watson of Rushfeldt, Shelley & Drake, for Defendant Santa Barbara Cottage Hospital/Santa Barbara Cottage Hospital, Inc.

Judges: Richard A. Gadbois, Jr., United States District Judge.

Opinion by: GADBOIS, JR.

Opinion

[*934] AMENDED MEMORANDUM OPINION AND ORDER RICHARD A. GADBOIS, JR., UNITED STATES DISTRICT JUDGE

Plaintiff George M. Austin, M.D. ("Dr. Austin"), is a neurosurgeon and brings this action alleging violations of the Sherman Antitrust Act, *15 U.S.C.A. §§ 1*, *2 (1982)*, and pendent state business tort claims against five individual physicians and the Santa Barbara Cottage Hospital ("Cottage Hospital"). Plaintiff's claims arise out **[**2]** of the alleged conspiracy and concerted actions of the individual Defendant physicians to shut down Dr. Austin's neurosurgery practice in Santa Barbara by having his staff privileges suspended at Cottage Hospital.

The three Motions for Summary Judgment pursuant to *F.R.Civ.P. 56* brought by the various Defendants came on regularly for hearing before this Court on October 30, 1989. Defendant Cottage Hospital brings the "main" Summary Judgment Motion, asserting that it is immune from federal antitrust liability by virtue of the provisions of the Health Care Quality Improvement Act of 1986 ("HCQIA"), *42 U.S.C.A. §§ 11101 et seq. (West Supp. 1989)*. Alternatively, Defendant Cottage Hospital **[*935]** argues that summary judgment is appropriate since Plaintiff Dr. Austin is unable to invoke Sherman Act jurisdiction on the facts of his case.

All five individual Defendant physicians join in Cottage Hospital's Motion for Summary Judgment. Defendants Dr. Jones and Dr. St. John each bring their own Motions for Summary Judgment on grounds very similar to those asserted by Defendant Cottage Hospital. Finally, Defendant Dr. Jones joins in Defendant Dr. St. John's Summary Judgment Motion.

Having carefully **[**3]** considered the voluminous moving papers, opposition papers, declarations, exhibits, and the oral arguments of counsel, the Court grants the Summary Judgment Motions of the Defendants Cottage Hospital, Dr. Jones, and Dr. St. John for the reasons enumerated below.

FACTUAL BACKGROUND

Plaintiff Dr. Austin spent the first 30 years of his medical career in academia as an instructor and professor of neurosurgery at the Universities of Pennsylvania, Oregon, Southern California, and at Loma Linda University School of Medicine. Upon retiring at the age of 65 from the chairmanship of the Loma Linda Neurosurgery Department, Dr. Austin moved to Santa Barbara, California in 1981 to establish a private practice for the first time since becoming a board-certified neurosurgeon back in 1952.

When Plaintiff arrived in Santa Barbara in 1981, there were only three other practicing neurosurgeons in the area, Defendants Dr. Brown, Dr. St. John, and Dr. Schweinfurth. The patient-to-neurosurgeon ratio in Santa Barbara was already close to saturation when Plaintiff arrived to set up shop. Defendant Dr. Jones came to Santa Barbara a few months after the Plaintiff and established his own neurosurgery practice.

[4]** Plaintiff Dr. Austin held staff privileges at a number of local hospitals, among them, Defendant Cottage Hospital. Cottage Hospital is the best-equipped hospital in the Santa Barbara area for neurosurgery. All five of the individual doctor Defendants were on staff at Cottage Hospital during the relevant time period. The Plaintiff's claims for violations of the Sherman Act, intentional interference with prospective business advantage, and conspiracy to commit these acts are based on the following factual allegations:

Dr. Austin alleges in his Complaint that although the Defendant neurosurgeons often "covered" patients for each other, shortly after his arrival, all of them refused to "cover" for the Plaintiff. In his deposition, however, Dr. Austin admits that Defendants Dr. Brown, Dr. Jones, and Dr. Schweinfurth did in fact "cover" for him, but only a few times over a seven-year period. Defendant Dr. St. John is the only one who has refused to "cover" for the Plaintiff from the outset and has never done so. In October of 1986, Dr. Brown sent the Plaintiff a letter confirming that he would never "cover" for Dr. Austin again.

The Plaintiff admits that "covering" patients for other physicians **[**5]** is merely professional courtesy and that there is no legal or ethical obligation to do so. With the exception of Dr. St. John, the other Defendant neurosurgeons testified in their depositions that they "covered" for the Plaintiff when their schedules allowed them to, and attributed any refusals to scheduling conflicts or last-minute notice. Plaintiff Dr. Austin admits that he has refused to "cover" or assist the various Defendant neurosurgeons on occasion due to scheduling conflicts.

As additional evidence of the conspiracy against him, Plaintiff alleges that Defendants Dr. Jones and Dr. St. John "openly demeaned [his] work to nurses on staff at Cottage Hospital in order to develop animosity over [sic] him." Dr. Austin also contends that the Defendant neurosurgeons would "aggressively attack" his judgment at various monthly Cottage Hospital neurosurgical group meetings. The Defendant neurosurgeons counter that there were legitimate concerns with the Plaintiff's treatment of patients at Cottage Hospital.

[*936] On January 1, 1986, Defendant Dr. McNamara, an internal medicine specialist, became Chief of Staff at Cottage Hospital and Defendant Dr. Brown became the Chief of Surgery. Plaintiff **[**6]** alleges that this turn of events, in addition to the fact that Defendant Dr. St. John's wife sat on Cottage Hospital's Board of Directors, gave the Defendants the power and ability "to expedite the process of excluding [him] from the practice of neurosurgery in Santa Barbara."

On January 29, 1986, Defendant Dr. McNamara, as Chief of Staff, informed Plaintiff that an internal evaluation of his cases would take place. This was done in response to concerns expressed by the nursing and technical staffs, as well as Dr. Austin's colleagues, about the quality of care some of the Plaintiff's patients were receiving. Defendant Dr. McNamara instructed his Chief of Surgery, Defendant Dr. Brown, to review all of the Plaintiff's cases in 1985.

On April 24, 1986, Defendant Dr. Brown presented his findings to Cottage Hospital's Surgical Audit Committee ("SAC"). Defendant Dr. Schweinfurth sat as a member of the SAC. In his presentation, Dr. Brown outlined what he perceived to be deficiencies in 26 out of the 30 cases handled by the Plaintiff in 1985. Dr. Brown also presented three additional "problematic" cases from 1986 to the SAC. The SAC voted to have an outside reviewer further evaluate Dr. Austin's **[**7]** charts and to continue monitoring his work.

On June 10, 1986, Chief of Staff Dr. McNamara requested Cottage Hospital's Medical Executive Committee ("MEC") to establish an *Ad Hoc* Committee ("AHC") of five doctors to investigate concerns voiced by the staff that Plaintiff Dr. Austin was providing substandard care to his patients at the Hospital. Defendant Dr. Jones served on the AHC which met four times between June 25, 1986 and August 15, 1986 to discuss the possible revocation of Plaintiff's staff privileges at Cottage Hospital.

In addition to the internal investigation by the AHC, Defendant Dr. McNamara also had an external, independent review conducted by Dr. Sidney Tolchin and Dr. David G. Sheetz, two neurosurgeons appointed by the California Medical Association. Dr. Tolchin and Dr. Sheetz spent a day at Cottage Hospital talking to various staff members and reviewing Dr. Austin's charts. The outside reviewers also spent an hour and a half interviewing Dr. Austin himself. Both Dr. Tolchin and Dr. Sheetz gave the Plaintiff a generally favorable evaluation, but both expressed serious concerns in some areas and recommended further monitoring. [1]

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[1] Plaintiff also asserts that the outside reviewers may have been part of the alleged conspiracy against him based solely on the fact that he was not present when Dr. Tolchin and Dr. Sheetz met with Defendants Dr. McNamara, Dr. Brown, and Dr. Jones at the beginning of their day-long review.

[8]** On August 15, 1986, after considering the findings of the independent reviewers, the *Ad Hoc* Committee voted to establish a six-month period of monitoring of the Plaintiff's cases by the Surgical Audit Committee. As a member of the AHC, Defendant Dr. Jones recommended and voted for the continued monitoring. From August 15, 1986 to November 16, 1986, five of the Plaintiff's cases were reviewed by the SAC. Defendant Dr. St. John reviewed three cases and Defendants Dr. Brown and Dr. Jones reviewed one each.

On November 17, 1986, Defendant Dr. McNamara, as Chief of Staff, informed Plaintiff that his staff privileges at Cottage Hospital were summarily suspended. This action was taken after Dr. McNamara had presented certain cases handled by Dr. Austin to the Medical Executive Committee. These cases had been monitored by members of the SAC since early October of 1986. On November 19, 1986, Plaintiff appeared before the MEC to defend his actions in the three cases that Defendant Dr. St. John had reviewed and found substandard, as well as the case of patient C.P. that Defendant Dr. Jones declared substandard. Following the discussion, the MEC passed a motion recommending to the Board of **[**9]** **[*937]** Directors corrective action to revoke the clinical privileges of Dr. Austin. Chief of Staff Dr. McNamara notified Plaintiff of this action by a letter dated November 20, 1986.

In a letter dated December 3, 1986 ("December 3rd Letter"), Dr. Robert A. Reid, Vice President of the Medical Staff, advised Plaintiff that the reason for the recommendation was that his professional conduct was lower than the applicable standard of practice. The December 3rd Letter set out 14 specific categories of allegedly substandard practice with patient chart numbers designated as to each specification. The December 3rd Letter alleges 103 instances of substandard professional conduct on the part of Dr. Austin.

California Business & Professions Code § 805 requires any disciplinary action affecting a physician practicing in the state be reported to the California Board of Medical Quality Assurance ("BMQA"). Defendant Cottage Hospital complied with this requirement on January 13, 1987 by sending a "Health Facility Reporting Form 805" containing the Plaintiff's name, a description of the reasons for the summary suspension, and other appropriate information to the BMQA.

Plaintiff Dr. Austin's suspension from **[**10]** Cottage Hospital lasted approximately seven months, from November 19, 1986 to June 3, 1987. During this time, Plaintiff continued to enjoy staff privileges at several other local hospitals including St. Francis, Goleta Valley, Santa Ynez, Lompoc, and Ojai. Plaintiff continued to see patients during this time period and performed neurosurgery at St. Francis Hospital while suspended from Cottage Hospital.

Plaintiff requested and received a hearing before the Judicial Review Committee ("JRC") to appeal the revocation of his staff privileges. The JRC was comprised of six impartial doctors and the Honorable William Reppy, retired Justice of the California Appeals Court presided over the hearings. Plaintiff admits that he was given adequate time to prepare and present all the witnesses and evidence he desired.

Both sides were represented by counsel at the JRC hearings which began on March 16, 1987. Defendants Dr. Brown, Dr. Jones, and Dr. Schweinfurth all testified before the JRC panel. By the time the hearings concluded on May 14, 1987, the JRC had heard over 70 hours of testimony requiring 12 volumes of transcripts and exhibits. The panel had approximately one week to individually review **[**11]** the transcripts, exhibits, and final written arguments for both sides. The panel reconvened on June 23, 1987 and deliberated from 8 p.m. until a final decision was reached around midnight.

The JRC issued its final report and recommendations on June 30, 1987. The JRC found that the MEC's decision to revoke the Plaintiff's staff privileges "was unreasonable" and reinstated Dr. Austin to the Cottage Hospital medical staff. The JRC's findings, however, were far short of complete vindication for the Plaintiff. The JRC found Dr. Austin's treatment of patient C.P. to be "below the applicable standard" and expressed concern in several other areas. [2]

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[2] "In the case of patient C.P., the Committee feels that Dr. Austin's failure to ascertain and to respond to the change in the patient's state of consciousness after admission to the Intensive Care Unit and failure to examine the patient resulted in loss of a valuable opportunity to diagnose a possibly reversible post-operative bleeding complication and that in this respect the

[12]** In reinstating the Plaintiff, the JRC concluded "that the totality of problems reasonably warrants some appropriate conditions **[*938]** on the continued exercise of clinical privileges by Dr. Austin." JRC Final Report, at 3. Specifically, the JRC recommended to the Board of Directors of Cottage Hospital:

> that the continued exercise of clinical privileges by Dr. Austin be conditioned in two respects:
>
> 1) for assurance of proper patient management, that Dr. Austin obtain Internal Medicine, Pathology and Radiological procedural consultations;
>
> 2) that there be periodical outside independent neurosurgical case review. The Committee feels that it has been demonstrated that objective monitoring by the neurosurgeons of Cottage Hospital could not be done.

JRC Final Report, at 4. While the Plaintiff attempts to gloss over these conditions on his staff privileges in his papers, there is no question that these are significant restrictions that are out of the ordinary for a surgeon of Plaintiff's experience.

On October 2, 1987, Defendant Dr. McNamara sent the BMQA a revised "Health Facility Reporting Form 805" to reflect Dr. Austin's conditional reinstatement. California law provides a process **[**13]** by which an individual in Dr. Austin's position can appeal the findings of quasi-judicial body, such as the JRC, to the state courts. *Cal.Civ.Proc.Code § 1094.5* (West Supp. 1990). Plaintiff has accepted the findings of the JRC and has made no attempt to overturn the restrictions placed on his staff privileges.

CONCLUSIONS OF LAW

The Court finds no genuine issue of material fact precluding the application of the Health Care Quality Improvement Act of 1986 ("HCQIA"), *42 U.S.C.A. §§ 11101 et seq.*, to this action. As a matter of law, the Court holds that all five of the individual doctor Defendants, as well as Defendant Cottage Hospital, qualify for immunity from federal antitrust liability pursuant to the provisions of the HCQIA. The Court therefore grants the three Defendants' Motions for Summary Judgment because "***HN1***[] under *Rule 56(c)*, summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 **[**14]** (1986)*.

I. *Immunity under the Health Care Quality Improvement Act*

This appears to be a case of first impression in which the Defendants in a federal antitrust action seek summary judgment by asserting immunity under the provisions of the HCQIA. "Neither the Act nor its legislative history indicates at which point in the litigation the court should determine whether the defendants qualify for protection." Note, *Physician Staff Privilege Cases: Antitrust Liability and the Health Care Quality Improvement Act*, 29 W & M L.Rev. 609, 628 (1988) (authored by John Neff). The only commentator so far on the HCQIA suggests that "the most effective point at which to decide [whether there is immunity] is prior to full trial on the antitrust issues," *Id*., which happens to be the current procedural posture of this action.

In passing the HCQIA in 1986, the United States Congress made the following findings:

> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.
>
> (2) There is a national need to restrict the ability **[**15]** of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.
>
> (3) This nationwide problem can be remedied through effective professional peer review.

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professional conduct of Dr. Austin was below the applicable standard. * * * In the case of patient P.H., the Committee feels that the failure of Dr. Austin to obtain an adequate biopsy resulted in excess morbidity. * * * In the case of patient C.C., the Committee feels that a more careful management process, including an evaluation of abnormal laboratory findings, was in order. * * * In the case of patient E.H., there was extensive discussion and concern by the Committee. * * * In the case of patient C.H., the failure of Dr. Austin to obtain informed consent and his failure to document pre-operatively the "promise not to injure" were cause for concern for the Committee." *Report and Recommendation of the Judicial Review Committee of Santa Barbara Cottage Hospital Medical Staff in the Matter of George M. Austin, M.D.* ("JRC Final Report"), at 3.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal ***antitrust law***, unreasonably discourages **[*939]** physicians from participating in effective professional peer review.
(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C.A. § 11101.

HN2[] The "incentive and protection for physicians engaging in effective professional peer review" comes in the form of immunity from damages under federal and state law for qualifying review bodies and individuals associated with, or assisting, the professional review action. *42 U.S.C.A. § 11111(a)(1)*. [3] The Court must first determine that the professional review action itself complies with the due process requirements outlined in *§ 11112(a)* before the review body and the individuals assisting in the process can be granted the immunity from federal antitrust liability **[**16]** that *§ 11111(a)(1)* promises.

The Court finds that there are two separate professional review actions at issue in this case. The first one being the meeting of Cottage Hospital's Medical Executive Committee on November 19, 1986 ("November 19th MEC Meeting"), where the MEC passed a motion to recommend to Cottage Hospital's Board of Directors that Plaintiff's staff privileges be revoked. The November 19th MEC Meeting is a "professional review **[**17]** action" as defined in *§ 11151(9)*. [4] The series of Judicial Review Committee hearings ("JRC Hearings"), that ran from March 16, 1987 through May 14, 1987 and resulted in the conditional reinstatement of Plaintiff's staff privileges constitutes the second "professional review action" as defined in *§ 11151(9)*.

II. *Requirements to Qualify for Immunity Under the HCQIA*

The Defendants can qualify for immunity under the HCQIA if they can demonstrate that:

A) the professional review actions complied with the standards set forth in *42 U.S.C.A. § 11112*;

B) the results of the professional review **[**18]** actions were properly reported to the State authorities in compliance with *42 U.S.C.A. §§ 11131(c)(1)*, *11151(2)*;
C) the professional review actions occurred on, or after November 14, 1986, the effective date of the HCQIA.

As detailed below, the Defendants have successfully shown that both professional review actions have complied with each of these three requirements.

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[3] *Section 11111* provides in pertinent part: "(a) In general (1) Limitation on damages for professional review actions

If a professional review action (as defined in *section 11151(9)* of this title) of a professional review body meets all the standards specified in *section 11112(a)* of this title, except as provided in subsection (b) of this section --

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

[4] Section ***HN3***[] 11151(9) provides in pertinent part: "The term 'professional review action' means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges . . . of a physician. Such a term includes . . . professional review activities relating to a professional review action."

A. Standards for Professional Review Actions

1. Section 11112(a)(1) *Analysis*

HN4[] In order to satisfy the due process requirements as outlined in 42 U.S.C.A. § 11112(a)(1)-(4), [5] the Defendants must **[*940]** first show that the professional review actions were taken "in the reasonable belief that the action was in the furtherance of quality health care." § 11112(a)(1). The legislative history indicates that this standard was not intended to test "the subjective state of mind of the physicians conducting the professional review." H.R.Rep. No. 903, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.Code Cong. & Admin.News 6384, 6392-93. This "more objective 'reasonable belief' standard . . . will be satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably **[**19]** have concluded that their action would restrict incompetent behavior or would protect patients." *Id.*, at 6393.

With regards to the November 19th MEC Meeting, the Court is satisfied that the MEC voted to revoke the Plaintiff's staff privileges in the interest of furthering quality health care at Cottage Hospital. The Defendant doctors came to believe that the Plaintiff's treatment in various cases was below the acceptable standard of care at Cottage Hospital through their own observations and from **[**20]** concerns voiced by the nursing and technical staffs. This concern for patient safety prompted nearly ten months' worth of both internal and external evaluations and monitoring of the Plaintiff's cases conducted by the Defendant neurosurgeons and other members of Cottage Hospital's Surgical Audit Committee and *Ad Hoc* Committee, as well as the two neurosurgeons appointed by the California Medical Association who had no connection to Cottage Hospital. All of the findings from these numerous evaluations and periods of monitoring were considered before the MEC voted to revoke the Plaintiff's staff privileges.

The Court also finds that the JRC Hearings were conducted "in the reasonable belief that the action was in furtherance of quality health care." § 11112(a)(1). After hearing over 70 hours of testimony at the JRC Hearings that extended from March 16, 1987 to May 14, 1987, the independent panel of five voting (six physicians sat on the panel during the hearings) physicians concluded that "the totality of problems reasonably warrants some appropriate conditions on the continued exercise of clinical privileges by Dr. Austin." JRC Final Report, at 3. The nature of the conditions placed **[**21]** on Plaintiff's reinstatement, that he obtain consultations in internal medicine, pathology, and radiology, and that his cases be periodically monitored by outside independent neurosurgeons, demonstrates that it was the JRC's intent to "restrict incompetent behavior" and "protect patients" through their recommendations.

2. Section 11112(a)(2) *Analysis*

HN5[] The Defendants must next demonstrate that there was a "reasonable effort to obtain the facts of the matter" before the professional review actions were undertaken. § 11112(a)(2). As more fully detailed in the Factual Background section, the November 19th MEC Meeting was the culmination of nearly ten months' worth of evaluations and monitoring of the Plaintiff's work. These reviews were conducted internally by the Defendant

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[5] Section 11112(a) provides in pertinent part:

"(a) In General

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken --

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances,

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3)."

neurosurgeons as well as the other physicians on Cottage Hospital's Surgical Audit Committee and *Ad Hoc* Committee.

A comprehensive, external review of the Plaintiff's work was conducted by Dr. Tolchin and Dr. Sheetz, two independent neurosurgeons appointed by the California Medical Association. These outside reviewers spent an entire day at Cottage Hospital reviewing the Plaintiff's charts as well as interviewing **[**22]** officials of the hospital staff and Dr. Austin himself. With regards to the JRC Hearings, Dr. Austin admits that he was allowed adequate time to prepare and was able to present all of the witnesses and evidence he desired to the panel. The Court concludes that both the November 19th MEC Meeting and the JRC Hearings were preceded by very diligent efforts to gather the relevant facts in compliance with *Section 11112(a)(2)*.

[*941] 3. *Section 11112(a)(3) Analysis*

HN6[] *Section 11112(a)(3)* requires that the professional review actions comply with the due process requirements of "adequate notice and hearing" in order to merit immunity. [6] The notice procedures outlined in *§ 11112(b)(1)-(2)* contemplate the professional review action being initiated by the health care entity, thereby necessitating adequate notice to the targeted physician. The facts of this case however, are somewhat unique in that Plaintiff requested a second professional review action, the JRC Hearings, to appeal the outcome of an earlier professional review action, the November 19th MEC Meeting.

While the legislative history indicates that "the due process requirement can always be met by the procedures specified in *[§ 11112(b)]*," **[**23]** 1986 U.S.Code Cong. & Admin.News, at 6393, both the text of *§ 11112(b)* and the legislative history agree that these procedures need not be followed to the letter in order to satisfy the due process requirement. [7] Taking into consideration the factual twist in this case, the Court concludes that under these circumstances, the closing paragraph of the December 3rd Letter gave Plaintiff sufficient notice of the JRC Hearings. [8]

[24]** The Court further finds that the JRC Hearings were conducted in compliance with the procedures outlined in *§ 11112(b)(3)(A)-(D)*, thereby satisfying the "adequate hearing" requirement of subsection (a)(3). First off, Plaintiff admits that he was afforded a "fair and impartial hearing." The JRC Hearings were held before a panel of six impartial, independent physicians appointed by the Cottage Hospital, none of whom were in direct economic competition with the Plaintiff. *§ 11112(b)(3)(A)(iii)*.

Dr. Austin was represented throughout the hearings by counsel and all of the proceedings were recorded by court reporters and 12 volumes of transcripts were produced. *§ 11112(b)(3)(C)(i)*, *(ii)*. Plaintiff admits that he was given the opportunity to call witnesses and to present all of the evidence he desired. *§ 11112(b)(3)(C)(iii)*, *(iv)*. Plaintiff submitted a written statement at the close of the hearings on June 15, 1987, and the JRC issued its final report and recommendations along with the underlying reasoning on June 30, 1987. *§§ 11112(b)(3)(C)(v)*, *11112(b)(3)(D)(i)*.

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[6] *Section 11112(a)(3)* provides that in order for a professional review action to merit immunity, it must be taken: "(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, ..."

[7] *Section 11112(b)* provides: "A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of *[§ 11112(a)(3)]*." The legislative history concurs, noting: "If other procedures are followed, but are not precisely of the character spelled out in *[§ 11112(b)]*, the test of 'adequacy' may still be met under other prevailing law." 1986 U.S.Code Cong. & Admin.News, at 6393.

[8] The December 3rd Letter provides in pertinent part: "As requested, a judicial review committee will be appointed by the Chief of Staff and approved by the Executive Committee at its December 16, 1986 meeting. A hearing date will be set and you will be notified as provided in the bylaws." The December 3rd Letter, addressed to the Plaintiff from Dr. Reid, Vice President of the Medical Staff, outlines the reasons for the revocation of the Plaintiff's staff privileges at the November 19th MEC Meeting.

The Court finds that the initial professional review action, the November 19th MEC Meeting, satisfies the subsection (a)(3) due **[**25]** process requirement by virtue of *§ 11112(c)(2)*, which allows "an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing . . . where the failure to take such an action may result in imminent danger to the health of an individual." The legislative history reveals that "the Committee felt strongly that it was necessary to establish these exceptions . . . to allow quick action where it would be reasonable to conclude that someone's health might otherwise suffer." 1986 U.S.Code Cong. & Admin.News, at 6394.

While the Court acknowledges that the JRC eventually found the revocation of Plaintiff's staff privileges to be "unreasonable," it must be noted that the JRC reached this conclusion only after considering **[*942]** over 70 hours of testimony in a series of hearings that lasted two months. The Court is convinced that based on the information available at the time of the special meeting on November 19, 1986, it was reasonable for the MEC to conclude that the health of Dr. Austin's patients "might otherwise suffer" unless immediate action was taken. This conclusion finds support in the fact that the JRC found Dr. Austin's treatment of patient C.P. **[**26]** to be substandard, expressed concerns regarding the treatment of other patients, [9] and placed significant restrictions on Plaintiff's continued exercise of clinical privileges at Cottage Hospital. The Court further finds that the December 3rd Letter and the JRC Hearings satisfy the "subsequent notice and hearing" component of *§ 11112(c)(2)*.

4. *Section 11112(a)(4) Analysis*

Lastly, ***HN7***[] in order to merit immunity, the professional review actions "must be taken . . . in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the [due process requirements]. . . ." *§ 11112(a)(4)*. Having already concluded that both professional review actions satisfy the requirements of due process [*§ 11112(a)(3)*] and reasonable efforts at fact-gathering [*§ 11112(a)(2)*], the Court finds that both the November 19th MEC Meeting and the JRC Hearings were reasonably warranted based on the facts available at the respective times. The Court comes to this conclusion for the reasons previously discussed in the *Section 11112(a)(1)* analysis.

5. *Plaintiff's Inability to Rebut the Presumption* ***[**27]*** *of Immunity Created by Section 11112(a)*

As outlined above, the Defendants have successfully demonstrated that both professional review actions at issue in this case warrant immunity under the HCQIA because both have satisfied the standards set forth in *Section 11112(a)(1)-(4)*. The burden is now on the Plaintiff to rebut this showing, as Section ***HN8***[] 11112(a) declares that "A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in *section 11111(a)* of this title unless the presumption is rebutted by a preponderance of the evidence."

The Plaintiff has failed to even address, much less rebut, the Defendants' evidentiary showing. Despite the fact that all three Defendants seeking summary judgment argue for immunity under the HCQIA in their moving papers, the Plaintiff's consolidated opposition papers makes no mention of the statute. The Plaintiff does not attempt to refute or contest any of the Defendants' efforts to apply the immunity provisions of the HCQIA to the facts of this case. The Court finds the Plaintiff's naked allegations of a conspiracy against him, based largely on the Defendant neurosurgeons' refusals to cover **[**28]** for him and unsubstantiated hearsay, insufficient to rebut the presumption of immunity conferred on the professional review actions.

B. Compliance with the HCQIA's Reporting Requirements

HN9[] The immunity provided by *§ 11111(a)(1)* can be forfeited if the health care entity fails to report any disciplinary action taken against a physician resulting from a professional review action. *§ 11111(b)*. [10] ***HN10***[]

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[9] JRC Final Report, at 3, *supra* note 2.

[10] *Section 11111(b)* provides: "If the Secretary has reason to believe that a health care entity has failed to report information in accordance with *section 11133(a)* of this title, the Secretary shall conduct an investigation. If, after providing notice of

The details of any "professional review action that adversely affects the clinical privileges of a physician for a period of longer than 30 days" must be reported to the Board of Medical Examiners. §§ 11133(a)(1)(A); **[*943]** 11133(a)(3)(A)-(C) (detailing the information required); 11134(a) (outlining the proper timing and form of reporting).

[29]** Plaintiff's clinical privileges at Cottage Hospital were "adversely" affected following both of the professional review actions at issue. In the context of the HCQIA's reporting requirements, the term "adversely affecting" is defined to include both the revocation and restriction of a physician's clinical privileges. § 11151(1). The November 19th MEC Meeting resulted in the revocation of the Plaintiff's clinical privileges and although they were reinstated as a result of the JRC Hearings, the panel concluded "that the totality of problems reasonably warrants some appropriate conditions on the continued exercise of clinical privileges by Dr. Austin." JRC Final Report, at 3. These conditions, mandatory consultations and periodic monitoring, are a definite restriction on Dr. Austin's privileges.

The Defendants have sufficiently shown, and Plaintiff admits, that the HCQIA's reporting requirements have been satisfied. On January 13, 1987, Defendant Cottage Hospital sent a "Health Facility Reporting Form 805" to the California Board of Medical Quality Assurance ("BMQA") containing Dr. Austin's name, a description of the reasons for the revocation of his privileges as of the November 19th **[**30]** MEC Meeting, and other appropriate information. Following Dr. Austin's conditional reinstatement as a result of the JRC Hearings, Defendant Cottage Hospital sent an amended "805 Form" to the BMQA on October 2, 1987. The contents of the "805 Form" satisfy the requirements of § 11133(a)(3) and the BMQA is the appropriate state authority. [11]

C. Occurrence of the Professional Review Actions After the Effective Date of the HCQIA

The Court finds that both professional review actions occurred after **[**31]** November 14, 1986, the effective date of the HCQIA. The immunity provided under § 11111(a) "shall apply to professional review actions commenced on or after the date of the enactment of this Act [November 14, 1986]." The Health Care Quality Improvement Act of 1986, Pub.L. No. 99-660, § 416, 42 U.S.C.A. §§ 11101 et seq. (West Supp. 1989). The first professional review action occurred on November 19, 1986 at the special meeting of the Cottage Hospital Medical Executive Committee, and the second review action, the JRC Hearings, commenced on March 16, 1987 with the final report issuing on June 30, 1987.

III. *Conclusion*

With the satisfaction of the final requirement above, the Court concludes that both professional review actions merit immunity from federal antitrust liability pursuant to § 11111(a)(1). This immunity extends to the five Defendant physicians because "any person who participates with, or assists the body with respect to the [professional review] action" is also shielded from federal antitrust liability by § 11111(a)(1)(D). Defendant Cottage Hospital, and its

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noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name."

[11] Section 11133(a)(3) provides in pertinent part:

"(3) Information to be reported

The information to be reported under this subsection is --

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate."

The term "Board of Medical Examiners" is defined in § 11151(2) to include "a Board as determined by the State with responsibility for the licensing of physicians. . . ." The Board so designated by the State of California is the Board of Medical Quality Assurance.

various committees involved in the review process -- the Surgical Audit Committee, the *Ad Hoc* Committee, **[**32]** the Medical Executive Committee, and the Judicial Review Committee -- all fall within the *§ 11151(11)* definition [12] of a "professional **[*944]** review body" that is entitled to immunity under *§ 11111(a)(1)(A)*.

Accordingly, IT IS HEREBY ORDERED that the Summary Judgment Motions of Defendants Santa Barbara Cottage Hospital, Thomas Jones, M.D., and James R. Saint John, M.D. be GRANTED. Since all of the Defendants are immune from federal antitrust liability by virtue of *§ 11111(a)* of the Health Care Quality Improvement Act of 1986, only the pendent state tort claims for Intentional Interference with Prospective Business Advantage and Conspiracy remain as viable causes of action.

IT IS FURTHER ORDERED that these pendent state claims are DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction. *United Mine Workers v. Gibbs, 383 U.S. 715, 726-27, 16 L. Ed. 2d 218, 86 S. Ct. 1130* ***[**33]*** *(1966)*.

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[12] *Section 11151(11)* provides: "The term 'professional review body' means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity."

Boczar v. Manatee Hosp. & Health Sys., Inc.

United States District Court for the Middle District of Florida, Tampa Division

February 21, 1990, Decided ; February 21, 1990, Filed

Case No. 88-1867-CIV-T-17B

Reporter

731 F. Supp. 1042 *; 1990 U.S. Dist. LEXIS 1788 **; 52 Fair Empl. Prac. Cas. (BNA) 321; 1990-1 Trade Cas. (CCH) P68,985

LINDA M. BOCZAR, M.D., and OBSTETRICS/GYNECOLOGY WOMENS [sic] GROUP, INC., a Florida Corporation, Plaintiffs v. MANATEE HOSPITALS & HEALTH SYSTEMS, INC., a Florida corporation, d/b/a Manatee Memorial Hospital, BAPTIST HOSPITALS and HEALTH SYSTEMS, INC., an Arizona corporation, RICHARD KALEBA, RAYMOND L. RAITZ, M.D., DONNA MCDONALD, JAMES N. GANEY, M.D., JAMES DERESPINO, M.D., and other unknown co-conspirators, Defendants

Core Terms

Antitrust, motion to dismiss, allegations, obstetrical, racketeering activity, conspiracy, monopolize, suspend, peer, hospital privileges, constituting, suspensions, harassment, rights

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the plaintiff.

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Elements > Color of State Law > State Agents

HN2[] **Protection of Rights, Public Versus Private Discrimination**

42 U.S.C.S. § 1983 grants an individual a private cause of action when his federal rights are infringed by state statute, state officials, or persons acting under color of state law. A defendant's alleged infringement of federal rights must be fairly attributable to the state.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Governments > State & Territorial Governments > General Overview

HN3[] **Elements, Color of State Law**

State regulation, substantial state funding, or a contractual relationship with a state government do not provide a sufficient nexus for state action.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN4[] **Pleadings, Heightened Pleading Requirements**

To satisfy the requirements of notice pleading in an antitrust complaint, enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified. Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Sherman Act, Claims**

The elements of a *§ 1* claim under the Sherman Act are 1) a conspiracy exists between two or more entities and 2) the conspiracy unreasonably restrains trade.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN6[] **Antitrust & Trade Law, Sherman Act**

A plaintiff fails to state a *§ 1* offense under the Sherman Act by failing to allege that the alleged restraint on trade tends or is reasonably calculated to prejudice the public interest.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN7[] Antitrust & Trade Law, Sherman Act

In a conspiracy to monopolize claim under *§ 2* of the Sherman Act, the plaintiff must allege 1) an agreement or understanding between two or more economic entities, 2) a specific intent to monopolize, and 3) overt acts in furtherance of the alleged conspiracy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

HN8[] Monopolies & Monopolization, Actual Monopolization

A monopoly is the power to control prices or exclude competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9[] Regulated Practices, Market Definition

The relevant geographic market is the area in which the defendant competes with other like businesses.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN10[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

A claim of civil RICO under *18 U.S.C.S. § 1964(c)* necessarily alleges a violation of *18 U.S.C.S. § 1962*. *18 U.S.C.S. § 1962* makes it unlawful for any person to use money derived from a pattern of racketeering activity to conduct an enterprise through a pattern of racketeering activity. The existence of an enterprise, defined in *18 U.S.C.S. § 1961(4)*, must be alleged and proved.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN11[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

A pattern of racketeering is defined as at least two acts of racketeering activity occurring within a specified time.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Labor & Employment Law > ... > Gender & Sex Discrimination > Employment Practices > Discharges

Labor & Employment Law > ... > Constructive Discharge > Statutory Application > Title VII of the Civil Rights Act of 1964

HN12[] **Governments, Civil Rights Act of 1964**

Claims for relief under Title VII of the Civil Rights Act of 1964 must allege either a hostile work environment or constructive discharge caused by sex discrimination.

Labor & Employment Law > ... > Sexual Harassment > Burdens of Proof > Employee Burdens of Proof

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Labor & Employment Law > ... > Harassment > Sexual Harassment > General Overview

Labor & Employment Law > ... > Sexual Harassment > Burdens of Proof > General Overview

Labor & Employment Law > ... > Sexual Harassment > Scope & Definitions > Sexual Harassment

Labor & Employment Law > ... > Sexual Harassment > Employment Practices > Compensation Discrepancies

Labor & Employment Law > ... > Sexual Harassment > Employment Practices > Discharges & Failures to Hire

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

Labor & Employment Law > ... > Constructive Discharge > Statutory Application > Title VII of the Civil Rights Act of 1964

HN13[] **Burdens of Proof, Employee Burdens of Proof**

In order to establish a hostile work environment claim under Title VII of the Civil Rights Act of 1964, a plaintiff must plead the following elements: 1) the employee belongs to a protected group, 2) the employee was subject to unwelcome sexual harassment, 3) the harassment complained of was based upon sex, 4) the harassment complained of affected a term, condition, or privilege of employment, and 5) respondeat superior.

Counsel: **[**1]** James J. Boczar, Esq., Sarasota, Florida, for Plaintiffs.

Richard R. Garland, Esq., Dickinson, O'Riorden, et al., Sarasota, Florida, for Defendants.

Judges: Elizabeth A. Kovachevich, United States District Judge.

Opinion by: KOVACHEVICH

Opinion

[*1044] ORDER ON DEFENDANTS' MOTION TO DISMISS AND MOTION TO STRIKE

ELIZABETH A. KOVACHEVICH, UNITED STATES DISTRICT JUDGE

This cause is before the Court on Defendants' motion to dismiss and motion to strike filed May 3, 1989. Responses thereto were filed May 24, 1989.

HN1[] A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d*

80, 78 S. Ct. 99 (1957). A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1947).

The amended complaint contains the following counts: 1) violation of 42 U.S.C. 1983, 2) violation of § 1 of the Sherman Antitrust Act, 3) violation of § 2 of the Sherman Antitrust Act, 4) violation of the Racketeer Influenced Corrupt Organization Act, 5) sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 6) violation of § 542.18 of Florida's Antitrust **[**2]** Act, 7) violation of § 542.19 of Florida's ***Antitrust Law***, 8) violation of Florida Statute Section 772.104, 9) violation of Florida Statute Section 772.11, 10) tortious interference with a business relationship, and 11) breach of contract.

Defendants move to dismiss Counts 1, 2, 3, 4, and 5 for failure to state a claim and to dismiss the remaining pendent state law claims for lack of federal court jurisdiction. Defendants further assert the entire Complaint fails to state a claim since suits against a hospital, its peer review panel, medical staff, employees and witnesses arising out of medical peer review are precluded by the peer review immunity provisions of Florida Statutes § 766.101 and Chapter 395 (1989) and the Federal Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111-11152, absent an allegation of fraud.

[*1045] COUNT I

VIOLATION OF 42 U.S.C. 1983

HN2[] Section 1983 grants an individual a private cause of action when his federal rights are infringed by state statute, state officials, or persons acting under color of state law. A Defendant's alleged infringement of federal rights must be "fairly attributable to the state." *Lugar v. Edmondson Oil Co., 457 U.S. 922,* ***[**3]*** *937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)*. "[A] sufficiently close nexus (must exist) between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982)*.

This standard insures the state is "responsible for the *specific* conduct [constituting the alleged infringement]." *Id. at 1004* (emphasis added). ***HN3***[] State regulation, substantial state funding, or a contractual relationship with a state government do not provide a sufficient nexus for state action. *Jackson v. Metro. Edison Co., 419 U.S. 345, 350, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1975)*; *Rendell-Baker v. Kohn, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982)*; *Blum, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982)*; *Crowder v. Conlan, 740 F.2d 447, 451 (6th Cir. 1984)*; *Seng v. Cibola General Hospital, 706 F.2d 306 (10th Cir. 1983)*. The state must exercise such "coercive power" or "[provide] such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Id. 457 U.S. at 1004*.

Though Defendants are private parties, Plaintiffs assert that Defendants acted under color of state law because the alleged infringement of federal rights, the decision to suspend Plaintiffs' **[**4]** hospital privileges, arose out of a statutorily mandated medical peer review. Plaintiffs' state action allegations also claim that Defendants acted under color of state law because defendant hospital, a privately owned non-profit organization, receives the majority of its revenue from state and federal funds and contracts with the county to provide medical services for the indigent.

Plaintiffs do not allege that the state coerced or significantly encouraged Defendants' decision to summarily suspend Plaintiffs' hospital privileges. The complaint shows the decision made by the medical peer review committee was made by private parties, was not based on medical standards established by the state, nor dictated by a state regulatory rule. Nor did the complaint show that the state is involved in the daily operation of the hospital. Therefore, the Court finds that state regulation of Manatee Hospital through statutorily required peer medical review, receipt by Manatee Hospital of state funds, and Manatee Hospital's contract with the county to provide indigent care do not create a sufficient nexus between the Defendants' decision to suspend the Plaintiffs' hospital privileges and the state **[**5]** to constitute state action for purposes of 1983 liability.

COUNTS II and III

VIOLATION OF THE SHERMAN ANTITRUST ACT

Standard for Antitrust Pleadings

HN4[] To satisfy the requirements of notice pleading in an antitrust complaint, "enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified." *Quality Foods v. Latin American Agribusiness Development Corp., 711 F.2d 989, 995 (11th Cir. 1983)*. "Conclusory allegations that Defendant violated the antitrust laws and Plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief." *Id.; Lombard's Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985)*.

Section 1 Claim

The purpose of the Sherman Antitrust Act is to protect competition, not individual competitors. *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*. ***HN5***[] The elements **[*1046]** of a *§ 1* claim under the Sherman Act are 1) a conspiracy exists between two or more entities and 2) the conspiracy unreasonably restrains trade. *Aviation Spec., Inc. v. United Technologies Corp., 568 F.2d 1186, 1191 (5th Cir. 1978)*.

Two different methods **[**6]** of analyses are used to determine whether conduct violates the second element: the rule of reason and the *per se* rule. *Goss v. Memorial Hosp. System, 789 F.2d 353, 354 (5th Cir. 1986)*. If the suspect conduct constitutes *per se* an unreasonable restraint on trade, element 2 is satisfied. Otherwise, the rule of reason analysis is used. *Id*. In this case, since Defendants' conduct, summary suspension of Plaintiff's hospital privileges, is not *per se* an unreasonable restraint of trade, the rule of reason analysis applies.

Using the rule of reason analysis, Plaintiffs must allege that Defendants' conduct had an "impact upon competition in his particular . . . profession, and not just upon [his] business." *Feldman v. Jackson Memorial Hospital, 571 F. Supp. 1000, 1008* (S.D.Fla. 1983, *affirmed*, *752 F.2d 647 (11th Cir. 1983))*. ***HN6***[] A plaintiff fails "to state a *section 1* offense by failing to allege 'that the alleged restraint on trade tends or is reasonably calculated to prejudice the public interest.'" *Quality Foods v. Latin Am. Agribusiness Devel., 711 F.2d 989 (11th Cir. 1983)* (*quoting Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 273 (5th Cir. 1979))*. **[**7]**

Plaintiffs allege damage to their business, property, and ability to compete in Manatee County. Plaintiffs also allege that prior to their final suspensions they voluntarily discontinued delivering patients at Manatee Memorial Hospital because of a purported inability of the hospital to provide timely anesthesia services. The Complaint further states that Dr. Boczar resigned from the hospital before her privileges were suspended for the second time.

The Court finds Plaintiffs' complaint deficient for failure to allege an injury to competition within the relevant medical market caused by the Defendants' conduct, the summary suspensions. Further, since Plaintiffs had voluntarily stopped admitting patients to Manatee Hospital prior to being suspended, the complaint does not demonstrate an injury to competition inflicted by Plaintiffs' summary suspensions. Therefore, Plaintiffs' conclusory allegation of a conspiracy to drive them out of the Manatee market will not survive a motion to dismiss since it is not supported by facts constituting a legitimate claim for relief.

Section 2 Claim

HN7[] In a conspiracy to monopolize claim under *§ 2* of the Sherman Act, the plaintiff must allege 1) an **[**8]** agreement or understanding between two or more economic entities, 2) a specific intent to monopolize, and 3) overt acts in furtherance of the alleged conspiracy. *Feldman, 571 F. Supp. at 1011* (*citing Robinson v. Magovern, 521 F.Supp 842, 892 (W.D.Pa. 1981))*. ***HN8***[] A monopoly is "the power to control prices or exclude competition." *Feldman, 571 F. Supp. at 1010* (*citing United States v. E.I. Dupont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994,* 100 L. Ed. 1264 (1965)). A plaintiff must define the relevant product and geographic market the alleged conspiracy to monopolize attempted to control. *Id*. **HN9**[] The relevant geographic market is the area in which the defendant competes with other like businesses. Feldman, 571 F. Supp. at 1010 (*citing* Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910 (8th Cir. 1976)).

Plaintiffs' complaint is contradictory. Plaintiffs allege that Manatee Hospital provided the only obstetrical beds in Manatee County at the time Plaintiffs' hospital privileges were suspended. Assuming the relevant product is obstetrical beds, Plaintiffs' allegation does not demonstrate an actual monopoly since Plaintiffs affirmatively allege they were taking patients to Sarasota **[**9]** Hospital for delivery and Plaintiffs' complaint repeatedly refers to competition or fear of competition between Sarasota Hospital and Manatee Hospital. Therefore, Plaintiffs' complaint demonstrates that Manatee Hospital does not actually monopolize the relevant geographic market. Plaintiffs do not allege what portion **[*1047]** of the market Manatee Hospital occupies.

Alternatively, assuming that the relevant product is obstetrical services, Manatee Hospital is not the Plaintiffs' competitor since the hospital does not perform obstetrical services. Also, since the allegations show that none of the defendant doctors practice obstetrics, they are incapable of monopolizing the obstetrical market or conspiring with the hospital to monopolize the obstetrical market since they too are not competitors within the market. *See* Feldman, 571 F. Supp. at 1010. Because Plaintiffs' do not allege the product or geographic market, the Court finds Plaintiffs' complaint does not give adequate notice to Defendants of the claim against them in accordance with Fed.R.Civ.P. 8(a)(2).

Since Plaintiffs' complaint does not state a claim under the Sherman Antitrust Act, this Court need not address whether participants **[**10]** in medical review committees are immune from federal antitrust suits due to the state action exemption.

COUNT IV

VIOLATION OF THE RACKETEER INFLUENCED CORRUPT ORGANIZATION ACT

The United States Supreme Court has defined compensable injury under 18 U.S.C. § 1964(c) to be the harm caused by the predicate acts. "[A] plaintiff has standing to sue only 'to the extent that, he has been injured . . . by the conduct constituting the violation.'" Morast v. Lance, 807 F.2d 926, 933 (11th Cir. 1987) (*quoting Sedima*, 473 U.S. at 479). "Any recoverable damages . . . will flow from the commission of the predicate acts." *Sedima*, 473 U.S. at 479.

HN10[] A claim of civil RICO under 18 U.S.C. § 1964(c) necessarily alleges a violation of § 1962. Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 495, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985); Outlet Communications v. King World Productions, 685 F. Supp. 1570 (M.D.Fla. 1988). "Section 1962 . . . makes it unlawful for 'any person' . . . to use money derived from a pattern of racketeering activity to . . . conduct an enterprise through a pattern of racketeering activity." Sedima, 473 U.S at 495. The existence of an enterprise, defined in § 1961(4), must be alleged **[**11]** and proved. United States v. Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981); Outlet, 685 F. Supp. at 1579.

HN11[] A "pattern of racketeering" is defined as "at least two acts of racketeering activity" occurring within a specified time. Outlet, 685 F. Supp. at 1580. "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." Sedima, 473 U.S. at 496 n. 14. In the Eleventh Circuit, Plaintiff must "allege definitively an enterprise as well as to state a 'threat of continuing activity' necessary to allege a pattern of racketeering activity. . . ." Outlet, 685 F. Supp. at 1581.

Plaintiffs allege injury to reputation and loss of business due to their summary suspensions but do not allege any facts demonstrating injury flowing from the commission of the predicate acts, mail fraud and extortion. Therefore, Plaintiffs' allegations are not sufficient to confer standing under Rico.

Further, Plaintiffs have not alleged facts demonstrating a threat of continuing mail fraud **[**12]** and extortion necessary to constitute a pattern of racketeering activity. Finally, Plaintiffs have not definitively alleged an enterprise. Therefore, the Court finds Plaintiffs' complaint does not state a claim for relief under *18 U.S.C. § 1964(c)*.

COUNT V

VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The purpose of Title VII is "to achieve equality of employment opportunities" and "to provide equal access to job markets for both men and women." *Sibley Memorial **[*1048]** Hospital v. Wilson, 160 U.S. App. D.C. 14, 488 F.2d 1338 (D.C.Cir. 1973)* (*quoting* *Griggs v. Duke Power Co., 401 U.S. 424, 426, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971))*. ***HN12***[] Claims for relief under Title VII must allege either a hostile work environment or constructive discharge caused by sex discrimination.

HN13[] In order to establish a hostile work environment claim under Title VII, a plaintiff must plead the following elements: 1) the employee belongs to a protected group, 2) the employee was subject to unwelcome sexual harassment, 3) the harassment complained of was based upon sex, 4) the harassment complained of affected a "term, condition, or privilege of employment", and 5) respondeat superior. To establish a constructive discharge claim, except for the fourth **[**13]** element, the complaint is the same. The fourth element is satisfied by showing that the employee's reaction to harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. *Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)*. An individual need not be an "employee" as defined in § 2000e-2(a)(1) to bring a claim under Title VII since the purpose of the act was to protect employment opportunities. *Id.; Doe on behalf of* *Doe v. St. Joseph Hospital, 788 F.2d 411 (7th Cir. 1986)*.

Dr. Boczar alleges that Dr. Derespino has a history of harassing women and Manatee Hospital employs no other female obstetrician/gynecologist. Although Dr. Boczar did not receive her privileges immediately, she affirmatively alleges that this was due to an attempt to prevent competition. Further, Dr. Boczar alleges that she resigned because of her dissatisfaction with medical care provided at Manatee Hospital. Therefore, since Dr. Boczar did not allege facts to show a hostile work environment or that her resignation was due to a hostile work environment, the Court finds that Plaintiffs' complaint does not state a claim for relief under Title VII.

[14]** Plaintiffs' pendent state claims are dismissed for lack of jurisdiction. Defendants' motion to strike is now moot.

ORDERED that the motion to dismiss of Defendants Manatee Hospitals & Health Systems, et al., be GRANTED in accordance with the preceding paragraphs. Plaintiffs shall file an amended complaint within fifteen (15) days of the date of this Order. If no amended complaint is filed within that time, the Clerk of District Court shall enter a final judgment of dismissal. It is further

ORDERED that Plaintiffs' pendent state claims are dismissed for lack of jurisdiction, and Defendants' motion to strike is denied as moot.

DONE AND ORDERED. in Chambers, in Tampa, Florida, this 21st day of of February, 1990.

End of Document

St. Paul v. FMC Corp.

United States District Court for the District of Minnesota, Third Division

February 26, 1990, Decided

Civil File No. 3-89-0466 Class Action

Reporter

1990 U.S. Dist. LEXIS 18142 *; 1991-1 Trade Cas. (CCH) P69,305

City of St. Paul, a municipal corporation, Plaintiff, v. FMC Corporation; Occidental Chemical Corporation; Stauffer Chemical Company; The Dow Chemical Company; PPG Industries, Inc.; Diamond Shamrock Corporation; Pennwalt Corporation; The B. F. Goodrich Company; Vulcan Materials Company; Georgia-Pacific Corporation; and Kaiser Aluminum and Chemical Corporation, Defendants

Core Terms

purchasers, indirect, indirect-purchaser, settlement, antitrust, class action, anti trust law, preclusion, caustic soda, chlorine, federal court, res judicata, state law, divergence, factual predicate, defendants', nationwide, contracts, Appeals, parties, cases, pendent jurisdiction, antitrust statute, antitrust action, cause of action, public entity, class member, anticompetitive, overcharge, pleadings

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN1[] **Purchasers, Direct Purchasers**

Indirect-purchaser antitrust actions under state law are not preempted by the limitation of federal antitrust actions to direct purchasers.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN2[] **Prerequisites for Class Action, Adequacy of Representation**

Adequate representation is required to support preclusion by judgment in a class action. One major requirement of representation draws from the due process perception that absent persons cannot be represented by parties who have fundamentally divergent interest in the subject of the representation.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN3[] **Special Proceedings, Class Actions**

The reasons for limiting preclusion to the subject of the class action are even stronger than the reasons for imposing similar limits on preclusion by other representative litigation. These limitations on preclusion by a class judgment are wrapped up with the general proposition that the court conducting the action cannot predetermine the preclusive effect of the judgment.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN4[] **Private Actions, Purchasers**

The Supreme Court recognizes the substantial divergence of interest between direct and indirect purchasers in a class action.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN5[] **Preclusion of Judgments, Res Judicata**

There are three elements to the res judicata doctrine: 1) the prior judgment must be rendered by a court of competent jurisdiction; 2) the prior judgment must be a final judgment on the merits; and 3) the same cause of action and the parties were involved in both cases.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN6[] **Preclusion of Judgments, Res Judicata**

Whether two claims are the same for res judicata purposes depends on whether the claims arise out of the same nucleus of operative fact or are based on the same factual predicate.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN7[] Private Actions, Purchasers

The "cost plus" exception allows recovery for indirect purchasers where there is a pre-existing, fixed-quantity, cost-plus contract between the direct purchaser and its customer, as well as between all other parties in other parties in the distribution chain.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN8[] Federal & State Interrelationships, Erie Doctrine

In applying state law, federal courts are bound by the decisions of the state's highest court. When state law is unclear or unsettled, it is the duty of a federal court to apply the rule it believes that state supreme court would follow. In making this determination, a decision of the state's intermediate appellate court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN9[] Public Enforcement, State Civil Actions

The Minnesota antitrust statute applies to the following: a) any contract, combination, or conspiracy when any part thereof was created, formed or entered into in this state; and b) any contract, combination or conspiracy whenever any of the foregoing affects the trade or commerce of this state.

Civil Procedure > Special Proceedings > Class Actions > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN10[] Special Proceedings, Class Actions

A court must conduct a two-step analysis in determining whether to apply state law to a foreign class member. First, the court must determine whether one state's law is in conflict with that of any other jurisdiction connected to the suit. Second, if there is a conflict of law, the court must determine whether the state's law has a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class. This analysis is required even in a nationwide class action which can serve the important goal of providing an efficient resolution or large numbers of claims which might otherwise not be asserted.

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Kenneth Kramer, Esq., Shearman & Sterling, New York, New York, for defendant Georgia-Pacific Corporation.

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Judges: Paul A. Magnuson, United States District Judge.

Opinion by: MAGNUSON

Opinion

MEMORANDUM AND ORDER

This matter is before the court upon defendants' motions for: 1) judgment on the pleadings; 2) dismissal for lack of subject matter jurisdiction; and 3) to limit the class action complaint. For the reasons set forth below, defendants' motions for judgment on the pleadings and dismissal are denied, and the motion to limit the complaint is granted.

FACTS

This class-action antitrust case owes its existence to the Supreme Court's recent decision in *California v. ARC America Corp., U.S. , 109 S.Ct. 1661 (1989)*, which held that ***HN1***[] indirect-purchaser antitrust actions under state law are not preempted by the Illinois Brick rule's limitation of federal antitrust actions to direct purchasers. Plaintiff, the City of St. Paul, brings this action as an indirect purchaser of chlorine and caustic soda products, alleging that the defendants, all chlorine and caustic soda producers, have engaged in price-fixing conduct for these products in violation of both **[*4]** the Sherman Act and Minnesota's antitrust statute. The procedural history of prior antitrust litigation between these same parties, as well as the changes in ***antitrust law*** noted above, constitute much of the relevant background for the instant motions. On June 17, 1986, St. Paul brought a class action against defendants in this court alleging essentially the same antitrust violations alleged in this case. St. Paul sought to represent a nation-wide class of municipalities and other public entities under both Minnesota law and under Section 1 of the Sherman Act Law, then amended the complaint by alleging a class of Minnesota public entities and dropping the Minnesota antitrust claims. In its second amended complaint St. Paul reinstated the allegations as they were in the original complaint. St. Paul does not deny that it brought this action as both a direct and an indirect purchaser of chlorine and caustic soda from defendants.

On December 2, 1986, the city of Philadelphia brought a class-action antitrust claim against a group of defendants including all of the defendants in this case alleging price-fixing for chlorine and caustic soda products in violation of Section 1 of the Sherman **[*5]** Act. The class consisted of all public entities -- nationwide -- which purchased chlorine and caustic soda directly from the named defendants. Meanwhile, in May, 1987, the 9th Circuit Court of Appeals held several state antitrust statutes, to the extent they provided actions for indirect purchasers, preempted by Federal ***Antitrust law***. *In re Cement and Concrete Antitrust Litigation, 817 F.2d 1435 (9th Cir. 1987)*. The Cement and Concrete court relied heavily on the Supreme Court's decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061 (1977)*, which held that Section 4 of the Clayton Act does not provide a cause of action to indirect purchasers. *817 F.2d at 1445*.

Subsequent to the Philadelphia complaint and the Cement and Concrete decision, on May 31, 1988, St. Paul entered into a stipulation of dismissal with defendants. Regarding indirect-purchaser claims, the stipulation states that "this dismissal is without prejudice to all [public entities], . . . located within the State of Minnesota . . . that purchased chlorine or caustic soda indirectly from any of the above-named defendants" (emphasis added). These claims were further subject to the follow **[*6]** proviso:

No such claims may be brought against the above-named defendants by the indirect purchasers unless and until a final decision is rendered in the matter of In re Cement and Concrete Antitrust Litigation, docket nos. 84-2865, 85-1670, and 85-1722 to 85-1724, by the Supreme Court and the Ninth Circuit Court of Appeals reversing the Ninth Circuit's ruling that section 325D.57 of the Minnesota Antitrust Statute, to the extent it purports to permit recovery by indirect purchasers, is preempted by operation of *Article VI, clause 2 of the United States Constitution*; provided further that no such claims shall be brought if the Supreme Court or the Ninth circuit rules, for any other reason, that indirect purchasers may not bring suit under the Minnesota Antitrust Statute.

The stipulation stated the following regarding direct purchasers: "All [public entities] located within the State of Minnesota that purchased chlorine or caustic soda directly from any of the defendants . . . are deemed members of the class certified in [the Philadelphia litigation] . . . unless . . . such direct purchasers out-out [sic] of the class certified by that court."

St. Paul does not dispute **[*7]** that it subsequently received proper class notice and an opportunity to opt out of the Philadelphia litigation. The notice unequivocally presented class members with the choice of opting out or remaining and being bound by the ultimate resolution, as well as defining the class as direct purchasers. Several settlement agreements eventually resolved the Philadelphia litigation as to all defendants. The settlements released the class members' claims according to the following language:

"Upon the Court's approval of this Agreement and the settlement set forth herein pursuant to Rule 23, a final judgment . . . shall be entered which shall forever discharge [each settling defendant] from any and all claims, demands, causes of action, obligations, damages and liabilities and all other claims of any kind, . . . of every member of the Class who did not timely request exclusion in the manner provided for in the pertinent notice to the Class (including all of each Class member's parents, subsidiaries, affiliates, predecessors and successors) under the antitrust laws of the United States, or the antitrust or similar laws regulating competition of any State thereof or of any other jurisdiction **[*8]** to the date hereof based upon, arising out of, or having connection in any way whatsoever with any act, omission, cause or matter that is in whole or in part the subject of or asserted in or any claims that could have been asserted under the antitrust laws of the United States or the antitrust or similar laws regulating competition of any State thereof or of any other jurisdiction, as well as any other claims based on the allegations asserted in, the Consolidated Amended Class Action Complaint or any of the complaints filed in the cases enumerated in Exhibit A hereto."

(emphasis added). The supplemental notice clearly stated that the class consisted of direct purchasers whose recovery would be apportioned pro rata according to the amount of their direct purchases. The claim forms sent to class members in this direct-purchaser action provided a column for the entry of direct purchases. No column was provided for indirect purchases, i.e. purchases from non-defendants.

Following the Supreme Court's decision in ARC America, St. Paul filed its complaint in the instant case, seeking recovery as an indirect purchaser under Minnesota law for what is conceded to be the defendants' **[*9]** same anticompetitive acts. The complaint further alleges that some of the purchases were "on a basis equatable to a cost plus basis." The putative class is nation-wide. Defendants now move for judgment on the pleadings based on the doctrines of claim preclusion or res judicata (part I); dismissal for lack of subject matter Jurisdiction (part II); and an order limiting the class (part III).

DISCUSSION

I.

CLAIM PRECLUSION AND RES JUDICATA

Defendants first argue that St. Paul, as a direct-purchaser member of the Philadelphia direct purchaser class, is precluded from bringing this action based on the judgments in that case. Similarly, defendants argue that St. Paul is precluded under the doctrine of res judicata. The court will discuss these issues separately although it reaches the same conclusions on both issues.

A. Claim Preclusion in Class Actions

This issue requires the court to determine the effect of the Philadelphia litigation settlements upon St. Paul, which by the May 1988 stipulation of dismissal deemed itself a member of the Philadelphia class. The stipulation clearly preserved indirect-purchaser claims for indirect purchasers. The stipulation also clearly subjected direct **[*10]** purchasers to the results of the Philadelphia litigation. The problem is that the stipulation does not specifically address how parties with both indirect and direct purchasers - like St. Paulare to be treated. Defendants correctly observe that nothing in the stipulation gave St. Paul the right to remain in the Philadelphia direct-purchaser action and later bring an indirect purchaser action. The converse, however, is also true.

Because the stipulation is silent the next step is to analyze the extent of the Philadelphia class-action's preclusive effect. St. Paul argues that its interests as an indirect purchaser were not the subject of the Philadelphia litigation and consequently were not adequately represented. Because the indirect claims were not represented, St. Paul further argues, they cannot be precluded.

HN2[] "Adequate representation is required to support preclusion by judgment in a class action. One major requirement of representation draws from the due process perception that absent persons cannot be represented by parties who have fundamentally divergent interest in the subject of the representation." Wright, Miller, and Cooper, Federal Practice and Procedure, § 4455 at **[*11]** 477 (West 1981) (citing *Hansberry v. Lee, 311 U.S. 32 (1946))*. ***HN3***[] "The reasons for limiting preclusion to the subject of the class action are even stronger than the reasons for imposing similar limits on preclusion by other representative litigation. Id. at 484. "These limitations on preclusion by a class judgment are wrapped up with the general proposition that 'the court conducting the action cannot predetermine the [preclusive] effect of the judgment.'" Id. at 485 (quoting *Gonzales v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973))*.

In the instant case the court concludes that the Philadelphia litigation does not preclude St. Paul from collaterally pursuing its indirect claims in this action. This conclusion is compelled by the divergence of interests between a direct-purchaser representative and an indirect-purchaser claimant. The class certified was of direct purchasers, the settlements were distributed pro rata according to direct purchases, and the class representative was a direct purchaser. *HN4*[] The Supreme Court in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 738 (1977)*, recognized the substantial divergence of interest between direct and indirect purchasers:

Permitting **[*12]** the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge -- from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

As we have indicated, potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund -- the amount of the alleged overcharge -- by contending that the entire overcharge was absorbed at that particular level in the chain.

The Illinois Brick court, in discussing its rationale for limiting private federal antitrust actions to direct purchasers, also anticipated the need for different classes with their own representatives should indirect-purchaser claims be allowed:

But allowing indirect purchasers to recover using pass-on theories, even under the optimistic assumption that joinder of potential plaintiffs will deal satisfactorily with problems of multiple **[*13]** litigation and liability, would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant. In treble-damages actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers, and other middlemen, whose representatives presumably should be joined. And in suits by direct purchasers or middlemen, the interests of ultimate consumers are similarly implicated.

431 U.S. at 740-41 (emphasis added). This divergence of interest between direct and indirect purchasers is still recognized despite the court's decision in ARC America. In holding that state indirect-purchaser actions do not interfere with the policies underlying federal law and thus are not preempted -- an analysis focusing on how best to effectuate the goals of compensating of antitrust victims and deterring anticompetitive conduct rather than how to preserve adequate representation for particular classes of purchasers -- the court cost great doubt on the wisdom of including pendent indirect claims in federal antitrust actions:

First, the Court **[*14]** of Appeals concluded that state indirect purchaser statutes interfere with the congressional purpose of avoiding unnecessarily complicated proceedings on federal antitrust claims. But these state statutes cannot and do not purport to affect remedies available under federal law. Furthermore, state indirect purchaser actions will not necessarily be brought in federal court. *817 F.2d, at 1445*. Unlike the federal indirect purchaser claims asserted in Illinois Brick, which would have been exclusively within the jurisdiction of the federal courts, *15 U.S.C. §§ 15(a)*, *26*, claims under state indirect purchaser statutes could be brought in state court, separately from federal actions brought by direct purchasers. Moreover, federal courts have the discretion to decline to exercise pendent jurisdiction over state indirect purchaser claims, even if those claims are brought in the first instance in federal court. See *United Mine Workers of America v. Gibbs, 383 U.S. 715, 725-726, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966)*. Since many state indirect purchaser actions would be heard in state courts, at least when the federal courts determined that hearing those claims would be overly **[*15]** burdensome, any complication of federal direct purchaser actions in federal court would be minimal.

109 S.Ct. at 1666. In discussing the diluted recovery problem, moreover, the court noted "that direct purchasers may have to share with indirect purchasers is a function of the fact and form of settlement rather than the impermissible operation of state indirect purchaser statutes" *109 S.Ct. at 1667* (emphasis added).

Here, as noted above, the fact and form of the settlement was determined by a direct purchaser on behalf of direct purchasers resulting in a pro rata distributions according to each member's direct purchases. Considering the divergent interests noted above, the court concludes that the Philadelphia class representative had no interest in pursuing indirect claims for those members who were both indirect and direct purchasers, thus diluting its own recovery. Defendants rely heavily on *TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456 (2d Cir. 1982)*, which involved the settlement of a shareholder derivative class action "involving a dispute over a century-old lease." *675 F.2d at 457*. The court affirmed the approval or the settlement over the objections of certain **[*16]** minority shareholders to the settlement's preclusion of "all claims that might be asserted in connection with the action . . . including [an] appraisal proceeding that had been dismissed without prejudice by the state court." *675 F.2d at 459*. The court approved the settlement because the state-law claim was "based on the identical factual predicate as that underlying the claims in the settled class action." *675 F.2d at 460*. The instant case is distinguishable. Unlike TBK, this case involves a class representative with no interest in the pursuit of indirect claims. This divergence of interest is based on the lack of an identical factual predicate. The anticompetitive conduct alleged is identical, but the indirect claims arise out of additional purchases of chlorine and caustic soda further along the distribution chain. As the TBK court recognized, "special care must be taken to ensure that the release of a claim not asserted within a class action or not shared alike by all class members does not represent 'an advantage to the class . . . by the uncompensated sacrifice of claims of members, whether few or many.'" *675 F.2d at 461* (quoting *National Super Spuds, Inc. v. New **[*17]** York Mercantile Exchange, 660 F.2d 9, 19 (2d Cir. 1981))*. Super Spuds, contrary to defendants' assertions, is the persuasive authority here. In Super Spuds the court refused to approve a class settlement on behalf of all those who purchased liquidated potato futures contracts to the extent it precluded separate state-court class actions by members who also had unliquidated potato future contracts, 660 F.2d at 919. The additional contracts prevented factual identity between the state and federal claims, resulting in a divergence of interest between the class representative and those with state claims and, in turn, resulting in inadequate representation. Claim preclusion was thus inappropriate. Id. Based on similar concerns the court must rule that the settlements in the Philadelphia litigation do not preclude St. Paul's collateral pursuit of this indirect-purchaser state action.

Defendants' res judicata arguments suffer the same fate for similar reasons. ***HN5***[] There are three elements to the res judicata doctrine: 1) the prior judgment must be rendered by a court of competent jurisdiction; 2) the prior judgment must be a final judgment on the merits; and the same cause of action **[*18]** and the parties were involved in both cases. *Murphy v. Jones, 877 F.2d 682, 684 (8th Cir. 1989)*. "Put another way, ***HN6***[] whether two claims are the same for res judicata purposes depends on whether the claims arise out of the same nucleus of operative fact or are based on the same factual predicate." *Murphy, 877 F.2d at 684-85*. Here, again, the two cases involve different facts -- different contracts leading to different damages. That the anticompetitive conduct was the same in both cases does not end the inquiry. Defendants correctly observe that, despite the Cement and Concrete holding, indirect-purchaser claims under state law were, at the time of the Philadelphia litigation, at least colorable. See *Crown Oil Corp. v. Superior Court, 223 Cal. Rptr. 164, 177 Cal. App. 3d 604 (1986)* (holding that indirect claims under state law were not preempted). The question here, however, is not whether colorable claims for state indirect-purchaser actions existed at that time; rather, the question is whether such claims had to be pursued in the Philadelphia litigation. The answer is no. Because the indirect claims are not based on the same factual predicate as the federal direct claims, **[*19]** res judicata does not apply here. Cases on which defendants rely, for this reason, have no weight in the instant case. See *Nash County Bd. of Ed. v. Biltmore Co., Co., 640 F.2d 484* (4th cir. 1981) (holding res judicata applicable where antitrust factual predicates -- including evidence and damages -- were identical and the only difference between the first state-court action and the second federal-court action was the allegation of an interstate commerce nexus); *Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964)* (holding res judicata applicable where, as above, the only difference between the first and second antitrust actions was the allegation of an interstate-commerce nexus). Res judicata, in sum, does not apply here because the Philadelphia litigation was based on a materially different factual predicate.

II.

SUBJECT MATTER JURISDICTION

Defendants assert, in a second motion, that this court lacks subject-matter jurisdiction because plaintiffs have failed to state a federal claim proving pendent jurisdiction for the indirect-purchaser claims. The court concludes that St.

Paul has properly asserted a federal claim. Pendent jurisdiction over the state indirect-purchaser **[*20]** claim is consequently appropriate.

Defendants contend that St. Paul has failed to properly plead a federal cause of action under the ***HN7***[] "cost plus" exception to Illinois Brick. This exception allows recovery for indirect purchasers "where there is a pre-existing, fixed-quantity, cost-plus contract between the direct purchaser and its customer, as well as between all other parties in other parties in the distribution chain[.]" *Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573, 577 (3d Cir. 1979)* (citing *Illinois Brick, 431 U.S. at 736*). St. Paul's complaint alleges that it made indirect purchases of chlorine and caustic soda on a "basis equitable to a cost-plus basis." Defendants claim this allegation fails to state a federal cause of action, relying on cases granting summary Judgment for failure to put forth evidence of cost-plus contracts. *In re Wyoming Tight Sands Cases, 866 F.2d 1286 (10th Cir. 1989)*; *In re Midwest Milk Monopolization, 529 F.Supp. 1326 (W.D. Mo. 1982)*. These summary judgment holdings have little relevance here, given the great difference in the requirements of notice pleading under *Fed. R. Civ. P. 8* and the requirement of providing **[*21]** evidence to avoid summary judgment. Although the court has serious doubts as to whether any such cost-plus contracts can be proven, it does not regard dismissal as appropriate. Pendent jurisdiction over the state indirect-purchaser statutes, in any event, exists because St. Paul has also made a claim for injunctive relief under the Clayton Act, *15 U.S.C. § 26*. Such relief is available to both indirect and direct purchasers. See, e.g., *Reiter v. Sonotone Corp., 486 F.Supp. 115, 121 (D. Minn. 1980)*. Because St. Paul has properly pleaded a federal claim, the court has pendent jurisdiction over the state indirect-purchaser action.

II.

MOTION TO LIMIT THE COMPLAINT

Defendants seek to limit the class action complaint to claims arising after August 1, 1984, the effective date of the amendment of Minnesota's antitrust statute to allow indirect purchaser actions. See *Minn. Stat. § 325D.54*. St. Paul counters by arguing that the amendment merely clarified existing law to explicitly allow indirect actions in light of Illinois Brick. The Minnesota Court of Appeals addressed the very same argument in *Keating v. Philip Morris, Inc., 417 N.W.2d 132, 136 (Minn. Ct. App. 1007)*, **[*22]** and rejected it. Noting that Minnesota ***antitrust law*** is to be construed consistently with federal ***antitrust law*** and that Minnesota laws are not to be applied retroactively unless "clearly and manifestly so intended by the legislature," the Keating court concluded pre-amendment indirect claims are not provided for under the Minnesota statute. Id. The Minnesota Supreme Court, however, has not addressed this issue, which raises a question of whether the court of appeals case accurately set forth Minnesota law. ***HN8***[] In applying state law, federal courts are bound by the decisions of the state's highest court. *Kifer v. Liberty Mutual Ins. Co., 777 F.2d 1325, 1329 (8th Cir. 1985)*. When state law is unclear or unsettled, "it is the duty of a federal court to apply the rule it believes that state supreme court would follow." *Gearhart v. Uniden Corp. of America, 781 F.2d 147, 149 (8th Cir. 1986)*. In making this determination, a decision of the state's intermediate appellate court is "a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Commissioner **[*23]** v. Estate of Bosch, 387 U.S. 456, 465 (1967)* (quoting *West v. Amer. Tel. and Tel. Co., 311 U.S. 223, 237 (1940))*. The court finds the Keating case persuasive here, particularly because Minnesota ***antitrust law*** is to be interpreted consistently with federal law. The court finds, moreover, no persuasive datum to the contrary. Accordingly, the complaint must be limited to post-August 1, 1984 purchases.

Defendants also seek to limit the complaint to purchasers within the State of Minnesota, advancing two arguments. First, they argue that the Minnesota antitrust statute applies only to Minnesota purchasers. ***HN9***[] The statute applies to the following:

a) any contract, combination, or conspiracy when any part thereof was created, formed or entered into in this state; and

(b) any contract, combination or conspiracy. . .whenever any of the foregoing affects the trade or commerce of this state.

Here, subdivision (a) clearly does not apply as all of the defendants are from foreign jurisdictions. Subdivision (b) clearly applies to purchases made by Minnesota municipal entities, but reading this provision to apply to foreign purchases is far more troublesome. In a nationwide market, such **[*24]** purchases might be seen to "affect the trade or commerce" of Minnesota by affecting the price Minnesota governmental entities pay for chlorine and caustic soda. On the other hand, the statute might be read to require a tighter nexus between the anticompetitive activity and these Minnesota purchases given the explicit purpose of protecting the trade or commerce of Minnesota. The latter interpretation strikes the court as more reasonable.

In any event, interpreting the statute to apply only to purchasers within Minnesota is compelled by defendants' second argument, that application of Minnesota law to a nationwide class is unconstitutional. Under *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965 (1985)*, ***HN10***[] the court must conduct a two-step analysis in determining whether to apply state law to a foreign class member. First, the court must determine whether Minnesota law is "in conflict with that of any other jurisdiction connected to this suit." *105 S.Ct. at 2976*. Second, if there is a conflict of law, the court must determine whether Minnesota has a "significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class." **[*25]** *105 S.Ct. at 2979*. This analysis is required "even in a nationwide class action" which can serve the important goal of providing an efficient resolution or large numbers of claims which might otherwise not be asserted. *105 S.Ct. at 2980*. Here, the claims of foreign purchasers against foreign defendants simply have no meaningful contact with Minnesota. The conflicts analysis is thus determinative of the issue's outcome. The court concludes that Minnesota ***antitrust law*** is in conflict with other states' antitrust laws. The key is the availability of the private treble damage remedy to indirect purchasers. The following brief discussion, although in no way an exhaustive or detailed discussion of state antitrust laws throughout the nation, provides sufficient illustration of the antitrust conflicts involved several states do not provide antitrust damages actions. Other states do not allow treble damages, and several more require participation by the state attorney general. Most importantly, only fifteen jurisdictions allow indirect purchaser suits, four of them requiring that class actions asserting such claims be brought by the state attorney general. Case law in three states, moreover, **[*26]** does not allow indirect-purchaser recovery. The remaining states are silent on the indirect purchaser issue. St. Paul glibly asserts that this court should interpret these states' laws consistently with Minnesota law. This task would not only lead to the possibility of later inconsistencies; it would require a burdensome attempt to predict such states' laws. These concerns also support a final reason to limit the class to Minnesota purchasers. In applying Minnesota law, the court would have to perform a choice of law analysis for each state under Minnesota's elaborate multiple factor Milkovitsch test. See *In re Control Data Corp. Securities Litigation, 116 F.R.D. 216, 223 (D. Minn. 1986)*. Given the burdensome nature of such a task, "the court does not consider performing a Milkovitsch choice of law analysis as a viable alternative to applying MInnesota law to all claims or allowing the class members to individually control the prosecution of their state claims." Id. (denying certification for foreign fraud claims under Minnesota common law -- despite the satisfaction of constitutional requirements). St. Paul relies on authorities from other jurisdictions which **[*27]** do not apply Minnesota conflicts law, do not involve analysis of every state's antitrust laws, and involve claims connected to the forum. These authorities provide no guidance in this case. See *In re Seagate Technologies Securities Litigation, 115 F.R.D. 264 (N.D. Cal. 1987)* (applying California choice of law principles where all fraud claims had a connection to California); *Sollenbarger v. Mountain States Tel. and Tel. Co., 121 F.R.D. 417 (D. N.M. 1988)* (analyzing potential conflicts in the contract law of seven states); *In re ORFA Securities Litigation, 634 F.Supp. 1449 (D. N.J. 1987)* (all pendent fraud claims had connection to the forum); *Kleiner v. First Nat'l. Bank of Atlanta, 97 F.R.D. 683 (N.D. Ga. 1983)* (analyzing potential conflicts in the contract law of five states). The court, in sum, concludes that this class should be limited to Minnesota governmental entities.

III.

CONCLUSION

Accordingly, IT IS ORDERED that:

1. Defendant's motion for judgment on the pleadings is DENIED;

2. Defendant's motion to dismiss for lack of subject matter jurisdiction is DENIED; and

3. The class is hereby limited to Minnesota governmental entities for purchases made after August **[*28]** 1, 1984.

End of Document

Wabash Publ'g Co. v. Flanagan

United States District Court for the Northern District of Illinois, Eastern Division

February 26, 1990, Decided

No. 89 C 1923

Reporter

1990 U.S. Dist. LEXIS 2102 *; 14 U.S.P.Q.2D (BNA) 2037 **; 14 U.S.P.Q. (BNA) 2037; Copy. L. Rep. (CCH) P26,572; 1990-1 Trade Cas. (CCH) P69,021

WABASH PUBLISHING COMPANY, an Illinois corporation, BULLETIN RECORD PUBLISHING COMPANY, an Illinois corporation, Plaintiffs, v. JAMES FLANAGAN, THOMAS E. KELLEY, and TURF NEWS, INC., an Illinois corporation, Defendants

Core Terms

plaintiffs', defendants', trademark, antitrust, counterclaim, temporary restraining order, abuse of process, monopolization, allegations, motion to dismiss, Sherman Act, racing, cause of action, injunction, copies, notice, sham, generic, summary judgment motion, affirmative defense, initiated, marks, challenging, competitor, forfeiture, monopoly, invalid, Counts, harass

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Governments > Legislation > Vagueness

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

In order to have a claim dismissed under *Fed. R. Civ. P. 12(b)(6)*, the moving party must meet a high standard. Under the simplified notice pleading of the Federal Rules of Civil Procedure, the allegations of a complaint should be construed liberally and the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Generally, mere vagueness or lack of detail does not constitute sufficient grounds for a motion to dismiss.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Motions to Dismiss, Failure to State Claim**

When considering a defendant's motion to dismiss the court must view the complaint's allegations in the light most favorable to the plaintiff. All well-pleaded facts and allegations in the plaintiff's complaint must be taken as true, and the plaintiff is entitled to all reasonable inferences that can be drawn therefrom. Furthermore, a complaint is not required to allege all, or any, of the facts logically entailed by the claim. A complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing.

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN3[] **Antitrust & Trade Law, Regulated Industries**

The Noerr-Pennington doctrine provides immunity from antitrust liability for bona fide efforts to obtain or influence legislative, executive, judicial or administrative action.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN4[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Litigation brought not in an effort legitimately to obtain redress or influence an adjudicatory or other political body but instead to interfere with a competitor is not protected under the Noerr-Pennington doctrine. Such activity is not protected by the *First Amendment* and falls under the "sham" exception to the Noerr-Pennington doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN5[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Judicial proceedings instituted without probable cause, and regardless of merit, are not protected from antitrust scrutiny by Noerr-Pennington. The Seventh Circuit has expanded the "sham" exception to find that the institution of meritorious proceedings can also fall under the "sham" exception.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A single suit brought only because of the costs litigation imposes on the other party may also fall within the "sham" exception to the Noerr-Pennington doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Civil Procedure > Trials > Bench Trials

HN7[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Whether conduct is a genuine attempt to influence government action or avail oneself of judicial process or instead is merely a sham, is a question of fact.

Torts > Intentional Torts > Abuse of Process > Elements

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN8[] **Abuse of Process, Elements**

Two elements are required to plead a cause of action for abuse of process: (1) the existence of an ulterior purpose or motive for the use of regular court process; and (2) an act in the use of process not proper in the regular prosecution of a suit. The second element is most critical, and the test for sufficiency of the allegation pertaining to the second element is whether process has been used to accomplish some result which is beyond the purview of the process.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Torts > Intentional Torts > Abuse of Process > Elements

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN9[] **Jurisdiction, Jurisdictional Sources**

"Process" is "any means used by the court to acquire or exercise jurisdiction over a person or over specific property. "Process" is action that emanates from the court and must therefore be distinguished from pleadings which are created and filed by the litigants. Accordingly, the mere institution of a proceeding, even a proceeding that has no foundation in law or fact, and brought merely to harass, does not constitute abuse of process. The gist of the tort is the abuse of the court's power or "process" in conjunction with the action.

Torts > Intentional Torts > Abuse of Process > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN10[] **Intentional Torts, Abuse of Process**

Plaintiffs' mere initiation of suit, even if done without probable cause, does not constitute an abuse of process.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN11[] Injunctions, Preliminary & Temporary Injunctions

See *Fed. R. Civ. P. 65 (c)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN12[] Defenses, Demurrers & Objections, Motions to Strike

Affirmative defenses are subject to a motion to strike as opposed to a motion to dismiss. *Fed. R. Civ. P. 12(f)*. Motions under *Fed. R. Civ. P. 12(f)* are viewed with disfavor and infrequently granted. To succeed on a motion to strike, it must be shown that the allegations being challenged are so unrelated to plaintiff's claims as to be unworthy of any consideration as a defense.

Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections > Fair Identification Requirement

Trademark Law > ... > Terms Requiring Secondary Meaning > Descriptive & Laudatory Terms > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

HN13[] Due Process Protections, Fair Identification Requirement

A descriptive mark, as the term indicates, is one that describes certain essential characteristics of the product. A descriptive mark cannot be a valid trademark because instead of identifying "source," it identifies product.

Copyright Law > ... > Formalities > Notice > Omissions

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Notice > General Overview

HN14[] Notice, Omissions

See § 21 of the Copyright Act of 1909.

Copyright Law > Scope of Copyright Protection > Publication > General Overview

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Notice > General Overview

Copyright Law > ... > Formalities > Notice > Omissions

HN15[] Scope of Copyright Protection, Publication

Under the Copyright Act of 1909, determining whether the number of published copies from which notice was omitted was sufficiently small as to constitute "a particular copy or copies" turns on the relation of such number to the total number of copies published. The question of what constitutes a de minimis number is an issue of fact which must be dealt with on a case-by-case basis.

Opinion by: [*1] KOCORAS

Opinion

[2038]** *MEMORANDUM OPINION*

CHARLES P. KOCORAS, UNITED STATES DISTRICT JUDGE

This matter comes before the Court on plaintiffs-counterdefendants' motion to dismiss the six counterclaims of defendants-counterplaintiffs. For the reasons set forth below, the plaintiffs-counterdefendants' motion is denied.

Background

This case arises out of the break-up of a family publication business. On the death of Thomas Kelly, Sr., a heated dispute arose between the son, defendant-counterplaintiff Thomas E. Kelly, his half sister, plaintiff-counterdefendant Anamarie Kelly Stoppa and his stepmother, plaintiff-counterdefendant Grace Kelly over ownership of the family companies. Anamarie Kelly Stoppa and Grace Kelly maintain that they obtained complete ownership of the family company by virtue of inheritance through Thomas Kelly Sr.'s will. Thomas E. Kelly claims that he owns a portion of the stock and thus because Thomas Sr. did not own the entire company, he could not have devised ownership of the entire company. This particular dispute is currently being litigated in the probate division of the Circuit Court of Cook County.

Claiming ownership in the family business, Anamarie Kelly Stoppa **[*2]** and her husband Alberto Stoppa, discharged the defendants Thomas E. Kelly and James Flanagan shortly after the death of Thomas Sr. After their discharge, Flanagan, with Kelly's financial backing, established a competing company. Both companies publish daily racing forms available for purchase at race tracks. The plaintiffs' forms are entitled the "Red Sheet" and the "Green Sheet." Defendants use the trademarks "Blue Streak" and "Red Streak" on their racing forms.

Shortly after defendants established their company, plaintiffs initiate this federal court suit. Plaintiffs' complaint sets forth claims for copyright and trademark infringement, unfair competition, and breach of duty of loyalty. After filing suit, the plaintiffs sought and obtained a temporary restraining order prohibiting defendants from distributing their racing forms. The temporary restraining order was based on the ground that the defendants' forms were substantially similar to those of the plaintiffs. The court, however, rejected plaintiffs' request for a preliminary injunction, but also denied defendants' motion for summary judgment on the copyright claims. Nonetheless, defendants have removed their racing forms from **[*3]** the market.

On April 21, 1989, defendants filed their answer and counterclaims. Defendants set forth six counterclaims, most of which are based on allegations that plaintiffs initiated this federal court suit merely to harass defendants and force them out of business. Count I is a claim under the Sherman Act's monopolization provision. *15 U.S.C. § 2 (1988)*. Essentially, defendants claim that until their entry into the market, plaintiffs enjoyed a monopoly in the publication of daily racing forms. Defendants contend that plaintiffs have committed a variety of acts which violate the Sherman Act in an attempt to maintain their monopoly. These acts of monopolization include initiating this law suit and threatening race track officials with adverse consequences should they continue to sell defendants' racing forms. Count II is based on the same factual allegations and asserts a cause of action under the monopolization provision of the Illinois Antitrust Act. Ill. Rev. Stat. ch. 38, para. 60-1-60-11 (1987).

Defendants' Count V sets forth a claim for abuse of process. The factual allegations which form the basis of this count are essentially the same facts which provide the basis for the **[*4]** antitrust claims. Defendants assert that plaintiffs filed this suit merely to harass and intimidate defendants thereby driving defendants out of business. Moreover, defendants claim that plaintiffs are using this action to gain a tactical advantage in the state court proceedings.

Counts III and IV attack the validity of plaintiffs' asserted trademarks and copyright. Count III challenges the plaintiffs' trademarks of "Red Sheet" and "Green Sheet" on the ground that the trademarks have become generic. In Count IV, defendants allege that plaintiffs published a number of their racing forms without providing a copyright notice and, consequently, the copyright is invalid.

Defendants' final count, Count VI, is a request for forfeiture of the injunction bond, posted by plaintiffs upon the imposition of the temporary restraining order. The defendants contend that the temporary restraining order would never have been granted had plaintiffs truthfully advised the Court of the facts. Accordingly, because the temporary restraining order was wrongfully granted, defendants claim they are entitled to enforcement of the bond to cover the losses defendants incurred during the period of the temporary **[*5]** restraining order. **[**2039]**

Plaintiffs challenge each of defendants' counterclaims under *Federal Rule of Civil Procedure 12(b)(6)*. Plaintiffs maintain that defendant has failed to plead facts sufficient to state a cause of action under any one of the counts.

Procedure

A. Motion to Dismiss

HN1[] In order to have a claim dismissed under *Rule 12(b)(6)*, the moving party must meet a high standard. The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. Under the "simplified notice pleading" of the Federal Rules of Civil Procedure, the allegations of a complaint should be construed liberally and "the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 46, 78 S.Ct. 99, 102 L.Ed.2d 80 (1957)*; see also *Lewis v. Local Union No. 199 of Laborers' Intern. Union of North America, AFL-CIO, 750 F.2d 1368 (7th Cir. 1984)*. Generally, "mere vagueness or lack of detail does not constitute sufficient grounds for a motion to dismiss." *Strauss v. City of Chicago, 760* ***[*6]*** *F.2d 765 (7th Cir. 1985)*.

HN2[] When considering a defendant's motion to dismiss the Court must view the complaint's allegations in the light most favorable to the plaintiff. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)*; *Conley, 355 U.S. at 45, 78 S.Ct. at 102*. All well-pleaded facts and allegations in the plaintiff's complaint must be taken as true, *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732, 733 (7th Cir. 1986)*, and the plaintiff is entitled to all reasonable inferences that can be drawn therefrom. "Furthermore, a complaint is not required to allege all, or any, of the facts logically entailed by the claim. . . . [A] complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing." *American Nurses Ass'n v. State of Illinois, 783 F.2d 716, 727 (7th Cir. 1986)*.

Discussion

A. Sherman Act and Illinois Antitrust Act

Counts I and II of defendants' counterclaim assert causes of action for antitrust violations under *section 2* of the Sherman Act, *15 U.S.C. § 2*, and under the Illinois Antitrust Act's monopolization provision. Ill. Rev. Stat. ch. 38, **[*7]** § 60-1-60-11. Defendants contend that certain conduct of the plaintiffs, including initiating this federal court action, constitutes acts of monopolization in the market of racing form publications. Plaintiffs do not challenge defendants' claim on its face, but instead assert a defense.

Plaintiffs contend that they cannot be held liable under either the Sherman Act or the Illinois Antitrust Act because filing this lawsuit is a legitimate attempt to seek redress through the courts and is therefore protected under the Noerr-Pennington doctrine. In response, defendants argue that the plaintiffs' acts are actually an attempt to interfere with a competitor's business and thus, fall within the "sham" exception to Noerr-Pennington protection. Defendants claim they have pled sufficient facts to survive a motion to dismiss, particularly because whether a party's conduct is a good-faith use of the courts to seek legal redress or instead an attempt to interfere with competition is a fact-specific question.

HN3[] The Noerr-Pennington doctrine provides immunity from antitrust liability for bona fide efforts to obtain or influence legislative, executive, judicial or administrative action. 7 von Kalinowski, **[*8]** Antitrust Laws and Trade Regulation § 46.04 (1989). The doctrine traces its roots to the case of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)*, in which a campaign by the defendant railroad designed to influence the passage and enforcement of laws which would hurt the trucking business was found to be immune from the antitrust laws. *Noerr, 365 U.S. at 135*. The doctrine was expanded in *United Mine Workers v. Pennington, 381 U.S. 657 (1965)*, to efforts to influence administrative agencies, and in *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)*, to attempts to influence adjudicatory bodies.

The source of the doctrine is two-fold. The Noerr court held that activity which could legitimately fall within the Sherman Act's parameters was not covered by the statute when such activity was directed at the political branches. The holding was based in part on the original purposes of the Sherman Act which did not include regulating political activity. *Noerr, 365 U.S. at 135-36*. Additionally, the Court reasoned that prohibiting such conduct could very well violate the *First Amendment*. Id. However, as **[*9]** the Noerr court hinted, *Noerr, 365 U.S. at 144* ("[t]here may be situations in which a publicity **[**2040]** campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."), and the California Motor court elaborated that ***HN4***[] litigation brought not in an effort legitimately to obtain redress or influence an adjudicatory or other political body but instead to interfere with a competitor is not protected under the Noerr-Pennington doctrine. California Motor, 404 U.S. at 661-62. Such activity is not protected by the *First Amendment* and falls under the "sham" exception to the Noerr-Pennington doctrine.

Thus, ***HN5***[] judicial proceedings instituted without probable cause, and regardless of merit, are not protected from antitrust scrutiny by Noerr-Pennington. *California Motor, 404 U.S. at 513*. This Circuit has expanded the "sham" exception and found that the institution of meritorious proceedings can also fall under the "sham" exception. The Seventh Circuit has stated that ***HN6***[] a single suit brought **[*10]** only because of the costs litigation imposes on the other party may also fall within the "sham" exception. *Grip-Pak Inc. v. Illinois Tool Works Inc., 694 F.2d 466 (7th Cir. 1982)* ("many claims not wholly groundless would never be sued on for their own sake; the stakes discounted by the probability of winning, would be too low to repay the investment in litigation"), cert. denied, *461 U.S. 958 (1983)*.

In light of the Seventh Circuit's Grip-Pak decision, we find that defendants have alleged a set of facts which would entitle them to relief. Although plaintiffs insist that their claims are not baseless, this is not enough to earn Noerr-Pennington protection as a matter of law. Defendants may demonstrate that even though plaintiffs' claims were viable, the benefits plaintiffs hoped to reap were so minimal that the true purpose of instituting litigation could only be to suppress competition. Moreover, ***HN7***[] whether conduct is a genuine attempt to influence government action or avail oneself of judicial process or instead is merely a sham, is a question of fact. *Clipper Express v. Rocky Mountain Motor Tariff, 690 F.2d 1240* (9th Cir), cert. denied *459 U.S. 1227 (1982)*. **[*11]** Thus, this is a particularly inappropriate challenge on a motion to dismiss.

Additionally, even were this Court to find plaintiffs' litigation activities protected, a question potentially resolvable on summary judgment, this would not entirely dispose of defendants' antitrust count. Defendant makes a number of other allegations to support their monopolization claim. Thus, while the harassing litigation allegation seems most significant, plaintiffs' conduct in allegedly threatening the racetracks which carried both plaintiffs' and defendants' racing forms must also be addressed to undermine the monopolization claim.

Finally, although neither party addresses this issue, it is necessary to determine whether the Noerr-Pennington doctrine applies to the Illinois Antitrust Act. Ill. Rev. Stat. ch. 38, para. 60-1-60-11 (1987). The parties apparently assume the doctrine applies to limit the Illinois Act's scope.

As discussed previously, the Noerr-Pennington doctrine finds its source in both the *First Amendment* and the purpose underlying the Sherman Act. Clearly, to the extent the Noerr-Pennington doctrine is grounded in the *First Amendment*, it also applies to immune from Illinois' **[*12]** ***antitrust law*** that activity which implicates the *First Amendment* right to influence governmental action.

Similarly, the Illinois Act instructs that it is to be construed in a manner consistent with federal antitrust laws when the statutory language of the two antitrust schemes are the same or similar. Ill. Rev. Stat. ch. 38, para. 60-11. Thus, to the extent the Noerr-Pennington doctrine limits a federal antitrust statute, it would appear also to limit an Illinois provision embodying similar language and purpose. Consequently, since the monopolization provision is nearly identical to the Sherman Act's *section 2*, the Noerr-Pennington doctrine would apply to the extent the doctrine relies for justification on the language and purpose of the Sherman Act. P. Tone & J. Stifter, Historical & Practice Notes Ill. Rev. Stat. ch 38, § 60-1 (3) (1987) (scope of Illinois monopolization provision essentially same as Sherman Act *§ 2*; only difference is that Illinois does not incorporate structural theory, i.e., there is no liability in Illinois for mere existence of monopoly plus intent to exercise power, liability in Illinois turns on abuse of monopoly power). It follows then that the "sham" **[*13]** exception is applicable as well.

Consequently, the previous discussion applies to Count II of defendants' counterclaim as well as Count I. We find, therefore, that defendant has pled facts sufficient to state a claim for monopolization under the Illinois Antitrust Act.

B. Abuse of Process

Count V of defendants' counterclaim sets forth the allegations defendants believe support a cause of action for abuse of process. **[**2041]** While the gist of the count is that this suit was filed with malice and for the purpose of harassing defendants, the defendants also rely on the plaintiffs' acquisition of a temporary restraining order to support their claim. Plaintiffs challenge this count on the ground that defendants have failed to plead one of the elements of the tort of abuse of process. Specifically, plaintiffs contend defendants have failed to plead any improper act in the plaintiffs' use of process. We disagree.

HN8[] Two elements are required to plead a cause of action for abuse of process: (1) the existence of an ulterior purpose or motive for the use of regular court process; and (2) an act in the use of process not proper in the regular prosecution of a suit. *McGrew v. Heinhold Commodities,* ***[*14]*** *Inc., 147 Ill. App.3d 104, 497 N.E.2d 424, 429 (1st Dist. 1986)*. The second element is most critical, and "[t]he test for sufficiency of the allegation pertaining to the second element is whether process has been used to accomplish some result which is beyond the purview of the process." *Doyle v. Schlensky, 120 Ill. App.3d 807, 816, 458 N.E.2d 1120, 1128 (1st Dist. 1983)*. ***HN9***[] "Process" is "any means used by the Court to acquire or exercise jurisdiction over a person or over specific property." *Holiday Magic, Inc. v. Scott, 4 Ill. App.3d 962, 282 N.E.2d 452 (1st Dist. 1972)*. "Process" is action that emanates from the court and must therefore be distinguished from pleadings which are created and filed by the litigants. *Holiday Magic, 282 N.E.2d at 456*. Accordingly, the mere institution of a proceeding, even a proceeding that has no foundation in law or fact, and brought merely to harass, does not constitute abuse of process. *Doyle, 458 N.E.2d at 1128*. The gist of the tort is the abuse of the court's power or "process" in conjunction with the action. Id.

Defendants' Count V states a claim for abuse of process. Contrary to plaintiffs' characterization, this count does **[*15]** not rely solely on allegations that plaintiffs instituted this suit out of malice. Indeed, defendants' paragraph 44 sets forth an allegation that plaintiffs invoked the Court's powers by seeking and obtaining a temporary restraining order. Defendants assert that plaintiffs sought this order not for the purpose for which it was created, but instead to cause defendants severe economic hardship, thereby eliminating defendants as competitors. We find, therefore, that defendants have sufficiently pled an act which constitutes an abuse of process.

Plaintiffs reliance on the case of *Alberto-Culver Co. v. Andrea Dumon, Inc. 295 F. Supp. 1155 (N.D. Ill. 1969)* is misplaced. In Alberto-Culver, as here, the defendant brought a counterclaim on an abuse of process theory. However, unlike this case, the Alberto-Culver defendant alleged that the institution of proceedings constituted the act of abuse. The Alberto-Culver court held that ***HN10***[] plaintiffs' mere initiation of suit, even if done without probable cause, did not constitute an abuse of process. *Alberto-Culver, 295 F. Supp. at 1160*.

C. Injunction Bond

Plaintiffs challenge defendants' final count in which defendants seek **[*16]** recovery on the injunction bond provided by plaintiff as a condition of obtaining the temporary restraining order. Defendants' count sets forth allegations that the temporary restraining order was improperly granted due to plaintiffs' misrepresentations to the Court. Consequently, defendants assert they are entitled to forfeiture of the bond to cover damages incurred during the pendency of the temporary restraining order. Plaintiffs contend that the Court's refusal to extend the preliminary injunction does not support a finding that the temporary restraining order was wrongly granted and that such a finding must await resolution of the merits. Accordingly, plaintiffs view this claim as premature. Additionally, plaintiffs assert, without elaboration, that this claim does not state a cause of action.

Federal Rule of Civil Procedure 65 sets out the general guidelines for obtaining temporary and permanent injunctive relief in the federal courts. *Fed. R. Civ. P. 65*. Relevant to this inquiry is *Rule 65(c)*, which states that "no ***HN11***[] restraining order or preliminary injunction shall issue except upon the giving of security by the applicant . . . ." *Fed. R. Civ. P. 65(c)*. The purpose of the provision **[*17]** is to enable the enjoined party to secure indemnification for injury which may accrue during the pendency of a wrongfully issued equitable order. 11 Wright & Miller, Federal Practice and Procedure § 2954 (1986). Here, defendants claim that the temporary restraining order was wrongfully issued and seek redress through forfeiture of the bond.

Rule 65's counterpart, *Rule 65.1* was added in 1966 and sets forth the procedures for obtaining relief through enforcement of a bond required or permitted by the Federal Rules of Civil Procedure. *Fed. R. Civ. P. 65.1*. *Rule 65.1* provides two methods of enforcement. First, the party wrongfully restrained or enjoined is entitled to bring an independent action against the surety. Alternatively, **[**2042]** the rule provides for enforcement through a motion procedure. *Fed. R. Civ. P. 65.1*. The motion procedure was designed to allow a claim to be made against the surety without resort to an independent action. 11 Wright & Miller, Federal Practice and Procedure § 2972 (1986).

The language of *Rule 65.1* addresses only judgments against surety, nonetheless, the summary motion procedure has been found applicable to the principal as well. *Coyne-Delany v. Capital Dev. **[*18]** Bd. of State of Ill., 717 F.2d 385 (7th Cir. 1983)*. Thus, as the summary procedure is applicable to both principal and surety, it follows that an independent action may be initiated against either party. Accordingly, defendants' counterclaim to enforce the injunction bond states a valid cause of action. [1]

D. Trademark and Copyright

In Counts III and IV of their counterclaim, defendants request cancellation of both plaintiffs' trademark and copyright registrations. Before analyzing the substance of these claims, we note that neither count asserts a proper counterclaim. Plaintiffs **[*19]** state causes of action for trademark and copyright infringement and therefore defendants' challenges to their validity would be more properly asserted as affirmative defenses. Defendants do not seek independent relief but instead seek to negate liability.

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[1] Defendants are entitled to seek relief through *Rule 65.1*'s summary procedure. However, a motion under *Rule 65.1* cannot precede a final determination on the merits. 11 Wright & Miller, Federal Practice and Procedure § 2972 (1986). Where an injunction bond is at issue, such a final determination occurs when it is finally determined that plaintiff was not entitled to the restraining order or upon dissolution of the injunction or failure to carry the burden of proof at the hearing on the preliminary injunction. See *Rocky Mountain Timber Corp. v. Federal Ins. Co., 502 F. Supp. 433, 435 (D.C. Or. 1980)*.

As ***HN12***[] affirmative defenses, these counts are subject to a motion to strike as opposed to a motion to dismiss. *Fed. R. Civ. P. 12(f)*. Motions under *Rule 12(f)* are viewed with disfavor and infrequently granted. *Garza v. Chicago Health Club, Inc., 347 F. Supp. 955, 962 (N.D. Ill. 1972)*. To succeed on a motion to strike, it must be shown that the "allegations being challenged are so unrelated to plaintiff's claims as to be unworthy of any consideration as a defense." 5 Wright & Miller, Federal Practice and Procedure § 1380 (1986). However, we find defendants' claims of copyright and trademark invalidity withstand scrutiny under the standards applicable to both motions to strike and motions to dismiss.

1. Trademark

Count III seeks cancellation of plaintiffs' trademark registration on two alternative grounds. First, defendants claim that the plaintiffs' marks are generic. Alternatively, defendants contend that plaintiffs' marks represent **[*20]** the common descriptive names of the racing forms. Plaintiffs take issue with the wording of defendants' counterclaim, directing the Court's attention to the allegation stating that:

The Red Sheet and the Green Sheet have been used by W&B and the public as the common descriptive names of their handicapping periodicals for so long, that in the minds of the purchasing public interested in such documents, the names . . . mean the products themselves.

Plaintiffs contend that the underlined reference suggests that plaintiffs' trademarks have come to be identified specifically with the plaintiffs' products and thus have developed secondary meaning. Secondary meaning, of course, is indicative of a particularly strong mark. We disagree with plaintiffs' interpretation of this count.

Plaintiffs pull the phrase on which they focus out of its context. It is clear upon a complete reading of the count that defendants are asserting that plaintiffs' marks have become generic. Indeed, the defendants contend that "in the minds of the purchasing public interested in such documents," plaintiffs' trademarks "mean the products themselves." This is precisely what the term "generic" means as used **[*21]** in the Lanham Act. See *Liquid Controls Corp. v. Liquid Control Corp., 902 F.2d 934 (7th Cir. 1986)* (a "generic" term is one commonly used as the name of a kind of good; unlike trademark which identifies source, generic term specifies genus of which particular product is species). Accordingly, we find that defendants have set forth an appropriate affirmative defense.

In their opposition to this motion, defendants state that they also challenge plaintiffs' trademarks on the ground that the marks are "merely descriptive." While this is a valid ground for challenging a trademark, defendants' counterclaim does not embody this challenge. Although defendants use the terms "common descriptive name" to describe plaintiffs' trademark, it is clear from the context that defendants use the phrase to **[**2043]** allege that the marks have become generic. A "merely descriptive" mark is something entirely different. ***HN13***[] A descriptive mark, as the term indicates, is one that describes certain essential characteristics of the product. 3 Callman on Unfair Competition, Trademark & Monopolies § 18.01 (4th ed. 1989). A descriptive mark cannot be a valid trademark because instead of identifying "source," it identifies **[*22]** product. Id. § 17.02. Consequently, it would be unfair to pull such terms from the public domain and prohibit their use by competitors because the term is likely to most accurately communicate the nature of the product and its qualities to consumers. Id. § 18.01. Defendants' count does not implicate this defense but instead discusses the flaw in plaintiffs' mark as a problem that has developed over time, through use of the mark. A descriptive term, in contrast, is invalid at its conception. Thus, if defendants intend to challenge plaintiffs' marks as "merely descriptive" they must amend their counterclaim.

2. Copyright

Defendants attack on plaintiffs' copyright is straightforward. Plaintiffs published a number of their handicapping periodicals without copyright notices and thus defendants assert that plaintiffs have forfeited copyright protection. Plaintiffs counter by using as a shield this Court's denial of defendants' motion for summary judgment on the copyright issue. Defendants' motion for summary judgment challenged the validity of plaintiffs' copyright on the same ground that defendants now assert as an affirmative defense. Plaintiffs apparently interpret the Court's **[*23]** ruling on summary judgment as settling the issue.

As determined in this Courts ruling on defendants' motion for summary judgment, this copyright action falls under the purview of the Copyright Act of 1909. Memorandum Opinion and Order, Wabash Publishing Co. v. Flanagan, No. 89 C 1923 slip op. at 3 (N.D. Ill. May 17, 1989). Accordingly, whether defendants' defense is viable is governed by section 21 of that Act. Section 21 of the 1909 Act provides:

HN14[] Where the copyright proprietor has sought to comply with the provisions of this title with respect to notice, the omission by accident or mistake of prescribed notice from a particular copy or copies shall not invalidate the copyright. . . .

The dispositive issue in applying this section is what constitutes "a particular copy or copies."

HN15[] Under the 1909 Act, determining whether the number of published copies from which notice was omitted was sufficiently small as to constitute "a particular copy or copies" turned on the relation of such number to the total number of copies published. J. *Nimmer on Copyright § 7.13[A]*. For example, in *United Merchants & Mfrs. Inc. v. Sarne Co., 278 F. Supp. 162 (S.D.N.Y. 1967)*, the court declined **[*24]** to find forfeiture because defendant was able to show that the copyright notice was missing from between 42 and 500 yards out of 325,000 yards of fabric. The court held that such a minor omission did not work a forfeiture.

The question of what constitutes a de minimis number is an issue of fact which must be dealt with on a case-by-case basis. Indeed, our denial of defendants' motion for summary judgment was based on our inability to find that the number of copies published by plaintiffs without notice was de minimis as a matter of law. Accordingly, in contrast to plaintiffs' interpretation of this holding, defendants' challenge was not found to be without merit. We simply found that a factual dispute existed as to the relevancy of the number of plaintiffs' unmarked copies.

It is clear then that defendants' defense survived the motion for summary judgment. It is also clear that defendants have asserted a defense which survives this motion. It is still possible that the number of copies plaintiffs published could have the effect of invalidating plaintiffs' copyright. Defendant is entitled to the opportunity to demonstrate that the omission had this effect.

Conclusions

For the reasons **[*25]** cited above, we deny plaintiffs' motion to dismiss and uphold each of defendants' counterclaims and affirmative defenses. We note that while plaintiffs have not presented an argument on this point, we cannot conclude that defendants' affirmative defense challenging the validity of plaintiffs' trademark asserts "descriptiveness" as a ground for attack. Thus, without amendment, defendants' pleading limits them to challenging the mark as "generic."

Dated: February 26, 1990

End of Document

Py Small Boats, Inc. v. International Marine Marketing Corp.

United States District Court for the District of Rhode Island

March 2, 1990, Decided

C.A. No. 89-0317B

Reporter
1990 U.S. Dist. LEXIS 3906 *; 16 Fed. R. Serv. 3d (Callaghan) 452

PY SMALL BOATS, INC. v. INTERNATIONAL MARINE MARKETING CORP. and BILL HUFF AND ASSOCIATES, INC.

Core Terms

trademark, motion to dismiss, counterclaims, logo, sailboat, contacts, personal jurisdiction, deposit, RECOMMENDATION, license, trademark infringement, accessories, purported, royalty

Counsel: **[*1]** BARBERA S. COHEN, (LOCAL COUNSEL).

MATTHEW MEDEIROS, (LOCAL COUNSEL).

Opinion by: HAGOPIAN, Magistrate

Opinion

REPORT AND RECOMMENDATION

JACOB HAGOPIAN, UNITED STATES MAGISTRATE.

The instant matters have been referred to the United States Magistrate for Report and Recommendation pursuant to *28 U.S.C. Section 636*. Before the Court are three motions: (1) the motion to dismiss for lack of personal jurisdiction and improper venue filed by defendant Bill Huff and Associates, Inc. (Huff) pursuant to *Fed.R.Civ.P. 12(b)(2)* and *12(b)(3)*; (2) the motion pursuant to *Fed.R.Civ.P. 67* by plaintiff PY Small Boats, Inc. (PY) to deposit a check in the Court; and (3) plaintiff PY's motion to dismiss defendant International Marine Marketing Corp.'s (IMMC) counterclaims pursuant to *Fed.R.Civ.P. 12(b)(6)*.

STATEMENT OF FACTS

Plaintiff PY's complaint avers the following. PY, a Rhode Island corporation, is a manufacturer and distributor of sailboats and sailboat parts and accessories. Defendant IMMC, an Indiana corporation, distributes sailboat parts and accessories. Defendant Huff, an Indiana corporation, distributes sailboats and sailboats parts and accessories. IMMC and Huff allegedly have sufficient contacts with **[*2]** Rhode Island to subject them to suit in this Court. Plaintiff asserts jurisdiction pursuant to *28 U.S.C. Sections 1331*, *1332* and *1338* and *15 U.S.C. Section 1121*. Pendent jurisdiction over a state law claim is further asserted.

A certain trademark (the name "Laser") was registered on April 20, 1976. The trademark and a logo are associates with a certain type of sailboat. There was a succession of ownership of the trademark and logo, through merger, assignment and name change, by six different corporate entities from 1976-1989. Plaintiff Py alleges that on March 31, 1989, Metcalfe Realty Company Limited (Metcalfe) assigned to PY all right, title and interest in and to the trademark and logo.

Laser International Holdings (1983) Limited (LIH) was one of the corporate entities in the succession of ownership of the trademark and logo. On January 5, 1987, LIH entered into a purchase and sale agreement for the sale of certain physical assets to Laser International Composites, Inc. (LIC). The agreement also provided that, upon meeting certain conditions, LIC would be licensed by LIH to use the trademark and logo. LIC was permitted by LIH to use the trademark and logo pending their meeting **[*3]** of the conditions. Allegedly, LIC never satisfied the conditions, the proposed license was never executed, and in February 1989, the permission given to LIC to use the trademark was terminated and withdrawn.

On or about September 28, 1988, LIC purported to enter into an "Exclusive Trademark and Tradename Licensing Agreement" with defendant IMMC; That agreement purported to grant IMMC an exclusive right to use the trademark.

Plaintiff alleges that defendants IMMC and Huff are currently using the trademark and logo without the permission or authority of PY or its predecessors in interest. Plaintiff has filed claims for trademark infringement (*15 U.S.C. Section 1114*) (Count I), false designation of origin and false description or representation (*15 U.S.C. Section 1125(a)*) (Count II), a state law claim for unfair competition (Count III) and declaratory relief (Count IV). Pursuant to *Fed.R.Civ.P. 67*, plaintiff has moved to deposit with the court a purported royalty check from IMMC.

Defendant IMMC has filed nine counterclaims for trademark infringement, false designation of origin and false descriptions, state trademark infringement, state unfair competition, various antitrust violations **[*4]** under the Sherman Act and state ***antitrust law***, state tortious interference and breach of contract. Defendant Huff has filed a motion to dismiss for lack of personal jurisdiction and improper venue.

DISCUSSION

Plaintiff's Motion Pursuant to Fed.R.Civ.P. 67.

Plaintiff PY, pursuant to *Fed.R.Civ.P. 67*, seeks to deposit in court a purported royalty check from defendant IMMC. Plaintiff claims that defendant IMMC holds no license, thus plaintiff has no right to receive royalty payments. Plaintiff, in its prayer for relief, does seek an accounting of and payment for all sales and profits derived by defendant IMMC from its alleged infringement. Defendant objects to the deposit sought by plaintiff.

Fed.R.Civ.P. 67 provides that in an action in which judgment for a sum of money is sought, a party may, by leave of court, deposit all or any part of such sum with the court. Plaintiff here seeks judgment for all sales and profits wrongfully derived by defendant IMMC.

[T]here are situations in which a litigant may wish to be relieved of responsibility for a sum or thing, but continue to claim an interest in all or part of it. In these cases the deposit-in-court procedure should be available. **[*5]** *Fed.R.Civ.P. 67*, Notes of Advisory Committee on 1983 Amendments to Rules.

Plaintiff PY asserts the right to all sales and profits, or alternatively, if defendant IMMC is found to hold a license, the right to royalty payments. Defendant IMMC asserts a right to damages if it prevails in this action. I find that deposit in court of the purported royalty check pursuant to *Fed.R.Civ.P. 67* is appropriate in the instant action. Plaintiff is "relieved of responsibility" for the check, yet continues to claim an interest in it. Defendant IMMC suffers no prejudice thereby. Therefore, plaintiff's motion pursuant to *Fed.R.Civ.P. 67* should be granted.

Plaintiff's Fed.R.Civ.P. 12(b)(6) Motion to Dismiss Defendant IMMC's Counterclaims

Plaintiff PY urges in argument that counterclaims I-VII of defendant IMMC's nine counterclaims must be dismissed for failure to state a claim upon which relief can be granted. Plaintiff's extensive memorandum sets forth numerous well-argued grounds in support of its motion to dismiss. Defendant IMMC, however, denies that PY exclusively holds all rights in and to the trademark and logo. This factual averment is central to the instant action and provides the foundation **[*6]** for defendants counterclaims.

Fed.R.Civ.P. 12(b)(6) is unequivocal. In considering a motion to dismiss under *Fed.R.Civ.P. 12(b)(6)*, the pleadings must be viewed in the light most favorable to the non-moving party, here defendant IMMC. The burden is upon the moving party, here the plaintiff, to establish that defendant can prove no possible set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson, 355 U.S. 41 (1957)*; *Harper v. Cserr, 544 F.2d 1121 (1st Cir. 1976)*.

Dispositive of plaintiff's urgings, without articulating each and every one, I find that plaintiff cannot satisfy its burden under *Fed.R.Civ.P. 12(b)(6)*. The factual issue concerning exclusivity of trademark rights is the key ingredient for success on the merits for either party. Also, in an action for trademark infringement or unfair competition, the crucial issue is the likelihood of confusion of purchases. *Universal City Studios, Inc. v. Ninetendo Co., Ltd., 746 F.2d 112, 115 (2d Cir. 1984)* (citations omitted). "The solution of this problem . . . depends upon a consideration of the facts and circumstances in each case." *Plus Products v. Plus Discount Foods Inc., 722 F.2d 999,* ***[*7]*** *1003 (2d Cir. 1983)*. Thus, dismissal pursuant to *Fed.R.Civ.P. 12(b)(6)* is rarely appropriate, since likelihood of confusion is generally a question of fact. *Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc., 627 F. Supp. 856 (E.D.Pa. 1985)*. Additionally, counterclaims of antitrust violations are a direct defense to a trademark enforcement action. *15 U.S.C. Section 1115 (b)(7)*; *Minnetonka Inc. v. Sani-Fresh Int'l., Inc., 103 F.R.D. 377 (D. Minn. 1984)*.

I find that defendant's counterclaims are arguable, though I recognize that several factual averments are not plead with particularity, but are instead made "upon information and belief." Plaintiff cannot demonstrate that defendant can prove no set of facts upon which relief can be granted. Moreover, it is virtually impossible to fully appraise defendant's counterclaims from the record now before the Court. Therefore, trial on the merits of defendant's counterclaims is necessary.

Defendant Huff's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(2) and *12(b)(3).*

Defendant Huff has filed a motion to dismiss for lack of personal jurisdiction and improper venue. Defendant argues that it has had no contact with Rhode Island after **[*8]** March 31, 1989 when plaintiff allegedly obtained the trademark rights sued upon in this action. Prior to that date, defendant concedes that it ran ads in a nationally circulated magazine and took purchase orders from Rhode Island buyers. Plaintiff avers that Huff is "using the Trademark and the Logo in connection with advertising, offering for sale, selling, and distributing sailboat parts and accessories throughout the United States, including the State of Rhode Island." Plaintiff's Complaint, Paragraph 33. Allegedly, Huff has sufficient contacts with Rhode Island to be subjected to suit in this Court.

This action arises from alleged trademark infringement by two corporate defendants. Defendant Huff urges dismissal for lack of personal jurisdiction. The initial inquiry is whether the Court had specific or general jurisdiction over defendant Huff. "Where plaintiff's claims 'arise out of' or are 'directly related' to defendant's contacts with the forum state, a court exercises specific jurisdiction." *Dupont Tire Service Center, Inc. v. North Stonington Auto-Truck Plaza, Inc., 659 F. Supp. 861, 863 (D.R.I. 1987)*, citing *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466* ***[*9]*** *U.S. 408, 414 n. 8 (1984)*. A court exercises general jurisdiction where plaintiff's claims do not so arise or relate. *Id*., citing *Helicopteros, supra at 414 n. 9*. General jurisdiction requires "continuous and systematic general business contacts." *Helicopteros, supra at 416*.

The sufficiency of minimum contacts is grounded in fact and thus can only be decided on a case by case basis. *E. F. Hutton & Co. v. Tourism and Development Corp., 455 F. Supp. 981, 984 (D.R.I. 1978)*. Defendant Huff's business involves sailboats and sailboat parts and accessories. Huff advertised in a nationally circulated magazine, and took purchase orders from Rhode Island buyers as sales representative for a Canadian boat manufacturer. Huff asserts, however, that it never shipped any goods into Rhode Island. Defendant Huff states that it has not taken any orders for goods from persons in Rhode Island after March 31, 1989, when plaintiff alleges it acquired the trademark rights sued upon in this action.

I find that defendant Huff's business contacts with the Rhode Island forum are sufficient for this Court to exercise specific personal jurisdiction. Huff advertised in Rhode Island and took **[*10]** orders from Rhode Island buyers. It is uncontradicted that Huff's business contacts with the Rhode Island forum involved the Laser trademark and logo which is the subject matter of the instant action. Huff argues that its activities were authorized by LIC, which, as discussed earlier, was allegedly licensed to use the trademark and logo until sometime during February, 1989. After February 1989, Huff asserts that it "continued to perform duties as a Laser sales representative, this time under the direct authority of G. Gordon Clayton, PY's President." Defendant Huff's Reply Memorandum in Support of its Motion to Dismiss, p.3. I find that these facts demonstrate the requisite contacts necessary for this Court to exercise specific personal jurisdiction over defendant Huff. Further, venue in this Court is proper, given my finding of personal jurisdiction over defendant Huff. *28 U.S.C. Section 1391(b)* and *(c)*.

A Magistrate's Report and Recommendation is filed herewith pursuant to Title *28 U.S.C. Section 636(b)(1)*B. Any objection to this Report must be specific and must be filed with the Clerk of Court within ten (10) days of the receipt of the Report. Rule 32, Local Rules of Court, *Rule **[*11]** 72(b), Fed.R.Civ.P.* Failure to timely file specific objections to the Magistrate's Report, findings, or recommendations is a waiver of the right to review by the District Court. *Park Motor Mart Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980)*; *U.S. v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986)*.

A review of the Magistrate's Report by a District Judge does not necessarily confer entitlement as of right to a *de novo* hearing and does not permit consideration of issues not raised before the magistrate. *Paterson-Leitch v. Massachusetts Elec., 840 F.2d 985 (1st Cir. 1988)*.

The party seeking review must arrange for a transcript of the record forthwith.

RECOMMENDATION

Plaintiff's *Fed.R.Civ.P. 67* motion for deposit with the Court should be granted. Plaintiff's *Fed.R.Civ.P. 12(b)(6)* motion to dismiss defendant IMMC's counterclaims should be denied. Defendant Huff's motion to dismiss pursuant to *Fed.R.Civ.P. 12(b)(2)* and *12(b)(3)* should be denied. I so recommend to the Court.

End of Document

Atari Games Corp. v. Nintendo of Am., Inc.

United States Court of Appeals for the Federal Circuit

March 7, 1990, Decided

Nos. 89-1396, 89-1426

Reporter

897 F.2d 1572 *; 1990 U.S. App. LEXIS 3351 **; 14 U.S.P.Q.2D (BNA) 1034 ***; 1990-1 Trade Cas. (CCH) P68,946

ATARI GAMES CORPORATION and Tengen, Inc., Plaintiffs/Cross-Appellants, v. NINTENDO OF AMERICA, INC., and Nintendo Co., Ltd., Defendants-Appellants

Subsequent History: [1]** Rehearing Denied April 4, 1990, Reported at *1990 U.S. App. LEXIS 5205*. As Corrected April 24, 1990.

Prior History: Appealed from U.S. District Court for the Northern District of California, Judge Smith.

Disposition: VACATED AND REMANDED.

Core Terms

patent, preliminary injunction, district court, cartridges, anti trust law, allegations, antitrust, violations, games, injunction, license, serious question, infringement, security system, home video, rights

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Governments > Courts > Judicial Precedent

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Standards of Review, Abuse of Discretion**

The decision to grant or deny a preliminary injunction is within the sound discretion of the district court. The appellate court may reverse the district court's decision only if the district court has committed an abuse of discretion, if the decision is based upon an error of law or if the court misapplied the law to particular facts. When the questions on appeal involve law and precedent on subjects not exclusively assigned to the Federal Circuit, the court applies the law which would be applied by the regional circuit.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

In order to obtain a preliminary injunction, a movant must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if the preliminary relief is not granted, (3) the balance of hardships favoring the plaintiff, and (4) advancement of the public interest. A party may meet the burden of establishing a need for a preliminary injunction under these four factors by demonstrating either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions of law are raised and the balance of hardships tips sharply in its favor.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction should not issue on the basis of affidavits alone. Moreover, a district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Injunctions, Preliminary & Temporary Injunctions**

When granting an injunction, *Fed. R. Civ. P. 52(a)* requires that a court set forth the findings of fact and conclusions of law which are the basis of its decision. The district court need not make binding findings of fact, but at the very least, must find probabilities that the necessary facts can be proved.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Governments > State & Territorial Governments > Boundaries

Patent Law > Ownership > Patents as Property

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN5[] **Intellectual Property, Ownership & Transfer of Rights**

A patent owner may not take the property right granted by a patent and use it to extend his power in the marketplace improperly, that is, beyond the limits of what Congress intended to give in the patent laws. The fact that a patent is obtained does not wholly insulate the patent owner from the antitrust laws.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN6[] **Bad Faith, Fraud & Nonuse, Fraud**

When a patent owner uses his patent rights not only as a shield to protect his invention, but as a sword to eviscerate competition unfairly, that owner may be found to have abused the grant and may become liable for antitrust violations when sufficient power in the relevant market is present. Therefore, patent owners may incur antitrust liability for enforcement of a patent known to be obtained through fraud or known to be invalid, where license of a patent compels the purchase of unpatented goods, or where there is an overall scheme to use the patent to violate antitrust laws.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Patent Law > Remedies > Equitable Relief > Injunctions

HN7[] **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction entered without a sufficient factual basis and findings, though intended to maintain the status quo, can offend the public policies embodied in both the patent and antitrust laws.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Patent Law > Remedies > Equitable Relief > Injunctions

HN8[] **Injunctions, Preliminary & Temporary Injunctions**

A "serious question" is characterized as one where the movant seeking an injunction has a fair chance of success on the merits.

Patent Law > US Patent & Trademark Office Proceedings > Continuation Applications > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN9[] **US Patent & Trademark Office Proceedings, Continuation Applications**

As patents are cloaked in a presumption of validity, a patent infringement suit is presumed to be brought in good faith.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Nonprice vertical restrictions on the location of resale of products are not per se violations, but are to be judged according to the "rule of reason", wherein all circumstances are weighed in deciding whether a restrictive practice is an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

HN11[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

License restrictions on the foreign export of a patented product do not violate antitrust laws. Neither does limiting the number of patented products which can be distributed constitute a per se violation.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN12[] **Injunctions, Preliminary & Temporary Injunctions**

The granting of a preliminary injunction is an extraordinary remedy. The appellate court must examine carefully extraordinary relief which precludes the filing of civil lawsuits for an indeterminate period of time. A preliminary injunction must be supported by sufficient factual evidence and a sufficient basis must be articulated by the district court in the order granting the injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

HN13[] **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction issued without notice, motion, hearing or evidence should be vacated.

Counsel: Morgan Chu, Richard C. P. De Bodo, and Dorette S. Feit, Irell & Manella, of Los Angeles, California, argued for Plaintiffs/Cross-Appellants. Robert Steinberg, Irell & Manella, of Los Angeles, California, of counsel.

Thomas G. Gallatin, Jr., Mudge, Rose, Guthrie, Alexander and Ferdon, of New York, New York, argued for Defendants-Appellants. With him on the brief was John J. Kirby, Jr. Also on the brief were George A. Cumming, Jr., Jeffrey S. Kingston and Thomas M. Kingston, Brobeck, Phleger & Harrison, of San Francisco, California.

Judges: Markey, Chief Judge, Smith, Senior Circuit Judge, and Norgle, * District Judge.

Opinion by: NORGLE

Opinion

[*1035]** **[*1574]** Norgle, District Judge.

Atari Games Corporation, (Atari) and its wholly owned subsidiary, Tengen Inc. (Tengen), have brought suit **[**2]** against Nintendo of America, Inc. and Nintendo Co., Ltd., (collectively Nintendo) for unfair competition and violations of *section 2* of the Sherman Anti-Trust Act, *15 U.S.C. § 2 (1988)*, based upon alleged monopolization and attempted monopolization of the markets for home video game machines and home video games and game cartridges playable on the Nintendo Entertainment System. Nintendo has also brought suit against Atari and Tengen for alleged patent infringement, Lanham Trademark Act and RICO violations, breach of contract, unfair competition and tortious interference with contract. Atari and Tengen sought a preliminary injunction enjoining Nintendo from filing lawsuits for contributory infringement against customers of Atari. The district court granted the motion but also enjoined Atari and Tengen from filing suit against Nintendo customers. Both parties have appealed. For the following reasons, the court vacates the preliminary injunction and remands this action to the district court for disposition consistent with this opinion.

BACKGROUND

Nintendo manufactures the Nintendo Entertainment System (NES). The NES has met with enormous success and Nintendo now **[**3]** is the undisputed industry leader in home video game entertainment, occupying an 80% share of the market for home video games. The NES includes a base console which allows the playing of various video games on a television screen and cartridges containing those games for use in the console. The NES contains a security system, which consists of a master computer chip in the base console and a slave computer chip in the cartridge. Atari says the security system renders it impossible to play a video game cartridge on the NES unless both chips are present. On January 24, 1989, Nintendo obtained a patent on the security system encompassing both the master chip and the slave chip described in the patent as necessary for a game cartridge to be played on the NES.

Tengen obtained a license from Nintendo, the patent owner, for the development and distribution of game software for the NES. Under the licensing agreement, Tengen was to create video games for use on the NES. Nintendo reserved the right to approve the game and manufacture the game cartridge. Nintendo would then sell the completed cartridges to Tengen for distribution. Tengen developed three games for Nintendo: "Pac-Man", "Gauntlet" **[**4]** and "RBI Baseball".

In December 1988, Atari, without obtaining a license from Nintendo, began to manufacture and sell its own Nintendo compatible cartridges which were able to circumvent the NES security system. On December 12, 1988, Atari filed this suit against Nintendo. Atari has asserted that Nintendo is improperly using its patent and greater market share to monopolize the home video game market. Specifically, Atari asserts that, once Nintendo received a patent **[*1575]** on its security **[***1036]** system, Nintendo sent letters to retailers of Nintendo and Atari game cartridges, such as Toys "R" Us and Bradlees, threatening suit for patent infringement against any retailer who continued to sell unauthorized NES compatible game cartridges. Nintendo then filed suit against Atari, alleging among other things patent infringement and Lanham Act and RICO violations.

District Court Proceedings

* The Honorable Charles R. Norgle, United States District Court for the Northern District of Illinois, Eastern Division, sitting by designation.

The suits were consolidated and Atari sought a Preliminary injunction preventing Nintendo from suing retailers of Atari's NES compatible cartridges. The district court granted the preliminary injunction, concluding that the practices alleged by Atari "raised serious questions going to the merits" of **[**5]** Atari's antitrust claims. The court further determined that the balance of hardships and public interest favored imposition of an injunction restraining Nintendo from filing lawsuits against customers, retailers, distributors and dealers of Atari game cartridges. However, the court went further than Atari asked, making the injunction reciprocally binding on Atari and Tengen as well. Both parties then appealed that decision to this court.

OPINION

HN1[] The decision to grant or deny a preliminary injunction is within the sound discretion of the district court. *Xeta, Inc. v. Atex, Inc., 852 F.2d 1280, 1282, 7 U.S.P.Q.2d (BNA) 1471, 1473 (Fed.Cir. 1988)*. This court may reverse the district court's decision only if the district court has committed an abuse of discretion, if the decision is based upon an error of law or if the court misapplied the law to particular facts. *Xeta, 852 F.2d at 1282, 7 USPQ2d at 1473*. When the questions on appeal involve law and precedent on subjects not exclusively assigned to the Federal Circuit, the court applies the law which would **[**6]** be applied by the regional circuit. *Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1575, 223 U.S.P.Q. (BNA) 465, 472 (Fed.Cir. 1984)*. In this action, the applicable law is that of the Ninth Circuit.

The Ninth Circuit has long held that, ***HN2***[] in order to obtain a preliminary injunction, a movant must show: 1) a strong likelihood of success on the merits, 2) the possibility of irreparable injury to the plaintiff if the preliminary relief is not granted, 3) the balance of hardships favoring the plaintiff, and 4) advancement of the public interest. *Los Angeles Memorial Coliseum Comm. v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980)*; *William Inglis & Sons Baking v. ITT Continental Baking Co. Inc., 526 F.2d 86, 87 (9th Cir. 1975)*. A party may meet the burden under these four factors by demonstrating either: 1) a combination of probable success on the merits and the possibility of irreparable injury, or 2) that serious questions **[**7]** of law are raised and the balance of hardships tips sharply in its favor. *Fong v. Lawn, 851 F.2d 1559, 1561 (9th Cir. 1988)*; *L.A. Memorial Coliseum, 634 F.2d at 1197*; *Inglis, 526 F.2d at 88*.

As a general rule, ***HN3***[] a preliminary injunction should not issue on the basis of affidavits alone. *People ex rel. Hartigan v. Peters, 871 F.2d 1336 (7th Cir. 1989)*; *Medeco Sec. Locks, Inc. v. Swiderek, 680 F.2d 37, 216 U.S.P.Q. (BNA) 577 (7th Cir. 1981)*; *Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp., 443 F.2d 867, 169 U.S.P.Q. (BNA) 625 (2d Cir. 1971)*. Moreover, a district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by plaintiff. *See* *American Passage Media Corp. v. Cass Communications, 750 F.2d 1470 (9th Cir. 1985)* (reversing grant of preliminary injunction of alleged antitrust violations based on conclusory affidavits); *Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374 (9th Cir. 1985)* **[**8]** (denying preliminary injunction of alleged antitrust violations supported by only two affidavits). ***HN4***[] When granting an injunction, *Rule 52(a)* requires that a court set forth the findings of fact and conclusions of law which are the basis of its decision. *Fed.R.Civ.P. 52(a)*. The district court need not make binding findings of fact, but at the very least, must find probabilities that the necessary facts can be proved. *Sierra On-Line, **[*1576]** Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 223 U.S.P.Q. (BNA) 227 (9th Cir. 1984)*.

A preliminary injunction takes on special significance when the injunction involves patent rights and antitrust allegations. The patent laws were enacted by Congress pursuant to *Article I, section 8 of the United States Constitution*. [1] Congress gave inventors the right to obtain patents on their inventions and thereby gain the right to exclude others from making, using or selling the invention, without the consent of the patent owner, for a period of seventeen **[**9]** years. *35 U.S.C. § 154 (1982)*. Moreover, Congress has specifically granted **[***1037]** patent owners the right to commence a civil suit in order to protect their inventions. *35 U.S.C. § 281 (1982)*; 7 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* at 59-15 (1989). As stated by the Ninth Circuit, "patentees must be

[1] "The Congress shall have Power . . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." *U.S. Const. Art. I, § 8*.

permitted to test the validity of their patents in court through actions against alleged infringers." *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 993, 202 U.S.P.Q. (BNA) 342, 348 (9th Cir. 1979)*, *cert. den., 444 U.S. 1025, 100 S. Ct. 688, 62 L. Ed. 2d 659 (1980)*; *see also,* 7 J. Von Kalinowski, *Antitrust Laws and Trade Regulation,* at 59-111 (infringement suits, in and of themselves, do not violate antitrust laws).

[10]** When the patented product is merely one of many products that actively compete on the market, few problems arise between the property rights of a patent owner and the antitrust laws. *SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203, 209 U.S.P.Q. (BNA) 889, 899 (2d Cir. 1981)*. However, when the patented product is so successful that it creates its own economic market or consumes a large section of an existing market, the aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition. *Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 876-77, 228 U.S.P.Q. (BNA) 90, 100-101 (Fed.Cir. 1985)*.

There may on occasion exist, therefore, a fine line between actions protecting the legitimate interests of a patent owner and ***antitrust law*** violations. On the one hand, the patent owner must be allowed to protect the property right given to him under the patent laws.

On the other hand, **[**11]** ***HN5***[] a patent owner may not take the property right granted by a patent and use it to extend his power in the marketplace improperly, i.e. beyond the limits of what Congress intended to give in the patent laws. The fact that a patent is obtained does not wholly insulate the patent owner from the antitrust laws. *United States v. Line Material Co., 333 U.S. 287, 308, 76 U.S.P.Q. (BNA) 399, 409, 92 L. Ed. 701, 68 S. Ct. 550 (1948)*; *Miller Insituform v. Insituform of N.A., 830 F.2d 606, 608, 4 U.S.P.Q.2d (BNA) 1463, 1464 (6th Cir. 1987)*, *cert. den., 484 U.S. 1064, 98 L. Ed. 2d 988, 108 S. Ct. 1023 (1988)*; *United States v. Westinghouse Elec. Corp., 648 F.2d 642, 647 (9th Cir. 1981)*. ***HN6***[] When a patent owner uses his patent rights not only as a shield to protect his invention, but as a sword to eviscerate competition unfairly, that owner may be found to have abused the grant and may become liable for antitrust violations when sufficient power in the relevant market is present. Therefore, **[**12]** patent owners may incur antitrust liability for enforcement of a patent known to be obtained through fraud [2] or known to be invalid, [3] where license of a patent compels the purchase of unpatented goods, [4] or where there is an overall scheme to use the patent to **[*1577]** violate antitrust laws. [5]

The danger of disturbing the complementary balance struck **[**13]** by Congress is great when a court is asked to preliminarily enjoin conduct affecting patent and antitrust rights. ***HN7***[] A preliminary injunction entered without a sufficient factual basis and findings, though intended to maintain the status quo, can offend the public policies embodied in both the patent and antitrust laws.

The district court based its grant of the preliminary injunction on the second alternative announced in *Los Angeles Memorial Coliseum and Inglis,* namely that "serious questions" existed and the balance of harms tipped sharply in favor of Atari. ***HN8***[] A "serious question" has been characterized as one where the movant has a fair chance of success on the merits. *Sierra On-Line, Inc., 739 F.2d at 1421*; *Benda v. Grand Lodge of Int'l Ass'n. of Machinists and Aerospace Workers, 584 F.2d 308, 315* (9th Cir.), *cert. dismissed, 441 U.S. 937, 99 S. Ct. 2065, 60 L. Ed. 2d 667 (1978)*. In determining the existence of "serious questions", the **[**14]** district court relied solely upon allegations made by Atari:

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[2] *Walker Process Equip., Inc. v. Food Mach. and Chem. Corp., 382 U.S. 172, 177, 147 U.S.P.Q. (BNA) 404, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)*.

[3] *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 202 U.S.P.Q. (BNA) 342 (9th Cir. 1979)*, *cert. denied,* ***444 U.S. 1025, 62 L. Ed. 2d 659, 100 S. Ct. 688 (1980)***.

[4] *Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 86 L. Ed. 363, 62 S. Ct. 402 (1942)*.

[5] *Kobe v. Dempsey Pump Co., 198 F.2d 416, 94 U.S.P.Q. (BNA) 43* (10th Cir.), *cert. denied,* ***344 U.S. 837, 97 L. Ed. 651, 73 S. Ct. 46 (1952)***.

> Atari alleges that Nintendo has engaged in monopolistic practices through its licensing agreements. Specifically, Atari notes that Nintendo, through its licensing agreements: 1) prohibits a licensee from selling Nintendo approved cartridges outside the United States; 2) prohibits a licensee from producing any Nintendo approved games for use on any other home system; 3) requires the licensee to buy Nintendo approved games from Nintendo; 4) limits the number of games which Nintendo will approve of for distribution in the United States. These allegations are supported by the documents submitted, and are not substantially disputed by Nintendo. These allegations, in the Court's view, raise serious questions going to the merits of the case. Although the Court, at **[***1038]** this juncture, is unwilling to make a finding of bad faith prosecution by Nintendo, the allegations, if proved, could result in antitrust liability for Nintendo . . . . Accordingly, the Court finds that this prong of the formulation has been satisfied by Atari.

District Court opinion, p. 3-4 (Citations omitted). This paragraph constitutes the entire basis **[**15]** articulated by the district court for its finding of "serious questions" necessary for the granting of a preliminary injunction.

After examination of the district court's opinion and the record below, this court cannot find a factual basis sufficient to support the findings necessary to grant a preliminary injunction. On the basis of the sparse record before the court, we hold that the granting of a preliminary injunction here to be an abuse of discretion. The district court made no findings of fact, save for the lone finding that "these allegations are supported by the documents submitted, and are not substantially disputed by Nintendo." Nowhere does the district court make a finding that Atari could probably prove its allegations. The district court has not referred to a factual basis for its granting of the preliminary injunction against Nintendo and this court cannot find one. [6] Also absent from its opinion and the record is the district court's basis for expanding the injunction to make it binding on Atari and Tengen.

[16]** Moreover, ***HN9***[] as patents are cloaked in a presumption of validity, a patent infringement suit is presumed to be brought in good faith. *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 996, 202 U.S.P.Q. (BNA) 342, 351 (9th Cir. 1979)*, *cert. denied, 444 U.S. 1025, 62 L. Ed. 2d 659, 100 S. Ct. 688 (1980)*. Yet, the record fails to reflect that Atari came forth with any evidence sufficient to show it had a fair chance of success in overcoming **[*1578]** this presumption of validity and to prove that Nintendo was enforcing its patent in bad faith or expanding its patent rights beyond their proper scope. On the contrary, the district court specifically refused to find that Nintendo was proceeding in bad faith with its patent enforcement. Again, the lone general finding made by the district court is clearly not sufficient to support a finding of a fair chance of success and warrant the imposition of a preliminary injunction.

It also appears from the opinion below that the district court assumes the truth of Atari's antitrust allegations. However, this court cannot **[**17]** find, either in the district court's opinion or anywhere in the record, specific factual findings or the basis for any findings concerning Nintendo's licensing agreement running afoul of the antitrust laws. Many of the restrictions Nintendo places on its licensees are not, as a matter of law, antitrust violations. For example, Atari claims that the clause restricting the sale of game cartridges outside the United States violates antitrust laws. However, the Supreme Court has held that ***HN10***[] nonprice vertical restrictions on the location of resale of products are not per se violations, but are to be judged according to the "rule of reason", wherein all circumstances are weighed in deciding whether a restrictive practice is an unreasonable restraint on competition. *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-58, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. In addition, the Ninth Circuit has specifically held that ***HN11***[] license restrictions on the foreign export of a patented **[**18]** product do not violate antitrust laws. *Brownell v. Ketcham Wire & Mfg. Co., 211 F.2d 121, 100 U.S.P.Q. (BNA) 338 (9th Cir. 1954)*. Neither does limiting the number of game cartridges which can be distributed constitute a *per se* violation. *E.I. Du Pont de Nemours & Co., 118 F. Supp. 41, 99 USPQ 402 (D. Del. 1953)*, *aff'd on other grounds, 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *United States v. Parker-Rust-Proofing Co., 61 F. Supp. 805, 65 U.S.P.Q. (BNA) 563 (E.D.Mich. 1945)*; *Aspinwall Mfg. Co. v. Gill, 32 F. 697 (C.C.D.N.J. 1887)*; *see also, Q-Tips v. Johnson & Johnson, 109 F. Supp. 657, 95 USPQ (BNA) 258 (D.N.J. 1951)*. The district court's

[6] Under certain circumstances, a preliminary injunction can issue on the basis of affidavits alone. *International Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547 (9th Cir. 1986)*. However, due to the competing interests here, reliance solely on plaintiff's allegations and supporting affidavits is an abuse of discretion.

reliance solely on these allegations as a basis for granting the injunction does not meet the requirements for a preliminary injunction and is an abuse of discretion.

The court wishes to stress that, in reversing the district court, it makes no determination of whether an injunction will ultimately be warranted. ***HN12***[] The granting of a **[**19]** preliminary injunction is an extraordinary remedy. *Shelton v. National Collegiate Athletic Ass'n, 539 F.2d 1197 (9th Cir. 1976)*. The court must examine carefully extraordinary relief which precludes the filing of civil lawsuits for an indeterminate period of time. A preliminary injunction must be supported by sufficient factual evidence and a sufficient basis must be articulated by the court in the order granting the injunction. Accordingly, the preliminary injunction is vacated and this **[***1039]** action is remanded to the district court for disposition consistent with this opinion. [7]

[20]** COSTS

Each party to bear its own costs.

VACATED AND REMANDED

End of Document

[7] The district court's injunction order grants a preliminary injunction as to Nintendo, Atari and Tengen. The district court seemed to make the injunction binding on the plaintiffs as a matter of equity. ***HN13***[] A preliminary injunction issued without notice, motion, hearing or evidence should be vacated. *Fed.R.Civ.P. 65*, *Digital Equip. Corp. v. Emulex Corp., 805 F.2d 380, 231 U.S.P.Q. (BNA) 779 (Fed.Cir. 1986)*. In both its brief and oral argument, Nintendo has shown little opposition to vacating the injunction as to Atari and Tengen.

General Aviation, Inc. v. Garrett Corp.

United States District Court for the Western District of Michigan, Southern Division

March 19, 1990, Decided ; March 22, 1990, Filed

Case No. G87-657-CA5

Reporter

743 F. Supp. 515 *; 1990 U.S. Dist. LEXIS 3251 **; 1990-2 Trade Cas. (CCH) P69,096

GENERAL AVIATION, INC., a Michigan corporation, Plaintiff, v. THE GARRETT CORPORATION, a California corporation, and THE CESSNA AIRCRAFT COMPANY, a Kansas corporation, Defendants

Core Terms

distributors, manufacturer, dealers, service center, rule of reason, engines, vertical, summary judgment motion, replacement part, horizontal, alleged agreement, anti-competitive, conspiracy, sells, per se rule, appointment, prices, dual, first amended complaint, expectancy, antitrust, effects, genuine, limitations period, summary judgment, Sherman Act, distributorship, competitors, aircraft, analyzed

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Discovery, Methods of Discovery**

Under *Fed. R. Civ. P. 56(c)*, a motion for summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] **Discovery, Methods of Discovery**

The party seeking summary judgment bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3[] **Summary Judgment, Opposing Materials**

When a motion for summary judgment is made and properly supported, the opposing party must set forth specific facts showing that there is a genuine issue for trial.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Regulated Practices, Private Actions**

Although use of summary procedures is not prohibited in antitrust cases, summary judgment motions are disfavored in such litigation. Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1* provides that every contract, combination or conspiracy, in restraint of trade or commerce among the several States is declared to be illegal.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Sherman Act, Claims

To establish a Section 1 of the Sherman Act, 15 U.S.C.S. § 1 claim, a plaintiff must prove the following essential elements: (1) That the defendants entered into a contract, combination, or conspiracy; (2) That this contract, combination, or conspiracy affected interstate commerce; and (3) That this contract, combination, or conspiracy unreasonably restrained such commerce.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In determining whether a restraint on trade unreasonably restricts competition, two different methods of analysis are used, the "per se rule" and the "rule of reason." In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality, they are illegal per se. In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN8[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

There is a general presumption in favor of applying the rule of reason analysis except in those cases where the alleged agreement is manifestly anticompetitive.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN9[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Horizontal conspiracies involve agreements among competitors at the same level of competition to restrain trade, such as agreements among manufacturers to fix prices for a given product and geographic market, or among distributors to fix prices for a given market. Vertical conspiracies, on the other hand, involve agreements between competitors at different levels of competition to restrain trade, such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN10[] Price Fixing & Restraints of Trade, Vertical Restraints

A dual distributorship involves a business structure in which one party operates a branch of dealership on the same market level as one or more of its customers.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN11[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN12[] Price Fixing & Restraints of Trade, Vertical Restraints

Dual distributorship situations are analyzed under the rule of reason.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Regulated Practices, Price Fixing & Restraints of Trade

If the factual context renders a plaintiff's claim implausible, if the claim is one that simply makes no economic sense, the plaintiff must come forward with more persuasive evidence to support the claim than would otherwise be necessary.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN14[] Price Fixing & Restraints of Trade, Vertical Restraints

Absent an allegation of anti-competitive purpose or effect at the interbrand level, the substitution of one distributor for another does not violate the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN15[] **Antitrust & Trade Law, Sherman Act**

A complaint charging restraint of trade based on a manufacturer's substitution of one distributor for another must allege anticompetitive effect at the interbrand level to survive a *Fed. R. Civ. P. 12(b)(6)* motion for failure to state a violation of *Section 1* of the Sherman Anti-Trust Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN16[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

There is a presumption in favor of the rule of reason standard. Departure from that standard must be justified by demonstrable economic effect, and interbrand competition is the primary concern of the antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN17[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Per se rules are appropriate only for conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output. Especially in the vertical restraint context, departure from the rule-of-reason standard must be based on demonstrable economic effect rather than upon formalistic line drawing. A rule of per se illegality for vertical nonprice restraints is not needed or effective to protect intrabrand competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN18[] **Regulated Practices, Price Fixing & Restraints of Trade**

Market power is normally inferred from the possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] **Monopolies & Monopolization, Attempts to Monopolize**

Interbrand competition is the primary concern of ***antitrust law***. Intrabrand competition is of some concern as well. Inquiries into the scope of competition under *section 1* and *section 2* of the Sherman Act, *15 U.S.C.S. § 1* and *2*, are not precisely the same; stifling intrabrand competition may violate *section 1*, while obtaining a "monopoly" over a given brand would clearly not run afoul of *section 2*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN20[] **Antitrust & Trade Law, Sherman Act**

The wording of *Mich. Comp. Laws Ann. § 445.772* is virtually identical to that of *section 1* of the Sherman Act, *15 U.S.C.S. § 1*, and therefore, federal precedents interpreting the Sherman Act are considered authoritative in Michigan courts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN21[] **Public Enforcement, State Civil Actions**

Mich. Comp. Laws Ann. § 445.772 provides that a contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Procedural Matters > Statute of Limitations > General Overview

HN22[] **Statute of Limitations, Time Limitations**

The limitations period applicable to a claim for loss of financial expectancy is the three year limitations period set forth in *Mich. Comp. Laws Ann. § 600.5805(8)*. Such a claim is most similar to a claim for tortious interference with prospective economic relations, to which *Mich. Comp. Laws Ann. § 600.5805(8)* is applied.

Governments > Legislation > Statute of Limitations > Time Limitations

HN23[] Statute of Limitations, Time Limitations

Mich. Comp. Laws Ann. § 600.5805(8) provides that the period of limitations is three years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Governments > Legislation > Statute of Limitations > Time Limitations

HN24[] Statute of Limitations, Time Limitations

Mich. Comp. Laws Ann. § 600.5813 provides that all other personal actions shall be commenced within the period of six years after the claims accrue and not afterwards unless a different period is stated in the statutes.

Contracts Law > Breach > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN25[] Contracts Law, Breach

Mich. Comp. Laws Ann. § 5807(8) provides that the period of limitations is six years for all other actions to recover damages or sums due for breach of contract.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

HN26[] Parties, Joinder of Parties

The gravamen of an action is determined by reading the claim as a whole.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN27[] Jury Trials, Province of Court & Jury

Whether the terms of a contract are ambiguous is a question of law for the court to determine.

Judges: Wendell A. Miles, Senior United States District Judge.

Opinion by: **[**1]** MILES

Opinion

[*516] OPINION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

WENDELL A. MILES, SENIOR UNITED STATES DISTRICT JUDGE

Now before the Court are the motions of the defendants, The Garrett Corporation and The Cessna Aircraft Company, for summary judgment on plaintiff General Aviation, Inc.'s three-count amended complaint. This action asserts violations of *Section 1* of the Sherman Act, *15 U.S.C. Section 1*, and the Michigan Antitrust Reform Act, *Mich. Comp. Laws Ann. section 445.772*, against both defendants. In addition, the plaintiff asserts a tortious interference claim (labelled "loss of financial expectancy" in the first amended complaint) against Cessna.

FACTUAL BACKGROUND

The Garrett Corporation ("Garrett") is a manufacturer of turboprop and turbofan (jet) engines. Garrett sells these engines to airplane manufacturers, including The Cessna Aircraft Company ("Cessna"). More specifically, Garrett supplied Cessna with an engine known as a "TPE 331-8," which Cessna installed in its "Conquest II," a small turboprop airplane.

Garrett also manufactures replacement parts for its engines. These parts reach consumers through a number of sources. First, Garrett sells the parts directly **[**2]** to consumers at "list price" through its six company-owned service centers in the United States. Garrett also sells TPE 331-8 replacement parts to Cessna at a deep discount, pursuant to a non-exclusive 1977 agreement between the two entities. (Cessna, in turn, sells the parts to Cessna Conquest II dealers at a price still less than Garrett's list price.) In addition, Garrett sells the parts at a discount to independently owned fixed base operators ("FBO's") which Garrett has authorized to perform maintenance and service on its engines ("service centers"). Finally, Garrett sells parts to independent FBO's (not authorized as service centers) at list price. [1]

General Aviation, Inc. ("General") is an FBO headquartered in Lansing, Michigan which services, charters, and sells airplanes. General was a Cessna Conquest dealer from 1977 until 1984, when Cessna refused to renew its franchise. [2] This relationship between Cessna and General, while it lasted, was non-exclusive. As a Cessna Conquest dealer, General could acquire Garrett replacement parts either from Garrett itself at list price, or from Cessna **[**3]** at a lesser price.

From approximately 1980 until 1984, General sought to become a Garrett service center. Becoming a service center would have authorized General to perform certain service functions on TPE 331-8 engines, and would have rendered General eligible for a discount on TPE 331-8 parts purchased **[*517]** directly from Garrett. [3] General was qualified to become a service center. However, upon deciding that it needed a TPE-331-8 service center in western

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[1] Used Garrett parts are also available to consumers through parts refurbishers.

[2] General brought a previous action against Cessna in this district, No. G85-890-CA5. The Honorable Robert Holmes Bell granted summary judgment to Cessna in that action on December 16, 1988. Cessna advised the court at oral argument on the present motions that an appeal of Judge Bell's order is pending.

[3] As a Cessna Conquest dealer, General was already authorized to perform some services on TPE 331 engines. However, without service center status, any parts which General purchased directly from Garrett would be at list price.

Michigan, Garrett appointed Kal Aero, a Kalamazoo, Michigan FBO which was not a dealer for any airplane manufacturer. [4]

[4]** General alleges that it did not receive the service center appointment because Garrett had earlier agreed with Cessna not to appoint Cessna dealers as service centers without Cessna's approval. According to General, this informal agreement lasted from 1981 through the "spring or summer of 1984." Also, according to General, the agreement was made upon the insistence of Cessna, which became concerned that its dealers would no longer purchase TPE 331-8 replacement parts from Cessna, but would buy them from Garrett at the discounted prices which it offered its service centers. Cessna, fearful of losing these revenues, and Garrett, fearful of losing a major engine customer, allegedly struck the subject agreement, which resulted in General's nonappointment as a service center.

STANDARD FOR DECISION

HN1[] Under *Fed. R. Civ. P. 56(c)*, a motion for summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***HN2***[] The party seeking summary judgment bears the initial burden of **[**5]** identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. ***HN3***[] When a motion for summary judgment is made and properly supported, the opposing party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

HN4[] Although use of summary procedures is certainly not prohibited in antitrust cases, summary judgment motions have traditionally been disfavored in such litigation. *Bender v. Southland Corp., 749 F.2d 1205, 1210 (6th Cir. 1984)*; *Smith v. Northern Michigan Hospitals, Inc., 703 F.2d 942, 947 (6th Cir. 1983)*. As the Supreme Court has stated,

> Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962). Accordingly, this court must strictly apply **[**6]** the general rule as stated in the paragraph above, and require a *conclusive* showing that no genuine issue of material fact remains to be tried. *Bender, 749 F.2d at 1210*. The evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

DISCUSSION

COUNT I -- FEDERAL ANTITRUST CLAIM

15 U.S.C. SECTION 1

General claims that the alleged agreement between Garrett and Cessna enabled them to "divide the market" for the sale of TPE 331 engine replacement parts and components, allocating to Cessna all sales to Cessna dealers and resulting in "artificially inflated prices" to Cessna dealers.

HN5[] *Section 1* of the Sherman Act provides that "every contract, combination . . . or conspiracy, in restraint of trade or commerce **[*518]** among the several States . . . is declared to be illegal." ***HN6***[] To establish a *Section 1* claim, a plaintiff must prove the following essential elements:

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[4] Other Cessna dealers also sought Garrett service center appointments during the same time frame that General did. None were appointed by Garrett from 1981 to 1984.

(1) That the defendants entered into a contract, combination, or conspiracy;

(2) That this contract, combination, or conspiracy affected interstate commerce; and

(3) That this contract, combination, or conspiracy unreasonably restrained such commerce.

White & White, Inc. v. American Hospital ***[**7]*** *Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983)*; *Continental Cablevision of Ohio, Inc. v. American Electric Power Co., 715 F.2d 1115, 1118 (6th Cir. 1983)*.

Garrett has not contested, for the purposes of this motion only, that it had an "informal agreement" with Cessna not to appoint Cessna dealers as Garrett service centers without Cessna's approval. Cessna disputes the existence of such an agreement; however, Cessna has not identified any factual materials in support of its motion which tend to negate the existence of the agreement. In contrast, General has identified a substantial amount of circumstantial evidence from which a jury could reasonably conclude that Garrett did not act independently in imposing its restriction on the appointment of service centers. *See* Plaintiff's Brief in Opposition to Motion for Summary Judgment at pp. 12-24. However, even assuming that General can establish the existence of the alleged agreement, that fact alone does not conclude the Court's analysis.

HN7[] In determining whether a restraint on trade unreasonably restricts competition, courts have traditionally used two different methods of analysis -- the "*per se* rule" and the "rule of reason." **[**8]** *United States v. Cooperative Theatres of Ohio, Inc., 845 F.2d 1367, 1370 (6th Cir. 1988)*:

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal *per se.*' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

(quoting *National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978))*. ***HN8***[] There is a general presumption in favor of applying the rule of reason analysis except in those cases where the alleged agreement is "'manifestly anticompetitive.'" *Id.* (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. For example, practices generally found to be illegal *per se* are price-fixing agreements, horizontal market allocations, and tying arrangements. *Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1196 (6th Cir. 1982)*, *cert. denied, 466 U.S. 931, 80 L. Ed. 2d 190, 104 S. Ct. 1718 (1984)*. **[**9]**

In their motions for summary judgment, Garrett and Cessna argue that the alleged agreement is a vertical nonprice restraint subject to rule of reason analysis under *GTE Sylvania, 433 U.S. at 58-59*; they argue that the restraint is not a *per se* violation of the Sherman Act. The defendants are correct that the alleged restraint contains no price agreement, and is therefore, obviously, a nonprice restraint. *See* *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 735-36, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)* (vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels). Indeed, General, in its complaint, contends only that the alleged agreement enabled Garrett and Cessna to divide the market for TPE 331 parts and "*resulted in* artificially inflated prices to Cessna dealers." [5] General does not contend that Garrett and Cessna jointly set prices.

[*519] The more complex question to be resolved is **[**10]** whether the alleged agreement is vertical or horizontal. The Sixth Circuit has distinguished these two types of conspiracies:

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[5] General's own expert has admitted that alleged agreement between Garrett and Cessna was not a price-fixing agreement. He stated that the agreement "allow[ed] Cessna to price *independently* . . . ." Affidavit of Peter Max, Paragraph 23 (emphasis added).

> HN9[] Horizontal conspiracies involve agreements among competitors at the same level of competition to restrain trade, such as agreements among manufacturers to fix prices for a given product and geographic market, or among distributors to fix prices for a given market. Vertical conspiracies, on the other hand, involve agreements between competitors at different levels of competition to restrain trade, such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market.

Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988). It is undisputed that Garrett manufactures and sells aircraft engines to a variety of aircraft manufacturers including Cessna. Garrett also manufactures replacement parts for its engines, and sells these parts to aircraft manufacturers, FBO's (including some Cessna dealers), and directly to consumers. Because Garrett sells replacement parts to Cessna dealers, as does its customer Cessna, Garrett operates at both the manufacturing level and **[**11]** at the distributorship level. Thus, this case involves a "dual distributorship." [6] However, it also involves a relationship between Garrett and Cessna which is neither purely vertical nor purely horizontal; Garrett is a supplier of Cessna, but the two are also competitors in the market for the sale of replacement parts and components.

General argues that summary judgment may not be granted because a genuine issue of material fact remains as to whether the alleged agreement is a horizontal market allocation between competitors (thus subject to the *per se* rule) or a vertical restraint (thus subject to rule of reason analysis). General alleges that the focus of the Court's inquiry must be must be upon the purpose and effect of the restraint. However, the Supreme Court has recently stated that

> . . . HN11[] a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.

Business Electronics, 485 U.S. at 730 n. 4. **[**12]** Garrett and Cessna have a supplier/customer relationship, and the restriction imposed by Garrett was a vertical restriction imposed upon its independent service center network. The mere fact that Garrett and Cessna also happen to compete in the sale of TPE 331 replacement parts does not rebut the presumption that a rule of reason analysis is to be applied.

Given the dual distributorship situation present in this case, this Court is of the belief that application of a *per se* analysis would be inappropriate as a matter of law. HN12[] Dual distributorship situations have, by and large since the Supreme Court's ruling in *GTE Sylvania,* been analyzed by courts under the rule of reason. *See* *Dimidowich v. Bell & Howell, 803 F.2d 1473 (9th Cir. 1986)*, *modified,* *810 F.2d 1517 (1987)* ("hybrid" arrangement, composed of both a dual distributorship and horizontal competitor relationship, should be analyzed under the rule of reason); *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705 (11th Cir. 1984)* (applying rule of reason analysis to dual distributorship, on motion for summary judgment); *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982)* (dual distribution **[**13]** system analyzed under rule of reason standard, on Rule 41(b) motion to dismiss); *Copy-Data Systems, Inc. v. Toshiba America, Inc., 663 F.2d 405 (2d Cir. 1981)*, *cert. denied, 474 U.S. 825, 88 L. Ed. 2d 66, 106 S. Ct. 80 (1985)* (district court's application of *per se* rule to dual distributor restraints reversed); *Abadir & Co. v. First Mississippi Corp., 651 F.2d 422 (5th Cir. 1981)* (reversing application of *per se* rule to vertical market-dividing agreement, where defendant, who competed with its distributor, attempted to impose territorial restriction on distributor); **[*520]** *Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001 (5th Cir. 1981)*, *cert. denied, 454 U.S. 827, 70 L. Ed. 2d 102, 102 S. Ct. 119 (1981)* (applying rule of reason to alleged agreement between manufacturer and distributors to maintain territorial and customer restrictions, even though manufacturer also sold products directly to users); *Manufacturers Supply Co. v. Minnesota Mining and Mfg. Co., 688 F. Supp. 303 (W.D. Mich. 1988)* (3M distributed its products through combination of its own salespeople and independent distributors; the court analyzed a restraint prohibiting distributors from reselling products to certain

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[6] *See* *Davis-Watkins, 686 F.2d at 1201 n. 14*:

> HN10[] "A dual distributorship involves a business structure in which one party operates a branch of dealership on the same market level as one or more of its customers."

customers or outside certain geographical **[**14]** territories as a vertical restraint, on motion to dismiss). The Sixth Circuit's recent opinion in *International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904 (6th Cir. 1989)* suggests that it believes this to be the correct approach. In that case, the Court of Appeals refused to apply a *per se* analysis to an alleged restraint imposed in a dual distribution context. Chrysler, a supplier and distributor of its own replacement parts to domestic dealers, together with one of its divisions which marketed Chrysler Power Master engines internationally at reduced prices, cancelled all Power Master orders from corporations which refused to desist from reselling the cheaper export units to Chrysler's domestic dealers. The Sixth Circuit found that such action did not even amount to a conspiracy, and certainly could not be characterized as a *per se* violation of the Sherman Act:

> Although some minimal horizontal competitive effects may have resulted, the marketing policies concerning the Power Master engine were not directed toward or designed to impose restraints upon parties at the same competitive level even though Chrysler, the manufacturer, was also a distributor.

[15]** *Id. at 906*.

Furthermore, the mere fact that Cessna -- the distributor -- may have initiated the agreement does not render the agreement horizontal, nor does it justify application of the *per se* approach. In *Business Electronics,* the respondent Sharp eliminated the petitioner Business Electronics as a retailer of its products upon the insistence of a second retailer, who complained about Business' price-cutting. *485 U.S. at 721*. Still, the Supreme Court held that such a vertical nonprice restraint was to be analyzed under the rule of reason. Indeed, the fact that Cessna initiated and demanded the agreement militates against application of the *per se* rule, particularly inasmuch as General itself concedes that the agreement was contrary to Garrett's own economic interests and marketing strategy. [7] In *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313 (6th Cir. 1989)*, the plaintiff-film exhibitor alleged that a film distributor's participation in a "split" agreement with exhibitors constituted a "group boycott" subject to *per se* liability. A "split" arrangement is one in which two or more distributors in a given market agree not to compete against each **[**16]** other in the licensing of films from distributors. The Sixth Circuit declined to apply a *per se* rule:

> . . . we are hard pressed to apply a *per se* standard to an alleged conspiracy which may be of little or no benefit to those accused of conspiring -- namely the defendant distributors. Decreased competition in bidding among exhibitors as purchasers **[*521]** of film, on the surface at least, would seem to produce lower licensing fees and, therefore, decreased profitability to distributors rather than, as Balmoral alleges, higher prices. Thus we cannot say that the conduct of the distributors in tacitly consenting to split agreements by purchasers of films was *per se* anti-competitive or harmful to consumers.

Id. at 317. For the same reasons, this Court is hard pressed to conclude that the alleged agreement between Garrett and Cessna is *per se* anti-competitive.

[17]** In an attempt to establish that the alleged agreement had anti-competitive effects which would justify application of the *per se* rule, General argues that the agreement "completely eliminated" *intra*brand competition

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[7] General's admission that the alleged agreement was contrary to Garrett's interests is supported by the conclusions of the defendants' expert:

> Garrett's incentive is to keep distributor margins as small as possible, consistent with its need to maintain viable, efficient distributors. To the extent that Garrett's actions increase distributor margins, the price Garrett can charge for its parts at wholesale is diminished. *Artificially* higher distributor margins -- margins raised without some compensating efficiency benefits that increase Garrett sales -- are thus directly contrary to Garrett's interest. Hence the complaint fails a basic test for antitrust matters: ***HN13***[] 'If the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.'

Affidavit of Howard Marvel, Sept. 22, 1989, pp. 12-13 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986))*.

(competition in the sale of *Garrett* parts) because Garrett parts "are not interchangeable with the parts of other engine manufacturers." Plaintiff's Brief at 57-58. General alleges that Cessna and Garrett are the only distributors of new TPE 331-8 parts. General's claim that intrabrand competition was completely eliminated is unsupported by the facts and by the law. First, Garrett has set forth facts, which have not been contested by General, showing that used Garrett parts are available through parts refurbishers. Secondly, General has not identified any "competitors" who have been "eliminated" pursuant to the agreement. [8] **[**18]** ***HN14***[] Absent an allegation of anti-competitive purpose or effect at the *inter*brand level, the substitution of one distributor for another does not violate the antitrust laws. *E.g., Crane & Shovel, 854 F.2d at 810*. General has alleged no anticompetitive effects whatsoever at the interbrand level. [9]

The Court is convinced that the *per se* rule can not as a matter of law be applied to the particular restraint alleged in this case. Keeping in mind the Supreme Court's recent reassertion in *Business Electronics* that ***HN16***[] there is a presumption in favor of the rule of reason standard, that departure from that standard must be justified by "demonstrable economic **[**19]** effect," and that "interbrand competition is the primary concern of the antitrust laws," *485 U.S. at 726*, this Court is not convinced that the activity of which General complains is the type of "manifestly anticompetitive" arrangement which justifies application of a *per se* analysis:

> We have said that ***HN17***[] *per se* rules are appropriate only for 'conduct that is manifestly anticompetitive,' . . . that is, conduct 'that would always or almost always tend to restrict competition and decrease output[.]' . . .
>
> . . . In [*GTE Sylvania*], we refused to extend *per se* illegality to vertical nonprice restraints, specifically to a manufacturer's **[*522]** termination of one dealer pursuant to an exclusive territory agreement with another. We noted that especially in the vertical restraint context 'departure from the rule-of-reason standard must be based on demonstrable economic effect rather than . . . upon formalistic line drawing.' . . . Moreover, we observed that a rule of *per se* illegality for vertical nonprice restraints was not needed or effective to protect *intrabrand* competition.

Business Electronics, 485 U.S. at 723-25 (citations omitted).

Ordinarily, upon concluding that this **[**20]** case is not an appropriate one for application of *per se* illegality, this Court would apply a rule of reason analysis to determine whether any genuine issues of material fact remain.

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[8] General's expert states that

> The effect of the agreement was to give Cessna all sales of Garrett TPE 331-8 parts to Cessna Conquest dealers. The anticompetitive nature of the agreement was that it eliminated a competitor from the market, protecting Cessna from price competition, allowing Cessna to price independently, and increasing Cessna's control of the market.

Affidavit of Peter Max, October 30, 1989, Paragraph 23. Mr. Max does not say which "competitor" was eliminated, but he appears to be referring to the elimination of Garrett as a competitor of Cessna. However, the facts are undisputed that Cessna dealers could continue to purchase TPE 331 replacement parts either from Garrett itself or from Cessna even after the two entities entered into the alleged agreement. Those Cessna dealers not authorized as Garrett service centers would simply have to pay Garrett's list price (which was higher than Cessna's price to its dealers) if they purchased from Garrett.

[9] The Sixth Circuit has stated that

> . . . ***HN15***[] a complaint charging restraint of trade based on a manufacturer's substitution of one distributor for another must allege anticompetitive effect at the interbrand level to survive a *Rule 12(b)(6)* motion for failure to state a violation of *Section 1* of the Sherman Anti-Trust Act.

Crane & Shovel, 854 F.2d at 807.

As the defendants' expert points out, the alleged agreement in this case may have even served to increase competition by improving service ability; had General been appointed as a Garrett service center, Cessna Conquest owners would have had only one authorized service option in Michigan -- General. The appointment of Kal Aero -- which was not affiliated with any aircraft manufacturers -- gave Conquest owners an additional authorized option. Marvel Affidavit, page 9.

However, General has chosen not to pursue its claims under the rule of reason. [10] **[**22]** Indeed, even construing the first amended complaint in a most liberal fashion, the Court cannot conclude that General has pleaded a rule of reason case. In order to show that the alleged restraint is unreasonable, General would be required to establish that the agreement produced anti-competitive effects within the relevant product and geographic markets, that the objects of and conduct pursuant to the agreement were illegal, and that the plaintiff was injured as a proximate result of that conspiracy. *Crane & Shovel, 854 F.2d at 805*; *Davis-Watkins, 686 F.2d at 1195-96*. Cessna argues that General has not pleaded, nor can it prove, that either Cessna or Garrett has sufficient market power in a relevant market to restrict competition. ***HN18***[] Market power is "'normally inferred from the possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography.'" *Manufacturers [**21] Supply, 688 F. Supp. at 307* (quoting *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987))*. General has alleged in its complaint only that the agreement between Garrett and Cessna "restrained and eliminated competition in the sale of replacement parts and components for the TPE 331 engine in the United States[.]" First Amended Complaint, Paragraphs 21 and 24. General has produced evidence in response to the defendants' present motions showing that Garrett was the only manufacturer of new TPE 331 parts, that these parts were not interchangeable with parts of other manufacturers, and that Garrett and Cessna were the only source of new replacement parts. However, because General has not set forth any facts suggesting effects on an interbrand market, [11] the Court believes that General has not set forth facts sufficient to preclude a grant of summary judgment in favor of the defendants. Therefore, summary judgment will be granted in their favor as to count I.

COUNT II -- STATE LAW ANTITRUST CLAIM

MICH.COMP.LAWS ANN. SECTION 445.772

Count II of the first amended complaint asserts a state law claim against both defendants **[*523]** under *Mich.Comp.Laws Ann. section 445.772*, the Michigan Antitrust Reform Act. This claim mirrors General's Sherman Act claim contained in count I. ***HN20***[] The wording of *Mich.Comp.Laws Ann. section [**23] 445.772* is virtually identical to that of *section 1* of the Sherman Act, and therefore, federal precedents interpreting the Sherman Act are considered authoritative in Michigan courts. [12] Thus, for the reasons stated above, summary judgment will be granted in favor of the defendants upon this state law claim. [13]

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[10] In its response to Garrett's requests for admissions, General admitted that it is "not pursuing any antitrust claims that will be evaluated under the rule of reason." Plaintiff General Aviation Inc.'s Response to the Garrett Corp.'s Request for Admissions, No. 12. Lest there be any doubt regarding the import of this admission, Garrett has alleged that General has refused to respond to discovery requests relevant to determining alleged harm to competition, which is required to establish liability on a rule of reason claim. Defendant The Garrett Corp.'s Brief in Support of Motion for Summary Judgment at 23.

[11] ***HN19***[] Interbrand competition is the "primary concern of ***antitrust law***." *GTE Sylvania, 433 U.S. at 52*. Intrabrand competition is of some concern as well. As one Circuit has stated, inquiries into the scope of competition under *section 1* and *section 2* of the Sherman Act are not precisely the same; stifling intrabrand competition may violate *section 1*, while obtaining a "monopoly" over a given brand would clearly not run afoul of *section 2*. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 27 n. 11 (3d Cir. 1978)*, *cert. denied,* ***439 U.S. 876, 58 L. Ed. 2d 190, 99 S. Ct. 214 (1978)***. However, General has not set forth facts showing that intrabrand competition was "stifled" in any sense of the word, having presented no evidence that consumers have any fewer sources available for purchase of Garrett replacement parts.

[12] ***HN21***[] *Mich.Comp.Laws Ann. section 445.772* provides as follows:

> A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.

This statute is modelled after the Uniform State Antitrust Act. The comment to the Uniform Act section above states that

> The adoption of Sherman Act language establishes its general standards of legality, provides needed flexibility, and makes available to state courts the relevant body of federal precedent.

[24]** COUNT III -- "LOSS OF FINANCIAL EXPECTANCY"

Count III of General's first amended complaint is a state law claim against Cessna labelled "loss of financial expectancy." General alleges that Cessna agreed not to prevent General from affiliating with other equipment manufacturers, but that Cessna nonetheless prevented General from being appointed as a Garrett service center, causing General to lose this "financial expectancy." In its motion for summary judgment, Cessna argues that this claim is barred by the statute of limitations.

In support of its motion for summary judgment, Cessna identifies facts showing that General's request for appointment as a Garrett line service center was denied in March 1984. *See* Deposition of Maynard McAdams, at p. 223 (showing denial prior to March 29, 1984). In response to Cessna's motion, General has not set forth any specific facts which create a genuine factual issue as to the date its claim arose, nor has it set forth any facts which would support the tolling of the limitations period. Thus, any "loss" suffered by Cessna occurred prior to that date, and it therefore follows that General's cause of action accrued no later than March 29, 1984.

General **[**25]** filed its initial complaint in this action on July 24, 1987. This initial complaint did not contain a claim for loss of financial expectancy. The first amended complaint was filed on August 7, 1989. [14] However, even assuming that the addition of Count III relates back to the filing of the initial complaint, General is time-barred from pursuing this particular claim.

HN22[] The limitations period applicable to General's claim for loss of financial expectancy is the three year limitations period set forth in *Mich.Comp.Laws Ann. section 600.5805(8)*. General's claim is most similar to a claim for tortious interference with prospective economic relations, to which Michigan courts have consistently applied *Mich. Comp. Laws Ann. section 600.5805(8)*. [15] *James v. Logee, 150 Mich. App. 35, 388 N.W.2d 294, 296 (1986)*; *Joba Construction Co., Inc. v. Burns and Roe, Inc., 121 Mich. App. 615,* ***[*524]*** *329 N.W.2d 760, 766 (1982)*; *Meyer v. Hubbell, 117 Mich. App. 699, 324 N.W.2d 139, 144 (1982)*; *Wilkerson* ***[**26]*** *v. Carlo, 101 Mich. App. 629, 300 N.W.2d 658, 660*, *appeal denied, 411 Mich. 984, 311 N.W. 2d 702 (1981)*.

General attempts to circumvent this three year limitations period by arguing that its claim is governed by the six year period contained in *Mich. Comp. Laws Ann. section 600.5813* [16] or, in the alternative, the six year period contained in *Mich.Comp.Laws Ann. section 600.5807(8)*. [17] The Court finds both of these arguments to be without

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[13] The Court notes that *Mich.Comp.Laws Ann. section 445.772* did not go into effect until March 29, 1985. General's first amended complaint alleges that the agreement between the defendants continued until "at least the spring/summer of 1984." Therefore, on its face, the first amended complaint does not state a violation of *section 445.772*.

Even if General had instead stated a claim for violation of the predecessor to *section 445.772* -- the now-repealed section 445.701 -- the same analysis would apply and summary judgment in favor of the defendants would be in order. Prior to its repeal, Michigan courts had held that section 445.702 was likewise patterned after the Sherman Act, and that federal court interpretations were persuasive authority as to section 445.701's meaning. *Goldman v. Loubella Extendables, 91 Mich. App. 212, 219, 283 N.W.2d 695, 699 (1979)*.

[14] In its order granting General permission to file the first amended complaint, the Court indicated that Cessna's right to assert a statute of limitations defense would not be prejudiced.

[15] ***HN23***[] *Mich.Comp.Laws Ann. section 600.5805(8)* provides as follows:

> The period of limitations is 3 years after the time of the death or injury *for all other actions to recover damages* for the death of a person, or *for injury to* a person or *property*.

(emphasis added).

[16] ***HN24***[] *Mich. Comp. Laws Ann. section 600.5813* provides as follows:

> All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.

merit. General has cited no case in which Michigan courts have applied *Mich.Comp.Laws Ann. section 600.5813* (applicable to "all other personal actions") to a tortious interference claim. As in *Logee, 388 N.W.2d at 296*, the plaintiff in this case has, in its complaint, set forth the essential elements of a tortious interference claim, to which the three year limitations period applies. *Id.* General's attempt to label its claim otherwise is not controlling. [18] *Huhtala* ***[**27]*** *v. Travelers Ins. Co., 401 Mich. 118, 257 N.W.2d 640, 649 (1977)*.

Likewise, General's argument that *Mich. Comp. Laws Ann. section 600.5807(8)* (applicable to actions for breach of contract) applies must also fail. General concedes that it has not stated a claim against Cessna for breach of contract, but instead a claim "for loss of financial expectancy which is based upon a contractual obligation. . . ." (Plaintiff's Brief in Opposition to Motion for Summary Judgment, at 63) ***HN26***[] The gravamen of an action is determined by reading the claim as a whole. *Adkins v. Annapolis Hospital, 116 Mich. App. 558,* ***[**28]*** *323 N.W.2d 482, 485 (1982)*, *aff'd,* *420 Mich. 87, 360 N.W.2d 150 (1984)*. The gravamen of General's claim as stated in the first amended complaint is Cessna's alleged interference with a potential profitable relationship with Garrett, not breach of contract. Indeed, the unambiguous [19] language of the contract between General and Cessna does not support a conclusion that Cessna assumed a contractual obligation to refrain from interfering with General's carrying of other product lines:

> Subject to the other terms and conditions of and for the term of this Agreement, Cessna appoints Dealer as a dealer for Cessna Conquest aircraft and parts and accessories therefor sold by Cessna granting to Dealer the non-exclusive privilege to sell such products.

(Paragraph A.1, Cessna Conquest Sales and Service Agreement dated October 27, 1983). If Cessna had a duty to refrain from interference, this duty was created by law and not by its contract with General, and the three year limitations period applies. *See* *Continental Casualty Co. v. Huron Valley Nat'l Bank, 85 Mich. App. 319, 271 N.W.2d 218, 221 (1978)* (where there is no express contract or express promise and defendant's liability is implied **[**29]** by law an action for injury to persons or property is controlled by the three year statute regardless of whether the action is labeled as one in tort or implied contract). Count III is therefore dismissed as being time-barred.

CONCLUSION

For the reasons stated above, the defendants' motions for summary judgment will be granted. The Court will enter an order in accordance with this opinion.

Dated: March 19, 1990

JUDGMENT IN A CIVIL CASE - March 22, 1990, Filed

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

In accordance with the opinion of this Court rendered on March 19, 1990,

[30]** Defendants' motions for summary judgment are GRANTED and the case is DISMISSED.

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[17] ***HN25***[] Mich.Comp.Laws Ann. section 5807(8) provides as follows:

> The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract.

[18] If the label alone were controlling, General would have stated no claim at all; this Court has never heard of a cause of action for "loss of financial expectancy."

[19] ***HN27***[] Whether the terms of a contract are ambiguous is a question of law for the court to determine. *Steinmetz Elec. Contractors Ass'n. v. Local Union No. 58, 517 F. Supp. 428, 432 (E.D.Mich. 1981)*.

Perfumer's Workshop, Ltd. v. Roure Bertrand du Pont, Inc.

United States District Court for the Southern District of New York

March 19, 1990, Decided ; March 20, 1990, Filed

No. 88 Civ. 1556 (KTD)

Reporter

737 F. Supp. 785 *; 1990 U.S. Dist. LEXIS 2908 **; 1990-2 Trade Cas. (CCH) P69,102

THE PERFUMER'S WORKSHOP, LTD., Plaintiff, v. ROURE BERTRAND du PONT, INC., ROURE BERTRAND du PONT, S.A. and F. HOFFMANN-La ROCHE & CO. LIMITED COMPANY, Defendants

Core Terms

Perfumer's, fragrance, amended complaint, antitrust, tocopherol, preservative, monopolize, formula, products, subsidiary, pleadings, predicate, secret, motion to dismiss, cause of action, ingredients, marketed

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Summary Judgment, Burdens of Proof**

The consideration of material beyond that contained in the pleadings does not convert a motion under *Fed. R. Civ. P. 12(b)(2)* into a motion for summary judgment. Generally, a court may properly rely on affidavits and depositions to establish jurisdictional facts in determining whether the plaintiff has sustained its burden on a jurisdictional question.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN2[] **In Rem & Personal Jurisdiction, In Personam Actions**

Personal jurisdiction is a composite notion of two separate ideas: amenability to jurisdiction, or predicate, and notice to the defendant through valid service of process.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN3[] **Federal & State Interrelationships, Erie Doctrine**

The applicable law of jurisdiction in a diversity action is the law of the state in which the district court sits.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN4[] **Jurisdiction, Jurisdictional Sources**

Pursuant to New York law, a court is permitted to exercise jurisdiction over a corporate entity on the basis of a single purposeful transaction of business conducted by it in New York. *N.Y. C.P.L.R. § 302(a)(1)* (1990).

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

International Law > Authority to Regulate > General Overview

HN5[] **In Rem & Personal Jurisdiction, In Personam Actions**

Merely entering products into the stream of commerce is an insufficient jurisdictional predicate.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN6[] **In Rem & Personal Jurisdiction, In Personam Actions**

Only where a parent corporation asserts such extensive control over its subsidiary as to be deemed the subsidiary's alter-ego, can the parent-subsidiary relationship be a sufficient jurisdictional predicate. Parent corporations that observe "a strict formal separation" from their subsidiaries and that derive no direct benefit therefrom are not subject to in personam jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN7[] **In Rem & Personal Jurisdiction, In Personam Actions**

Marketing products and establishing channels for providing advice in the forum state, in addition to placing product in the stream of commerce, indicate acts of the defendant purposefully directed toward the forum state such that jurisdiction may be conferred.

Civil Procedure > ... > Service of Process > Service of Summons > Content & Form

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Service on Corporations

HN8[] **Service of Summons, Content & Form**

Fed. R. Civ. P. 4(e) requires that service be made under the circumstances and in the manner prescribed by the law of the state in which the forum court is located. In New York, service of process on a corporation requires that an officer or director of the corporation be present in the forum to accept service of summons on its behalf. *N.Y. C.P.L.R. §§ 308*, *318* (1990).

Business & Corporate Law > Foreign Corporations > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Service on Corporations

International Law > Dispute Resolution > Service of Process

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Foreign Service

Civil Procedure > ... > Service of Process > Proof of Service > General Overview

HN9[] **Business & Corporate Law, Foreign Corporations**

Absent domiciliary agents in the forum, leave of court is mandated in order to use substituted service. *N.Y. C.P.L.R. §§ 308*, *318* (1990). Indiscriminate use of the mails to effect service abroad does not assure either receipt or sufficient notice of a pending action comporting with fairness and due process. Furthermore, service effected outside the United States on a foreign corporation demands proper service under the constraints of the foreign domiciliary's law, unless that law is inconsistent with requirements of the Hague Convention Treaty. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, art. 163, 20 U.S.T. 361, T.I.A.S. No. 6638.

Civil Procedure > Discovery & Disclosure > General Overview

HN10[] **Civil Procedure, Discovery & Disclosure**

Discovery procedures are appropriate only when there is at least some slight factual indication that a basis for jurisdiction exists. The discovery rules are not a hunting license to conjure up a claim that does not exist.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN11[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN12[] **Monopolies & Monopolization, Actual Monopolization**

Antitrust claims are comprised of three elements: (1) possession of a monopoly in the relevant market; (2) willful maintenance of power over the product; and (3) causal antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN13[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Conspiracy to monopolize a market requires a finding of specific intent to monopolize.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

HN14[] **Monopolies & Monopolization, Actual Monopolization**

Owning the exclusive recipe for a product, albeit monopolistic, is not necessarily violative of the antitrust laws, especially where the parties formally agreed to maintain the integrity of the trade secret formula.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

HN15[] **Tying Arrangements, Clayton Act**

Tying arrangements involve a seller's coercion of a buyer to purchase two distinct products, whereby the buyer seeking to purchase one product is forced by the seller to purchase a second distinct product. *15 U.S.C.S. § 14*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN16[] **Public Enforcement, State Civil Actions**

To sustain an action under the New York Donnelly Act, elements similar to a federal antitrust cause of action must be pleaded.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN17[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) provides that a complaint charging fraud or mistake must state the circumstances constituting fraud or mistake with particularity. A cause of action for fraud cannot be the outgrowth of simple breach of contract claims.

Counsel: **[**1]** Kleinberg, Kaplan, Wolff & Cohen, P.C., Attorneys for Plaintiff, New York, New York, of Counsel: Norris D. Wolff, Esq., Ronald D. Hariri, Esq.

Kelley Drye & Warren, Attorneys for Defendants, New York, New York, of Counsel: Kevin J. Walsh, Esq.

Judges: Kevin Thomas Duffy, United States District Judge.

Opinion by: DUFFY

Opinion

[*786] MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, UNITED STATES DISTRICT JUDGE.

Plaintiff Perfumer's Workshop, Ltd. ("Perfumer's"), seeks compensatory and punitive damages for alleged violations of various federal and state antitrust laws, and for state breach of contract, common law fraud, and negligence claims. Defendants Roure Bertrand du Pont, Inc. ("Roure"), Roure Bertrand du Pont, S.A. ("Roure-France"), [1] **[**2]** and F. Hoffman-La Roche & Co. Limited Company ("Hoffman-La Roche") move pursuant to *Fed. R. Civ. P. 12(b)(2-5)* [2] to dismiss for lack of personal jurisdiction, improper service of process, and improper venue. Alternatively, defendants move, under *Fed. R. Civ. P. 12(b)(6)*, to dismiss the federal and state antitrust and fraud causes of action. Roure is the only defendant that concedes jurisdiction. Subject matter jurisdiction rests on federal antitrust claims, pendent and diversity jurisdiction.

FACTS

Perfumer's, a New York corporation, sells and produces perfume fragrances and related products. Amended Complaint para. 4. Roure, a New Jersey corporation, is a perfume house, supplying and manufacturing concentrates, essential oils, and other chemicals for perfumes and cosmetics. Amended Complaint para. 5. Roure-France is a French corporation that, together with Roure, participates in developing and producing prestige perfume products marketed world-wide. Amended Complaint para. 5. Hoffman-La Roche, the Swiss parent corporation of Roure and Roure-France, is engaged in the manufacture and sale of, among other things, pharmaceuticals, vitamins, **[**3]** **[*787]** fragrance products, and chemicals used in perfume production. Amended Complaint paras. 6-7.

It is uncontested that a perfume house that creates or develops a perfume fragrance formula owns it as a trade secret according to industry custom. Amended Complaint para. 14. In April 1985, Roure developed a perfume fragrance for Perfumer's under the code name and number "Neroli Nights R6068," which Roure protected as a trade secret. Amended Complaint paras. 38-40. Pursuant to agreement Perfumer's purchased and distributed 1,200 one-ounce samples of the secret formula for test marketing in December 1985. By late winter 1986, Perfumer's purchased the fragrance in varying concentrations to create cologne, eau de toilette, and eau de parfum. Touted as a "major new prestige fine fragrance," the fragrance was to be sold under Perfumer's trademark SAMBA. Amended Complaint paras. 39-40. By spring 1987, Perfumer's undertook a major marketing and advertising campaign for the SAMBA fragrance both domestically and abroad. Amended Complaint paras. 46-48.

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[1] Defendant's responsive pleadings refer to Roure Bertrand DuPont, S.A. as "Roure S.A."

[2] ***HN1***[] The consideration of material beyond that contained in the pleadings does not convert a motion under *Fed. R. Civ. P. 12 (b) (2)* into a motion for summary judgment. *Attwell v. LaSalle National Bank, 607 F.2d 1157 (5th Cir. 1979)*, *cert. denied*, ***445 U.S. 954, 100 S. Ct. 1607, 63 L. Ed. 2d 791 (1980)***. Generally, a court may properly rely on affidavits and depositions to establish jurisdictional facts in determining whether the plaintiff has sustained its burden on a jurisdictional question. *Marine Midland Bank v. Miller, 664 F.2d 899, 904 (2d Cir. 1981)*.

Perfumer's allegedly detected an "off odor" in the SAMBA fragrance in post-promotional shipments of the product. In addition, Perfumer's determined that **[**4]** the scent's endurance on the skin of the 18% solution eau de toilette pre-production samples was inadequate. Roure proposed increasing the eau de toilette solution from 18% to 22% and Perfumer's agreed; Roure supposedly made no offer to remedy the "off odor." Amended Complaint para. 59.

Perfumer's claims, inter alia, that Roure breached its obligations under the supply agreement because all post-promotional shipments of the SAMBA fragrance failed to contain the preservative, BHT, at the agreed upon level of 0.05% of the essential oil. Perfumer's objected to the use of the preservative DL-alpha tocopherol in lieu of BHT, which it claimed to be the cause of the fragrance's premature destabilization, resulting in the drastic and unpleasant change in the scent. In addition, Perfumer's claims that the raw materials utilized were not of like grade and quality as the raw materials used in the "Neroli Nights" formula, test marketed in 1985. After refusing to pay Roure under the supply agreement, Perfumer's rejected all post-promotional SAMBA shipments. Perfumer's then engaged Roure-France's expertise to try and remedy SAMBA's "off odor." Nonetheless, as a result of Perfumer's failure to tender **[**5]** payment to Roure, Roure filed an action in New Jersey state court. That action has since been removed to New Jersey's Federal District Court and this court has not been advised as to the status of that action. Roure's Memorandum of Law in Support of Motion To Dismiss, at 3.

DISCUSSION

I. *In Personam Jurisdiction*

Both Hoffman-La Roche and Roure-France contest the assertion of jurisdiction over them in this forum. ***HN2***[] Personal jurisdiction "is a composite notion of two separate ideas: amenability to jurisdiction, or predicate, and notice to the defendant through valid service of process." *Soltex Polymer Corp. v. Fortex Industries, Inc., 590 F. Supp. 1453, 1456 (E.D.N.Y. 1984)*, *aff'd*, *832 F.2d 1325 (2d Cir. 1987)*.

A. Hoffman-La Roche

HN3[] The applicable law of jurisdiction in a diversity action is the law of the state in which the district court sits. *CutCo Industries, Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986)*. Whether this court may assert jurisdiction over Hoffman-La Roche as Roure's foreign parent turns on whether a prima facie showing is made that Hoffman-La Roche had sufficient contacts with New York such that traditional notions of fair play are not offended. **[**6]** *International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*; *Marine Midland, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981)*. ***HN4***[] Pursuant to New York law, a court is permitted to exercise jurisdiction over a corporate entity on the basis of a single purposeful transaction of business conducted by it in New York. *N.Y. Civ. Prac. L. & R. § 302(a)(1)* (McKinney 1983 & Supp. 1990). Thus, if jurisdiction is predicated **[*788]** upon a New York-based business transaction, an articulable nexus must exist between business transacted by Hoffman-La Roche in-state and the cause of action sued upon here. *Alexander & Alexander v. Donald F. Muldoon & Co., 685 F. Supp. 346 (S.D.N.Y. 1986)*.

As a threshold matter, nothing in the record before me indicates that Hoffman-La Roche has either conducted business in New York or facilitated any transaction between Perfumer's and Roure in-state. Moreover, the nexus that Perfumer's draws upon in their pleadings and supportive documentation is a tenuous one, reliant on magazine articles and broadly ambiguous statements which suggest only that Hoffman-La Roche conducts business worldwide. The Supreme Court has held that ***HN5***[] merely entering products into the stream **[**7]** of commerce is an insufficient jurisdictional predicate. *Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 110, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987)* (citing *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980))*. Although Hoffman-La Roche has many subsidiaries and its name is world renowned for such items as cosmetics and perfumes, business activity of this sort is nonetheless insufficient evidence of purposeful contacts with New York for the purposes of this action.

Nor can this court assert jurisdiction over Hoffman-La Roche simply because it is the parent of a United States subsidiary. ***HN6***[] Only where a parent corporation asserts such extensive control over its subsidiary as to be deemed the subsidiary's alter-ego, can the parent-subsidiary relationship be a sufficient jurisdictional predicate. *See* *Volkswagenwerk Atkengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120 (2d Cir. 1984)* ("identical ownership interests must exist before one corporation can be considered a department of another corporation for jurisdictional purposes"). Parent corporations that observe "a strict formal separation" from their subsidiaries and that derive no direct benefit therefrom are not subject to in personam **[**8]** jurisdiction. *Bulova Watch Co., Inc. v. K.* Hattori & Co., Ltd., 508 F. Supp. 1322, 1342 (E.D.N.Y. 1981) (Weinstein, J.). Because Hoffman-La Roche neither supplied ingredients for the SAMBA perfume nor asserted control over or derived financial benefit with regard to SAMBA from Roure or Roure-France, no viable jurisdictional predicate exists over Hoffman-La Roche. *Id*.

Alternatively, Perfumer's contends that Hoffman-La Roche is subject to New York's longarm jurisdiction based on its allegedly tortious behavior occurring outside New York that caused Perfumer's harm in New York. N.Y. Civ. Pract. L. & R. § 302(a)(3) (McKinney's 1983 & Supp. 1990). Perfumer's, however, fails to show either that Hoffman-La Roche had purposeful contacts within New York or was a party to the SAMBA deal such that any torts arising therefrom could be traced to Hoffman-La Roche. Any purported tort or fraud arising from Perfumer's contract with Roure therefore remains wholly unrelated to Hoffman-La Roche and cannot form the basis of longarm jurisdiction. *Cf.* Cleopatra Kohlique, Inc. v. New High Glass, Inc., 652 F. Supp. 1254 (E.D.N.Y. 1987) (independent tort committed outside New York which causes **[**9]** and can be traced to a harm in New York is a sufficient predicate for longarm jurisdiction.); Mayer v. Josiah Wedgwood & Sons, Ltd., 601 F. Supp. 1523 (S.D.N.Y. 1985). Thus, no jurisdiction can be exercised over Hoffman-La Roche based upon the tort theory of longarm jurisdiction.

B. Roure-France

It is uncontested that Perfumer's engaged the assistance of Roure-France in order to remedy problems with the SAMBA fragrance after "off odors" were detected, and that subsequent meetings between Perfumer's and Roure-France were conducted in France. Amended Complaint paras. 92-105. ***HN7***[] Marketing products and establishing channels for providing advice in the forum state, in addition to placing product in the stream of commerce, have been held to indicate "acts of the defendant purposefully directed toward the forum State" such that jurisdiction may be conferred. *Asahi Industry Co., 480 U.S. at 113*. **[*789]** In addition to acting in an advisory capacity to Perfumer's, Roure-France co-developed the original "Neroli Nights" prototype for SAMBA, which was destined to be developed for production and distribution in the United States by Roure. These are sufficient purposeful acts in New York to confer **[**10]** personal jurisdiction over Roure-France, presuming that sufficient notice and service were made upon Roure-France.

II. *Service of Process*

Rule 4(e) of the Federal Rules of Civil Procedure ***HN8***[] requires that service be made "under the circumstances and in the manner prescribed" by the law of the state in which the forum court is located. *Davis v. Musler, 713 F.2d 907, 914 (2d Cir. 1983)*. In New York, service of process on a corporation requires that an officer or director of the corporation be present in the forum to accept service of summons on its behalf. *N.Y. Civ. Prac. L. & R. §§ 308*, *318* (McKinney's 1983 & Supp. 1990). Here, Perfumer's merely mailed a certified copy of the summons overseas expecting Roure-France to acknowledge receipt without objection.

Roure-France avers that it does not maintain an office or agents in New York state, and no affidavits of service upon the Secretary of State in Albany appear in Perfumer's papers. And although Roure-France met with and advised Perfumer's after the prototype fragrance was developed, such meetings were conducted in France. Therefore, for the purposes of determining the service issue, Roure-France never voluntarily availed itself **[**11]** of or entered New York in order to accept service as required by New York law. Nor could Roure have properly accepted service on Roure-France's behalf because they were not held out as agents of one another.

HN9[] Absent domiciliary agents in the forum, leave of court is mandated in order to use substituted service. *N.Y. Civ. Prac. L. & R. §§ 308*, *313* (McKinney's 1983 & Supp. 1990). Perfumer's failed to seek court assistance in serving process. Indiscriminate use of the mails to effect service abroad does not assure either receipt or sufficient notice of a pending action comporting with fairness and due process. Furthermore, service effected outside the United States on a foreign corporation demands proper service under the constraints of the foreign domiciliary's law, unless that law is inconsistent with requirements of the Hague Convention Treaty. *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658, 658 U.N.T.S. 163 ("Hague Convention").

France and the United States are participants and signatories of the Hague Convention. The Hague Convention, **[**12]** which takes precedence over inconsistent foreign law, mandates that where service is not or cannot be properly effected on a foreign corporation in accordance with its forum's law, an agent of the state shall be designated by the corporation to receive service of documents. French law requires that service be made by the applicable central authority designated by the French government, or, alternatively, by an authorized bailiff or huissier. Weymuller Affid. para. 8. Perfumer's failed to properly serve Roure-France either by French or International law.

As such, I therefore find that service was improper. Because Roure-France correctly preserved its jurisdictional objection, service of summons and complaint on Roure-France is quashed as fatally deficient. *See* *Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 2d 722*, slip op. at 3 (1988).

Finally, Perfumer's requests additional discovery regarding the jurisdiction questions. However, ***HN10***[] discovery procedures are appropriate only when there is at least some slight factual indication that a basis for jurisdiction exists." *Ronar, Inc. v. Wallace, 649 F. Supp. 310, 317-18 (S.D.N.Y. 1986)*. The discovery rules "are **[**13]** not a hunting license to conjure up a claim that does not exist." *Samuels v. Eleonora Beheer, B.V., 500 F. Supp. 1357, 1362 (S.D.N.Y. 1980)* (Weinfeld, J.), *aff'd*, *661 F.2d 907 (2d* ***[*790]*** *Cir. 1981)*. The request is therefore denied. [3]

III. *Substantive Claims*

Because personal jurisdiction cannot be asserted over Hoffman-La Roche and Roure-France, Perfumer's substantive claims relate only to the agreement between Perfumer's and Roure. Perfumer's alleges several claims sounding in federal and state antitrust, conspiracy, fraud, and breach of contract based on Roure's wrongful use of DL-alpha tocopherol, the perfume's malodorous preservative ingredient, rather than BHT.

Perfumer's federal conspiracy and fraud claims are grounded on allegations that Roure, with others, monopolized the use of certain preservatives in the fragrance market in violation of *§ 2* of the Sherman Act. The Act, in pertinent part, states:

> ***HN11***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, **[**14]** to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

15 U.S.C. § 2 (1980).

Ultimately, to find a *§ 2* violation it must be determined either that Roure intended to monopolize the DL-alpha tocopherol market or that Roure's acts asserted such sufficient control over DL-alpha tocopherol as to affect its price and/or unreasonably restrict competition in the marketplace for that product. *See* *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1980)*, *cert. denied*, *450 U.S. 921, 101 S. Ct. 1369, 67 L. Ed. 2d 348 (1981)* (***HN12***[] antitrust claims are comprised of three elements: (1) possession of a monopoly in the relevant market; (2) willful maintenance of power over the product; and (3) causal antitrust injury); *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 380, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*.

Perfumer's pleadings in support of its antitrust claims against Roure are sparse. Perfumer's asserting bald allegations that Roure monopolized the preservative market in the perfume industry in fact present no more than a simple breach of contract claim. Specifically, Perfumer's maintains that Roure was motivated to use DL-alpha tocopherol because **[**15]** of an otherwise unexplained market-share or stake that Roure maintained over that

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[3] The issue of improper venue over Roure-France and Hoffman-La Roche is mooted because there is no *in personam* jurisdiction over either entity.

product. As such, Perfumer's argues that Roure secretly changed SAMBA's ingredients, instead of using the recipe upon which Perfumer's and Roure had originally agreed, in furtherance of this control over a nebulously defined DL-alpha tocopherol market. *See* Amended Complaint para. 21. The pleadings do not indicate, however, that there is a distinct DL-alpha tocopherol market, or that the market price for and availability of DL-alpha tocopherol was adversely affected by Roure's allegedly controlling market share.

Perfumer's further maintains that Roure conspired with its corporate affiliates, Hoffman-La Roche and Roure-France, to monopolize the market for that chemical stabilizer. Amended Complaint para. 95. ***HN13***[] Conspiracy to monopolize a market requires a finding of specific intent to monopolize. *International Railways of Central America v. United Brands Co., 532 F.2d 231* (2d Cir.), *cert. denied 429 U.S. 835, 97 S. Ct. 101, 50 L. Ed. 2d 100(1976)*. Secretly changing the preservative is insufficient proof that Roure had the requisite intent to take over a significant market share of the DL-alpha tocopherol market.

Perfumer's also **[**16]** claims that because of Roure's monopoly power over the trade secret formula, Perfumer's was not able to purchase products derived from the SAMBA standard formula from alternate suppliers. Amended Complaint para. 96. However, because Perfumer's accepted that "SAMBA" would be produced by a secret and protected formula, it is precluded from asserting that as a basis to allege violative monopoly power, regardless of whether it was unable to obtain like perfume oils elsewhere. ***HN14***[] Owning the exclusive recipe for a product, albeit monopolistic, is not necessarily **[*791]** violative of the antitrust laws, especially where the parties formally agreed to maintain the integrity of the trade secret formula. *See, e.g., United States v. E.I. du Pont de Nemours & Co., 351 U.S. at 382*.

Moreover, that a specific choice of ingredients was made exclusively by Roure is inconclusive that such conduct rises to the "predatory" level which threatens the marketplace as a whole. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. Perfumer's argues that it is a violation of the antitrust laws for Roure, as Hoffman-La Roche's subsidiary, to buy raw materials from Hoffman-La Roche and incorporate **[**17]** them into an end product, without resultant antitrust implications. More must be alleged to show some detriment to the marketplace; Perfumer's fails to plead a prima facie case of Sherman Act violations to withstand this motion to dismiss.

Additionally, Perfumer's alleges violations of § 3 of the Clayton Act, namely, that Roure had unlawfully tied the SAMBA fragrance with DL-alpha tocopherol preservative. ***HN15***[] Tying arrangements involve a seller's coercion of a buyer to purchase two distinct products, whereby the buyer seeking to purchase one product is forced by the seller to purchase a second distinct product. *15 U.S.C. § 14 (1980)*; *Times Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; *Unijax, Inc. v. Champion Intern, Inc., 683 F.2d 678, 684-85 (2d Cir. 1982)*. Because the amended complaint fails to allege the existence of any coercive tactics perpetrated by Roure, and considering that preservatives are a necessary and integral ingredient of the final perfume product, Perfumer's fails to state a Clayton Act cause of action.

Similarly, Perfumer's claim under New York's Donnelly Act, *N.Y. Gen. Bus. L. § 340* (McKinney's 1988), must also fall. ***HN16***[] To sustain an action under **[**18]** the Donnelly Act, elements similar to a federal antitrust cause of action must be pleaded. For the same reasons that Perfumer's fails to state a federal antitrust claim, its Donnelly Act claims must fall as well. *Id*.

Additionally, Perfumer's fails to state a claim sufficient to invoke New York's consumer protection laws. *N.Y. Gen. Bus. L. § 349* (McKinney's 1988). New York's Consumer Protection Act is intended as "a strong deterrent against deceptive business practices" which directly affect the consuming public. *See N.Y. Gen. Bus. L. § 349(a)*. Although Perfumer's avers that some courts have allowed a private right of action under that statute for corporate claims, such right arises only if the movant demonstrates an injury to the public interest. *See Azby Brokerage v. Allstate Insur. Co., 681 F. Supp. 1084 (S.D.N.Y. 1988)*. Perfumer's has not alleged such injury nor do its pleadings demonstrate the requisite impact on consumers. Therefore, Perfumer's Consumer Protection Act claims are dismissed.

Perfumer's also alleges a fraud claim based on Roure's failure to tell Perfumer's of its decision to use DL-alpha tocopherol instead of BHT. *Rule 9(b) of the Federal Rules of Civil* ***[**19]*** *Procedure* ***HN17***[] provides that a complaint charging fraud or mistake must state the circumstances constituting fraud or mistake with particularity. *Luce v. Edelstein, 802 F.2d 49, 54-55 (2d Cir. 1986)*. The complaint fails to meet this requirement. Even if it did, New York courts have consistently held that a cause of action for fraud cannot be the outgrowth of simple breach of contract claims. *Metropolitan Transportation Auth. v. Triumph Advertising Prod., Inc., 116 A.D.2d 526, 497 N.Y.S.2d 673, 675* (1st Dep't 1986). Here, the only alleged misrepresentations involve Roure's failure to produce the SAMBA fragrance in accordance with the original "Neroli Nights" formula. Perfumer's thus cloaks a simple breach of contract claim in broad allegations of fraud. Accordingly, Perfumer's fraud claims are dismissed. [4]

Although the allegations of the complaint must be accepted as true on a *Rule 12(b)(6)* motion to dismiss, Perfumer's pleadings present only a dispute between **[**20]** a supplier and a purchaser regarding the **[*792]** merchantibility of the "SAMBA" fragrance as it was developed pursuant to contract. As such, the only claims that survive this motion to dismiss are negligence, common law and UCC breach of contract claims, and implied warranty of merchantibility claims as alleged against Roure.

For the foregoing reasons, the motion to dismiss is granted as to defendants Hoffman-La Roche and Roure-France and the complaint is dismissed in its entirety as against both. The complaint survives as to counts five, six, seven, nine, ten, twelve, thirteen and fourteen as against Roure only.

SO ORDERED.

DATED: New York, New York

March 19, 1990

End of Document

[4] Although Perfumer's alleges entitlement to punitive damages, all of the claims which would have otherwise supported punitive damages have been dismissed. Accordingly, Perfumer's claims for punitive damages are dismissed as well.

In re Workers' Compensation

United States District Court for the District of Minnesota, Fourth Division

March 20, 1990, Decided

Civil No. 4-85-1166

Reporter
130 F.R.D. 99 *; 1990 U.S. Dist. LEXIS 3142 **; 1990-1 Trade Cas. (CCH) P68,975

In re WORKERS' COMPENSATION

Core Terms

plaintiffs', conspiracy, workers' compensation, insurers, predominate, damages, rates, class action, Defendants', antitrust, questions, policies, boycott, prices, named plaintiff, purchases, question of law, class member, certification, class representative, representative party, class certification, alleged conspiracy, price fixing, defenses, factors, member of the class, individual member, insurance company, common question

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN1[] **Class Actions, Certification of Classes**

Plaintiffs' motion for class certification must be considered in light of the well established principles of *Fed. R. Civ. P. 23*. Plaintiffs must first satisfy the four requirements of *Fed. R. Civ. P. 23(a)*: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(1)-(4)*. These are commonly referred to as the tests of numerosity, commonality, typicality, and adequacy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] **Class Actions, Prerequisites for Class Action**

In addition, plaintiffs must demonstrate that their action is encompassed within one of the three categories listed in *Fed. R. Civ. P. 23(b)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3[] **Class Actions, Prerequisites for Class Action**

Before addressing any of the *Fed. R. Civ. P. 23* criteria, however, the court must find that a precisely defined class exists and that the class representatives fall within this class. This test is an implicit requirement of *Rule 23*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN4[] **Class Actions, Certification of Classes**

Plaintiffs carry the burden of proof regarding *Fed. R. Civ. P. 23*'s requirements. The court may only certify the class if it is satisfied after a rigorous analysis that all of the prerequisites are met. Approval or denial of certification, however, ultimately is vested in the discretion of the court.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN5[] **Class Actions, Prerequisites for Class Action**

In considering each requirement of *Fed. R. Civ. P. Rule 23*, the court is mindful of the accepted rationale underlying class actions. It is a necessary vehicle for the vindication of small claims, particularly when those claims involve complex litigation. *Rule 23* is an instrument of convenience, but should not put an unjustified burden upon judicial resources. When there is a question as to whether certification is appropriate, the court should give the benefit of the doubt to approving the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Workers' Compensation & SSDI > Coverage > Employment Status > Employers

HN6[] **Class Actions, Prerequisites for Class Action**

The implicit criterion, subsumed within *Fed. R. Civ. P. 23*, is the existence of a defined class of which the named representatives are a part.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN7[] Prerequisites for Class Action, Numerosity

Fed. R. Civ. P. 23(a)(1) precludes any class action unless the class is so numerous that joinder of all members is impracticable. There is, however, no absolute number that satisfies the numerosity requirement. The Eighth Circuit has not established any rigid rules regarding the necessary size of a class. Beyond mere numbers, a court may look to the type of action, the size of individual claims, the inconvenience of conducting individual lawsuits, and any other factors pertaining to the propriety of joining all proposed class members. Courts have approved classes as small as 250-300, and as large as a nationwide class. If class treatment is found to be inappropriate, the court can invoke its management discretion pursuant to *Rule 23(c)(1)*, *(c)(4)*, and *(d)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN8[] Class Actions, Prerequisites for Class Action

Fed. R. Civ. P. 23(a)(2) requires that plaintiffs show there are questions of law or fact common to the class. Yet, not every question of law or fact must be common to every member of the class. The requirement is met if the questions linking the class members are substantially related to the resolution of the litigation even though the individuals are not identically situated. Identical questions are not necessary and factual discrepancies are not fatal to certification. *Rule 23(a)(2)* may be satisfied if common questions of liability are present despite individual differences in damages.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN9[] Private Actions, Remedies

To prevail on their claims, plaintiffs must prove a violation of the antitrust laws, direct injury resulting from the violation (impact), and damages. Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy. Numerous courts have approved class treatment where the putative class alleges a price fixing conspiracy. If there be no proof of a conspiracy, no plaintiffs recover under any theory of the pleadings.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN10[] Prerequisites for Class Action, Typicality

Fed. R. Civ. P. 23(a)(3) requires the claims or defenses of the representative parties be typical of the claims or defenses of the class. Typicality has independent significance: it requires a demonstration that members of the class have the same or similar grievances as plaintiffs. The typicality requirement is satisfied when the claims of the named plaintiffs emanate from the same event or are based on the same legal theory as the claims of the class members. Plaintiffs' liability theory and type of relief must be co-extensive with those of the class members. As such, the representatives' claims must adequately protect the interests of the class and there must be no antagonistic interests between the representatives and the class. Perfect identity of claims, however, is not required, and factual differences between plaintiffs are not fatal.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN11[] **Class Actions, Prerequisites for Class Action**

An antitrust price fixing case generally will involve claims sufficiently similar to satisfy *Fed. R. Civ. P. 23(a)(3)*. If the representatives must prove a conspiracy, its effectuation, and damages therefrom -- precisely what the absentees must prove to recover -- the representative claims can hardly be considered atypical.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN12[] **Class Actions, Prerequisites for Class Action**

The fact that the purchases were not made from all of the defendants, or that all of the methods through which the conspiracy was allegedly effected were not utilized against the named plaintiffs, is not dispositive of their ability to represent the class. Nor will differing damages, resulting from varied methods of procuring and purchasing the product, defeat satisfaction of *Fed. R. Civ. P. 23(a)(3)*.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN13[] **Class Members, Named Members**

The mere fact that all of the methods through which the alleged conspiracy was effected were not used with respect to the named representatives, or the fact that they did not purchase from all defendants, does not determine that the claim of the named plaintiffs lack typicality under *Fed. R. Civ. P. 23(a)(3)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN14[] **Prerequisites for Class Action, Adequacy of Representation**

Fed. R. Civ. P. 23(a)(4) demands that the representative parties will fairly and adequately protect the interests of the class. Adequate representation is measured by two factors: (1) plaintiffs' counsel must be competent to pursue this action, and (2) the representatives must not have interests which are antagonistic to those of the class. *Rule 23(a)(4)* asks whether the class representatives will vigorously prosecute the interests of the class. *Rule 23(a)(4)* also requires that the representative display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation. The question is: Will the representative parties put up a genuine fight?

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN15[] **Prerequisites for Class Action, Typicality**

The second of *Fed. R. Civ. P. 23(a)(4)*'s requirements -- lack of antagonism -- is similar to *Rule 23(a)(3)*'s typicality test. In an antitrust action, therefore, the plaintiffs need not have purchased from all of the defendants or have been adversely affected by all of the means and methods by which the alleged conspiracy was implemented. Moreover, the fact that some representatives face additional defenses does not defeat their ability adequately to represent the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN16[] **Class Actions, Prerequisites for Class Action**

An additional factor considered by some courts is the financial wherewithal available to, and provided by, the class representatives. Consideration of this factor, however, should be limited. The focus of the financial issue should be on the class representatives' ability to finance the cost of notice to absent class members and to retain vigorous and effective counsel.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN17[] **Class Actions, Prerequisites for Class Action**

Naked allegations of antagonism are insufficient to undermine certification pursuant to *Fed. R. Civ. P. 23(a)(4)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN18[] **Class Actions, Prerequisites for Class Action**

The representative need not have, and often in an anti-trust action will not have, personal knowledge of the facts needed to make out a prima facie case.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN19[] **Prerequisites for Class Action, Predominance**

Fed. R. Civ. P. 23(b)(3) requires that questions of law or fact predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Trials > Separate Trials

HN20[] **Class Actions, Prerequisites for Class Action**

There are no bright lines for determining whether common questions predominate. An issue will meet the predominance standard when there exists generalized evidence that proves or disproves an element on a simultaneous, class-wide basis. Such proof obviates the need to examine each class member's individual position. The total amount of time spent on a common issue compared to time spent on individual issues is immaterial. The mere existence of individual questions such as damages does not automatically preclude satisfaction of the predominance requirement, so long as there is some common proof to adequately demonstrate some damage to each plaintiff. Individualized, separate trials -- mini-trials -- on individual issues of fact are not a bar to the use of the class action procedure.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN21[] **Private Actions, Remedies**

The common principles have been applied with particular force in the antitrust setting. Plaintiffs must prove three elements to succeed: (1) violation of the ***antitrust law***; (2) direct injury (or impact) from the violation; and (3) damages suffered by the plaintiffs. Non-uniformity of the prices at which plaintiffs purchased their goods is not fatal to certification. As long as the existence of a conspiracy is the overriding question, then the class has met its predominance requirement. To prove injury, plaintiffs need only demonstrate they have suffered some damage from the unlawful conspiracy. Such a showing may be made on a class basis if the evidence demonstrates that the conspiracy succeeded in increasing prices above the competitive level.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN22[] **Private Actions, Remedies**

Common proof of impact is possible even though prices are individually negotiated. Proof of impact typically follows proof of a price-fixing conspiracy where the defendants are shown to have sufficient market power. Although damage amounts may vary among plaintiffs, this fact alone, particularly in antitrust actions, will not defeat certification.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN23[] **Private Actions, Remedies**

Individual questions of damages are often a problem encountered in an antitrust action and are rarely a barrier to certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN24[] **Class Actions, Prerequisites for Class Action**

In considering whether a class action is the superior method of proceeding, a court should consider: (A) the interest of members of the class in individually controlling the prosecution for defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. *Fed. R. Civ. P. 23(b)(3)(A)-(D)*. Manageability is a real issue.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

HN25[] **Class Actions, Prerequisites for Class Action**

The court is mindful that dismissal for management reasons is never favored. The vehicle of class action is meant to permit plaintiffs with small claims and little money to pursue a claim otherwise unavailable. A contrary rule would essentially preclude class treatment whenever separate issues had to be tried.

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Judges: James M. Rosenbaum, United States District Judge.

Opinion by: ROSENBAUM

Opinion

[*101] ORDER

JAMES M. ROSENBAUM, UNITED STATES DISTRICT JUDGE.

Plaintiffs move for class certification pursuant to *Rule 23, Federal Rules of Civil Procedure* (Fed.R.Civ.P.). Plaintiffs seek to certify a class of:

> All employers (excluding defendants and co-conspirators, including any subsidiary or affiliate thereof) with places of business within the State of Minnesota required by Minnesota law to carry workers' compensation insurance coverage, who between June 8, 1979, and April 25, 1983 purchased policies of workers compensation insurance from one or more of the named defendants, including any subsidiary or affiliate thereof, or from one or more other member insurance companies of the Workers Compensation Insurers' Rating Association **[**3]** of Minnesota.

For the reasons set forth herein, plaintiffs' motion is granted.

I. *Background*

The facts of this case, at this pretrial stage, were set out by this Court and the court of appeals. They are reported in this Court's order, dated July 28, 1987, and at *867 F.2d 1552*, respectively. A very brief review is warranted, however, for purposes of this motion.

Prior to June 7, 1979, *Minnesota Statutes, § 79.21*, required that the rates for Minnesota's workers' compensation insurance be approved by the Insurance Commission of Minnesota. On June 7, 1979, Minnesota's legislature amended *§ 79.21* to permit insurers to "write insurance at rates that are lower than the rates approved by the commissioner . . . .." *Minnesota Statutes, § 79.21*. Plaintiffs argue that, notwithstanding the statutory amendment, defendants conspired, through the Workers' Compensation Insurance Rating Association of Minnesota (WCIRAM), to continue to charge inflated rates by price fixing and enforced their agreement through a group boycott from June 7, 1979, to and until April 25, 1983.

The putative plaintiffs purchased workers' compensation insurance from the named defendants and approximately 250 other insurers **[**4]** between June 7, 1979, and April 25, 1983. Plaintiffs instituted this action in 1983, alleging price fixing and boycott in violation of the Sherman Act, *15 U.S.C. § 1*, and the Minnesota ***Antitrust Law*** of 1971, *Minnesota Statutes, §§ 325D.49-.66*. This Court granted summary judgment in defendants' favor on plaintiffs' federal claims on July 28, 1987, and declined to accept the remainder of the case under pendent jurisdiction. *In re* ***[*102]*** *Workers' Compensation Insurance Antitrust Litigation,* Civil No. 4-85-1166, mem. op. at 23 (July 28, 1987).

This Court's order was reversed by the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit held that the evidence offered in opposition to the motion for summary judgment "support[ed] an inference of an agreement to boycott, coerce or intimidate companies into adherence to a fixed price." *In re Workers' Compensation Insurance Antitrust Litigation, 867 F.2d 1552, 1566* (8th Cir), *cert. denied, 492 U.S. 920, 109 S. Ct. 3247, 106 L. Ed. 2d 593 (1989)*. The court of appeals then directed this Court to maintain pendent jurisdiction over plaintiffs' state law claims. *Id., at 1567-68*. And so the matter is before this Court.

[5]** In reply to plaintiffs' present motion for class certification, defendants zealously urge that a class action is a most undesirable, unmanageable, and particularly unjust method of resolving these issues. They claim each plaintiff is so unique that no commonality of interest or claims is possible. Defendants then argue the incomprehensibly complex nature of the insurance business, lecturing the Court regarding the intricacies of insurers' risks and resulting decision-making policies.

Defendants highlight three factors which they allege distinguish this antitrust certification motion from the myriad others with which courts have somehow managed. First, defendants assert plaintiffs will have to prove that each of the 250 insurance companies joined in and adhered to the conspiratorial boycott, thus creating numerous individual questions of impact and injury, none of which predominate.

Second, defendants contend the method of calculating insurance prices is not conducive to class action treatment because the allegedly fixed rates constitute only one of a number of factors utilized to set insurance prices. Defendants argue each defendant will have calculated prices in a different manner **[**6]** using the challenged rate in varying degrees. Defendants, here, emphasize the complexity of computing workers' compensation insurance rates. Defendants allege pricing policies vary so widely from employer to employer that no consistent method could possibly be derived by which all of the defendants' actions could be judged in a class proceeding.

Third, defendants note that differences between the various plaintiffs are also incorporated into insurance prices. This, defendants argue, destroys any typicality among the plaintiffs. In this regard, they note that employers are big and small and their employees either do, or do not, engage in high risk activities. Further, defendants suggest the existence of an incredible variety of workers' compensation plans, including some to employers which were so small that they did not purchase insurance under the rates specified by the Commissioner and others which purchased under an assigned risk program rather than the rate statute. Defendants finally, but emphatically, suggest that some employers purchased policies whose premiums were not impacted by any allegedly illegal activity. Defendants ask the Court to consider:

> 1) employers who purchased **[**7]** multi-state and multi-line policies the premiums for which were not calculated using the Commissioner's rate;
> 2) employers who purchase policies based upon individual loss characteristics including retrospective rating plans as well as employers who were simply bad risks;
>
> 3) employers who purchased policies reflecting anticipated changes by the Minnesota legislature on *Minnesota Statutes, § 79.23*; and
> 4) employers who purchased policies in which they received other options which lowered their premiums.

These considerable discrepancies, argue defendants, make class certification under *Rule 23* an unavailable option. In view of all of these concerns, defendants presumably suggest the courts would be best served by several hundred individual lawsuits against each of 250 or so putative defendants.

[*103] II. *Analysis*

HN1[] Plaintiffs' motion for class certification must be considered in light of the well established principles of *Rule 23, Fed.R.Civ.P.* Plaintiffs must first satisfy the four requirements of *Rule 23(a)*:

> 1) the class is so numerous that joinder of all members is impracticable;
>
> 2) there are questions of law or fact common to the class;
>
> 3) the claims or defenses of the representative **[**8]** parties are typical of the claims or defenses of the class; and
>
> 4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a)(1)-(4), Fed.R.Civ.P.; *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 162, 94 S. Ct. 2140, 2145, 40 L. Ed. 2d 732 (1974)*. These are commonly referred to as the tests of "numerosity, commonality, typicality, and adequacy."

HN2[] In addition, plaintiffs must demonstrate that their action is encompassed within one of the three categories listed in *Rule 23(b)*. *Eisen, 417 U.S. at 162, 94 S. Ct. at 2145*. Plaintiffs must demonstrate that:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class **[**9]** has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23(b)(1)-(3), Fed.R.Civ.P. It is apparent that plaintiffs' claims fall most naturally within the ambit of subsection 23(b)(3) which requires that common questions predominate and that the class action format be superior to other means of adjudication.

HN3[] Before addressing any of the *Rule 23* criteria, however, the Court must find that a precisely defined class exists and that the class representatives fall within this class. *John Does 1-100 v. Boyd, 613 F. Supp. 1514, 1527 (D.Minn. 1985)*; *Dirks v. Clayton Brokerage Co. of St. Louis, Inc., 105 F.R.D. 125, 130-31 (D.Minn. 1985)*. This test is an implicit requirement of *Rule 23*. *Dirks, 105 F.R.D. at 130*.

HN4[] Plaintiffs carry the burden of proof regarding **[**10]** *Rule 23*'s requirements. *Smith v. Merchants & Farmers Bank, 574 F.2d 982, 983 (8th Cir. 1978)*; *Kassover v. Computer Depot, Inc., 691 F. Supp. 1205, 1213 (D.Minn. 1987)*. The Court may only certify the class if it is satisfied after a rigorous analysis that all of the prerequisites are met. *Bishop v. Committee on Professional Ethics, 686 F.2d 1278, 1287 (8th Cir. 1982)*. Approval or denial of certification, however, ultimately is vested in the discretion of the Court. *Gilbert v. City of Little Rock, Arkansas, 722 F.2d 1390, 1399 (8th Cir. 1983)*, *cert. denied, 466 U.S. 972, 104 S. Ct. 2347, 80 L. Ed. 2d 820 (1984)*; *In re Control Data Corp. Securities Litigation, 116 F.R.D. 216, 219 (D.Minn. 1986)*.

HN5[] In considering each requirement of *Rule 23*, the Court is mindful of the accepted rationale underlying class actions. It is a necessary vehicle for the vindication of small claims, particularly when those claims involve complex litigation. *Kassover, 691 F. Supp. at 1213*. *Rule 23* is an "instrument of convenience," but should not put an "unjustified burden upon judicial resources." *Id.* When there is a question as to whether certification is appropriate, the Court should **[**11]** give the benefit of the doubt to approving the class. *In re Control Data Corp., 116 F.R.D. at 219*.

[*104] Having set forth these implicit and explicit criteria, the Court considers each of the *Rule 23* requirements. [1]

A. *Implicit Criteria -- Defined Class*

HN6[] The implicit criterion, subsumed within *Rule 23*, is the existence of a defined class of which the named representatives are a part. *John Does 1-100, 613 F. Supp. at 1527*. The Court holds that such a class is sufficiently defined in this case. Class members will include only those employers who purchased workers' compensation insurance -- a fact easily determined. According to their pleadings, the named representatives fall within this class, and each purchased workers' compensation insurance between 1979 and 1983 from one of the defendants. This

[1] The Court considers plaintiffs' federal and state antitrust claims together for purposes of this motion. *See generally Midwest Communications, Inc. v. Minnesota Twins, 779 F.2d 444, 452-53 (8th Cir. 1985)*, *cert. denied, **476 U.S. 1163, 106 S. Ct. 2289, 90 L. Ed. 2d 730 (1986)***; *Hoffman v. Delta Dental Plan of Minnesota, 517 F. Supp. 564, 573 (D.Minn. 1981)*.

implicit requirement **[**12]** is satisfied. The Court then turns to the requirements of Rule 23(a), all of which must be met.

B. Rule 23(a) *Requirements*

1. Rule 23(a)(1) -- *Numerosity*

HN7[] Rule 23(a)(1) precludes any class action unless "the class is so numerous that joinder of all members is impracticable." There is, however, no absolute number which satisfies the "numerosity" requirement. The Eighth Circuit has not established any rigid rules regarding the necessary size of a class. *Boyd v. Ozark Airlines, Inc., 568 F.2d 50, 54 (8th Cir. 1977)*. Beyond mere numbers, a court may look to the type of action, the size of individual claims, the inconvenience of conducting individual lawsuits, and any other factors pertaining to the propriety of joining all proposed class members. *Paxton v. Union National Bank, 688 F.2d 552, 559-60 (8th Cir. 1982)*. Courts have approved classes as small as 250-300, *Bowman v. National Football League, 402 F. Supp. 754, 756 (D.Minn. 1975)*, and as large as a nationwide class. *Califano v. Yamasaki, 442 U.S. 682, 703, 99 S. Ct. 2545, 2558, 61 L. Ed. 2d 176 (1979)*. If class treatment is found to be inappropriate, the Court can invoke its management discretion pursuant to **[**13]** Rule 23(c)(1), (c)(4), and (d). *General Telephone Co. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982)*; *State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 566 (D.Minn. 1968)*.

Plaintiffs have asserted no specific numbers, but contemplate a plaintiff class in excess of 10,000. Defendants do not seriously challenge this figure or that it would satisfy this requirement. The Court, therefore, concludes defendants have met their burden of establishing numerosity pursuant to Rule 23(a)(1).

2. Rule 23(a)(2) -- *Commonality*

HN8[] Rule 23(a)(2) requires that plaintiffs show "there are questions of law or fact common to the class." Yet, not every question of law or fact must be common to every member of the class. *Paxton, 688 F.2d at 561*; *Mosley v. General Motors Corp., 497 F.2d 1330, 1334 (8th Cir. 1974)*. The requirement is met if the questions linking the class members are "substantially related to the resolution of the litigation even though the individuals are not identically situated." *Paxton, 688 F.2d at 561* (quoting *American Finance Sys., Inc. v. Harlow, 65 F.R.D. 94, 107 (D.Md. 1974)*). Identical questions are not necessary **[**14]** and factual discrepancies are not fatal to certification. *Dirks, 105 F.R.D. at 131*. Rule 23(a)(2) may be satisfied if common questions of liability are present despite individual differences in damages. [2] *Jenson v. Continental Financial Corp., 404 F. Supp. 806, 810 (D.Minn. 1975)*. *See* *Gentry v. C & D Oil Co., 102 F.R.D. 490, 493 (W.D.Ark. 1984)*.

HN9[] To prevail on their claims, plaintiffs must prove a violation of the antitrust laws, direct **[*105]** injury resulting from the violation (impact), and damages. *Windham v. American Brands, Inc., 565 F.2d 59, 65 (4th Cir. 1977)*, *cert. denied, 435 U.S. 968, 98 S. Ct. 1605, 56 L. Ed. 2d 58 (1978)*; *In re Wirebound Boxes Antitrust Litigation, 128 F.R.D. 268, 271 (D.Minn. 1989)*. " Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about **[**15]** the existence, scope and effect of the alleged conspiracy." *In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 335 (E.D.Pa. 1976)*. *See* *Fisher Bros. v. Mueller Brass Co., 102 F.R.D. 570, 574-75 (E.D.Pa. 1984)*; *In re Alcoholic Beverages Litigation, 95 F.R.D. 321, 324 (E.D.N.Y. 1982)*. Numerous courts have approved class treatment where the putative class alleges a price fixing conspiracy. [3] *See* *Rios v. Marshall, 100 F.R.D. 395, 405 (S.D.N.Y. 1983)*; *United Nat'l Records, Inc. v. MCA, Inc., 99 F.R.D. 178, 180*

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[2] Rule 23(a)(2) is not the same requirement as that contemplated in Rule 23(b)(3) which requires that common questions predominate. For purposes of Rule 23(a)(2), plaintiffs need only show that common questions exist. *See* *In re South Central States Bakery Products Antitrust Litigation, 86 F.R.D. 407, 415 (M.D.La. 1980)*.

[3] Generally, the "tactical problems inherent in arriving at a satisfactory calculation of damages must be considered, and given their appropriate weight, elsewhere in Rule 23." *PDQ of Miami v. Nissan Motor Corp. in USA, 61 F.R.D. 372, 375 (S.D.Fla. 1973)*, *aff'd,* *577 F.2d 910 (5th Cir. 1978)*, *cert. denied,* ***439 U.S. 1072, 99 S. Ct. 843, 59 L. Ed. 2d 38 (1979)***.

(N.D.Ill. 1983); Davis v. Northside Realty Assoc. Inc., 95 F.R.D. 39, 43 (N.D.Ga. 1982); In re South Central States Bakery Products Antitrust Litigation, 86 F.R.D. 407, 415 (M.D.La. 1980); In re Sugar Industry, 73 F.R.D. at 335-36; PDQ of Miami v. Nissan Motor Corp. in U.S.A., 61 F.R.D. 372, 375 (S.D.Fla. 1973), *aff'd*, 577 F.2d 910 (5th Cir. 1978), *cert. denied, 439 U.S. 1072, 99 S. Ct. 843, 59 L. Ed. 2d 38 (1979)*; State of Minnesota, 44 F.R.D. 559 at 566. "If there be no proof of a conspiracy," no plaintiffs recover under any theory of the pleadings. State of Minnesota, 44 F.R.D. 559 at 566.

[16]** Plaintiffs correctly note that both this Court and the court of appeals have treated plaintiffs' claims and the insurance companies' defenses identically to this point. The question of liability, moreover, turns on the existence or non-existence of a conspiracy to boycott. While there are certainly factual differences among plaintiffs' claims, the allegations need not be identical to comport with Rule 23(a)(2). The law requires only that there be questions common to the class.

Again, defendants only indirectly dispute the existence of common questions of law and fact. Instead, they focus on whether these common questions predominate within the contemplation of Rule 23(b)(3). The Court, therefore, concludes plaintiffs have met their burden pursuant to Rule 23(a)(2).

3. Rule 23(a)(3) -- *Typicality*

HN10[] Rule 23(a)(3) requires "the claims or defenses of the representative parties . . . . [be] typical of the claims or defenses of the class." Typicality has independent significance: it requires a demonstration that members of the class have the same or similar grievances as plaintiffs. Tate v. Weyerhaeuser Co., 723 F.2d 598, 608 (8th Cir. 1983), *cert. denied, 469 U.S. 847,* ***[**17]*** *105 S. Ct. 160, 83 L. Ed. 2d 97 (1984)*. The typicality requirement is satisfied "when the claims of the named plaintiffs emanate from the same event or are based on the same legal theory as the claims of the class members." Dirks, 105 F.R.D. at 132-33 *(citing* Paxton, 688 F.2d at 561-62). Plaintiffs' liability theory and type of relief must be co-extensive with those of the class members. In re Wirebound Boxes, 128 F.R.D. at 270; In re South Central States Bakery Products, 86 F.R.D. at 415; State of Minnesota, 44 F.R.D. 559 at 566. As such, the representatives' claims must adequately protect the interests of the class and there must be no antagonistic interests between the representatives and the class. [4] In re Wirebound Boxes, 128 F.R.D. at 270; **[*106]** In re Control Data Corp., 116 F.R.D. 216 at 220. Perfect identity of claims, however, is not required, In re Wirebound Boxes, 128 F.R.D. at 270; In re South Central States Bakery Products, 86 F.R.D. at 415, and factual differences between plaintiffs are not fatal. *See e.g.* Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir.), *cert. denied, 434 U.S. 856, 98 S. Ct. 177, 54 L. Ed. 2d 128 (1977)*.

[18]** ***HN11***[] An antitrust price fixing case generally will involve claims sufficiently similar to satisfy Rule 23(a)(3). If the representatives must prove "a conspiracy, its effectuation, and damages therefrom -- precisely what the absentees must prove to recover -- the representative claims can hardly be considered atypical." State of Minnesota, 44 F.R.D. 559 at 567. *See* In re Wirebound Boxes, 128 F.R.D. at 270; Butt v. Allegheny Pepsi-Cola Bottling Co., 116 F.R.D. 486, 488 (E.D.Va. 1987).

> ***HN12***[] The fact that the purchases were not made from all of the defendants, or that all of the methods through which the conspiracy was allegedly effected were not utilized against the named plaintiffs, is not dispositive of their ability to represent the class.

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[4] Rule 23(a)(3) has been interpreted to mean the representative's allegation must be "squarely aligned in interest" with the purported class, Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 42 (N.D.Cal. 1977), and that the representative's interest must be "sufficiently parallel to the interests of the other class members to assure a vigorous representation of the class." Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir.), *cert. denied,* ***434 U.S. 856, 98 S. Ct. 177, 54 L. Ed. 2d 128 (1977)***. Put another way, "in the course of proving [their] own claim [the representatives] must also prove the claims of the other members of the class." Amswiss Int'l Corp. v. Heublein, Inc., 69 F.R.D. 663, 667 (N.D.Ga. 1975).

Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 39 (S.D.N.Y. 1977), *appeal dismissed, 574 F.2d 656 (2d Cir. 1978)*. Nor will differing damages, resulting from varied methods of procuring and purchasing the product, defeat satisfaction of *Rule 23(a)(3)*.

Defendants argue plaintiffs have failed on typicality. They contend the six named plaintiffs' insurance plans differ in form and their contacts with defendants are so varied **[**19]** that they cannot be considered typical. Defendants stress that the Court must examine the factual circumstances of each employer. Defendants ultimately claim that the impact of any alleged conspiracy on the named representatives is too speculative. The upshot of their argument is that if any conspiracy had existed its effect would be unique to each plaintiff.

The Court disagrees. It is true that the six putative class plaintiffs differ in their present makeup and their past transactions. And the types of insurance they purchased were admittedly varied. But in its essence, plaintiffs claim that the insurance companies combined to fix prices of workers' compensation insurance rates at a rate higher than would have existed in the absence of the illegal conspiracy. The elements of these claims are similar to those of any other price fixing cases: proof of the existence, scope, and effect of the alleged conspiracy. Those same elements would have to be shown by any party so aggrieved, even if each plaintiff's claim were taken individually.

> This Court has spoken on this very issue: Defendants argue that the plaintiffs' claims are neither typical nor co-extensive in that all plaintiffs **[**20]** have sustained substantially different damages requiring extensive proof because of diverse methods of procuring and purchasing fabricated steel products. But all claims in the classes herein will require proof of a conspiracy, plus a showing of price fixing, allocation of business or other non-competitive activity, as well as evidence of purchases at allegedly inflated prices. Although each plaintiff will have to prove a precise purchase or purchases to show damages, the former two elements of proof will redound to the benefit of the entire class of claimants, and the court therefore is disposed to reject the defendants' theory. While a disparity of damages may be argued to go to the question of "predominance," such disparate proof fails to make the representatives' claims atypical . . . .. Since the representative parties need prove a conspiracy, its effectuation, and damages therefrom -- precisely what the absentees must prove to recover -- the representative claims can hardly be considered atypical. Moreover, if the "typical" requirement of 23(a)(3) is thought to mean only a lack of adversity between the representatives and the absentee plaintiffs, there is no showing of adverse **[**21]** interests in these actions which would militate against class action treatment.

State of Minnesota, 44 F.R.D. at 566-67 (footnotes and citations omitted). As such:

> ***HN13***[] **[*107]** the mere fact that all of the methods through which the alleged conspiracy was effected were not used with respect to [the named representatives], or the fact that [they] did not purchase from all defendants, does not determine that the claim of [the named plaintiffs] lack[] typicality under *Rule 23(a)(3)*.

In re South Central States Bakery Products, 86 F.R.D. at 417.

4. *Rule 23(a)(4)* -- *Adequacy*

HN14[] *Rule 23(a)(4)* demands that "the representative parties will fairly and adequately protect the interests of the class." Adequate representation is measured by two factors: (1) plaintiffs' counsel must be competent to pursue this action, and (2) the representatives must not have interests which are antagonistic to those of the class. *Jenson, 404 F. Supp. at 811*. *Rule 23(a)(4)* asks whether the class representatives will vigorously prosecute the interests of the class. [5] *Paxton, 688 F.2d at 562-63*; *Dirks, 105 F.R.D. at 133*. *Rule 23(a)(4)* also requires that:

[5] This factor is of "critical importance." *Bishop v. Committee on Professional Ethics, 686 F.2d 1278, 1288 (8th Cir. 1982)*.

> the representative display some minimal **[**22]** level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation.

Gentry, 102 F.R.D. at 494-95. The question is: Will the representative parties put up a genuine fight? *In re Endotronics, 1989 U.S. Dist. LEXIS 1141*, Civil No. 4-87-130, mem. op. at 11 (D.Minn. Jan. 28, 1988).

HN15[] The second of *Rule 23(a)(4)*'s requirements -- lack of antagonism -- is similar to *Rule 23(a)(3)*'s typicality test. *In re Wirebound Boxes, 128 F.R.D. 268, 271*. In an antitrust action, therefore, the plaintiffs need not "have purchased from all of the defendants or . . . . have been adversely affected by all of the means and methods by which the alleged conspiracy was implemented." *In re South Central Bakery Products, 86 F.R.D. at 418*. Moreover, the "fact that some representatives face additional defenses does not defeat their ability adequately to represent the class." *In re Wirebound Boxes, 128 F.R.D. at 271*.

HN16[] An additional factor considered by some courts is the financial wherewithal available to, and provided **[**23]** by, the class representatives. *See e.g. In re South Central Bakery Products, 86 F.R.D. at 418-419*. Consideration of this factor, however, should be limited. *See Dirks, 105 F.R.D. at 134*. The focus of the financial issue should be on the class representatives' ability to finance the "cost of notice to absent class members and to retain vigorous and effective counsel." *In re South Central Bakery Products, 86 F.R.D. at 418*; *Butt, 116 F.R.D. at 489*.

Defendants suggest that plaintiffs fail to satisfy *Rule 23(a)(4)* in three ways. First, defendants claim the interests of the named plaintiffs are co-extensive neither among themselves nor with those of the proposed class respecting particular plan purchases and the unique characteristics of each insured. Second, defendants contend the named plaintiffs lack the financial strength to insure fair and adequate representation. Third, defendants claim that discovery has revealed that at least three of the named plaintiffs have no knowledge of the facts upon which this litigation is based beyond any explanations given to them by counsel. [6]

[24]** The Court rejects defendants' first argument that the putative plaintiffs' interests are not aligned with those of the class. Earlier in this opinion, the Court held that the claims of the named plaintiffs and the proposed class satisfied *Rule 23(a)(3)* in that the plaintiffs' claims were typical. As noted, *Rule 23(a)(4)* is related to *Rule 23(a)(3)*. The Court notes the class representatives here are a "'part of the class and possess the same interest and [have] suffer[ed] the same injury as the class members.'" *Bishop, 686 F.2d at 1289 (quoting East Texas Motor Freight System,* ***[*108]*** *Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 1896, 52 L. Ed. 2d 453 (1977))*. The Court further finds that there has been no showing whatsoever that plaintiffs' individual interests are antagonistic to one another. [7] As a general rule, "only a conflict which goes to the very subject matter of the litigation will defeat a party's claim to representative status." *Jenson, 404 F. Supp. at 811*. No such conflict exists here. Defendants' argument regarding the different types of purchases and insurance policies goes to typicality -- which the Court has held satisfied -- and the predominance of common questions **[**25]** of law and fact pursuant to *Rule 23(b)(3)*. It is not sufficient to disqualify the class representatives pursuant to *Rule 23(a)(4)*.

Defendants' second argument, touching the named plaintiffs' knowledge, is also unpersuasive. ***HN18***[] "The representative need not have, and often in an anti-trust action will not have, personal knowledge of the facts needed to make out a prima facie case." *Gentry, 102 F.R.D. at 495*. As such, the depth of a named representative's knowledge is irrelevant. *See e.g. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371-74, 86 S. Ct. 845, 850-51, 15 L. Ed. 2d 807 (1966)*. As a practical matter, the named plaintiffs surely are aware of the factual and procedural circumstances of their case. The case has been hard litigated, for nearly seven years, both in this Court and in the

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[6] As a preliminary matter, no challenge has been raised regarding the competency or expertise of plaintiffs' counsel. Their expertise and competence in class action representation is not in question.

[7] ***HN17***[] Naked allegations of antagonism are insufficient to undermine certification pursuant to *Rule 23(a)(4)*. *In re South Central States Bakery Products Antitrust Litigation, 86 F.R.D. 407, 418 (M.D.La. 1980)*.

Eighth Circuit. The Court finds that, for purposes of this motion, plaintiffs are sufficiently aware of the status of the litigation. *See* Gentry, 102 F.R.D. at 495.

Defendants' **[**26]** final argument questioning plaintiffs' financial resources is baseless. Plaintiffs' counsel have found the means to prosecute this case for seven years. Plaintiffs' counsel's assurances satisfy the Court that the financial requirements which may be imposed upon the class representatives will be satisfied adequately. The Court finds this sufficient to meet the requisites of 23(a)(4).

C. Rule 23(b) *Requirements*

HN19[] Rule 23(b)(3) requires that "questions of law or fact predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

1. *Predominance*

HN20[] There are no bright lines for determining whether common questions predominate. *Dirks, 105 F.R.D. at 132, 136*. An issue will meet the predominance "standard when there exists generalized evidence that proves or disproves [an] element on a simultaneous, class-wide basis. Such proof obviates the need to examine each class member's individual position." *In re Industrial Gas, 100 F.R.D. 280, 288 (N.D.Ill. 1983)*. The total amount of time spent on a common issue compared to time spent on individual issues is immaterial. *State **[**27]** of Minnesota, 44 F.R.D. at 568*. The mere existence of individual questions such as damages does not automatically preclude satisfaction of the predominance requirement, *Rios, 100 F.R.D. at 408*; *In re Alcoholic Beverages, 95 F.R.D. at 327*; *Davis, 95 F.R.D. at 48*; *In re South Central States Bakery Products, 86 F.R.D. at 419*, so long as there is some common proof to adequately demonstrate some damage to each plaintiff. *In re Wirebound Boxes, 128 F.R.D. 268, 272*; *In re South Central Bakery Products, 86 F.R.D. at 421*. Individualized, separate trials -- mini-trials -- on individual issues of fact are not a bar to the use of the class action procedure. *In re Industrial Gas, 100 F.R.D. at 290*.

HN21[] These common principles have been applied with particular force in the antitrust setting. As discussed, plaintiffs must prove three elements to succeed: (1) violation of the ***antitrust law***; (2) direct injury (or impact) from the violation; and (3) damages suffered by the plaintiffs. *In re Wirebound Boxes, 128 F.R.D. 268, 271*; *In re Industrial Gas, 100 F.R.D. at 288*; *In re South Central States Bakery Products, 86 F.R.D. at 419*. Non-uniformity of the **[*109]** prices at which plaintiffs **[**28]** purchased their goods is not fatal to certification. *In re South Central Bakery Products, 86 F.R.D. at 421*. As long as the existence of a conspiracy is the overriding question, then the class has met its predominance requirement. *In re Wirebound Boxes, at 271*; *Gentry, 102 F.R.D. at 495*; *In re Alcoholic Beverages, 95 F.R.D. at 326*; *In re South Central States Bakery Products, 86 F.R.D. at 419-22*; *State of Minnesota, 44 F.R.D. at 568, 571*. To prove injury, plaintiffs need only demonstrate they have suffered some damage from the unlawful conspiracy. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S. Ct. 1562, 1571 n. 9, 23 L. Ed. 2d 129 n. 9 (1969)*. Such a showing may be made on a class basis if the evidence demonstrates that the conspiracy succeeded in increasing prices above the competitive level. *In re Wirebound Boxes, at 271*.

Defendants steadfastly assert that common questions do not predominate. They first suggest that plaintiffs must present individualized proof regarding an "agreement to boycott" by all insurers of WCIRAM, including those not named as defendants. They next claim that each individual plaintiff must **[**29]** prove that the boycott caused its own insurance company to use the highest allowable rate. Defendants would analogize this case to those involving dealers who claim vertical price-fixing by their manufacturer. Defendants cite a number of cases for the proposition that class certification should be denied under these circumstances. *See e.g. Mekani v. Miller Brewing Co., 93 F.R.D. 506, 513 (E.D.Mich. 1982)*. Defendants summarize their argument as follows:

> In short, this case will necessarily require a factual inquiry concerning whether (and when) each of the 250-plus insurers licensed to write workers' compensation insurance in Minnesota between 1979 and 1983 succumbed to the alleged agreement to boycott, and whether (and when) each of these insurers otherwise joined the alleged conspiracy to fix rates. Demonstrating that Insurer A succumbed or otherwise participated in the

> alleged price-fixing conspiracy does not show that Insurer B -- or any of the 250-plus other insurers -- did so. Therefore an employer customer of Insurer B cannot recover without showing that Insurer B succumbed to the group boycott or otherwise participated in the alleged price-fixing conspiracy.

Defendants' **[**30]** Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 30 (footnote omitted).

Defendants then focus upon the individual employers and their separate insurance purchases. They state that the degree of each insurer's reliance on the claimed conspiracy and the various types of policies sold affect individual damages. Defendants suggest this case is similar to class actions involving "goods or services that are not homogenous or fungible and are priced in a variety of ways."

As is expected, defendants reject plaintiffs' assurances that a statistical formula exists to determine individual impact and damages. Instead, defendants argue no such formula has been proffered and none can be created under these circumstances.

Defendants' first response ultimately suggests that the case is too complex, involving as it does some 250 insurers. Their argument proves too little. Complexity does not mean the issue of conspiracy does not predominate. Defendants' argument, on analysis, simply goes to the issue of manageability, which will be considered below. The existence of agreements among individual defendants and difficulties in proof will not defeat predominance.

The differences **[**31]** between individual plaintiffs, however, pose more subtle problems. First, defendants contend not all of the insurers supplying workers' compensation insurance used the rate set by the Commissioner. Second, even in cases where the rate was utilized, the rate may have been only one of numerous factors constituting the ultimate premium. These questions ultimately ask, "Who was a member of the conspiracy?" Plaintiffs, of course, bear the burden of demonstrating participation in the conspiracy to boycott. But proof of **[*110]** which insurers sold boycott rate based insurance does not strike the Court as dauntingly difficult. If "yes," the insurer is in; if "no," it will be dismissed, as would any non-liable party.

The multiple factors which affect rates may cause difficulties, but are equally unavailing to defendants. As discussed, the defendants will be only those insurers who sold rate based insurance and joined the conspiracy. This argument actually relates to damages rather than impact or injury. *In re Wirebound Boxes, 128 F.R.D. at 271*. ***HN22***[🡅] "Common proof of impact is possible even though prices" are individually negotiated. *Id.* "Proof of impact typically follows proof of a price-fixing conspiracy **[**32]** where the defendants are shown to have sufficient market power." *Id.* 128 F.R.D. 271-272; *Gentry, 102 F.R.D. at 495*. Although damage amounts may vary among plaintiffs, this fact alone, particularly in antitrust actions, will not defeat certification.

Plaintiffs offer expert affidavits suggesting ease of calculation. At this chronologically late, but litigation-early stage, the Court suggests that such a calculation is probably not as simple as plaintiffs claim. On the other hand this determination does not seem as incomprehensibly difficult as defendants threaten. ***HN23***[🡅] Individual questions of damages are often a problem encountered in an antitrust action and are rarely a barrier to certification. *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977)*.

Separate mini-trials, a special master, later stratification of the class, or a magistrate may be available to resolve such issues. In this action plaintiffs must demonstrate a conspiracy and its impact, not necessarily on an individual basis; those questions predominate over any secondary and individual questions of damages.

2. *Superiority*

HN24[🡅] In considering whether a class action is the superior method of proceeding, a court should **[**33]** consider:

> (A) the interest of members of the class in individually controlling the prosecution for defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(b)(3)(A)-(D), Fed.R.Civ.P. Manageability is a real issue.

But defendants' parade of horrors is chimerical. They know, as does this Court, that this case can be managed. It does not take a battalion of rocket scientists to handle a large case -- although each side clearly have talented and competent counsel. If the plaintiffs' claims are substantiated, a question as to which the Court presently has no opinion, the class action mechanism is clearly the most efficient means of resolving the many claims which may be asserted. The Court is confident that stated classes or subclasses will make the case comfortably -- if not easily -- manageable. If the case were not handled as a class, thousands of small claims would be either brought or unjustly **[**34]** abandoned. The first possibility would be a flood of cases, the second would involve individual claims abandoned because of cost.

HN25[] The Court is mindful that dismissal for management reasons is never favored. *In re South Central States Bakery Products, 86 F.R.D. at 423*. The vehicle of class action is meant to permit plaintiffs with small claims and little money to pursue a claim otherwise unavailable. *In re Endotronics,* mem. op. at 16; *State of Minnesota, 44 F.R.D. at 570*. A contrary rule would "essentially preclude class treatment whenever separate issues had to be tried." *Simer v. Rios, 661 F.2d 655, 672 n. 29 (7th Cir. 1981)*, *cert. denied, 456 U.S. 917, 102 S. Ct. 1773, 72 L. Ed. 2d 177 (1982)*. If, as this case develops, class treatment proves to be inappropriate, the Court may exercise its discretionary powers pursuant to *Rule 23(c)* and adjust the action accordingly.

Based on the files, records, and proceedings herein, and for the reasons set forth above, IT IS ORDERED that:

Plaintiffs' motion for class certification of a class consisting of:

> **[*111]** all employers (excluding defendants and co-conspirators, including any subsidiary or affiliate thereof) with places of business **[**35]** within the State of Minnesota required by Minnesota law to carry workers' compensation insurance coverage, who between June 8, 1979, and April 25, 1983, purchased policies of workers compensation insurance from one or more of the named defendants, including any subsidiary or affiliate thereof, or from one or more other member insurance companies of the Workers Compensation Insurers' Rating Association of Minnesota

is granted.

Dated: March 20th, 1990

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American Medical Transport, Inc. v. Curtis-Universal, Inc.

Supreme Court of Wisconsin

November 28, 1989, Argued ; March 22, 1990, Decided

No. 88-0257

Reporter
154 Wis. 2d 135 *; 452 N.W.2d 575 **; 1990 Wisc. LEXIS 103 ***; 1990-1 Trade Cas. (CCH) P68,962

AMERICAN MEDICAL TRANSPORT OF WISCONSIN, INC., Lifeline Ambulance Service, Inc., and Cross Ambulance Service, Inc., Plaintiffs-Appellants-Petitioners, v. CURTIS-UNIVERSAL, INC., Paratech Ambulance Service, Inc., Meda-Care Ambulance Service, Inc., R.A. Zehetner & Associates, Inc., d/b/a Bell Ambulance, and City of Milwaukee, Defendants-Respondents

Prior History: [*1]** Reversing and remanding 148 Wis. 2d 294, 435 N.W.2d 286 (Ct. App. 1988).

Review of a decision of the Court of Appeals.

Disposition: *By the Court*. -- Decision of the court of appeals in respect to the matters reviewed is reversed and the cause is remanded to the circuit court for trial.

Core Terms

ambulance service, ambulance, anticompetitive, court of appeals, anti trust law, home-rule, providers, powers, legislative intent, ordinance, restraint of trade, municipalities, allegations, authorize, immune, designated, statewide concern, circuit court, assigned, fire department, matter of law, service area, favored, antitrust statute, participated, dispatcher, antitrust, contracts, emergency, practices

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

HN1[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

See Wis. Stat. § 133.03.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Motions to Dismiss, Failure to State Claim**

A complaint should be dismissed as legally insufficient only if it is quite clear that under no conditions can the plaintiff recover.

Governments > Local Governments > Home Rule

Governments > State & Territorial Governments > Relations With Governments

HN3[] **Local Governments, Home Rule**

See *Wis. Const. art. XI, § 3(1)*.

Governments > Local Governments > Home Rule

Governments > State & Territorial Governments > Relations With Governments

HN4[] **Local Governments, Home Rule**

See *Wis. Stat. § 62.11(5)*.

Governments > Local Governments > Home Rule

Governments > State & Territorial Governments > Relations With Governments

HN5[] **Local Governments, Home Rule**

See *Wis. Stat. §§ 59.07(41)* and *60.565*.

Governments > Legislation > Interpretation

HN6[] **Legislation, Interpretation**

See *Wis. Stat. § 133.01*.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN7[] **Regulated Practices, Private Actions**

If a scheme or enterprise that has been merely petitioned or lobbied for by private persons is found to violate antitrust laws, liability will not be imposed on those private persons for that conduct alone.

Counsel: For the plaintiffs-appellants-petitioners there were briefs by *Darryl S. Bell, David R. Cross, David L. Bourne* and *Quarles & Brady*, Milwaukee and oral argument by *Mr. Cross*.

For the defendants-respondents, Curtis-Universal, Inc. and Paratech Ambulance Service, Inc., there was a joint brief by *Randall L. Nash, Claude J. Krawczyk* and *O'Neil, Cannon & Hollman, S.C.*, Milwaukee, and *Robert L. Hersh*, Mequon and oral argument by *Mr. Nash*.

For the defendant-respondent, Meda-Care Ambulance Service, Inc., there was a brief by *Elizabeth Adelman* and *Adelman & Adelman*, Milwaukee and oral argument by *Elizabeth Adelman*.

For the defendant-respondent, City of Milwaukee, there was a brief by *Scott G. Thomas, Thomas J. Beamish* and *Rudolph M. Konrad*, assistant city attorneys, and oral argument by *Mr. Konrad*.

For the defendant-respondent, R.A. Zehetner **[***2]** & Associates, Inc. d/b/a Bell Ambulance, there was a brief by *Sherman S. Abrahamson* and *Patricia Clifton Smith*, Milwaukee.

Judges: Heffernan, Chief Justice.

Opinion by: HEFFERNAN

Opinion

[*138] **[**576]** This is a review of a decision of the court of appeals [1] that affirmed the order of the circuit court for Milwaukee county, Lee E. Wells, Circuit Judge, dismissing the complaint of the plaintiffs against the City of Milwaukee (City) and four private ambulance service providers for alleged violations of the Wisconsin ***antitrust law***, *sec. 133.03*, Stats. We reverse the decision of the court of appeals and remand to the circuit court for further proceedings, because we conclude that the city of Milwaukee is not immune from antitrust liability under the alleged circumstances, and because we conclude that the individual ambulance companies who are defendants, under the allegations of the complaint, participated with the city of Milwaukee in an unlawful conspiracy to restrain trade.

[*3]** The plaintiffs in this case are three private companies legally certified to do business in the city of Milwaukee. They are American Medical Transport of Wisconsin, Inc., Lifeline Ambulance Service, Inc., and Cross **[*139]** Ambulance Service, Inc. The plaintiffs have alleged that the city of Milwaukee's adoption of a city-wide emergency ambulance service system pursuant to an ordinance and the defendant ambulance companies' participation in the system violate Wisconsin's ***antitrust law***.

Under the system, the City requires the certification of private ambulance companies as a prerequisite to providing service in the City. All fees and rates for service are set by the City. The Milwaukee Fire Department was designated as the central dispatcher. It receives and allocates all calls for emergency service assistance in the City of Milwaukee. If the emergency is deemed life-threatening, fire department personnel respond to the call, for only the **[**577]** fire department has paramedic personnel. If the emergency is deemed not life-threatening, the fire department dispatcher assigns one of the private ambulance companies to respond.

The City divided the Milwaukee area into four sections **[***4]** designated as service areas. By a process not stated in the complaint, a private ambulance company is assigned primary responsibility for each service area. Thus, only four of seven legally certified ambulance companies were assigned a service area. These four companies, together with the City, are the defendants in this action. The three certified ambulance companies which were not assigned to a designated service area are the plaintiffs.

In the event a non-life-threatening emergency call is received and the designated service company is not able to respond, the fire department dispatcher then assigns one of the three non-designated companies to respond. They are called only as back-up where the designated providers cannot respond. The back-up or support status to which the plaintiffs are relegated is defined by Milwaukee Ordinance sec. 75-15(a) as "[a] status whereby a **[*140]**

[1] *American Medical Transport et al. v. Curtis-Universal, Inc., the City of Milwaukee, et al., 148 Wis. 2d 294, 435 N.W.2d 286 (Ct. App. 1988)*.

certified provider, in lieu of being assigned a service area, receives dispatch calls to which the designated provider within the assigned service area cannot promptly respond." [2]

[*5]** The plaintiffs, the back-up providers, allege that, by enacting and implementing the ordinance, the defendant city has chosen "to eliminate competition in the emergency ambulance services market," because the arrangement adopted results in almost all calls going to the favored four designated providers.

The plaintiffs allege that, by allocating markets and relegating them to a back-up status, they are deprived of their market share and have sustained, and continue to sustain, economic damages, despite the fact that they are certified ambulance service providers. The plaintiffs allege that the defendants, *i.e.*, City and the favored four providers, "By jointly creating the Section 75-15 system . . . have contracted, combined or conspired to restrain trade in ambulance services in the City of Milwaukee," in violation of *sec. 133.03(1)*, Stats. [3] They also allege **[*141]** that the City, by its conduct, has allocated monopoly power to itself.

[*6]** An additional count -- that the City and the four providers conspired to publish notices, rates, and schedules which falsely represented that ambulance calls could only be placed through the fire department telephone dispatcher -- was dismissed by the circuit court. The court of appeals reversed that determination, stating that there were issues of fact that must be determined. The court of appeals remanded on that count for further consideration, and we denied defendants' cross-petition for review of that issue. Accordingly, that allegation of conspiracy to make fraudulent representations is not before us.

In the circuit court each of the defendants brought a motion to dismiss under sec. 802.06(2), Stats., that the complaint failed to state a claim under *sec. 133.01, et* ***[**578]*** *seq.*, upon which relief could be granted. The circuit court granted those motions and dismissed the complaint. It concluded that the City was authorized to implement the anticompetitive ordinance under the home-rule authority granted by *sec. 62.11(5)*, Stats., and the rationale of *Town of Hallie v. City of Chippewa Falls, 105 Wis. 2d 533, 314 N.W.2d 321 (1982)*. **[***7]** The judge acknowledged that, under the facts, there appeared to be a *per se* restraint of trade but it was not unlawful, because the restraint by the City of Milwaukee was authorized by the home-rule statute. He exonerated the four ambulance companies, because he believed they did nothing more than apply for the designation as providers **[*142]** as set forth in the ordinance, which the judge had already concluded did not provide for an illegal restraint of trade. [4] He decided that, despite sufficient allegations of a combination in restraint of trade, the defendants were "protected" as a matter of law.

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[2] Milwaukee Ordinance 75-15(a) became effective on December 23, 1983.

[3] ***HN1***[] **133.03 Unlawful contracts; conspiracies. (1)** Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. Every person who makes any contract or engages in any combination or conspiracy in restraint of trade or commerce may be fined not more than $ 100,000 if a corporation, or, if any other person, $ 50,000, or be imprisoned for not more than 5 years, or both.

> **(2)** Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce may be fined not more than $ 100,000 if a corporation, or, if any other person, $ 50,000, or be imprisoned for not more than 5 years, or both.
>
> **(3)** As an alternative to the criminal penalties for violation of this section, the department of justice or district attorney may bring an action for a civil forfeiture. In an action for a civil forfeiture under this subsection a corporation may be required to forfeit not more than $ 100,000 and any other person may be required to forfeit not more than $ 50,000.

It is interesting to note that nowhere in the complaint is *sec. 133.03*, Stats., cited. All the parties assume, however, that the complaint purports to invoke the provisions of that statute.

[4] He also alluded in passing to the plaintiffs' failure to allege in their complaint a combination between the four defendants and the City. This point was not commented upon by the court of appeals. We discuss this issue *infra*, majority opinion at 154.

The plaintiffs appealed to the court of appeals, which unanimously affirmed the circuit court's order of dismissal. Like the circuit court, the court of **[***8]** appeals concluded, stating that it used the reasoning of *Town of Hallie*, that the home-rule statute in itself provided the necessary legislation to justify the restraint of trade. It concluded that, because no specific statute limited its broad home-rule powers, the City of Milwaukee had the authority to implement the ambulance system despite its anticompetitive effect.

The court of appeals also gave weight to *secs. 59.07(41)* and *60.565*, Stats., applicable to counties and towns, respectively, authorizing them to contract for ambulance services, stating, "[T]he legislature has recognized the importance of permitting local units of government to provide for ambulance service within their areas." *148 Wis. 2d at 304*. Thus, although without explication, the court of appeals concluded that these statutes impliedly permitted the City of Milwaukee to enter into anticompetitive contracts. No support was offered for that conclusion. The theory was that the specific statute would have allowed counties and towns to enter into a similar anticompetitive ambulance system. A further assumption was that only because counties and towns did not have home-rule powers **[***9]** was there special legislation necessary in respect to them. But similar authorization **[*143]** was not required for cities and villages with home-rule powers. [5]

[*10]** Because the court of appeals held that the general scheme adopted by the City of Milwaukee was within its home-rule powers, it did not find it necessary to discuss the separate liability of the four favored defendants other than holding as a matter of law that, because the ordinance passed home-rule muster and therefore constituted legislatively authorized conduct, the private defendants could not be liable. The court stated, "Actions by the defendant ambulance companies that are necessary for the regulatory scheme [i.e., anticompetitive] established by the ordinance to work must be similarly protected." *148 Wis. 2d at 307*. It had no reason to discuss **[**579]** the *Noerr-Pennington* doctrine. [6] *148 Wis. 2d at 307,* ***[*144]*** *n.4*.

[*11]** On this review of the decision of the court of appeals, we confront the question of that court's correctness in affirming the circuit court's dismissal of the complaint. "In testing the sufficiency of the complaint the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true." *Prah v. Maretti, 108 Wis. 2d 223, 229, 321 N.W.2d 182 (1982)*. ***HN2***[] A complaint should be dismissed as legally insufficient "only if 'it is quite clear that under no conditions can the plaintiff recover.'" *Evans v. Cameron, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985)*. The court of appeals correctly stated:

> We may not affirm that dismissal unless, looking at the allegations in a light most favorable to the plaintiffs, "it appears to a certainty that no relief can be granted under any set of facts that [they] can prove in support of [the plaintiffs'] allegations."

148 Wis. 2d at 299-300.

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[5] The court of appeals recognized that the City of Milwaukee had attempted to make sure of the legality of its proposed ambulance system by seeking legislation that would specifically validate its anticompetitive ordinance, and that legislation, even in a watered-down version, never became law because of a governor's veto. The court of appeals properly, we conclude, gave little weight to this legislation that did not pass even though this bit of legislative history reveals that the City of Milwaukee's legal department was worried that the ordinance violated the state's ***antitrust law***. We do not believe, however, that the subjective belief of the Milwaukee City Attorney's office in respect to this law is significant. Nor can we conclude that the failure of the bill to pass was because it was the legislative intent to demonstrate that the Milwaukee ambulance ordinance violated antitrust laws. We reach this conclusion even though the governor's veto message stated as one reason for vetoing the bill that this law might have anticompetitive effects. We consider this bit of legislative history to be substantially neutral on the question.

[6] Private ambulance company defendants argued that they were protected by the *Noerr-Pennington* doctrine, *i.e.*, that there could be no liability in circumstances where persons obtained a competitive advantage by exercise of their free-speech prerogative to petition the legislature for special status. *See, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657 (1965)*.

"The purpose of the motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint." *Evans, supra at 426*.

The question is whether, **[***12]** as a matter of law, giving the facts a liberal interpretation in favor of the plaintiffs, the City and the four favored ambulance companies are, as a matter of law, immune from state antitrust liability.

The court of appeals correctly stated the standard for review, but we conclude it erred as a matter of law by misinterpreting what is clearly the controlling opinion: **[*145]** *Town of Hallie v. City of Chippewa Falls, 105 Wis. 2d 533, 314 N.W.2d 321 (1982)*.

It should be noted that *Town of Hallie* relied entirely upon state law. While that decision recognized that *sec. 133.03*, Stats., is Wisconsin's version of the Sherman Act in defining and prohibiting unlawful restraints on trade, and that federal law is persuasive in that respect, the particular defense asserted in *Town of Hallie*, the *Parker v. Brown* [7] or "state action" defense under federal law was held to be inapplicable. The City in *Town of Hallie* argued that the state-action immunity under the federal law was analogous to the claimed immunity from state ***antitrust law*** because the city's conduct was the result of its legislative action. The court pointed out that "state action" **[***13]** was immune from federal ***antitrust law***, because of the general principles of federalism that control the relationship of the government of the United States with the sovereign states, and "on the specific constitutional limits on federal power contained in the tenth and eleventh amendments," citing Note, "*Parker v. Brown* Revisited: The State Action Doctrine After *Goldfarb, Cantor* and *Bates*," 77 Columbia Law Review 898, 899 n. 6 (1977). *105 Wis. 2d at 537*.

The *Town of Hallie* court said it was not the intent of the federal government to control state public policy through the federal antitrust laws. Hence, under *Parker v. Brown, supra*, if a municipality were acting under state authority, its action would be state action and not subject to federal ***antitrust law***.

Chief Justice Beilfuss, writing for a unanimous court in *Town of Hallie*, carefully pointed out that there is no independent sovereignty in respect to the **[***14]** relations of a municipality and the state. "Cities are creatures of **[*146]** the state, derive their power from it, and are not recognized as independent sovereigns." *105 Wis. 2d at 539*. Although the *Town of Hallie* court distinguished the defense offered by the city from the *Parker v. Brown* defense, it acknowledged a similarity in basic rationale.

[580]** *Town of Hallie* adopted the language of Milton Handler, [8] and stated that "the overriding issue in cases like *[Town of Hallie]* is 'the reconciliation of two ostensibly conflicting enactments of a *single* sovereign . . . . The job quite simply is to ascertain, as best as can be, the intent of the legislators.'" *105 Wis. 2d at 538*.

Town of Hallie adopted the methodology to be utilized where municipal corporations are involved: "When dealing with actions by municipalities, we hold that the test as to the applicability **[***15]** of the state ***antitrust law*** is whether the legislature intended to allow municipalities to undertake such actions." *105 Wis. 2d at 539*.

Thus, we confront a question of statutory interpretation. We follow the methodology set forth in *Town of Hallie*, taking into consideration "the home rule powers of cities, the type of conduct undertaken . . . and the general statutory framework set up by the legislature in the particular field." *105 Wis. 2d at 539*.

HN3[] The Wisconsin home rule amendment to the constitution, art. XI, sec. 3(1), provides:

> **(1)** Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

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[7] *317 U.S. 341 (1943)*.

[8] Handler, "Antitrust -- 1978," Columbia Law Review 1363, 1378 (1978).

[*147] ***HN4***[] *Section 62.11(5)*, Stats., the statutory home rule statute, provides:

> **(5)** Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable **[***16]** waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

It is apparent the powers of a municipality to determine its local affairs are broad indeed; but, as the constitution makes clear, the broad grant of constitutional authority is subject to "enactments of the legislature of statewide concern as with uniformity shall affect every city or every village."

The court of appeals in the instant case appeared to consider that some actions of a city "might . . . be sufficiently within an area of local concern to be immune from antitrust regulation." *148 Wis. 2d at 304*. We think this improperly emphasizes the primacy of local concern. A plain reading of the constitutional provision reveals that it is precisely the areas of local **[***17]** affairs that will be superseded by legislation of statewide concern. Only if there is no legislation of statewide concern on the particular subject is the city afforded primacy to manage its local affairs in that respect.

As *Town of Hallie* points out, we look to the legislation that is of statewide concern; and unless there is **[*148]** evidence that it was the legislative intent to make that legislation not applicable to localities by authorizing contrary or inconsistent conduct by the city, the statewide law controls as a matter of legislative intent.

Town of Hallie makes clear, and we reaffirm that holding, that *sec. 133.03 et seq.*, the Wisconsin ***antitrust law***, is legislation of statewide concern that with uniformity affects every city and village. Accordingly, unless it can be said that the legislative scheme is at least impliedly of a nature to authorize the anticompetitive conduct of the city, the City of Milwaukee has, if the factual allegations are proved, violated the Wisconsin ***antitrust law***. The ***antitrust law*** manifestly indicates a legislative **[**581]** intent to subordinate the city's home-rule authority to its provisions.

The additional question is whether **[***18]** the legislature has impliedly authorized an exception from the antitrust laws in respect to certain types of conduct. Although Milwaukee ordinance sec. 75-15 is within the home-rule powers conferred by *sec. 62.11(5)*, Stats., the exercise of that power by an admittedly anticompetitive ordinance, contrary to the conclusion of the court of appeals, is in direct conflict with a law of statewide concern, unless there are implied exceptions that may insulate the conduct of the City. The question is whether there is any evidence extraneous to the antitrust statutes that indicates the legislature did not intend their application.

In *Town of Hallie*, this court looked to other statutory enactments to conclude that the legislature did not intend to curtail the City of Chippewa Falls' ability to tie in the grant of sewer services, when obliged to provide such services, with a proceeding to annex to the city the areas to be served. *See Town of Hallie, 105 Wis. 2d at 541*.

[*149] Following that same methodology, we examine some of the legislation extraneous to the antitrust statute that might guide us in determining legislative intent. Is there evidence **[***19]** that can reasonably lead to the conclusion that the legislature would consider an anticompetitive ordinance such as sec. 75-15 reasonable and not violative of the antitrust statutes?

With this purpose in mind, we look to other statutes to determine whether the legislature contemplated the type of anticompetitive activity engaged in by the City of Milwaukee. In addition to their home-rule power pursuant to *art. XI, sec. 3(1), of the Wisconsin Constitution* and *sec. 62.11(5)*, Stats., defendants rely on a number of statutes which they claim show the legislative authorization for their ambulance service system. ***HN5***[] They cite *secs. 59.07(41)* and *60.565*, Stats., which authorize counties and towns (which do not have home-rule authority) to operate emergency medical services:

> Section 59.07 General powers of [county] board. **(41)** Ambulances. Purchase, equip, operate and maintain ambulances and *contract for* ambulance service for conveyance of the sick or injured and make reasonable charges for the use thereof. [Emphasis supplied.]

> Section 60.565 Ambulance service. The town board shall *contract for* or operate and maintain ambulance services unless such services are provided by **[***20]** another person. The town board may purchase equipment for medical and other emergency calls. [Emphasis supplied.]

The City argues that the reason the legislature passed these statutes was to grant the authority to counties and towns which had already been granted to cities through their home-rule powers. Defendants add that it would be absurd to allow counties and towns to contract **[*150]** for ambulance service systems while prohibiting cities from doing the same thing. In addition, the City relies on secs. 146.35(3) and 146.50(9), Stats., which contemplate operation of emergency medical services by a municipality. [9] The city also points to sec. 146.70 which authorizes municipalities to create a **[**582]** centralized emergency telephone system or "911" system, which may also have anticompetitive effects on the provision of emergency services.

[*21]** The court of appeals was persuaded that secs. 59.07(41) and 60.565, Stats., showed that the legislature contemplated the type of anticompetitive ambulance service system developed by the City. 148 Wis. 2d at 304. The court of appeals relied on the "contract for" language of these statutes. While these statutes clearly **[*151]** authorize local government units to contract for ambulance service in the manner therein specified, we cannot conclude that these statutes authorize the anticompetitive, monopolistic regulation adopted by the City of Milwaukee. Although municipalities have the authority to provide ambulance services to its citizens, they are still required to do so in the most competitive manner feasible. The importance of competition in a free society was well stated in the opinion of the United States Supreme Court in *City of LaFayette v. Louisiana Power & Light Co, 435 U.S. 389, 398, n.16 (1978)*: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise." In an equally emphatic statement, our Wisconsin legislature has required us to interpret the antitrust laws in a manner that **[***22]** will promote a maximum level of competition:

> ***HN6***[] **133.01 Legislative intent.** The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

Thus, as a matter of general state policy, explicitly declared by the legislature, we should not lightly reach the conclusion that monopoly or restraint of trade is **[*152]** authorized by extraneous statutes that do not quite clearly

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[9] Section 146.35(3), Stats., provides:

> **(3)** Emergency medical services programs. Any county, municipality, hospital or combination thereof may, after submission of a plan approved by the department, conduct a program utilizing emergency medical technicians -- advanced (paramedics) for the delivery of emergency medical care to the sick and injured at the scene of an emergency and during transport to a hospital, while in the hospital emergency department, and until care responsibility is assumed by the regular hospital staff. Nothing in this section shall be construed to prohibit the operation of fire department, police department or other emergency vehicles utilizing the services of emergency medical technicians -- advanced (paramedics) in conjunction with a program approved by the department. Hospitals which offer approved training courses for emergency medical technicians -- advanced (paramedics) should, if feasible, serve as the base of operation for approved programs utilizing emergency medical technicians -- advanced (paramedics).

Section 146.50(9), Stats., provides for free training by the Department for any person who holds an ambulance attendant license or an ambulance service provider license and who is an employee of a county, city, village, or town.

indicate that intent -- an intent made clear by the statutes relied upon in *Town of Hallie. See,* Town of Hallie, 105 Wis. 2d 541, n.5 and n.6. **[***23]**

In the first place, we cannot reasonably conclude that the authority of towns and counties to "contract for" ambulance services evinces a legislative intent to contract in a way that leads to monopoly or restraint of trade. The defendants, without justification, would have us adopt the predicate that the legislation in respect to towns and counties authorizes governments of those classifications to legally engage in the same type of regulation and restraint as practiced by the City of Milwaukee. We do not in this case have reason to examine whether ambulance service contracts entered into by towns and counties are violative of antitrust statutes. However, we cannot assume, in the present posture of this case, that sec. 59.07(41) and sec. 60.565, Stats., permit those governmental entities to contract for ambulance services in an anticompetitive manner. Thus, even if the legislature passed these statutes to fill the void in the powers of towns and counties, because they did not otherwise have authority to enter into ambulance service contracts, we cannot conclude that anticompetitive practices were validated by the legislature and, by *ipse dixit*, conclude the same anticompetitive **[***24]** practices are appropriate for cities under their home-rule power.

While we decide the question of the City's liability or immunity from the Wisconsin ***antitrust law*** on the basis of Wisconsin law alone, federal antitrust cases may, however, in many cases, be instructive and persuasive. Gold Cross Ambulance and Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983), involved a question of immunity under the doctrine of *Parker v. Brown, supra*. The federal court looked **[**583]** to the enabling legislation **[*153]** to determine whether it was the legislative intent that state action displace competition. It found that explicit state policy by language in the statute, "to contract with *one* or more" (emphasis supplied) ambulance company operators. 705 F.2d at 1011. Because there was specific legislative authority to contract with *one* operator, the federal court considered this to be action of a sovereign state to validate a monopoly. The statutes posed by the defendants in this case which they assert authorize anticompetitive practices lack the specificity of the Missouri statute and, hence, under the general policy provisions **[***25]** of sec. 133.01, Stats., favoring competition, we cannot reasonably construe these statutes as displacing competition sought to be assured by the legislative guarantees of the antitrust statute. Our examination of the opinion of the court of appeals leads us to conclude the court of appeals did not give due weight to the strong procompetitive admonitions of sec. 133.01 in evaluating the effect of these statutes. [10]

We conclude that the plaintiffs have stated a claim upon which relief can be granted. The conduct alleged to have been engaged in by the City is anticompetitive and, if the facts **[***26]** alleged can be proved, relief may follow. The arguments made by the defendant City that the anticompetitive conduct was contemplated and approved by the legislature and, hence, was not violative of the Wisconsin ***antitrust law*** cannot be supported after **[*154]** an analysis of the legislative pronouncements that the City insists validates its action. The decision of the court of appeals affirming the dismissal of the complaint against the City, therefore, must be reversed.

The dismissal of the claim against the favored four ambulance companies presents a different question. The court of appeals was able to facilely affirm the dismissal of the complaint against the private defendants because its analysis led to the conclusion that they were not participants in a combination or conspiracy in restraint of trade -- that the conduct of the City and those who participated in that conduct were acting in accordance with the intent of the legislature and, hence, were immune from sanctions.

Because we hold that a claim of an antitrust violation was stated against the City, we cannot dispose of the claims against the individual ambulance service companies in that way.

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[10] We also question the court of appeals assertion, p. 302, n.1, that cities have more leeway for anticompetitive conduct under state law than under federal law. The strong statement of Wisconsin legislative policy in favor of competition in sec. 133.01, Stats., tends to lead to the opposite conclusion. *See*, Comment, "Municipal Antitrust Liability After *Town of Hallie v. Eau Claire*," 1986 Wisconsin Law Rev. 1039, 1058.

The posture in respect **[***27]** to them is that they participated with the City in illegal conduct. It is, however, asserted that they are protected by what the federal courts refer to as the *Noerr-Pennington* doctrine derived from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657 (1965)*. See n.6, *supra*. Essentially, these cases protect the right of free speech and, particularly, the right to petition government -- even to petition government to enact anticompetitive legislation that will benefit the petitioner. While the doctrine arose in a federal context, the constitutional concerns and right to petition government are equally applicable under state law.

The court of appeals correctly stated the applicable law when it said that the "*Noerr-Pennington* doctrine **[*155]** . . . protects advocacy and not participation." *148 Wis. 2d 294, 307, n.4*.

Airport Car Rental Antitrust Litigation, 521 F. Supp. 568, 584 (N.D. Cal. 1981), *aff'd* *693 F.2d 84 (9th Cir. 1982)*, capsulized the limits of the *Noerr-Pennington* **[***28]** doctrine when it stated:

> Private parties attempting to influence public officials to engage in commercial activities which may later be found to violate the ***antitrust law*** do not thereby become themselves liable. For liability **[**584]** to be imposed upon them, they must be *participants* in the scheme. [Emphasis supplied.]

Thus, it is clear that, ***HN7***[] if a scheme or enterprise that has been merely petitioned or lobbied for by private persons is found to violate antitrust laws, liability will not be imposed on those private persons for that conduct alone. *See*, P. Areeda, H. Hovenkamp, ***Antitrust Law***, para. 201, p. 21 (Supp. 1989).

There have been no cases brought to our attention or which we have discovered in the course of this court's research where a private party who has participated in an anticompetitive scheme is exonerated by *Noerr-Pennington*. This absence of authority fully accords with the basic premise of *Noerr-Pennington* -- to protect the citizens' right to free speech and to petition government. It goes no further than that.

Accordingly, if we can conclude that the allegations of the complaint may be construed to allege participation in an illegal restraint **[***29]** of trade, a cause of action is spelled out against the ambulance company defendants.

Paragraph 18 of the complaint alleges:

> By jointly creating the Section 75-15 system . . . the Defendants have contracted, combined or **[*156]** conspired to restrain trade in ambulance services in the City of Milwaukee.

As pointed out earlier in this opinion, all reasonable inferences that can be drawn from the words of the complaint may be used by a court in determining whether a claim has been stated upon which relief can be granted. Dismissal cannot be affirmed unless, looking at the allegations in a light most favorable to the plaintiffs, "it appears to a certainty that no relief can be granted under any set of facts that [they] can prove in support of [their] allegations." *Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 732, 275 N.W.2d 660 (1979)*.

We conclude that a reasonable inference to be drawn from the allegations of Paragraph 18 is that the defendant ambulance companies did more than petition government. They participated in an illegal restraint of trade. Whether such allegations can be proved must abide the trial of this case, but we conclude **[***30]** that a reasonable inference from the complaint is that the individual ambulance provider defendants cannot, at this juncture, claim exoneration because their only conduct was to exercise their right of free speech. There may, of course, come a time that, under the facts, the state equivalent of the *Noerr-Pennington* doctrine may be reasserted, but the complaint -- as we conclude a reasonable interpretation requires -- forecloses that defense as a matter of law at this juncture. Accordingly, we reverse the decision of the court of appeals which affirmed the circuit court's dismissal against the defendant private ambulance providers.

[*157] *By the Court*. -- Decision of the court of appeals in respect to the matters reviewed is reversed and the cause is remanded to the circuit court for trial.

Biljac Assocs. v. First Interstate Bank

Court of Appeal of California, First Appellate District, Division Two

March 22, 1990

Nos. A041024, A041783

Reporter

218 Cal. App. 3d 1410 *; 267 Cal. Rptr. 819 **; 1990 Cal. App. LEXIS 542 ***

BILJAC ASSOCIATES, Plaintiff and Appellant, v. FIRST INTERSTATE BANK OF OREGON, N.A., et al., Defendants and Respondents. ERWIN C. NIELSEN et al., Plaintiffs and Appellants, v. FIRST INTERSTATE BANK OF OREGON, N.A., et al., Defendants and Respondents

Notice: [*1]** Opinion certified for partial publication - Pursuant to rules 976 and 976.1, California Rules of Court, this opinion is certified for publication except for parts I and V.

Subsequent History: The petition of all appellants for review by the Supreme Court was denied June 27, 1990.

Prior History: Superior Court of the City and County of San Francisco, Nos. 824289 and 829062, Lucy Kelly McCabe and Stuart R. Pollak, Judges.

Core Terms

summary judgment, conspiracy, rates, banks, borrowers, cases, antitrust, prime rate, Cartwright Act, prices, trade association, declarations, cause of action, interest rate, moving party, conspired, negate, loans, alleged conspiracy, interpreting, plaintiffs', abandoned, courts, limits, burden of proof, middle-market, evidentiary, floating, summary judgment motion, unfair competition

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Supporting Materials, Affidavits**

Under California's summary judgment statute, supporting and opposing affidavits or declarations shall be made on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated. Cal. Civ. Proc. Code § 437c(d). Evidentiary objections not made either in writing or orally at the hearing are deemed waived. *Cal. Civ. Proc. Code § 437c(b)*. The court, in ruling on summary judgment, may not consider matters to which objections have been made and sustained by the court. *Cal Civ. Proc. Code. § 437c(c)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > ... > Freedom of Speech > Free Press > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN2[] **Standards of Review, De Novo Review**

An appellate court reviews summary judgments de novo. The parties remain free to press their admissibility arguments on appeal, the same as they did in the trial court. Identifying particular flaws in the lower court's reasoning has no value because summary judgment must be upheld if correct on any ground--regardless of wrong reasons which may have guided the court. More generally, it is presumed on appeal that a judge has not relied on irrelevant or incompetent evidence.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN3[] **Summary Judgment, Supporting Materials**

Summary judgment is a drastic measure which should be used with caution so that it does not become a substitute for trial. Affidavits of the moving party are strictly construed and those of the opponent liberally construed, with doubts as to the propriety of granting the motion resolved in favor of the opposing party.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Standards of Review, De Novo Review**

Summary judgment raises only questions of law, which are reviewed independently. An appellate court's review tracks the same, three-step process used by the trial court. First, the court identifies the issues framed by the pleadings. Second, the court determines whether the moving party has established facts sufficient to negate the opponent's claim. Third, if that burden is met, the court examines whether the opposing party's showing discloses that triable issues of material fact exist.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

In antitrust actions brought under the Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, California courts look to interpretations of its federal law counterpart, the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, for guidance because the federal act was a model for the California statute in most respects.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN6[] **Summary Judgment, Motions for Summary Judgment**

There is nothing in *Cal. Civ. Proc. Code § 437c* that lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, the moving party must generally negative the matters that the resisting party would have to prove at the trial. The placement of the burden of proof at trial does not affect the showing required for a summary judgment in California.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN7[] **Reviewability of Lower Court Decisions, Preservation for Review**

An appellant must fully present all arguments in briefs rather than incorporate them by reference from papers filed below.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN8[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

See *Cal. Bus. & Prof. Code § 16720*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Cal. Bus. & Prof. Code § 17200*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

Concerted activity is essential to a Cartwright Act claim, *Cal. Bus. & Prof. Code § 16700 et seq.*, or Sherman Antitrust Act claim, *15 U.S.C.S. § 1 et seq.*, because those acts prohibit only contracts, combinations, or conspiracies in restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, is not concerned with individual conduct, no matter how anticompetitive.

Evidence > Inferences & Presumptions > General Overview

Evidence > Admissibility > Statements as Evidence > Pleas & Related Statements

HN12[] **Evidence, Inferences & Presumptions**

See *Cal. Evid. Code § 410*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN13[] **Regulated Practices, Trade Practices & Unfair Competition**

Trade association activities tend to promote competition and are lawful. Gathering and compiling industry information and disseminating it among members does not offend antitrust policy, even though to do so naturally tends to stabilize that trade or business and to produce uniformity of price and trade practice. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. Members do not become conspirators merely because they gather and disseminate information bearing on the business in which they are engaged and make use of it in the management and control of their individual businesses. Only when they take concerted action to restrain trade based on such information do they act illegally.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Commercial borrowers brought an action against banks and bank trade associations under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) and unfair competition laws (*Bus. & Prof. Code, § 17200 et seq.*) for conspiracy to set and manipulate variable interest rates on loans made to "middle market" commercial borrowers. The trial court granted summary adjudication of issues for defendants as to the borrowers' first three causes of action (Cartwright Act violation and two unfair competition theories). Since these were the only causes of action affecting the associations, their motion for summary judgment was granted. One bank and its holding company were also granted summary judgment after they prevailed on their motion for summary adjudication as to the only other cause of action affecting them. (Superior Court of the City and County of San Francisco, Nos. 824289 and 829062, Lucy Kelly McCabe and Stuart R. Pollak, Judges.)

The Court of Appeal affirmed. It held that the bank and its holding company had satisfied their burden, in moving for summary adjudication of issues, of negating the borrowers' causes of action alleging unfair competition and Cartwright Act violations, since the bank's declarants, who were solely responsible for determining its loan rates, denied receiving or sharing competitive information with other banks or giving notice of rate changes to others in advance of making them known to the general public, and the bank holding company submitted declarations showing that it was not a bank and did not have a prime rate or participate in setting commercial rates. The court held that the bank's and its holding company's motions for summary adjudication of issues were properly granted. The borrowers were relying on a theory that the conspiracy was not to fix prices but to fix a new system that resulted in noncompetitive high rates for middle market borrowers. However, the court held, the only logical inference was that the movement from a fixed prime to individually set primes was due to market forces, since it was undisputed that the changes were industry-wide and evolved over almost 10 years, with different banks trying and ultimately abandoning many alternatives during that time. Finally, the court held, the trial court properly granted summary adjudication of issues for the trade associations as well, since the associations offered the same evidence as did the banks and more in order to carry their burden of negating the conspiracy claim. (Opinion by Smith, J., with Benson, J., concurring. Separate concurring opinion by Kline, P. J.)

Headnotes

CA(1)[] **(1)**

Summary Judgment § 19—Evidence—Rulings on Objections.

--In an action by commercial borrowers against banks and bank trade associations for conspiracy to set and manipulate variable interest rates on loans made to "middle market" commercial borrowers, in which action defendants moved for summary adjudication of issues and the borrowers filed voluminous evidentiary objections and a request that the court give written rulings on all objections, the trial court did not commit reversible error in declining to render formal rulings on the objections, explaining that it would disregard all inadmissible or incompetent evidence in ruling. A written or other formal ruling for the record is not required under *Code Civ. Proc., § 437c, subd. (d)*, nor under Cal. Rules of Court, rules 343, 345. Express rulings were not needed for appellate review, since summary judgments are reviewed de novo. Further, being able to identify particular flaws in the trial court's reasoning would have no value, since summary judgment must be upheld if correct on any ground.

CA(2)[] **(2)**

Summary Judgment § 25—Appellate Review—Abandonment of Theory on Appeal.

--On appeal of a summary judgment in favor of defendants in an action by commercial borrowers against banks and bank trade associations for conspiracy to set and manipulate variable interest rates on loans made to "middle market" commercial borrowers, the borrowers' failure to discuss on appeal their theory that there was a conspiracy to reduce competition by having eastern banks announce rate changes, disseminate that information to western banks early in the day, and in that way produce simultaneous rate increases within a single business day, constituted an abandonment of the theory.

CA(3)[] **(3)**

Summary Judgment § 8—Affidavits—Construction.

--Summary judgment is a drastic measure that should be used with caution so that it does not become a substitute for trial. Affidavits of the moving party are strictly construed and those of the opponent liberally construed, with doubts as to the propriety of granting the motion resolved in favor of the opposing party.

CA(4)[] **(4)**

Summary Judgment § 26—Appellate Review—Scope of Review.

--Summary judgment raises only questions of law, which are reviewed independently. The appellate court's review tracks the same three-step process used by the trial court: the court identifies the issues framed by the pleadings; it determines whether the moving party has established facts sufficient to negate the opponent's claims; and if that burden is met, the court examines whether the opposing party's showing discloses that triable issues of material fact exist.

CA(5)[] **(5)**

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Role of Federal Law.

--In reviewing a judgment in an antitrust action brought under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), the court looks to interpretations of its federal law counterpart, the Sherman Antitrust Act (*15 U.S.C. § 1 et seq.*), for guidance, since the federal act was a model for the state act in most respects.

CA(6)[] **(6)**

Summary Judgment § 19—Evidence—Moving Party's Burden as Affected by Burden of Proof at Trial—Difference From Federal Rule.

--The federal rule that a party moving for summary judgment need not produce competent admissible evidence to negate elements of a claim on which the nonmoving party would bear the burden of proof at trial, and that the moving party satisfies its burden by showing--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case, is incompatible with California law interpreting *Code Civ. Proc., § 437c*. There is nothing in that statute that lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, the moving party must generally negative the matters that the resisting party would have to prove at the trial. In short, the placement of the burden of proof at trial does not affect the showing required for a summary judgment.

CA(7a)[] **(7a)** *CA(7b)*[] **(7b)**

Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Commercial Loan Rates.

--In an action by commercial borrowers against banks and bank trade associations for conspiracy to set and manipulate variable interest rates on loans made to "middle market" commercial borrowers, the trial court, in granting a summary adjudication of issues to defendants, did not err in finding that a bank and its bank holding company had satisfied their burden, in moving for summary adjudication of issues, of negating the borrowers' causes of action alleging unfair competition (*Bus. & Prof. Code, § 17200*) and a violation of *Bus. & Prof. Code, § 16720* (defining trusts). The heart of both causes of action was conspiracy. Concerted activity is essential to a claim under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), since that act prohibits only contracts, combinations, or conspiracies in restraint of trade. Defendants' declarants denied receiving or sharing competitive information with other banks or giving notice of rate changes to others in advance of making them known to the general public. The declarants, having established that they alone were responsible for determining rates, were competent to testify how rates and policy were set. Further, the bank holding company submitted declarations showing that it was not a bank and did not have a prime rate or participate in setting commercial rates.

CA(8)[] **(8)**

Appellate Review § 109—Briefs—Form and Requisites—Argument and Authority—Reference to Papers Filed Below.

--An appellant must fully present all arguments in briefs rather than incorporate them by reference from papers filed below.

CA(9)[] **(9)**

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Price Fixing—Federal Sherman Act and State Standards for Lawful Conduct.

--Both the Sherman Act (*15 U.S.C. § 1 et seq.*) and the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) proscribe price fixing--the standard for lawful competitive conduct is identical under both state and federal law.

CA(10a)[] **(10a)** ***CA(10b)***[] **(10b)** ***CA(10c)***[] **(10c)** ***CA(10d)***[] **(10d)**

Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Bank's Commercial Loan Rates—Evidence of Conspiracy.

--In an action by commercial borrowers against banks and bank trade associations for conspiracy to set and manipulate variable interest rates on loans made to "middle market" commercial borrowers, the trial court did not err in granting a bank's and its holding company's motions for summary adjudication of issues as to the borrowers' causes of action alleging unfair competition (*Bus. & Prof. Code, § 17200*) and a violation of *Bus. & Prof. Code, § 16720* (defining trusts), where the borrowers relied on a theory that the conspiracy was not to fix prices but to fix a new system that resulted in more or less even loan pricing. The only logical inference was that the movement from a fixed prime to individually set primes was due to market forces, since it was undisputed that the changes were industry-wide and evolved over almost 10 years, with different banks trying and ultimately abandoning many alternatives during that time. The borrowers offered no direct evidence of conspiracy. There was evidence of discussions of loan pricing and interest rates at trade association meetings, but such activity is condoned under antitrust policy, and no inference of conspiracy could be drawn from it absent proof of agreement or concerted action to manipulate the loan market.

CA(11)[] **(11)**

Monopolies and Restraints of Trade § 4—Sherman Act—Individual Conduct.

--*Section 1* of the Sherman Act (*15 U.S.C. § 1 et seq.*) is not concerned with individual conduct, no matter how competitive.

CA(12a)[] **(12a)** ***CA(12b)***[] **(12b)**

Monopolies and Restraints of Trade § 3—Trade Association Activities.

--In general, trade association activities tend to promote competition and are lawful. Gathering and compiling industry information and disseminating it among members does not offend antitrust policy, even though to do so naturally tends to stabilize that trade or business and to produce uniformity of price and trade practice. It is only where members take concerted action to restrain trade based on such information that the law is violated.

CA(13)[] **(13)**

Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Bank's Commercial Loan Rates—Role of Industry Trade Associations.

--In an action by commercial borrowers against banks and bank trade associations for conspiracy to set and manipulate variable interest rates on loans made to "middle market" commercial borrowers, the trial court did not err in granting summary adjudication of issues as to the trade associations' causes of action alleging unfair competition (*Bus. & Prof. Code, § 17200*) and a violation of *Bus. & Prof. Code, § 16720* (defining trusts). The court properly granted the summary adjudication motions of the banks, and the associations offered the same evidence as did the banks and more in order to carry their burden of negating the conspiracy claim. They submitted declarations showing that they were not banks and did not lend money, charge, have or set prime rates, did not participate in setting members' rates, and existed as industry organizations fostering education, legislation, and the dissemination of economic and regulatory information. Since these were the only causes of action affecting the associations, summary judgment was properly granted to them as well.

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Judges: Opinion by Smith, J., with Benson, J., concurring. Separate concurring opinion by Kline, P. **[***2]** J.

Opinion by: SMITH

Opinion

[*1415] **[**821]** In consolidated appeals, we review summary judgment granted in favor of defendant banks and bank trade associations in actions brought by commercial borrowers, under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.* [all further section references in this opinion are to that code unless otherwise specified]) and unfair competition laws (*§ 17200 et seq.*), for conspiracy to set and manipulate variable interest rates on loans made to "middle market" commercial borrowers.

We will affirm.

[*1416] Background

Plaintiffs in these actions are BILJAC Associates, a California partnership involved in real estate investments, and Erwin C. Nielsen and Bonnie Nielsen, a married couple operating a cattle ranch. Each allegedly took out commercial loans from one or more of the various defendant banks named below and paid prime-rate-based interest on those loans. BILJAC Associates filed its first complaint in May 1984 (No. 824289), and the Nielsens filed theirs in September 1984 (No. 829062).

The cases were inspired by the initial success of consolidated federal district court actions in *Wilcox Development v. First Interstate Bank of Or. (D.Ore. 1985) 605 F.Supp. 592* **[***3]** (*Wilcox I*), where a jury found in favor of plaintiffs alleging federal ***antitrust law*** violations by various banking institutions based on conspiracy to raise, fix and maintain "prime" interest rates at artificial and anticompetitive levels. Plaintiffs here relied heavily at first on the record developed in the *Wilcox* litigation. The victory in *Wilcox* was short lived, however, for the defendants were granted judgment notwithstanding the verdict (*id., at pp. 593-594, 597)*, and that ruling was upheld in April 1987 by the Ninth Circuit Court of Appeals in *Wilcox v. First Interstate Bank of Oregon, N.A. (9th Cir. 1987) 815 F.2d 522* (*Wilcox II*).

Meanwhile, after four amendments to the individual complaints, the cases below were consolidated, and a consolidated amended complaint was filed in December 1985. Named as defendants were six New York- and Chicago-based banking institutions and eight based in California or Oregon. Western defendants include First Interstate Bank of Oregon, N.A. (FIOR), and its holding company, First Interstate Bancorp (Bancorp), two of the respondents here. [1] The other respondents are banking **[**822]** industry **[***4]** trade association defendants: the American Bankers Association (ABA), Association of Reserve City Bankers (ARCB) and Robert Morris Associates (RMA). The parties inform us that the New York and Chicago banks settled after the judgments under review here were granted. Summary judgment was not granted as to the California banks due to other claims pending against them.

These appeals concern summary judgments granted in favor of respondents on the first, second, third and eighth causes of action of the consolidated **[*1417]** amended complaint, which alleged conspiracy violations against all defendants **[***5]** based on the following core set of alleged facts: From the 1930's into the 1970's, the term "prime rate" was understood to be the rate which banks charged to their most creditworthy corporate commercial borrowers. It was a fairly stable rate. Then, beginning in the 1970's, major commercial banks in the United States moved from this preferred borrowing rate to the concept of a "base" or "reference" rate, one which each bank publicly announced from time to time yet continued to disseminate to the borrowing public as a "prime interest rate."

The crux of the conspiracy alleged in the first two counts as unfair competition and violating the Cartwright Act is that defendants conspired over time, through an exchange of information and ideas, to move from the traditional prime rate to the new, more volatile base rate, which the banks themselves controlled. They agreed to fix, raise, maintain and stabilize that rate, using it as a "benchmark" for commercial loans to so-called "middle-market" borrowers, and thereby suppress or eliminate competition between themselves. Forecasting the onset of worldwide inflation and rises in commercial interest rates, which might depress their profits, **[***6]** they conspired to raise and standardize the spread (points charged above the new base rate) for commercial borrowers, to move away from fixed-rate loans toward "floating" (variable-rate) loans referenced to the new "prime," and to base those rates on fluctuations in short-term commercial paper rates. This reduced bank competition and led to noncompetitive, high

[1] The New York and Chicago defendants are Citibank, NA, Morgan Guarantee Trust Company, Bankers Trust Company, Chase Manhattan Bank, Manufacturer Hanover Trust Company and First National Bank of Chicago. California defendants besides FIOR and Bancorp are Bank of America NT&SA, First Interstate Bank of California (also a Bancorp subsidiary), Wells Fargo Bank, Crocker National Bank, Security Pacific National Bank and Union Bank.

rates for middle-market borrowers while allowing banks to make below-"prime" loans to their preferred, multinational corporate borrowers and thus prevent those larger borrowers from entering the commercial paper market themselves. The conspiracy was furthered in part through meetings held under the auspices of industry trade associations.

The third cause of action alleges unfair competition in that defendants conspired to reduce borrowing alternatives by choreographing simultaneous rises in rates. Eastern banks announce upward rate changes before business hours on the east coast, transmit that information to banks in more western time zones (who announce almost identical rises) and thereby prevent borrowers from shopping for lower rates. Again, because larger borrowers borrow at below-"prime" rates, this harms only smaller **[***7]** commercial borrowers, for whom interest rates are maintained at "supra-competitive" levels.

The eighth cause of action charges unfair competition against the bank defendants only, alleging that they stand in a superior bargaining position to commercial borrowers, exact the disclosure of "intimate financial and personal information" in the loan application process, offer "adhesion **[*1418]** contracts" which leave borrowers no alternative but to accede to "unreasonable, oppressive and unconscionable" rates referenced to a controlled "prime rate," and do so without disclosing anticipated rising or falling rates during the loan term.

The bank defendants had jointly moved for summary adjudication of the antitrust and related conspiracy issues some months prior to the consolidated amended complaint being filed. Plaintiffs were granted several continuances, before and after the new pleading, to conduct further discovery. To organize the pending motion and related evidence, the court (Hon. Stuart R. Pollak) denied the motion without prejudice in February 1987, deemed the matter resubmitted, ordered that separate motions and supporting **[**823]** papers be filed, and set a hearing for May 7.

Judge **[***8]** Pollak heard the motions as scheduled, took them under submission and, in an order of June 30, 1987, granted them on the first three causes of action. Bank defendants then moved for summary judgment and/or summary adjudication of issues on various other causes of action, of which only the eighth affected FIOR and Bancorp.

At about the same time, trade association defendants moved for summary judgment on the first three causes of action, the only ones affecting them. The court (Hon. Lucy Kelly McCabe) granted the motions and entered judgment in their favor on January 11, 1988. Plaintiffs filed a timely notice of appeal the next day, and that appeal is No. A041024 in our docket.

By an order of March 14, 1988, Judge McCabe granted the bank defendants' motions for summary adjudication on the eighth cause of action and, there being no further causes of action against FIOR and Bancorp, ruled them entitled to summary judgment. Judgment in their favor was entered August 9, 1988. Plaintiffs prematurely appealed from the March 14 order (as to FIOR and Bancorp), but we construe the notice of appeal as applying to the later judgment (*Cal. Rules of Court, rule 2(c)*).

Discussion

I [*]

[*9]** . . .

[*1419] II

HN1[] Under our summary judgment statute, supporting and opposing affidavits or declarations "shall be made . . . on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." (*Code Civ. Proc., § 437c, subd. (d)*). Evidentiary objections "not

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[*] See footnote, *ante*, page 1410.

made either in writing or orally at the hearing" are deemed waived (*Code Civ. Proc., § 437c, subd. (b)*), and the court, in ruling on summary judgment, may not consider matters "to which objections have been made and sustained by the court" (*Code Civ. Proc., § 437c, subd. (c)*). (See also Cal. Rules of Court, rules 343 and 345, requiring page-and-line citations to objectionable matters and that specific grounds for the objections be stated.)

CA(1)[] **(1)** Plaintiffs filed voluminous evidentiary objections and a request that the court give written rulings on all objections. Judge Pollak declined, however, explaining that while he found merit to some of the objections on both sides and would be disregarding all inadmissible or incompetent evidence in ruling, he saw little purpose in rendering formal rulings. [3] Plaintiffs contend that this was reversible **[***10]** error. We disagree.

Nothing in the statute or rules requires a written or other formal ruling for the record, and the single case which plaintiffs cite for that proposition has no bearing on it.

Plaintiffs urge that express rulings are needed for appellate review so that they, and we, can know what **[***11]** evidence was considered. However, there is no use in such a procedure. ***HN2***[] We review summary judgments de novo (*AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal.App.3d 1061, 1064-1065 [225 Cal.Rptr. 203]*), and the parties remain free to press their admissibility arguments on appeal, the same as they did in the trial court. Also, being able to identify particular flaws in the lower court's reasoning has no value because, as appellants themselves note, summary judgment must be upheld if correct **[**824]** on any ground -- regardless of wrong "reasons" which may have guided the court. (*Barbary Coast Furniture Co. v. Sjolie* ***[*1420]*** *(1985) 167 Cal.App.3d 319, 331 [213 Cal.Rptr. 168]*.) More generally, it is presumed on appeal that a judge has not relied on irrelevant or incompetent evidence. (*Monogram Industries, Inc. v. Sar Industries (1976) 64 Cal.App.3d 692, 704 [134 Cal.Rptr. 714]*.) No error occurred.

III

We first examine the summary adjudication granted to FIOR and Bancorp on the first three causes of action. We do so on the assumption that plaintiffs have abandoned **[***12]** the third cause of action, which alleged a conspiracy to reduce competition by having eastern banks announce rate changes, disseminate that information to western banks early in the day, and in that way produce simultaneous rate increases within a single business day. This appears to be a variant of what plaintiffs call the "straw-man, parallel-pricing theory" which they abandoned below. ***CA(2)***[] **(2)** In any event, their failure to discuss the theory *on appeal* constitutes abandonment. (*Conner v. Dart Transportation Service (1976) 65 Cal.App.3d 320, 323 [135 Cal.Rptr. 259]*; *Jacobs v. Retail Clerks Union, Local 1222 (1975) 49 Cal.App.3d 959, 966 [123 Cal.Rptr. 309]*; see also fn. 6, *post*.)

CA(3)[] **(3)** ***HN3***[] Summary judgment is a drastic measure which should be used with caution so that it does not become a substitute for trial. Affidavits of the moving party are strictly construed and those of the opponent liberally construed, with doubts as to the propriety of granting the motion resolved in favor of the opposing party. (*Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46]*, **[***13]** cert. den. *(1989) 490 U.S. 1084 [104 L.Ed.2d 670, 109 S.Ct. 2110]*.) ***CA(4)***[] **(4)** ***HN4***[] Summary judgment raises only questions of law, which are reviewed independently. Our review tracks the same, three-step process used by the trial court: First, we identify the issues framed by the pleadings. Second, we determine whether the moving party has established facts sufficient to negate the opponent's claim. Third, if that burden is met, we examine whether the opposing party's showing discloses that triable issues of material fact exist. (*AARTS Productions, Inc. v. Crocker National Bank, supra, 179 Cal.App.3d 1061, 1064-1065*.)

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[3] "[W]ith respect to . . . objections that have been made by both sides to evidentiary materials submitted by the other, I do not propose to rule individually on each exception to each piece of evidence. It would be a horrendous, incredibly time-consuming task that I think would serve very little useful purpose.

"I have noted the objections, and in part on both sides the objections are well taken. . . . I am going to disregard all those portions of the evidence that I consider to be incompetent and inadmissible." Judge Pollak restated his intentions at the close of the hearing and again in his written order.

Judge McCabe similarly did not give evidentiary rulings for the record when ruling on the eighth cause of action.

CA(5)[] **(5)** ***HN5***[] In antitrust actions brought under the Cartwright Act, we look to interpretations of its federal law counterpart, the Sherman Antitrust Act (*15 U.S.C. § 1 et seq.*), for guidance since the federal act was a model for our own in most respects. (*State of California* ex rel. *Van de Kamp v. Texaco, Inc. (1988) 46 Cal.3d 1147, 1153-1164 [252 Cal.Rptr. 221, 762 P.2d 385]* [noting that our act is in some ways more closely modeled after Michigan and Texas acts in **[***14]** force when the federal act was enacted]; see generally *Mailand v. Burckle (1978) 20 Cal.3d 367, 376-377 [143 Cal.Rptr. 1, 572 P.2d 1142]*; *Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1042* ***[*1421]*** *[219 Cal.Rptr. 203]*; *Truta v. Avis Rent A Car System, Inc. (1987) 193 Cal.App.3d 802, 822 [238 Cal.Rptr. 806]*.) Comparative sparsity of state-court precedent often means that we must rely heavily on federal cases. (*Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal.App.3d 687, 694 [248 Cal.Rptr. 189]*.)

Defendants' burden

Judge Pollak concluded initially, at the hearing, that all bank defendants had met their burdens of negating the first three causes of action *except for* FIOR and Bancorp. He deemed their showing lacking in detail and too conclusory but allowed them to file supplementary declarations and was then satisfied.

We pause to consider something which Judge Pollak noted below but which the parties do not address here, namely, that recent developments in federal summary **[***15]** judgment law make reliance on subsequent federal cases hazardous when deciding whether a moving party has met its burden of negating an opponent's claims. ***CA(6)***[] **(6)** Interpreting *rule 56 of the Federal Rules of Civil Procedure* (28 U.S.C.), the United **[**825]** States Supreme Court held in *Celotex* *Corp. v. Catrett (1986) 477 U.S. 317 [91 L.Ed.2d 265, 106 S.Ct. 2548]* (*Celotex*), that a moving party need not produce competent admissible evidence to negate elements of a claim on which the nonmoving party would bear the burden of proof at trial. In that situation, the moving party satisfies its burden under *rule 56* "by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." (*Id., at p. 325 [91 L.Ed.2d at p. 275*]; see also *id., at pp. 322-325 [91 L.Ed.2d at pp. 273-275*].)

That is incompatible with California law interpreting *Code of Civil Procedure section 437c*: ***HN6***[] "There is nothing in the statute which lessens the burden of the moving party simply because at the trial the resisting party would **[***16]** have the burden of proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, the moving party must generally negative the matters which the resisting party would have to prove at the trial. [Citations.]" (*Barnes v. Blue Haven Pools (1969) 1 Cal.App.3d 123, 127 [81 Cal.Rptr. 444]*; *Pena v. W. H. Douthitt Steel & Supply Co. (1986) 179 Cal.App.3d 924, 929 [225 Cal.Rptr. 76]*; *Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal.App.3d 171, 179 [165 Cal.Rptr. 38]* [even where the moving party enjoys a presumption affecting the burden of proof].) In short, "[t]he placement of the burden of proof at trial does not affect the showing required for a summary judgment" in California. (*Lee v. Electric Motor Division (1985) 169 Cal.App.3d 375, 382 [215 Cal.Rptr. 195]*.)

[*1422] Judge Pollak expressly declined to apply *Celotex*. So do we. It represents a rule of federal civil procedure that is not binding on state courts and which conflicts with current California **[***17]** law.

CA(7a)[] **(7a)** Returning to the briefs, plaintiffs urge that the court erroneously found defendants' burden satisfied. We disagree.

To begin with, the argument is inadequately presented. In their opening brief, plaintiffs recite boilerplate rules on hearsay, opinions, conclusions, ultimate facts, etc. They give undifferentiated citations to hundreds of objections filed below and then abruptly conclude, *without analyzing any part of the declarations*, that defendants "offered no admissible evidence . . . ." ***CA(8)***[] **(8)** This violates the rule that ***HN7***[] an appellant must fully present all arguments in briefs rather than incorporate them by reference from papers filed below. (*Balesteri v. Holler (1978) 87 Cal.App.3d 717, 720 [151 Cal.Rptr. 229]*.) Belatedly, in a closing brief, plaintiffs do specifically relate some of their objections to the evidence. We address only those objections that are briefed.

The first two causes of action allege unfair competition (*§ 17200*) and a Cartwright Act violation (*§ 16720*). [4] The heart of both actions is a conspiracy by banks, when lending to middle-market borrowers, to abandon the traditional prime-based, fixed-rate loans in favor **[***18]** of "floating" or variable rate loans. The banks allegedly agreed to link interest rates to a new, fluctuating "prime rate" controlled by the banks themselves. The result, it is alleged, increased interest rates and reduced inter-bank competition for middle-market borrowers. [5]

Defendants' motions for summary adjudication, while directed against some of the complaint's assumed *economic* facts, focused on the crucial element of *conspiracy* **[***19]** . While it is not generally necessary to show a trust or conspiracy in an unfair competition claim (*§ 17200*) as opposed to one brought under the Cartwright Act or federal Sherman Antitrust Act, the allegations in this case clearly require a conspiracy. Plaintiffs do not allege in their unfair **[**826]** competition (first) cause of action that a bank which carries out the alleged interest rate practices *on its own* violates *section 17200*.

In fact, plaintiffs do not cite *any* unfair-competition-law authority as to these causes of action. We could deem this an abandonment of the first **[*1423]** cause of action. (*Conner v. Dart Transportation Service, supra, 65 Cal.App.3d 320, 323*; *Jacobs* v. *Retail Clerks Union, Local 1222, supra, 49 Cal.App.3d 959, 966*.) [6] Instead, however, since remedies under *section 17200* are cumulative to those provided by other laws (*People v. McKale (1979) 25 Cal.3d 626, 632 [159 Cal.Rptr. 811, 602 P.2d 731]*; § 17205), we will take their lack of separate analysis to mean that the alleged acts are "unlawful" under that section (see fn. 4, *ante* **[***20]**) only to the extent that they violate the Cartwright Act (*§ 16720*). (See *Blank v. Kirwan (1985) 39 Cal.3d 311, 329 [216 Cal.Rptr. 718, 703 P.2d 58]*.) Accordingly, we analyze the alleged conspiracy, as the parties do, only under cases interpreting the Cartwright Act and Sherman Antitrust Act.

CA(7b)[] **(7b)** ***HN10***[] Concerted activity is essential to a Cartwright Act or Sherman Antitrust Act claim because those acts prohibit only **[***21]** *contracts, combinations or conspiracies* in restraint of trade. (*Truta v. Avis Rent A Car System, Inc., supra, 193 Cal.App.3d 802, 822*; *Wilcox II, supra, 815 F.2d 522, 525*.) Summary adjudication was based on defendants having negated this element.

Defendant banks presented declarations and, after the hearing, supplementary declarations (*Johnson v. Banducci (1963) 212 Cal.App.2d 254, 260 [27 Cal.Rptr. 764]*) from the officers and employees charged over the years in question with setting, changing and publicizing information on their prime rates. FIOR and Bancorp relied on their own declarations as well as evidence from others.

FIOR's declarations were typical. An unbroken chain of officers whose principal responsibility it was to determine the bank's prime rate and commercial loan pricing policies from 1970 into 1986 detailed the criteria they used, the risk factors used to tailor rates for individual borrowers, the reasons for moving from fixed rates to floating rates and the reasons for changing rate criteria over the years. Each denied receiving or sharing competitive information with **[***22]** other banks (except for cooperative efforts such as "participation," "interbank" or "correspondent" lending), or giving notice of rate changes to others in advance of making them known to the general public. Their

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[4] *Section 16720* provides in broad terms that: ***HN8***[] "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: [para.] (a) To create or carry out restrictions in trade or commerce."

Section 17200 states in part: ***HN9***[] "As used in this chapter [ch. 5, *§ 17200 et seq.*], unfair competition shall mean and include unlawful, unfair or fraudulent business practice . . . ."

[5] Plaintiffs defined the "middle-market" for purposes of this litigation as comprised of commercial borrowers having annual sales between several million and 250 million dollars.

[6] Plaintiffs consistently refer to the first three causes of action as involving "antitrust" issues and only the eighth cause of action (*§ 17200*) as raising "non-antitrust" issues. This also shows abandonment since, as has been observed, the unfair competition law, despite its historical emphasis on protecting "competition," is more akin to a consumer-protection law than an "***antitrust" law***. (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 209-210 [197 Cal.Rptr. 783, 673 P.2d 660]*.)

declarations explained how market forces influenced rates and the importance of making changes as other banks announced changes in order to compete. In addition, employees responsible for making **[*1424]** rate changes public during those years detailed standard procedures used to do this and how the information was received from corporate higher-ups.

Renewing objections raised below, plaintiffs urge that declarations such as one from Ralph J. Voss -- the chairman and chief executive officer of FIOR (known as First National Bank of Oregon until July 1981) who determined rates from 1970 to 1974 -- contain only opinions, legal conclusions and facts not within personal knowledge. However, discounting objectionable parts, including some that appear speculative and beyond personal knowledge (e.g., "nor, insofar as I am aware, has any other employee of FIOR . . ."), the declarations contain abundant competent and admissible evidence. Voss and other FIOR declarants, having **[***23]** established that they alone were responsible for determining rates and that they followed and implemented certain criteria during certain years, were competent to testify how rates and policy were **[**827]** set (cf. *Vesely v. Sager (1971) 5 Cal.3d 153, 167, 169 [95 Cal.Rptr. 623, 486 P.2d 151]*; *Zuckerman v. Pacific Savings Bank (1986) 187 Cal.App.3d 1394, 1404 [232 Cal.Rptr. 458]*; *Chatman v. Alameda County Flood Control etc. Dist. (1986) 183 Cal.App.3d 424, 429 [228 Cal.Rptr. 257]*; *Kiernan v. Union Bank (1976) 55 Cal.App.3d 111, 116 [127 Cal.Rptr. 441]*) and obviously could say whether they had exchanged or agreed to exchange competitive information with other banks. They set out their objectives in attending trade association meetings and denied having agreed with other participants to take collective action or exchange confidential information on commercial rates.

Bancorp submitted declarations from its chief executive officer and its executive vice-president for finance. They show that Bancorp is a bank holding company, not a bank, and **[***24]** does not have a prime rate or participate in setting commercial rates of its subsidiaries (FIOR or First Interstate Bank of California).

Finally, as background and to corroborate that FIOR's conduct was consistent with independent economic activity, FIOR and Bancorp relied on declarations from several experts, including two declarations submitted by plaintiffs.

This combined evidence was enough to carry defendants' burden, under California law, of negating conspiracy. (Compare federal precedent holding conspiracy allegations rebutted by showing justifiable reasons for practices that are consistent with independent business practice, *Richards v. Neilsen Freight Lines (9th Cir. 1987) 810 F.2d 898, 902*; *O.S.C. Corp. v. Apple Computer, Inc. (9th Cir. 1986) 792 F.2d 1464, 1468*; *Barnes v. Arden Mayfair, Inc. (9th Cir. 1985) 759 F.2d 676, 680*.)

[*1425] *Plaintiffs' burden*

Plaintiffs had to offer admissible evidence that would raise a reasonable inference of conspiracy. The California and federal high courts have urged restraint in granting defendants summary judgment "'in complex antitrust litigation where motive **[***25]** and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. . . .'" (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 852 [94 Cal.Rptr. 785, 484 P.2d 953]*, quoting *Poller v. Columbia Broadcasting (1962) 368 U.S. 464, 473 [7 L.Ed.2d 458, 464, 82 S.Ct. 486]*.)

A. *Monsanto/Matsushita*

That settled expression of deference to antitrust plaintiffs has been partly undermined in two relatively recent decisions of the United States Supreme Court interpreting the Sherman Antitrust Act. In light of the policy of ***antitrust law*** to promote procompetitive, independent business judgment and to penalize only activity which is anticompetitive and concerted, the federal high court has announced *limits* on the range of inferences that may be drawn from ambiguous evidence of conspiracy and has made it clear that those limits apply at the summary **[***26]** judgment stage. "'[On] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' . . . But ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a [Sherman Antitrust Act*] § 1* case. Thus, in *Monsanto Co. v.*

Spray-Rite Service Corp., 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Id., at 764. . . . To survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently. 465 U.S., at 764. [Plaintiffs], in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive **[**828]** action that could not have harmed [them]. . . ." (Matsushita Elec. Industrial Co. v. Zenith Radio (1986) 475 U.S. 574, 587-588 [89 L.Ed.2d 538, 553, 106 S.Ct. 1348] **[***27]** (*Matsushita*), some citations omitted.) Put another way, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' [Citations.]" (Monsanto Co. v. Spray-Rite **[*1426]** Service Corp. (1984) 465 U.S. 752, 764 [79 L.Ed.2d 775, 785-786, 104 S.Ct. 1464] (*Monsanto*).)

Our state Supreme Court has not had occasion yet to endorse, in the context of the Cartwright Act, the policy limits of *Monsanto* and *Matsushita*, and the parties here differ on how and whether those limits apply in this case. An argument can be made that the limits should govern Cartwright Act cases. The same solicitude for lawful, independent business activity undergirds state law policy. **CA(9)**[] **(9)** As this court has noted, "'Both the Sherman Act and the Cartwright Act proscribe price fixing -- *the standard for lawful competitive conduct is identical* under both state and federal law.'" (Crown Oil Corp. v. Superior Court (1986) 177 Cal.App.3d 604, 611 [223 Cal.Rptr. 164], **[***28]** quoting Alton Box Bd. Co. v. Esprit de Corp. (9th Cir. 1982) 682 F.2d 1267, 1274, fn. 11, italics ours.) On the other hand, as our concurring colleague notes, an argument can be made that the limits are procedural ones tied to federal summary judgment law rather than purely substantive ones flowing from ***antitrust law*** policy.

Even accepting the limits as substantive, however, leaves considerable room for argument on how they should apply in this case. Plaintiffs, for example, while not claiming that state and federal policy diverge in this context, argue that *Monsanto* and *Matsushita* apply only where *vertical* restraints of trade are involved and, therefore, cannot apply here, where the alleged restraint is *horizontal*. The argument has some appeal in that the limitation announced in *Monsanto* grew at least in part out of concern that a manufacturer in a vertical-restraint context remains free to terminate a price-cutting distributor -- even in response to complaints from other distributors -- so long as the decision is made independently and based on the manufacturer's legitimate marketing plans. (See analysis in Helicopter Support Systems v. Hughes Helicopter (11th Cir. 1987) 818 F.2d 1530, 1533.) **[***29]** On the other hand, no case called to our attention has found that distinction determinative, and we have found cases applying the *Monsanto/Matsushita* limits in horizontal contexts. (E.g., City of Long Beach v. Standard Oil Co. of California (9th Cir. 1989) 872 F.2d 1401, 1404-1407, mod. 886 F.2d 246; Richards v. Nielsen Freight Lines, supra, 810 F.2d 898, 903-904.) Most notably, the Ninth Circuit applied them in *Wilcox II*, the very litigation which spawned the cases before us now. (Wilcox II, supra, 815 F.2d 522, 525-526.)

Another way of interpreting *Monsanto* and *Matsushita* is one developed by the Ninth Circuit. Emphasizing that *Monsanto* only limits conspiratorial inferences to be drawn from *ambiguous* evidence, that court distinguishes between cases resting solely on *circumstantial* evidence and those in which there is at least some *direct* evidence of conspiracy, strictly applying the **[*1427]** limitations only in the former cases. (See, e.g., T.W. Elec. Service v. Pacific Elec. Contractors (9th Cir. 1987) 809 F.2d 626, 632; McLaughlin v. Liu (9th Cir. 1988) 849 F.2d 1205, 1207-1209; **[***30]** City of Long Beach v. Standard Oil Co. of California, supra, 872 F.2d 1401, 1404-1407.) In *Wilcox II*, for example, the Ninth Circuit stressed that the plaintiffs had relied solely on circumstantial evidence. (Wilcox II, supra, 815 F.2d 522, 525.)

We will not attempt to resolve those uncertainties in this case. It is not clear, first of all, that the court below employed the *Monsanto/Matsushita* limitation in finding that no supportable inference of conspiracy was raised. Second, we will hold that summary judgment was properly granted under standards traditionally applied in this state. (Corwin v. Los Angeles Newspaper **[**829]** Service Bureau, Inc., supra, 4 Cal.3d 842, 842.)

B. *Wilcox*

Wilcox is the best starting point for approaching the enormous record in this case since plaintiffs incorporated much of the *Wilcox* record below. Plaintiffs do espouse a different theory. A straightforward interest-rate-fixing conspiracy was alleged in *Wilcox*, based on parallel rate movement plus other evidence. Here, plaintiffs allege a much broader conspiracy, embracing an underlying movement **[***31]** from fixed to floating rates, the emergence of prime rates tied to factors within the banks' control, the tendency of floating rates to move upward quickly while "lagging" in downward movement, an increased "spread" between floating rates and banks' cost of funds, banks' use of the increased spread to offset "below-prime" loans made to more powerful, "Fortune 500" companies that might otherwise be lost to other funding sources, and a resulting harm to middle-market commercial borrowers that lack similar alternatives. The effect of this shift is to abandon any claim of actual rate fixing and to claim instead, in the words of one of plaintiffs' experts, that "the major banks have now somehow managed to put together a system that provides incentives to go along with increases in the prime and incentives not to go along with the decreases, *even without communication among the banks regarding individual decisions*." (Italics added.) This is a different theory than the one alleged in *Wilcox*.

Nevertheless, much of the same conspiratorial activity is alleged here, particularly the exchange of ideas at meetings of defendant trade associations. Thus the *Wilcox* cases remain highly **[***32]** relevant as background, and plaintiffs do not dispute the results reached there.

All evidence of conspiracy in the *Wilcox* cases was circumstantial (*Wilcox II, supra, 815 F.2d 522, 525)* and, in the end, was found wanting not **[*1428]** only under *Monsanto* and *Matsushita*, but also under Ninth Circuit authority predating those cases. *Parallel movement of prime rates was not enough by itself*. As the court found on virtually the same evidence produced here, "Reliance on other banks' prime rate changes is a convenient and accurate way for FIOR to maintain its prime rate at the level set by the national market." (*Id., at p. 526*.) The fact that FIOR was the only Bancorp subsidiary to use a "'count-to-four'" rule for rate changes (i.e., raising or lowering them whenever four out of seven major West Coast competitors did so) further "indicate[d] independent action." (*Ibid*.) Using other banks' rate changes is not illegal. The information is public and disseminated over wire services, and the prime rate is just one factor affecting commercial interest rates: "The prime rate is more indicative of an average cost because most loans **[***33]** are negotiated at interest rates either a certain percentage above or below prime. Thus disclosure of the prime rate does not enable competitors to conspire to fix prices . . . . An exchange of price information which constitutes reasonable business behavior is not an illegal agreement." (*Id., at pp. 526-527*, citations omitted.) Here, as was true in *Wilcox II*, FIOR's cooperative exchange of interest rate information in negotiating "participation loans" is "a necessary incident" to that task. (*Id., at p. 527* & fn. 4.)

Finally, the Ninth Circuit found nothing collusive in what plaintiffs here offer as convincing "evidence" of illegal motive -- that a two-tier system was developed whereby larger, more creditworthy borrowers were able to obtain below-prime rates while middle-market borrowers could not. Rejecting the notion that this showed a motive "to stabilize profits by avoiding competitive forces that could bring interest rates down," the court observed: "Near uniformity in prime interest rates reflects a competitive market for funds. Prime rates will arguably be nearly identical when each bank pursues its individual self-interest because **[***34]** failure to follow national prime rates could cause either losses or severe liquidity problems. FIOR presented credible, rebutting evidence that sub-prime loans and prime based loans are offered to different classes of borrowers and that both markets are highly competitive; that middle-market **[**830]** customers are not strong or secure enough to enter the sub-prime market; and that the prime based loans carry higher risks and are influenced by the national prime rate which theoretically reflects all relevant business conditions influencing the cost of funds. [para.] . . . A two tier pricing system is not inherently non-competitive unless it can be shown to be related to an anti-competitive agreement. [Citation.] There has been no such showing here. The actions alleged to constitute a conspiracy are precisely those that could be motivated by independent self-interest." (*815 F.2d at p. 528*.)

Sustaining a grant of judgment notwithstanding the verdict, the court held that the plaintiffs had not "carried their burden of proving that an **[*1429]** inference of conspiracy was more probable than an inference of concerted action . . . ." (*815 F.2d at p. 528*.) The Ninth **[***35]** Circuit's application of *Monsanto* and *Matsushita* does not concern us here since plaintiffs in this case insist that they abandoned the pure parallel price-fixing theory of *Wilcox* in the court below and, therefore, do not challenge the Ninth Circuit's result.

C. *New theory and the evidence*

Plaintiffs' theory is conceptually at odds with the one presented in *Wilcox*. Here, rather than conspiring to fix rates, the defendants are seen as conspiring to set in place a *system* by which they act independently, in the sense that each has and periodically adjusts its own prime rate more or less in accord with other banks' rate changes, but with the net effect being an assertedly anticompetitive control over rates. In other words, the conspiracy is not to fix prices but to fix a new system which *results* in more or less even loan pricing.

This conceptual difference brings even more difficult problems of proof than those encountered in *Wilcox*. ***CA(10a)***[] **(10a)** Here, as there, no one disputes that middle-market borrowing did change over time, more or less as alleged. The ultimate question is whether it did so as a result of conspiracy or, instead, as the result of independent business **[***36]** judgment in response to market forces. ***CA(11)***[] **(11)** ***HN11***[] "*Section 1* of the Sherman Act is not concerned with individual conduct, no matter how anticompetitive." (*Overseas Motors, Inc. v. Import Motors Limited, Inc. (E.D.Mich. 1974) 375 F.Supp. 499, 531*, affd. (6th Cir. 1975) *519 F.2d 119*, cert. den., *423 U.S. 987 [46 L.Ed.2d 304, 96 S.Ct. 395]*; *Fisher v. Berkeley (1986) 475 U.S. 260, 266 [89 L.Ed.2d 206, 106 S.Ct. 1045]*.)

The court in *Wilcox II* saw that market forces were *as likely as not* the reason for the complained-of parallel prices, meaning that inferences *preponderated* in favor of independent rather than concerted action. ***CA(10b)***[] **(10b)** Here, the *only* logical inference is that the movement from a fixed prime to individually set "primes" was due to market forces. It is undisputed that these changes were industry-wide and evolved over almost 10 years, with different banks (conspirators in plaintiffs' view) trying and ultimately abandoning many alternatives during that time. (See discussion in text, *post*.) Even plaintiffs' experts in this case, economists who felt **[***37]** that some of those practices were anticompetitive, agreed that they were consistent with prevailing economic pressures and independent business judgment. (See also *Wilcox I, supra, 605 F.Supp. 592, 595*.) It is almost a contradiction in terms to say that defendants could "conspire" to achieve a uniform result and yet take 10 years (with independent, halting attempts to arrive at the right system) to accomplish that conspiracy.

[*1430] Also, as in *Wilcox*, these plaintiffs offer no *direct* evidence of conspiracy. ***HN12***[] "'[D]irect evidence' means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." (*Evid. Code, § 410*.) The closest they come is some direct evidence that floating rates, interest rates and interest-rate pricing were topics of *discussion*, usually at trade association meetings. It requires further inferences, however, to conclude that any *agreement* or *consensus* came out of those discussions.

CA(12a)[] **(12a)** In general, ***HN13***[] trade association activities tend to promote competition and are lawful. **[**831]** Gathering and compiling industry information and disseminating it among **[***38]** members does not offend antitrust policy, even though to do so naturally "tends to stabilize that trade or business and to produce uniformity of price and trade practice." (*Maple Flooring Assn. v. United States (1925) 268 U.S. 563, 582 [69 L.Ed. 1093, 1102, 45 S.Ct. 578]*.) "Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction." (*Id*., at p. 583 [69 L.Ed.2d at p. 1102], fn. omitted.) Individuals engaged in trade association activities, including the exchange of information on market prices, "are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information." (*Id*., at p. 584 [69 L.Ed.2d at p. 1103].) **[***39]** Members do not "become . . . conspirators merely because they gather and disseminate information . . . bearing on the business in which they are engaged *and make use of it in the management and control of their individual businesses . . . ." (Ibid*., italics added.) Only when they take *concerted action to restrain trade* based on such information do they act illegally. (*Id*., at p. 584 [69 L.Ed.2d at p. 1103].)

CA(10c)[] **(10c)** Plaintiffs set the stage for their allegations with evidence that loan pricing and interest rates were the subject of trade association panel discussions, publications, meetings, symposia and the like in the 1970's, when the shift to floating rates and other developments of which they complain occurred. It is not disputed that those topics were discussed. However, such activity is condoned under antitrust policy, and thus no inference of conspiracy may be drawn from it without proof of agreement or concerted action to manipulate the commercial loan market with such information. There is also undisputed evidence that market forces, including the onset of unprecedented high inflation and interest rate instability made those **[***40]** topics timely and natural ones within the industry.

[*1431] As proof of agreement, plaintiffs point to evidence which corroborates the fact of those discussions, but without disclosing any agreement or even, in some instances, whether any named defendants were participants. That evidence does not bear further discussion.

There is evidence that discussions of floating rates during the early 1970's turned to the question of what indices could be used as references and that some banks (not including FIOR) instituted formulas for tying their primes in varying ways to market indices, such as short-term commercial paper rates or certificate of deposit rates. However, as defendants point out, those formulas differed from one another, were often revised or suspended, and received widespread publicity in the popular and trade press. Of the three banks in this case that experimented with them, two abandoned formulas in the early 1970's while one (Citibank) did not do so until 1981. This hardly connotes a conscious commitment to a *common* scheme (*Monsanto, supra, 465 U.S. 752, 764 [79 L.Ed.2d 775, 784])*, and there was undisputed testimony **[***41]** that those defendants using the formulas set them independently. Since there is no reasonable basis for inferring concerted action in instituting these formula rates, there can be no merit to the argument by plaintiffs that there was concerted action in abandoning them and ultimately adopting criteria (differing from bank to bank) over which banks had more control.

To show motive and a conspiracy to raise interest rates, plaintiffs rely on some extremely vague evidence, such as a program (from ARCB's 1972 annual meeting) on which Richard Cooley, then-president of Wells Fargo Bank, wrote: "Bankers Trust -- predicts prime rate 6-6 1/2% by yr. end if floating rate allows normal upward movement. Need other b[an]ks to make idea stick." Not only is this vague on its **[**832]** face but Cooley explained in deposition that the note was a reminder to himself that the forecast rise depended on other banks adopting *formula rates*. As just noted, that "conspiracy" went nowhere.

Some communications which plaintiffs cite for motive and conspiracy involve discussions of risk-analysis factors. However, the record shows that those factors determine rate distinctions not only between larger borrowers and **[***42]** the middle market, but also between borrowers *within* the middle market. This does not show collusion any more than the "two-tier" system noted by the Ninth Circuit in *Wilcox*. (*Wilcox II, supra, 815 F.2d 522, 528*.)

Plaintiffs lay special emphasis on the activities of Richard L. Thomas. They first point to remarks that he gave, as president of First National Bank of Chicago, at a 1975 RMA panel discussion on future lending needs and priorities. Underlining every reference to "pricing" in the remarks, plaintiffs **[*1432]** urge that these *public* and *published* remarks set the tone for later, *private* talks on raising rates for middle-market borrowers. Defendants correctly note, however, that this distorts the message. In context, he was urging that despite a severe capital shortage on the horizon, banks should allocate more capital to growing ("deserving") small and medium sized companies while making rate distinctions between seasonal and "permanent" loans. The fact that these were only part of his remarks, and that he was just one of four speakers (others spoke for legislative, regulatory and commercial customer sectors), further attenuates **[***43]** the inferences urged by plaintiffs.

Thomas went on to serve as chairman of ARCB's Committee on Bank Credit Policies (CBCP) for the following fiscal year, 1976-1977. Plaintiffs cite letters from that period, most of them to and from other committee members. The letters explore "appropriate pricing policies," "differential pricing," credit trends, the future of commercial lending and like subjects, as possible topics for inclusion on the agendas for a January 1977 CBCP meeting on bank practices and an April 1977 CBCP panel discussion on "Trends in Commercial Bank Credit" (part of ARCB's annual meeting in Phoenix), both of which Thomas moderated. [7]

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[7] For example, a fellow committee member wrote to Thomas just a week before the January meeting: "With reference to Point #2 of your letter of January 7, and as I view sagging domestic loan demand and an anything but ebullient near-term loan forecast, I wonder if the pricing section of our agenda could be amplified to include some discussion relating to differential pricing. With so many of our higher quality relationships covering what modest short-term requirements they may have in the commercial paper

[*44]** Plaintiffs confront serious obstacles in trying to weave a thread of conspiracy through Thomas's activities with ARCB. ***CA(12b)***[] **(12b)** First is the strong policy that disseminating competitive information, even pricing information, through trade association activities is condoned by ***antitrust law***. **[*1433]** Members may use that information in the management and control of their individual businesses. It is only where they **[**833]** take concerted action to restrain trade based on such information that the law is violated. (*Maple Flooring Assn. v. United States, supra, 268 U.S. 563, 585 [268 U.S. 563, 1103]*.) Thus, plaintiffs must show conspiracy with something beyond the ARCB's activities. Second, while bits and pieces of committee members' letters might connote advocacy of a sort in the area of commercial credit policy (see fn. 7, *ante*), we must distinguish between those private communications (the letters) and the way that such information actually came out in panel discussions. The public discussions themselves, according to the record we have, lacked the degree of innuendo found in the letters. Third, the panel discussions covered a wide array **[***45]** of topics, only a small part of which concerned commercial loan pricing, which makes the potential for conspiracy more remote.

Plaintiffs depend on the coincidence of certain topics having been discussed and the concurrent or later development of consistent trends in the marketplace. Analogizing the case to one where several people enter a room together, hear an idea and then, the next day, all begin acting in accord with that idea, plaintiffs urge that there *must* be a conspiracy. However, the analogy proves too facile. This was not a room full of people; the conspiracy as envisioned by this lawsuit was nationwide, involving virtually every commercial bank, coast to coast. The "concert of action" was not evidenced overnight; it took years to develop. ***CA(10d)***[] **(10d)** To the extent that we can attribute the evolution in middle-market lending to trade association activities, the facts are overwhelmingly consistent with the legitimate dissemination and use of information, not conspiracy in the antitrust sense. Plaintiffs' showing fails to bridge the gap.

We have examined plaintiffs' remaining evidence and find it no more probative, even in the aggregate.

We hold, as the court below did, that **[***46]** plaintiffs failed to raise a triable issue of fact on the issue of antitrust conspiracy. (*Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal.3d 842, 842*; *AARTS Productions, Inc. v. Crocker National Bank, supra, 179 Cal.App.3d 1061, 1064-1065*.) Failure to raise a triable issue of antitrust conspiracy (and the derivative unfair competition claim) (*§§ 16720*, *17200*) means that the court properly granted summary adjudication.

IV

CA(13)[] **(13)** It follows from our analysis in part III that summary adjudication was also properly granted to the trade association defendants to the extent **[*1434]** that they and plaintiffs relied on the same evidentiary materials. In fact, the trade associations offered that evidence *and more* to carry their burden of negating the conspiracy claim. They submitted declarations showing that they are not banks, do not lend money, charge, have or set prime rates, do not participate in setting members' rates, and exist as banking industry organizations that foster education,

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market, I think that the industry needs to develop a way in which these borrowers can be brought back to the banking system, but at the same time without jeop[a]rdizing the spreads on existing credits that merit higher interest rates. It is a difficult area, but I do think our industry needs to develop a more sophisticated approach to the pricing of our credit-related products."

Another letter, from Thomas to CBCP members a month before the April meeting, reads in part: "[M]y thinking is that we can divide the panel into four sections. As moderator, I thought I might open the session by giving a brief overview of the role of commercial bank credit in our economy, perhaps dating back to the end of World War II, but with greater emphasis on the past five years. Reuben Richards has then agreed to talk for seven or eight minutes on current activities in the marketplace, and Harry Meily has then agreed to discuss the likely course of commercial bank lending in the future. Finally, Charlie Pistor will discuss the personnel implications of current practices and anticipated developments in commercial bank lending."

At the April panel, Thomas prefaced his remarks as follows: "Our basic concern today . . . is whether or not there has been a *fundamental* change in demand for commercial loans. Frankly, we don't know for sure, but we hope that our discussion today will shed some light on the issues involved. We do believe that the answer to that question will have important implications for the way we will be doing business in the next several years."

legislation, and the dissemination of economic and regulatory information among their members, regulators **[***47]** and the public through a range of forums, including regular meetings and publications. [8]

Plaintiffs, for their part, relied on essentially the same evidence as presented against the bank defendants' motions. Our previous discussion thus suffices here as well.

Plaintiffs ask us to draw inferences in their favor based on assertions that trade association defendants destroyed documentary evidence and offered only "obfuscation" and "double talk" in depositions. They cite no authority, however, and thus waive the claim. (*Strutt v. Ontario Sav. & Loan Assn. (1972) 28 Cal.App.3d 866, 873 [105 Cal.Rptr. 395]*.) In any event, the "destroyed" evidence of which **[***48]** they speak **[**834]** includes committee meeting minutes which defendant ARCB explained, by affidavits filed below, *were never kept during the years in question* and a calendar page which, while lost during discovery, was described by an employee who had seen it. Also, a Citibank officer whose calendar for 1971 could not be produced explained in deposition what steps he had taken to locate it and that he could not find it. The "double talk" to which plaintiffs allude amounts to deponents admitting being at certain meetings (based on calendar notations) but being unable to recall details of those meetings. This was hardly surprising since the meetings were held many years past. Nothing in this "destruction" of evidence would raise inferences of conspiracy.

For reasons already stated in part III, we deem the third cause of action abandoned, view the first cause of action (unfair competition) as depending entirely on the second (Cartwright Act), and reject the idea that the court (this time Judge McCabe) had to give formal rulings on evidentiary objections. Plaintiffs again urge that inadmissible evidence was presented, but our analysis in part III coupled with plaintiffs' failure to brief **[***49]** particular deficiencies in any detail, makes an elaborate response unnecessary. We simply note that enough competent, admissible evidence was presented to negate the conspiracy allegations, ignoring those parts of the declarations **[*1435]** which truly were too conclusionary. In general, the declarants established that they were in positions to know from personal knowledge whether there was collusive agreement by the trade associations.

Turning to plaintiffs' responsive showing, we have already determined that insufficient evidence was presented to draw a reasonable inference of conspiracy among the *bank* defendants, and the trade association defendants presented undisputed evidence that they did not have or set interest rates. Since liability can only be predicated on fostering and encouraging a bank conspiracy for which no reasonable inference was raised, Judge McCabe properly granted summary adjudication. Because only the first three causes of action affected the trade associations, she also correctly granted them summary judgment.

V [*]

[*50]** . . .

The judgments are affirmed.

Concur by: KLINE

Concur

KLINE, P. J., Concurring.

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[8] Defendant ABA is a national trade association whose members include over 11,000 commercial banks. ARCB, founded in 1912, is an association of individual bankers from commercial banks. RMA is an association of 3,100 institutions comprised mostly of commercial banks but including some savings banks and savings and loan associations.

[*] See footnote, *ante*, page 1410.

In agreement with my colleagues that summary judgment was properly granted, I write separately to more fully address respondents' claim that, in the context of a motion for summary judgment, the proper standard to be applied in determining whether the evidence will support an inference of concerted action in a Cartwright Act case ought to be that prescribed by the United States Supreme Court in *Matsushita Elec. Industrial Co. v. Zenith Radio (1986) 475 U.S. 574 [89 L.Ed.2d 538, 106 S.Ct. 1348]* (*Matsushita*).

Relying upon *Matsushita*, respondent banks vigorously contend that "it is not enough for plaintiffs to point to evidence that is as consistent with lawful independent action as with unlawful concerted action." According to the banks, "[s]uch evidence is insufficient as a matter of law to establish an unlawful antitrust conspiracy and hence cannot give rise to a triable issue of material fact." These "*Matsushita* principles" apply to proof of price fixing conspiracies under the Cartwright Act, the banks maintain, because the California Supreme Court has **[***51]** repeatedly held that federal cases interpreting **[*1436]** *section 1* of the Sherman Act are persuasive in cases filed in state court under the Cartwright Act.

It is, of course, true that "[i]n interpreting the Cartwright Act, we properly look to the Sherman Act and cases construing it: 'the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law.'" (*Blank v. Kirwan (1985) 39 Cal.3d 311, 320 [216 Cal.Rptr. 718, 703 P.2d 58]*, **[**835]** quoting *Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 925 [130 Cal.Rptr. 1, 549 P.2d 833]*.) This familiar principle does not mean, however, that interpretations of the federal rule pertaining to summary judgment (*Fed. Rules Civ. Proc., rule 56*, 28 U.S.C.) controls application of the California summary judgment statute (*Code Civ. Proc., § 437c*) in Cartwright Act cases. *Matsushita* cannot be reconciled with the California statute and case law pertaining to summary judgment and therefore cannot be followed by the courts of this State.

I.

Matsushita is among a trio of cases interpreting *rule 56* **[***52]** *of the Federal Rules of Civil Procedure*, all decided in 1986 by sharply divided courts, that collectively mark a major change in the United States Supreme Court's attitude about summary judgment. (Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court (1987) 116 F.R.D. 183*.) Though *Matsushita* involves application of the Sherman Act it is primarily significant for what it has to say about the burden of proof and the burden of persuasion in connection with summary judgment motions. Because it is so inextricably a part of a new federal judicial view of summary judgment, *Matsushita* is best understood in the context of the two other summary judgment cases decided the same term: *Celotex Corp. v. Catrett (1986) 477 U.S. 317 [91 L.Ed.2d 265, 106 S.Ct. 2548]*, and *Anderson v. Liberty Lobby, Inc. (1986) 477 U.S. 242 [91 L.Ed.2d 202, 106 S.Ct. 2505]*.

Celotex was an asbestos products liability suit in which the defendant sought summary judgment on the ground that there was no evidence connecting the decedent with its asbestos and that the plaintiff **[***53]** had failed to identify any witness who could establish such a connection. The Court of Appeals reversed the grant of summary judgment, declaring that *rule 56* imposed upon the defendant movant the "burden of coming forward with proof of the absence of any genuine issues of material fact." (*Catrett v. Johns Manville Sales Corp. (D.C. Cir. 1985) 756 F.2d 181, 184 [244 App.D.C. 160]*, fn. omitted.) Summary judgment should have been denied, the Court of Appeals reasoned, because the defendant had offered no evidence. The Supreme Court reversed, ruling that a defendant seeking summary judgment, who does not bear the ultimate burden of proof, may rely **[*1437]** on the record to show the absence of a genuine dispute about a material fact. "In our view, the plain language of *rule 56(c)* mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the ultimate burden of proof at trial." (*Celotex Corp. v. Catrett, supra, 477 U.S. at p. 322 [91 L.Ed.2d at p. 273*].) **[***54]**

Anderson v. Liberty Lobby, Inc., supra, 477 U.S. 242, decided the same day as *Celotex*, was a libel suit against the publisher and editor of a magazine. The defendants moved for summary judgment on the theory that the essential element of "actual malice" was absent as a matter of law. In support of the motion the author of the article submitted an affidavit specifying his sources, describing the extent of his considerable research and stating his belief that the article was truthful and accurate. Concluding that the district court properly granted the defendants' motion for summary judgment, the Supreme Court held that, as in the case of a motion for directed verdict, a court ruling on a motion for summary judgment "must be guided by the substantive evidentiary standards that apply to the case." (*Id., at p. 255 [91 L.Ed.2d at p. 216*].) In determining whether a dispute is "genuine" within the meaning of *rule 56*, the trial judge must inquire whether a "reasonable" jury could find for the nonmoving party. A "genuine" dispute is one that is not "one-sided" and one which could reasonably **[***55]** be resolved by a "fair-minded" jury in favor of either party. (*Id., at pp. 251-252 [91 L.Ed.2d at pp. 213-214*].) [1]

[*56]** **[**836]** As will be seen, *Matsushita* is of a piece with *Celotex* and *Anderson* in that it permits a defendant seeking summary judgment in federal court to shift a greater evidentiary burden to the nonmoving plaintiff than is permitted under the California summary judgment statute.

[*1438] *Matsushita* was a highly unusual antitrust case. [2] The plaintiffs, a group of American electronics manufacturers, claimed that the 21 defendants, Japanese television manufacturers and their affiliated trading companies, conspired to fix artificially high prices in Japan and artificially low prices in the United States. By boosting the prices of Japanese goods in Japan the defendants allegedly subsidized the artificially low priced sales of their products in the United States. By minimizing competition in the United States between Japanese manufacturers, it was claimed, the defendants facilitated predation against their American competitors.

[*57]** The Supreme Court clearly believed this scenario preposterous. "[P]redatory pricing schemes are rarely tried, and even more rarely successful." (*Matsushita, supra, 475 U.S. at p. 589 [89 L.Ed.2d at p. 554*].) Moreover, a scheme involving 21 conspirators "is incalculably more difficult to execute than an analogous plan executed by a single predator." (*Id. at p. 590 [89 L.Ed.2d at p. 554*].) "Finally," the court observed, "if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices." (*Id., at pp. 590-591 [89 L.Ed.2d at p. 555*].) Data in the record strongly suggested that the goals of the alleged scheme had not been achieved. The two largest shares of the retail market in television sets was held by American, not Japanese **[***58]** manufacturers. Moreover, those shares did not decline appreciably during the two decades after the conspiracy were alleged to have commenced. (*475 U.S. at p. 591 [89 L.Ed.2d at p. 555*].) After further analysis the court concluded that "petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses **[**837]** for petitioners with no corresponding gains." (*Id., at p. 595 [89 L.Ed.2d at p. 558*], italics in original.)

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[1] In his dissent in *Anderson*, Justice Brennan contended that the majority, "while instructing the trial judge to 'consider' heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a 'fairminded' jury could 'reasonably' decide?" (*Id., at p. 265 [91 L.Ed.2d at p. 222*].) Because the majority opinion "could surely be understood as an invitation -- if not an instruction -- to trial courts to assess and weigh evidence much as a juror would" (*id., at p. 266 [91 L.Ed.2d at p. 223*]), Justice Brennan feared it "may erode the constitutionally enshrined role of the jury." (*Id., at p. 268 [91 L.Ed.2d at p. 224*].) Justice Rehnquist who in an opinion joined by Chief Justice Burger also dissented in *Anderson*, claimed that the "substantive standard" which the majority decided must be applied by trial courts in deciding a motion for summary judgment "is actually a procedural requirement engrafted onto *Rule 56*." (*Id., at pp. 268-269 [91 L.Ed.2d at p. 225*].) "The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law rather than a question of fact [citation]), will do great mischief with little corresponding benefit." (*Id., at p. 272 [91 L.Ed.2d at p. 227*].)

[2] "*Matsushita* was the quintessential overblown antitrust case. The published opinions of the trial court 'would fill an entire volume of the *Federal Supplement*.' By the time the court granted summary judgment for defendants in 1981, the record had ballooned so that the 'essence of the evidence' filled forty volumes. Judge Becker, who ruled much of the evidence inadmissible and granted summary judgment, said the 'enormous record . . . may be the largest summary judgment record ever developed.' To manage this record he required plaintiffs to file a 'final pretrial statement' detailing every fact they hoped to prove at trial, and all evidence that would be offered to prove these facts. The final pretrial statement was to have preclusive effect: except for good cause, no other facts or evidence could be offered at trial. Plaintiffs' final pretrial statement totaled 11,500 pages, not counting a 6,000 page appendix that cross-referenced 250,000 pages of documents." (Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System* (1986) *74 Geo.L.J. 1065, 1123*.)

[*1439] After establishing the implausibility of the plaintiffs' claim, and inquiring whether the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, the court had little trouble concluding that there was no "genuine issue for trial" within the meaning of *rule 56(e)*.) (*475 U.S. at p. 598 [89 L.Ed.2d at p. 559*].) To survive a defendant's motion for summary judgment in a Sherman Act case, the court declared, a plaintiff "must **[***59]** present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." (*Id., at p. 588 [89 L.Ed.2d at p. 553*].) This "tends to exclude" standard requires a plaintiff to produce considerably more evidence of agreement than does the reasonableness standard that was previously applied. [3] "While it does not technically require a specific determination by the judge that the existence of an agreement is more probable than not, as a practical matter it amounts to the same thing." (Shores, *Narrowing the Sherman Act Through an Extension of Colgate: The Matsushita Case* (1988) *55 Tenn.L.Rev. 261, 298-299*.)

[*60]** One of the most notable aspects of *Matsushita* is its adoption of the rationale of *Monsanto Co. v. Spray-Rite Service Corp. (1984) 465 U.S. 752 [79 L.Ed.2d 775, 785-786, 104 S.Ct. 1464]*. In a footnote, the *Matsushita* court stated that "[w]e do not imply that, if petitioners had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co.* v. *Spray-Rite Service Corp*., . . . establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." (*Matsushita, supra, 475 U.S. at p. 597, fn. 21 [89 L.Ed.2d at p. 559*].) Unlike *Matsushita, Monsanto* was a vertical case. Before *Matsushita* it was generally understood that the evidentiary standard for inferring an agreement was much higher in the vertical context than the horizontal. [4] *Monsanto*, **[**838]** which reinforced the early decision in *United States **[*1440]** v. Colgate & Co. (1919) 250 U.S. 300 [63 L.Ed. 992, 39 S.Ct. 465, 7 A.L.R. 443]*, **[***61]** was taken by the lower federal courts to mean that they should apply a "lesser standard" for plaintiffs to meet in establishing a horizontal combination than a vertical agreement. (See, e.g., *Filco v. Amana Refrigeration, Inc. (9th Cir. 1983) 709 F.2d 1257, 1266*.) Moreover, the *Monsanto* principles were originally fashioned for use in vertical cases *after trial on the merits*, not in connection with summary proceedings prior to trial.

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[3] It is true that in the very next sentence after the one in which the court articulates the "tends to exclude" standard the court states as follows: "Respondents . . . , in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents." (*475 U.S. at p. 588 [89 L.Ed.2d at p. 553*].). Taken at face value, this sentence creates an ambiguity, because it is inconsistent with the preceding statement that the plaintiff must present "evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." However, other language in *Matsushita* makes it very clear that "tends to exclude" standard prevails; particularly the statement that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." (*Id., at p. 597, fn. 21 [89 L.Ed.2d at p. 559*].)

[4] The *Monsanto* court emphasized that distributor termination are different from horizontal cases in several ways. "For example, the fact that a manufacturer and its distributors are in constant communication about prices and market strategy does not alone show that the distributors are not making independent pricing decisions." (*Id., at p. 762 [79 L.Ed.2d at p. 784*].) Moreover, complaints from rival distributors are natural and unavoidable and "'do not indicate illegal concerted action.'" (*Monsanto, supra, 465 U.S. at p. 763 [79 L.Ed.2d at p. 785*], quoting *Roesch, Inc. v. Star Cooler Corp. (8th Cir. 1982) 671 F.2d 1168, 1172*.) Thus, it is precisely because "[a] manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market" (*id., at p. 762 [79 L.Ed.2d at p. 784*]), that the inference of concerted action cannot be drawn in vertical price-fixing conspiracy cases only from proof of termination following competitor complaints. Because of the "important distinctions" that are at the center of distributor-termination cases, the plaintiff must provide additional evidence "that tends to exclude the possibility of independent action by the manufacturer and distributor." (*Id., at p. 768 [79 L.Ed.2d at p. 788*].) Thus, the innocence in distributor termination cases of facts that in other antitrust contexts might appear incriminating -- e.g., the sharing of information and complaints from rival distributors -- in effect renders a claim in such a vertical case "implausible" if it is not supported by additional evidence.

Because *Monsanto* relates to concerns peculiar to vertical cases never thought to be relevant to horizontal cases, it has been said that *Matsushita's* reliance on *Monsanto* is "unfair." (Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, supra*, 74 Geo.L.J. at p. 1125 and fn. 456.)

[*62]** By using *Monsanto* to redefine the substantive law, *Matsushita* alters the procedural rules and the evidentiary standard applicable in connection with motions for summary judgment in antitrust cases. *Matsushita* is in this respect analogous to *Anderson v. Liberty Lobby, supra, 477 U.S. 242*; both decisions mean that a plaintiff cannot at the summary judgment stage rely on undisputed evidence where under the applicable substantive law his right to a jury verdict would turn on a mixed question of fact and law. Whereas summary judgment was previously denied whenever competing inferences could reasonably be drawn, it is in the federal courts now proper to grant the motion in such circumstances. Moreover, once the moving defendant has shown that competing inferences may reasonably be drawn, which may not prove difficult, the nonmoving plaintiff must satisfy a much more daunting evidentiary requirement. This evidentiary requirement also vests the judge with powers that federal courts previously reserved to the jury. As Justice White pointed out in his dissent in *Matsushita*, which was joined by three of his colleagues, the **[***63]** majority's reference to *Monsanto* "suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. [The cases relied upon, *Monsanto* and *First Nat. Bank v. Cities Service (1968) 391 U.S. 253 (20 L.Ed.2d 569, 88 S.Ct. 1575)*)], do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case **[*1441]** to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment." (*Matsushita, supra, 475 U.S. at pp. 600-601 [89 L.Ed.2d at p. 561*], dis. opn. of White, J., fn. omitted.)

As a result of *Matsushita, Anderson* and *Celotex* the Supreme Court "has shifted its focus away from legal cognizability and more to actual disposition of *factual* issues. The result is that summary judgment can be less of a pretrial dismissal **[***64]** motion and more of a kind of trial itself, a bench trial on paper." (Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court, supra, 116 F.R.D. at p. 184*, italics in original.) [5]

[*65]** II.

The new federal view of summary judgment has not been adopted by the courts of this state. For one thing, the California summary judgment statute is in certain important respects different from *rule 56(e) of the Federal Rules of Civil Procedure*. The first sentence of the statute provides that a party may move for summary judgment only when "it is contended that the action has no merit or that there is no defense thereto" (*Code of Civ. Proc.,* ***[**839]*** *§ 437c, subd. (a)*), a provision that has no counterpart in the federal rule. Our statute also specifically provides, as federal *rule 56* does not, that summary judgment "shall not be granted . . . based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raises a triable issue as to any material fact." (*Code of Civ. Proc., § 437c, subd. (c)*.) As a result of these provisions, the rule has evolved that "[w]here, as here, the moving party is a *defendant* he must either negate a necessary element of the plaintiff's case or state a complete defense. [Citation.]" (*Parsons Manufacturing Corp. v. Superior Court (1984) 156 Cal.App.3d 1151, 1157 [203 Cal.Rptr. 419]*, **[***66]** italics added, citing *LaRosa v. Superior Court (1981) 122 Cal.App.3d 741, 744-745 [176 Cal.Rptr. 224]*; accord *Pultz v. Holgerson (1986) 184 Cal.App.3d 1110, 1115 [229 Cal.Rptr. 531]*; *Frazier, Dame, Doherty, Parrish & Hanawalt v. Boccardo, Blum, Lull, Niland, Teerlink & Bell (1977) 70 Cal.App.3d 331, 338 [138 Cal.Rptr. 670]*; **[*1442]** *Smith v. Southern Pacific Co. (1963) 222 Cal.App.2d 728, 733 [35 Cal.Rptr. 575]*; *Security First Nat. Bank v. Ross (1963) 214 Cal.App.2d 424, 432 [29 Cal.Rptr. 538]*.)

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[5] It has been suggested that this new attitude is more related to a desire of overburdened courts to increase the quantity of dispositions than the quality of adjudications. (See, e.g., Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment* (1988) 22 U.C. Davis L.Rev 93, 94 ["Today's courts, facing more complex cases and an increasing caseload, are simply more receptive to docket clearing devices such as summary judgment"]; Miner, *Federal Courts at the Crossroads* (1987) 4 Const. Commentary 251, 255 ["courts are beginning to relax the standards for summary judgment, and I do not believe that this development is unrelated to the caseload crunch"], and Comment, *Federal Summary Judgment: The "New" Workhorse for an Overburdened Federal System* (1987) 20 U.C. Davis L.Rev. 955, 978 ["Considering the high litigation costs and crowded dockets in federal courts today, the future of summary judgment seems secure"].)

Under the California case law it is difficult for a defendant moving for summary judgment to shift the burden of proof or of persuasion to the plaintiff. "The statute requires the trial court to consider all inferences reasonably deducible from the evidence; hence, the fact that [plaintiffs'] attorney did not urge the trial court at the original hearing on the motion to draw certain specific inferences of negligence does not relieve the trial court or this [appellate] court from a duty to take those inferences **[***67]** into account." (*Maxwell v. Colburn (1980) 105 Cal.App.3d 180, 185 [163 Cal.Rptr. 912]*; accord *Hepp v. Lockheed-California Co. (1978) 86 Cal.App.3d 714, 719 [150 Cal.Rptr. 408]*.)

Though the Supreme Court was more explicit on the point in *Celotex* and *Anderson, Matsushita* also suggests that the burdens of coming forward and of persuasion may justifiably be shifted to a plaintiff resisting summary judgment because the latter must ultimately bear those burdens at trial. As pointed out by the trial judge and in the lead opinion, such a rationale is incompatible with California law on the subject. In California, "[t]he placement of the burden of proof at trial does not affect the showing required for a summary judgment. (*Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal.App.3d 171, 179* . . . .) 'There is nothing in the [summary judgment] statute which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue[s] on which the summary judgment is sought to be predicated. In such a case, **[***68]** on the motion for summary judgment, the moving party must generally [negate] the matters which the resisting party would have to prove at the trial.' (*Barnes v. Blue Haven Pools (1969) 1 Cal.App.3d 123, 127* . . . .)" (*Lee v. Electric Motor Division (1985) 169 Cal.App.3d 375, 382 [215 Cal.Rptr. 195]*.) Stated differently, the burdens substantive ***antitrust law*** imposes upon a plaintiff at trial do not in state court serve to diminish the burdens on a defendant moving for summary judgment. The similarities between the state and federal antitrust statutes cannot be permitted to obscure the significant differences between state and federal summary judgment practices, which on the state side is governed by statute.

The reluctance of California courts to ease the burdens on parties seeking summary judgment is pronounced in cases involving the existence of an agreement. (6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 308, p. 601.) Often, the surrounding circumstances are thought to give meaning to the terms of an understanding, thus presenting a question of fact. (See, e.g., *Mason v. Superior Court (1985) 163 Cal.App.3d 989, 999* ***[*1443]*** *[210 Cal.Rptr. 63]*.) **[***69]** This judicial attitude is particularly evident in antitrust cases. As stated in *Sherman v. Mertz Enterprises (1974) 42 Cal.App.3d 769 [117 Cal.Rptr. 188]*, "[s]ummary judgment, by its nature, should be sparingly granted in cases alleging antitrust activities by defendant. **[**840]** The plaintiff in such a case finds himself outside a door of information that can be opened only by obtaining the key from the defendants. Unless plaintiff is allowed to probe into the secrecy of defendants, he would forever be foreclosed from finding facts to support his contention." (*Id., at p. 774*.)

The California Supreme Court has adopted this view. In *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842 [94 Cal.Rptr. 785, 484 P.2d 95]* the court reversed a grant of summary judgment for the defendant in a Cartwright Act case primarily on the basis of several "well-established rules" governing the meaning of *Code of Civil Procedure section 437c* (*id., at p. 851*), such as the rule that the affidavits in support of the moving party must **[***70]** in and of themselves be sufficient to sustain a judgment in his favor (*ibid*.), and the rule that "the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion." (*Id., at pp. 851-852*.) Rules such as these, the court indicated, are necessary to insure that the "drastic" remedy of summary judgment is "'used with caution so that it does not become a substitute for the open trial method of determining facts.'" (*Id., at p. 852*, quoting *Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785]*.)

The *Corwin* court also relied on language in *Poller v. Columbia Broadcasting (1962) 368 U.S. 464 [7 L.Ed.2d 458, 82 S.Ct. 486]*, that reflects a judicial sensibility hard to square with the theme of *Celotex, Anderson* and, particularly *Matsushita*: "We believe that summary procedures should be used sparingly **[***71]** in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" (Poller, supra, 368 U.S. at p. 473 [7 L.Ed.2d at p. 464]; quoted in Corwin, supra, 4 Cal.3d at p. 852.)

III.

The trial judge in this case, who understood the difference between summary judgment procedures in federal and state courts, observed on the record that "the California courts have not yet adopted *Celotex* standards **[*1444]** for ruling on motions for summary judgment." For this reason, he concluded, defendant banks and trade associations, the moving parties, "have got the burden of coming forward with evidence that is fully competent to negate the allegations made against them in the complaint." It was only because he believed the defendants **[***72]** sustained the burden of presenting sufficient evidence negating the allegations of the complaint that the trial judge shifted to the nonmoving plaintiff the burden of establishing the existence of a triable issue of material fact. [6] The rationale of the trial judge's refusal to utilize "*Celotex* standards" applies with equal force to the *Matsushita* standards, which the judge never indicated he was even considering. As has been shown, the *Matsushita* standards are closely related to those set forth in *Celotex* and are just as difficult **[**841]** to reconcile with the California summary judgment statute. As has also been shown, the *Matsushita* standards represent a policy inconsistent with that adhered to by the courts of this state.

[*73]** Finally, there remains some doubt whether even the federal courts would apply the *Matsushita* standard to the present case. First of all, the Cartwright Act claim in this case is not as facially implausible as the Sherman Act claims in *Matsushita* and *Monsanto* because there *is* an economic incentive to engage in the conduct charged and the alleged conspiracy is not practically infeasible. Nor would denial of summary judgment in this case "deter pro-competitive conduct," as the *Matsushita* and *Monsanto* courts both feared due to circumstances not present in this case. [7] (Matsushita, supra, 475 U.S. at p. 593 [89 L.Ed.2d at 556]; Monsanto, supra, 465 U.S. at pp. 762-764 [79 L.Ed.2d at pp. 784-785].) Moreover, the omission in the *Matsushita* opinion of any reference to the Supreme Court's earlier opinion in *Poller* v. *Columbia Broadcasting, supra*, 368 U.S. 454, which emphasizes very different policy considerations, suggests the possibility that *Poller* continues to apply in cases such as this one, in which the defendant's motive is a central issue **[***74]** or element of the claim. (See First Natl. Bank v. Cities Service, supra, 391 U.S. 253, 285 [20 L.Ed.2d 569, 590]; White Motor Co. v. United States (1963) 372 U.S. 253, 259 [9 L.Ed.2d 738, 744, 83 S.Ct. 696]; see also 2 Areeda & Turner, ***Antitrust Law*** (1978) § 316(b).)

[*1445] In any event, because *Matsushita* is predicated on rule 56 of the Federal Rules of Civil Procedure and conflicts with the California summary judgment statute (Code Civ. Proc., § 437c) and cases interpreting that statute, the opinion in that case is not binding on California courts.

End of Document

[6] The standard applied by the trial court in this case was precisely that adopted by the Court of Appeals in *Celotex* and rejected by the Supreme Court. As stated in the Supreme Court opinion, the majority of the Court of Appeals concluded that " Rule 56(e) of the Federal Rules of Civil Procedure, and this Court's decision in Adickes v. S. H. Kress & Co., 398 U.S. 144, 159 (1970), establish that 'the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact.' 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (italics in original; footnote omitted)." (Celotex, supra, 477 U.S. at pp. 321-322 [91 L.Ed.2d at pp. 272-273], fn. omitted.)

[7] Conducting trade association meetings does not constitute "procompetitive behavior" within the meaning of *Matsushita* and *Monsanto*.

Mylan Lab., Inc. v. Akzo, N.V.

United States District Court for the District of Columbia

March 26, 1990, Decided ; March 27, 1990, Filed

Civil Action No. 89-1671

Reporter
1990 U.S. Dist. LEXIS 3521 *; 1990-1 Trade Cas. (CCH) P68,981

MYLAN LABORATORIES, INC., Plaintiff v. AKZO, N.V., et al., Defendants

Core Terms

venue, resides, motion to dismiss, transaction of business, district court, transacts, dinner, principal place of business, venue provision, asserts, Pharmaceutical, allegations, guilty plea, purposes, personal jurisdiction, drugs, sales, illegal gratuity, drug sale, paying, co-conspirator, trip, proper venue, conspiracy, restaurant, antitrust, chief executive officer, anti trust law, vice president, press release

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN1[] **In Rem & Personal Jurisdiction, In Personam Actions**

Ordinarily, a court considers the question of personal jurisdiction before considering the issue of proper venue. However, when there is sound prudential justification for doing so, a court may reverse the normal order of its consideration and address venue before personal jurisdiction.

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN2[] **Venue, Individual Defendants**

When the court's jurisdiction is not founded solely on the diversity of citizenship, venue is proper only in the judicial district where all defendants reside or in which the claim arose, except as otherwise provided by law. *28 U.S.C.S. § 1391(b)*.

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN3[] **Venue, Multiparty Litigation**

28 U.S.C.S. § 1391(b) provides: A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN4[] **Venue, Individual Defendants**

In the usual case, a claim arises in only one specific district. In determining where "the claim arose," a court should be guided by a review of events having operative significance in the case, and a commonsense appraisal of the implications of those events for accessibility to witnesses and records. Additionally, venue is conferred on a district where a substantial portion of the acts or omissions giving rise to the actions occurred, notwithstanding that venue might also lie in other districts. The substantiality of the operative events must be determined by assessment of their ramifications for efficient conduct of the suit. Venue must be established independently as to each defendant and as to each cause of action.

Civil Procedure > Preliminary Considerations > Venue > General Overview

Torts > Procedural Matters > Commencement & Prosecution > Venue

Civil Procedure > Preliminary Considerations > Venue > Agents

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN5[] **Preliminary Considerations, Venue**

The special venue provisions of the antitrust laws are *15 U.S.C.S. §§ 15*, *22*. *Section 22* permits service of process in a non-forum district as long as the venue provision is met. *Section 15* provides that suit may be brought by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws in the district in which the defendant resides or is found or has an agent. *15 U.S.C.S. § 15*. *Section 22* provides: Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business. Venue under *15 U.S.C.S. §§ 15*, *22* must be properly established as to each defendant, and cannot be based upon allegations that the defendant's co-conspirators were found there, or transacted business there, or that all the conspirators are agents for each other.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > Preliminary Considerations > Venue > Agents

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN6[] **Racketeer Influenced & Corrupt Organizations, Claims**

The Racketeer Influenced and Corrupt Organization (RICO) Act venue provision is 28 U.S.C.S. § 1965. 28 U.S.C.S. § 1965(a) provides: Any civil action or proceeding under RICO against any person may be instituted in the district court of the United States for any district in which such person resides, is found has an agent, or transacts his affairs.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations (RICO) statute was patterned after the Clayton Act. Accordingly, the analysis the court conducts with regard to whether each of the defendants "is found," "has an agent," or "transacts business" in the district for the purposes of the antitrust laws, will be adopted for the purposes of RICO. The "transacts his affairs" language of the RICO statute has been interpreted to mean the same thing as the "transacts business" language of the antitrust statute.

Business & Corporate Law > ... > Corporate Formation > Place of Incorporation > Principal Office

Civil Procedure > Preliminary Considerations > Venue > Corporations

Governments > State & Territorial Governments > Licenses

HN8[] **Place of Incorporation, Principal Office**

A corporation "resides" in a district where it is incorporated or licensed to do business, is actually doing business in that state or has its principal place of business there.

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN9[] **Venue, Corporations**

A corporation is said to be an inhabitant of the state of its incorporation.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN10[] Antitrust & Trade Law, Clayton Act

The "transacts business" provision does not appear in *15 U.S.C.S. § 15*. It does, however, appear in *15 U.S.C.S. § 22*, which applies solely to corporations.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN11[] Antitrust & Trade Law, Clayton Act

A corporation transacts business in a district for purposes of the antitrust statute if in fact, in the ordinary and usual sense, it "transacts business" therein of any substantial character.

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

Civil Procedure > ... > Service of Process > Methods of Service > Service on Corporations

HN12[] Venue, Corporations

An alien corporation may be sued in any district under the general venue statute. *28 U.S.C.S. § 1391(d)*. However, the alien venue provision does not establish personal jurisdiction in any federal district court. Instead, alien corporations may be sued in any district where valid service of process can be made against the alien corporation.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

HN13[] Private Actions, Racketeer Influenced & Corrupt Organizations

Attendance at an occasional trade fair is insufficient to be "transacting business" in the District of Columbia for the purposes of *18 U.S.C.S. § 1965(a)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN14[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Venue under the "transacts his affairs" provision of *18 U.S.C.S. § 1965(a)* connotes the same type of substantiality and regular contact required for the "transacts business" prong of *15 U.S.C.S. § 22*. Under *18 U.S.C.S. § 1965(a)*, a person transacts his affairs within a particular district when he regularly conducts business of a substantial character within that district.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN15[] **Antitrust & Trade Law, Clayton Act**

In order to be "found" within a district, for the purposes of *15 U.S.C.S. §§ 15*, *22*, a corporation must engage in greater activities than required to be "transacting business" there. A corporation is found in a district where it has presence and continuous local activities.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN16[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1965(b) provides: In any action under *28 U.S.C.S. § 1964* ("Civil Remedies"), in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN17[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

28 U.S.C.S. § 1965(b) operates as a waiver of applicable venue requirements if the "ends of justice" so require.

Civil Procedure > ... > Venue > Federal Venue Transfers > Improper Venue Transfers

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN18[] **Federal Venue Transfers, Improper Venue Transfers**

28 U.S.C.S. § 1406(a) provides: The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN19[] **Venue, Multiparty Litigation**

The convenience of the plaintiff is not a factor in determining proper venue.

Opinion by: [*1] HOGAN

Opinion

MEMORANDUM OPINION

THOMAS F. HOGAN, UNITED STATES DISTRICT JUDGE

This case is before the Court on the motions by defendants Akzo, N.V., Azeem, Matkari, Par Pharmaceuticals, Inc., Patel, Pharmaceutical Basics, Inc., Shah, and Vegesna to dismiss for lack of personal jurisdiction and improper venue, pursuant to *Federal Rules of Civil Procedure 12(b)(2)* and *12(b)(3)*. In consideration of the motions, the numerous pleadings, [1] the entire record of the case, the arguments made at the hearing, and for the reasons stated below, the Court shall transfer this case to the United States District Court for the District of Maryland in the interest of justice, pursuant to *28 U.S.C. § 1406(a)*. The Court finds it unnecessary to rule upon the motions to dismiss for lack of personal jurisdiction. [2]

[*2] *BACKGROUND*

Plaintiff Mylan Laboratories, Inc. ("Mylan") filed this complaint for damages for violations of the federal anti-trust laws, *15 U.S.C. § § 1 et seq.*, violations of and conspiracy to violate the federal Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § § 1961 et seq.*, and unfair competition and tortious interference with prospective

[1] The Court notes that there were at least 21 pleadings filed on the issues of personal jurisdiction and venue.

[2] Additionally, the Court shall not reach the following motions filed by the defendants: any motions to dismiss based on insufficiency of process or insufficiency of service of process; any motions to dismiss for failure to plead fraud with particularity; any motions to strike portions of the complaint; or, any motions to dismiss for failure to state a cause of action.

business relations against the following defendants: Akzo, N.V. ("Akzo"); Pharmaceutical Basics, Inc. ("Pharmaceutical Basics" or "PBI"); Par Pharmaceuticals, Inc. ("Par"); Quad Pharmaceuticals, Inc. ("Quad"); American Therapeutics, Inc. ("ATI"); Vitarine Pharmaceuticals, Inc. ("Vitarine"); Raj Matkari ("Matkari"); Ashok Patel ("Patel"); Dilip Shah ("Shah"); Raju Vegesna ("Vegesna"); Mohammed Azeem ("Azeem"); Charles Chang ("Chang"); and David Brancato ("Brancato"). The factual basis of this civil suit stems from the on-going criminal prosecutions and investigations by the United States Attorney for the District of Maryland of persons allegedly participating in the bribery of officials employed by the Federal Drug Administration, headquartered in Maryland. The bribery scheme allegedly was centered around the application **[*3]** approval process of the Division of Generic Drugs, which was administered at the FDA in Maryland. All of the defendants are allegedly involved, in one way or another, in the generic prescription drug industry.

Cutting away the complaint to its core, a difficult task given its voluminous nature, [3] Mylan alleges that there was a conspiracy between the defendants to bribe officials of the FDA, which caused Mylan's drugs to be approved more slowly than drugs of companies on whose behalf bribes had been paid. This conspiracy allegedly damaged Mylan because it suffered a competitive disadvantage in the marketplace.

ANALYSIS

HN1[] Ordinarily, a Court considers the question of personal jurisdiction before considering the issue of proper venue. However, when there is sound prudential justification for doing so, a Court may reverse the normal order of its consideration and address venue before personal jurisdiction. *Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1978)*. In this case, involving thirteen defendants, eight of whom have filed both motions to dismiss for lack of personal jurisdiction and for improper venue, the Court would have **[*4]** to undertake a lengthy and difficult analysis to reach a decision on personal jurisdiction. Were the Court to embark on such an analysis of personal jurisdiction and find that personal jurisdiction existed, the Court would still be obligated to address the venue challenges it decides today. The Court finds it unnecessary and inappropriate to engage in such an analysis regarding personal jurisdiction when it is so clear that venue is improper in the District of Columbia.

Mylan has suggested that "[t]his Court should cut through the smoke screen of meritless legal technicalities which these corporate defendants have raised and hold them fully responsible for their conduct." Mylan's Opposition to the Motions of Par and PBI at 1. The Court, while not condoning the alleged actions of the defendants, views the venue provisions as more than "meritless legal technicalities," and will proceed to examine defendants' objections to District of Columbia venue.

Mylan asserts that venue is proper in the District of Columbia based on three provisions: the general venue statute, *28 U.S.C. § 1391(b)*; the venue provisions of the Clayton Act, *15 U.S.C. § § 15* and *22*; and the venue provision of the RICO **[*5]** Act, *18 U.S.C. § 1965*. Since the legal analysis for each provision rests upon factual allegations, the Court will outline the factual allegations here, and analyze them in due course.

Parties

Plaintiff Mylan is a Pennsylvania corporation, with its principal place of business in West Virginia. Mylan is engaged in the development, manufacture, sale, and distribution of generic prescription drugs.

Akzo is a Netherlands corporation, with its principal place of business in the Netherlands. Akzo allegedly conducts business in the United States and is the parent company of defendant Pharmaceutical Basics.

Pharmaceutical Basics is a Delaware corporation, with its principal place of business in Illinois. Prior to 1986, PBI's principal place of business was in Colorado. in 1986, defendant Akzo allegedly acquired PBI.

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[3] The complaint numbers 213 pages.

Par is a New Jersey corporation, with its principal place of business in New York. Par is allegedly the parent company of defendant Quad. On July 19, 1989, Par pleaded guilty in the United States District Court for the District of Maryland to paying an illegal gratuity to defendant Chang.

Quad is an Indiana corporation, with its principal place of business in Indiana. On July **[*6]** 19, 1989, Quad pleaded guilty in the United States District Court for the District of Maryland to paying an illegal gratuity to defendant Chang.

American Therapeutics is a Delaware corporation, with its principal place of business in New York.

Vitarine is a Delaware corporation, with its principal place of business in New York.

Raj Matkari is an individual who resides in Colorado. He was a vice president for regulatory affairs and product development for PBI. Matkari has entered a plea of guilty in the United States District Court for the District of Maryland for paying an illegal gratuity to defendant Chang, in violation of *18 U.S.C. § 201(c)(1)(A)*.

Ashok Patel is an individual who resides in New York. He was a senior vice president of Par. On July 17, 1989, Patel entered a guilty plea in the United States District Court for the District of Maryland to paying an illegal gratuity to Charles Chang "[o]n or about September 15, 1987, in the State and District of Maryland," in violation of *18 U.S.C. § 201(c)(1)(A)*. *See* Information, Exhibit 2 to Patel's Motion to Dismiss. Patel states that he has never lived, worked, maintained a place of business, or owned real estate or other property **[*7]** in the District of Columbia.

Dilip Shah is an individual who resides in Indiana. He was president and chief executive officer of Quad. On July 18, 1989, Shah entered a guilty plea in the United States District Court for the District of Maryland to paying an illegal gratuity to Charles Chang "[o]n or about September 15, 1987, in the State and District of Maryland," in violation of *18 U.S.C. § 201(c)(1)(A)*. *See* Information, exhibit 2 to Shah's Motion to Dismiss.

Raju Vegesna is an individual who resides in New York. He was president and a chief executive officer of ATI.

Mohammed Azeem is an individual who resides in New York. For a time, he was a consultant to defendant ATI.

Charles Chang is an individual who resides in Maryland. He is a former FDA employee, who was a supervisory chemist in the Generic Drug Division of the FDA, located in Maryland.

David Brancato is an individual who resides in Maryland. He is a former chemist in the Generic Drug Division of the FDA, located in Maryland. On May 17, 1989, Brancato pleaded guilty in the United States Court for the District of Maryland to accepting a series of illegal cash payments from defendants Patel and Shah.

Alleged Conspiracy

[*8] The factual basis of plaintiff's claim was not significantly developed when Mylan filed the complaint, or when it responded to the numerous motions to dismiss. The complaint and rests primarily on facts gleaned from press releases of and prosecutions by the United States Attorneys Office for the District of Maryland, and various affidavits filed with the Court. In its Opposition to Defendant Matkari's Motion to Dismiss, Mylan asserted that it based its claims of conspiracy on "admissions of wrongdoing by both Matkari and other co-defendants in this case such as Brancato and Chang." Mylan's Opposition to Matkari's Motion to Dismiss at 2 n.1. [4] Mylan has attached copies of various Press Releases from the United States Attorney for the District of Maryland to its pleadings as exhibits. [5] The press releases, obviously not prepared in preparation for the motions now pending before this Court, are not always specific with regard to the location of various criminal conduct, some of it admitted, some of it alleged, of the defendants now before this Court. The only specific locations of activity by any of the defendants are

[4] All of the admissions of wrongdoing involve actions in Maryland. Although Mylan filed this brief on July 11, 1989, it referred to this description of its factual basis for its claims in a brief filed as late as October 13, 1989, just prior to the hearing on the Motions to Dismiss.

[5] *See,* e.g., Exhibits A, B, C, D, E, F to Mylan's Opposition to Matkari's Motion to Dismiss.

in Maryland. The press releases identify numerous meals attended **[*9]** by only a few of the defendants before this Court at restaurants in Maryland. [6] Additionally, significant conduct allegedly occurred at the FDA in Maryland, including the review, recommendation for approval, and approval of drug applications submitted by the corporate defendants to the FDA, located in Maryland. This activity at the FDA was conducted by defendants Chang and Brancato, who are both residents of the state of Maryland.

[*10] Mylan alleges that while Vegesna was serving as President and Chief Executive Officer of defendant ATI, he took Chang, an FDA branch chief, on an all-expenses-paid trip around the world in the summer of 1987. There is no indication that this trip included a visit to the District of Columbia. This trip was allegedly paid for by defendants ATI, Vegesna, and Azeem, who was serving as a consultant to ATI. Mylan alleges that Azeem flew from New York to Hong Kong and back to New York, paid for $ 3,1721.57 in airline tickets and for a hotel room at the direction of defendant Vegesna. Complaint para. 94(A)(1). Vegesna also allegedly purchased a series of gifts, including furniture and computers, for Chang. Mylan's Opposition to Vegesna' Motion to Dismiss at 2 n.1, citing Complaint at paras. 17, 94(a)(1), (2). These purchases occurred in Maryland and New York. There is no indication that any purchases were made in the District. *See* Exhibit D to Mylan's Opposition to Matkari's Motion to Dismiss.

Based on the press releases, and the information contained in the complaint, a substantial number of bribes were paid in the course of meals eaten at various restaurants located in the Bethesda **[*11]** and Rockville areas Of Maryland. In September, 1986, Chang, Brancato, Shah, and Patel allegedly ate dinner in a restaurant in Bethesda, Maryland. During this dinner, Shah allegedly handed Brancato an envelope containing approximately $ 3,000. On one occasion, during November, 1987, Chang allegedly invited Brancato to Chang's home in Maryland, to meet with Vegesna and Azeem. Brancato Affidavit, Exhibit A to Mylan's Opposition to Vegesna's Motion to Dismiss ("Brancato affidavit"). [7] Following the meeting, Vegesna, Azeem, and Chang had dinner in a restaurant located in Rockville, Maryland, at which Vegesna allegedly slipped $ 5,000 to Brancato. Azeem allegedly picked up the dinner tab. Second Brancato Affidavit, February 16, 1990.

In its complaint, Mylan does not identify a single overt act which occurred in the District of Columbia. The only two allegations of overt activity in the District of Columbia are contained in two affidavits of David Brancato, one of the defendants in this action. The first affidavit was filed **[*12]** fortuitously just four days before the hearing scheduled on these motions. [8] The second affidavit was filed after the hearing, when the Court allowed supplemental evidence to be filed. The October 13, 1989 affidavit of defendant Brancato asserted that during June, 1987, he ate dinner with defendants Patel, and Shah at Mr. K's restaurant in Washington, D.C. Brancato asserts that during the dinner, Shah dropped an envelope containing between $ 1,000 and $ 2,000 in cash into his briefcase. At the conclusion of the dinner, Brancato alleges that either Patel or Shah paid the dinner check. Affidavit of David J. Brancato, Exhibit A to Mylan's Opposition to Vegesna's Motion to Dismiss. In a later affidavit, filed on February 16, 1990, Brancato

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[6] Meals attended by defendants Chang, Brancato, Patel and Shah, at which illegal gratuities were paid, occurred "at restaurants in the Rockville [located in Maryland] area." Matkari and Chang had a meeting "at the Bethesda Marriott Hotel in Bethesda, Maryland where [Matkari] gave Mr. Chang an envelope containing $ 2,000 in currency." No mention is made of any payments in the District of Columbia at all. *See* Press Release From the United States Attorney for the District of Maryland, May 17, 1989, Exhibit C to Mylan's Opposition to Matkari's Motion to Dismiss.

[7] Brancato suggests that this meeting was in response to Chang's statement to him that Vegesna wanted to "do something for [him]." Brancato Affidavit at para. 9.

[8] The first Brancato affidavit was filed in response to affidavits filed by defendants Patel and Shah.

Defendant Patel asserted in his affidavit that "I have never travelled to the District of Columbia to transact business with FDA officials or employees either as an individual or as a representative of Par. . . . All of my business with representatives of the FDA, including Charles Chang and David Brancato, was conducted in the State of Maryland. No business was conducted with FDA officials within the District of Columbia." Affidavit of Ashok Patel in Support of Motion to Dismiss at para. 6.

Defendant Shah asserted in his affidavit that "I never have given either Chang or Brancato anything of value in the District of Columbia." Affidavit of Dilip Shah in Support of his Motion to Dismiss at para. 9.

asserts that he ate dinner with Shah and Patel in Washington, D.C. During this dinner, Shah allegedly gave Brancato approximately $ 2,000, and paid for the dinner.

[*13] The other alleged District of Columbia activities focus on the alleged sale of drugs in the District of Columbia by the corporate defendants in this action. Mylan's primary factual basis for the structure and extent of defendants' drug sales is obtained from information from the defendants themselves, and an affidavit submitted by Roderick P. Jackson, the Vice President of Marketing and Sales for Mylan. Mylan's Opposition to Matkari's Motion to Dismiss, Exhibit G. The Court finds that the Jackson affidavit contains no information or assertions which could lead the Court to find venue in the District for any of the defendants who currently have filed motions to dismiss for lack of venue. [9] The Jackson affidavit, referred to throughout Mylan's filings in opposition to the Motions to Dismiss, primarily contains information regarding *Mylan's* drug sales, not any of the sales of the defendants. To the extent it contains information regarding the drug sales of Akzo, PBI, or Par, the affidavit contains only vague and insubstantial allegations regarding defendants' alleged indirect drug sales in the District of Columbia. [10] The affidavit contains no specific names of companies, drugs, **[*14]** or quantities of sales. The assertions regarding the defendants are replete with disclaimers such as "to the best of my knowledge and belief," and the connections between the defendants and any of their drugs finding their way to the District are through numerous unnamed intermediaries. The Court finds it inappropriate to rely on Jackson's vague assertions to find venue proper for any of the defendants under any of the venue provisions by virtue of these alleged "indirect" drug sales in the District of Columbia.

[*15] *The General Venue Statute, 28 U.S.C. 1391(b)*

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[9] Mr. Jackson states that "[t]he purpose of this affidavit is to establish that the products of Mylan . . . as well as those defendants in this action -- . . . [Akzo, PBI, Par, Quad, ATI, and Vitarine] are sold in the District of Columbia." para. 2.

[10] Mr. Jackson asserts that there are three ways that "Mylan, as well as other generic drug companies" market their drugs, each of which allegedly leads to sales of drugs in the District. These three ways are: one, by selling to national or regional distributors who in turn sell drugs primarily to independent pharmacies or small chains; two, by selling to local wholesalers which in turn sell to chain or independent drug stores which do not maintain their own drug warehouses; and three, by selling drugs directly to drug store chains which maintain their own warehouses. para. 4.

In category one, Jackson's assertion regarding the defendants is "[t]o the best of my knowledge and belief, in addition to the drugs that defendants . . . sell through Mason [a national distributor which buys from Mylan], some or all of them also sell quantities of drugs to many, if not all, of the national distributors listed in para. 8 [none of which are defendants], as well as other national and regional distributors.

To the best of my knowledge and belief, each of the national distributors listed in para. 8, as well as other national and regional distributors, sells drugs to retailers for ultimate resale in the District of Columbia. To the best of my knowledge and belief, some or all of the defendants . . . have sold drugs to the companies listed in para. 8, as well as other national and regional distributors, for ultimate resale within the District of Columbia. *See* paras. 11, 12.

In category two, Jackson's assertions regarding the defendants' sale of drugs is limited to the following general, vague information: "[t]o the best of my knowledge and belief, some or all of the defendants . . . presently sell drugs through District Wholesale. To the best of my knowledge and belief, similar sales occurred during all of the years relevant to the complaint. To the best of my knowledge and belief, a portion of these drugs were resold in the District of Columbia. . . . To the best of my knowledge and belief, the sales . . . include sales of some of the drugs listed [in the complaint] . . . as well as numerous other drugs." paras. 20, 21.

In category three, Jackson's assertions regarding defendants' drug sales in the District of Columbia are similarly vague and insubstantial: "[t]o the best of my knowledge and belief, some or all of the defendants . . . have sold drugs to the companies listed in para. 24 [three companies to which *Mylan* sells] for ultimate resale within the District of Columbia. . . To the best of my knowledge and belief, the sales . . . include sales of some of the drugs listed in [the complaint] . . . as well as numerous other drugs." paras. 28, 29.

In this case, **HN2**[] the Court's jurisdiction is not founded solely on the diversity of citizenship. Accordingly, venue is proper "only in the judicial district where all defendants reside or in which the claim arose, except as otherwise provided by law." *28 U.S.C. § 1391(b)*. [11] Since there is no district where all the defendants reside, the Court must determine whether. or not plaintiff's claim arose in the District of Columbia.

HN4[] In the usual case, a claim arises in only one specific district. *Leroy v. Great Western United Corp., 443 U.S. 173, 185 (1978)*. In determining where "the claim arose," a Court should be guided by a review of "events having operative significance in the case, and a commonsense appraisal of the implications of those events for accessibility to witnesses and records." Additionally, venue is conferred on a district "where a substantial portion of the acts **[*16]** or omissions giving rise to the actions occurred, notwithstanding that venue might also lie in other districts." The substantiality of the operative events must be determined by assessment of their ramifications for efficient conduct of the suit. *Lamont,* 590 F.2d at 1134-1135. Venue must be established independently as to each defendant and as to each cause of action. *Lamont v. Haig, 590 F.2d 1124, 1135 (D.C. Cir. 1978)*. [12]

Two meals between some of the defendants in the District of Columbia and the weak allegations of drug sales of some of the corporate defendants do not rise to the level of substantiality required by the holdings of *Leroy, 443 U.S. 173 (1978)*, *Naartex Consulting Corn. v. Watt, 722 F.2d 779 (D.C. Cir. 1983)*, or *Lamont, 590 F. 2d 1124 (D.C. Cir. 1978)*. Further, there is no basis for a finding by this Court that maintaining this suit in the District of Columbia would contribute to the "efficient **[*17]** conduct of [this] suit." The great weight of significant events relating to this action occurred in Maryland: the FDA is located in Maryland, the application and approval processes for the drugs at issue in this case occurred in Maryland, and almost all of the alleged payments of gratuities took place in Maryland. All of the criminal indictments arising out of defendants' actions have been brought in the United States District Court for the District of Maryland, and are based on actions by defendants in Maryland. None of the parties to this action reside in the District of Columbia. *See* *Naartex, 722 F.2d 779, 789 n.17 (D.C. Cir. 1983)*.

Because the Court finds that the claim did not arise in the District of Columbia, venue is not proper in the District of Columbia under *28 U.S.C. § 1391*.

The Antitrust Venue Provisions, 15 U.S.C. § § 15 and 22 and The RICO Venue Provision, 18 U.S.C. § § 1965(a) and (b)

HN5[] The special venue provisions of the antitrust laws are *15 U.S.C. § § 15* and *22*. [13] *Section 22* permits service of process in a non-forum district as long as the venue provision is met. *Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182, 1195 (D.D.C. 1984)*, *citing Frederick* **[*18]** *Cinema Crop. v. Interstate Theatres Corp., 413 F. Supp. 840, 841-42 n.1 (D.D.C. 1976)*. *Section 15* provides that suit may be brought "by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . in the district in which the defendant resides or is found or has an agent . . . ." *15 U.S.C. § 15*. *Section 22* provides:

Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business.

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[11] **HN3**[] *28 U.S.C. § 1391(b)* provides:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

[12] Since the Court has determined that the claim did not arise in the District of Columbia for purposes of *28 U.S.C. § 1391(b)*, it is not necessary for it to consider whether venue is proper as to each defendant under the general venue provisions.

[13] Congress' intent in enacting *15 U.S.C. § 22* was to expand the jurisdiction of the District Courts in antitrust suits beyond previous bounds of *15 U.S.C. § 15*. *Austad v. United States Steel Corp., 141 F. Supp. 437, 440 (D.Cal. 1956)*, citing *Eastman Kodak Co. v. Southern Photo Material Co., 273 U.S. 359 (1927)*.

Venue under 15 U.S.C. § § 15 and 22 must be properly established as to each defendant, and cannot be based upon allegations that the defendant's co-conspirators were found there, or transacted business there, or that all the conspirators are agents for each other. *See* Caribe Trailer Systems v. Puerto Rico Maritime Shipping Auth., 475 F. Supp. 711 (D.D.C. 1979). *See also* Piedmont Label Co. v. Sun Garden Packing Co., 589 F.2d 491 (9th Cir. 1979) (and cases cited therein).

[*19] The venue and jurisdiction provisions of RICO overlap, much in the same way as the antitrust provisions. ***HN6***[] The RICO venue provision is 28 U.S.C. § 1965. Subsection (a) provides:

(a) Any civil action or proceeding under [the RICO statute] against any person may be instituted in the district court of the United States for any district in which such person resides, is found has an agent, or transacts his affairs.

HN7[] The RICO statute was patterned after the Clayton Act. *See* Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) (RICO was modeled on the Clayton Act). Accordingly, the analysis the Court conducts with regard to whether each of the defendants "is found," "has an agent," or "transacts business" in the District of Columbia for the purposes of the antitrust laws, will be adopted for the purposes of RICO. The "transacts his affairs" language of the RICO statute has been interpreted to mean the same thing as the "transacts business" language of the antitrust statute. *Abeloff v. Barth, 119 F.R.D. 315, 326 (D. Mass. 1988)*.

Since none of the defendants resides [14] in or is an inhabitant [15] of the District, the Court must examine whether any of the defendants "is **[*20]** found," "has an agent," "transacts business," or "transacts his affairs" in the District.

Transacts Business and Transacts his Affairs

HN10[] The "transacts business" provision does not appear in 15 U.S.C. § 15. It does, however, appear in 15 U.S.C. § 22, which applies solely to corporations. Accordingly, 15 U.S.C. § 22 cannot be used to confer venue in the District for any of the individual defendants, and the Court will consider it only as it applies to defendants Akzo, PBI, and Par. [16]

[*21] ***HN11***[] A corporation transacts business in a district for purposes of the antitrust statute "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any *substantial* character." Chrysler Corporation v. General Motors Corp., 589 F. Supp. 1182 (D.D.C. 1984), quoting Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373 (1927).

PBI asserts that it is not licensed to do business in the District, does not own, rent or lease any offices, production facilities or warehouses within the District. PBI states it has no officers, directors, employees or agents within the District, and does not have any bank accounts or telephone listings within the District. PBI's salespeople do not visit customers within the District, and PBI does not have any suppliers within the District. Affidavit of Daryl Johnson, Exhibit C to PBI's Motion to Dismiss, at paras. 4-5.

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[14] ***HN8***[] A corporation "resides" in a district where it is incorporated or licensed to do business, is actually doing business in that state or has its principal place of business there. *Caribe Trailer Systems v. Puerto Rico Maritime, 475 F. Supp. at 716* (citation omitted).

[15] ***HN9***[] A corporation is said to be an inhabitant of the state of its incorporation. *Caribe Trailer Systems v. Puerto Rico Maritime, 475 F. Supp. 711, 716 (D.D.C. 1979)*.

[16] *15 U.S.C. § 22* cannot be used to confer venue in the District over defendants Matkari, Patel, Shah, Vegesna, Azeem, Chang, or Brancato, who are individuals. Additionally, the Court only considers *§ 22* as it applies to defendants Akzo, PBI, and Par, since they are the corporate defendants that have filed motions to dismiss based on improper venue.

PBI states that it is aware of only one PBI customer that is located in the District. Its sales to that customer amount to a total of about $ 7,000, or less than .0089% of PBI's sales for the period 1986-1988. PBI asserts that its sales of the drug Oxybutynin (the only drug named in Mylan's complaint **[*22]** that this District customer has purchased from FBI) amounted to $ 232 in 1988 and $ 110 from January to August, 1989. These sales of Oxybutynin apparently represent .0005% of PBI's 1988 revenues and .00027 of PBI's 1989 revenues. *Id.* at paras. 5 and 6. [17]

The Court finds that these FBI drug sales in the District do not rise to the level of substantiality required for venue to be proper as to PBI under the "transacts business" prong of *15 U.S.C. § 22*. [18]

[*23] Mylan asserts that venue is proper in the District of Columbia over Akzo, based on the actions of Akzo's subsidiary, PBI. [19] The Court has found that there is no basis for venue in the District of Columbia under the "transacts business" clause of *15 U.S.C. § 22* for defendant PBI. Thus, Mylan's assertion that venue is proper in the District of Columbia as to Akzo must fail. [20]

[*24] Par pleaded guilty to paying an illegal gratuity to defendant Chang, for acts in Maryland. These Maryland acts cannot be the basis for proper venue in the District of Columbia. Par asserts that it has never had any office, production facilities, warehouse, or other premises in the District of Columbia, has never rented or leased, any real property within the District, and does not have any personal property in the District. Par claims that it does not pay, and has never paid, any income taxes, franchise taxes, or other local taxes to the District of Columbia, that it has never been licensed to do business in the District, and has no registered agent for service of process in the District. Par further contends that it does not maintain any bank accounts, or telephone listings in the District, and that it has never solicited business in, or conducted advertising in, the District. Affidavit of Richard J. Nadler, Exhibit A to Par's Motion to Dismiss at paras. 3-8.

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[17] FBI asserts that it sold its products to three drugstore chains outside the District. FBI believes that these chains operate drugstores within the District, in addition to other states. FBI contends that it does not have knowledge of or control over where the drugstore chains sell the products they purchase from FBI. *Id.,* at para. 7.

[18] The Court has already rejected reliance on Mylan's arguments regarding the "indirect" sales of drugs of defendants which were averred to in the affidavit submitted by Roderick P. Jackson. Accordingly, the Court will limit its analyses of the defendants' business transactions in the District to their direct sales.

The Court also finds unpersuasive Mylan's other arguments regarding this Court's proper venue. In particular, the Court rejects the following vague assertion: "[i]n a July 11, 1989 hearing before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, Dr. Marvin Seife, the Director of FDA's Division of Generic Drugs, testified under oath that he had received information that defendant Chang had met with an executive of defendant . . . ATI within the District under circumstances strongly suggesting that the meeting was part of the conspiracy alleged in the Complaint." Mylan's Opposition to Par and PBI at 8.

[19] Mylan also argues that venue is proper in the District of Columbia for Akzo based on Akzo's own actions. However, all of the actions of Akzo to which Mylan points refer to business activities in the United States and North America. (*See*, e.g. "During 1988, Akzo had approximately $ 1.35 billion in sales and employed 8900 people in North America." "In 1988 alone, Akzo invested an additional $ 125 million . . . in North America." Akzo has begun work on, opened or taken over at least three new plants in the United States [in California and Michigan]." Mylan's Opposition to Akzo's Motion to Dismiss at 7-9. Actions which are identified as taking place in North America or the United States cannot be the basis for proper venue in the District of Columbia.

[20] The Court realizes that Akzo has substantial arguments regarding any Court's jurisdictional over Akzo by virtue of its subsidiary PBI. Since Akzo is ***HN12***[] an alien corporation, it may be sued in any district under the general venue statute. *28 U.S.C. § 1391(d)*. However, the alien venue provision does not establish personal jurisdiction in any Federal District Court. Instead, alien corporations may be sued in any district where valid service of process can be made against the alien corporation. *Weinstein v. Norman M. Morris Corporation, 432 F. Supp. 337 (E.D. Mich. 1977)*.

However, this Court will leave resolution of these arguments to the District Court for the District of Maryland. For now, this Court merely holds that since venue is improper as to PBI, there can be no basis for venue in the District of Columbia as to its parent company, Akzo, given that the only asserted basis for venue over Akzo was through PBI.

In the last six years, Par states that it sold approximately $ 23,000 worth of pharmaceutical products to purchasers located in the District. [21] Par's total sales in the past six years amounted to $ 231,000,000. Thus, according **[*25]** to Par, its sales in the District from 1984 to 1989 amounted to less than 0.01% of Par's total sales during these years. *Id.,* at 9-12. The Court finds Par's business transactions in the District of Columbia to be insubstantial. Thus, venue is improper under *15 U.S.C. § 22* in the District as to defendant Par.

The only analysis not already conducted under the venue provisions of the ***antitrust law*** is whether any of the individual defendants who have filed motions to dismiss for improper venue, that is, defendants Azeem, Matkari, Vegesna, and Shah, "transacted his affairs" in the District of Columbia for purposes of *18 U.S.C. § 1965*.

Azeem is a resident of New York, and for a time was a consultant to ATI, a Delaware Corporation with its principal place of business in New York. Azeem states that he does not have an agent in the District, nor does he transact any business here. Azeem states that he does not contract to supply services in the District of Columbia, does not engage in any persistent course of conduct in the District, and does not derive substantial revenue from goods consumed in **[*26]** the District. Azeem's Motion to Dismiss at 8-9.

Mylan's assertions of District of Columbia venue over defendant Azeem rely almost exclusively on a co-conspirator theory of venue ("defendants Patel, Shah, and Azeem have transacted, and continue to transact business, in the District through their multiple co-conspirator theory." Mylan's Opposition to Azeem, Patel and Shah at 8. This Court has rejected this theory, relying on *Caribe.* Mylan's briefs are often so rambling, the Court has found it difficult to find exactly on what other facts Mylan bases its arguments of proper venue as to Azeem. [22] In fact, in the section of its opposition to the motion to dismiss by Azeem on the RICO and Antitrust statutes, there is not a single specific reference to Azeem. In other sections of Mylan's opposition, Mylan refers to the around the world trip of Chang, paid by Azeem, ATI and Vegesna. There is no allegation that this trip included a stop in Washington, D.C., or that it was paid for in the District of Columbia. Based on the foregoing, the Court finds that defendant Azeem does not transact his affairs in the District of Columbia for the purposes of the RICO venue provision, *18 U.S.C. § 1965(a)*. **[*27]**

Matkari is a an individual who resides in Colorado. He was a Vice President for Regulatory Affairs and Product Development for PBI, a Delaware corporation with its principal place of business in Illinois. Matkari pleaded guilty to paying an illegal gratuity to defendant Chang in the state of Maryland. Mylan's assertions with regard to venue as to defendant Matkari are as vague and insubstantial as those regarding defendant Azeem, and rely on the alleged contacts with the District by Matkari's alleged co-conspirators ("defendant Matkari has transacted and continues to transact business in the District through his multiple coconspirator agents." Mylan's Opposition to Matkari at 6). [23] The Court rejects this theory of proper venue. Thus, the Court finds that there is no basis for finding that defendant Matkari "transacted his affairs" in the District for the purposes of *18 U.S.C. § 1965(a)*.

[*28] Defendant Vegesna is an individual who resides in New York. He was a chief executive officer of ATI, a Delaware corporation with its principal place of business in New York. Putting aside Mylan's co-conspirator basis for proper venue in the District, Mylan puts forth three specific bases for proper venue in which defendant Vegesna

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[21] Only a portion of these sales were of Par products identified in Mylan's complaint.

[22] Mylan chose to respond to Azeem's motion to dismiss for lack of jurisdiction and improper venue along with its opposition to similar motions by defendants Patel and Shah.

[23] Mylan puts forth several other weak arguments, including:

"[t]he illegal activity which Matkari has already admitted occurred in nearby Bethesda, Maryland. It is likely that defendant Matkari, who traveled from Colorado to pay the cash to defendant Chang, traveled through or stayed in the District during that trip." Mylan's Opposition to Matkari at 12. The Court will not rely on such hypothetical assertions to find venue proper in the District.

Mylan also asserted the interesting theory that "Matkari corrupted a federal government process, the ultimate control over which lay in the District." Mylan's Opposition to Matkari at 18. As defendant Matkari so aptly responded, "[n]ot surprisingly, no authority is cited for this unusual theory." Matkari's Reply at 17. As far as the Court is aware, there is none.

was directly involved: his involvement in paying for an around-the-world trip for Chang (which was not paid for in and did not include a trip to the District of Columbia); his purchase of furniture and other gifts for defendant Chang in New York and Maryland; and Vegesna's payment of $ 5,000 to defendant Brancato in the state of Maryland. Mylan's Opposition to Vegesna's Motion to Dismiss at 2 n.1. None of these establishes that Vegesna "transacted his affairs" in the District of Columbia for the purposes of *18 U.S.C. § 1965(a)*.

Defendant Patel is a resident of New Jersey, and was a Vice President of Par Pharmaceutical, Inc., a New Jersey corporation with its principal place of business in New York. Patel has never lived or worked in the District, does not own real estate or other property in the District, and has never maintained a place of business, office, **[*29]** street address, post office box, telephone listing or telephone number in the District. Affidavit of Ashok Patel, Exhibit A to Patel's Motion to Dismiss at paras. 1-5. Patel pleaded guilty to one count of violating *18 U.S.C. § 201(c)(1)(A)* in the District of Maryland.

Patel states that he occasionally attended some trade association conventions and FDA seminars in the District of Columbia, and these events may have included defendants Chang and Brancato. Id., at para. 7. However, ***HN13***[] attendance at an occasional trade fair is insufficient to be "transacting business" in the District of Columbia for the purposes of *18 U.S.C. § 1965(a)*. *Sunray Enterprises Inc. v. David C. Bouza & Assoc., 606 F. Supp. 116, 119 (S.D.N.Y. 1984)*.

The only activity which connects Patel to the District of Columbia was his attendance at two dinners with defendants Shah and Brancato. However, the Court finds these two dinners insubstantial, particularly when compared to the numerous other actions which Patel undertook in Maryland. ***HN14***[] Venue under the "transacts his affairs" provision of *18 U.S.C. § 1965(a)* connotes the same type of substantiality and regular contact required for the "transacts business" prong of **[*30]** *15 U.S.C. § 22*. [24] Under *18 U.S.C. § 1965(a)*, a person transacts his affairs within a particular district "when he *regularly* conducts business of a *substantial character* within that district." *Dody v. Brown, 659 F. Supp. 541, 545 (W.D. Mo. 1987)* (citations omitted, emphasis in the original). No such substantiality or regularity can be found based on just two dinners in the District of Columbia. Indeed, Patel states that he met with Chang and Brancato on several occasions in Maryland, both at restaurants and at the FDA, located in Maryland. Thus, the Court finds no basis for venue in the District of Columbia for defendant Patel under *18 U.S.C. § 1965(a)*.

[*31] Defendant Shah is a resident of Indiana, and was President and Chief Executive Officer of Quad, an Indiana corporation with its principal place of business in Indiana. Defendant Shah has never resided in the District, has never been employed here, and has never maintained a place of business in the District. Shah pleaded guilty to giving an illegal gratuity to an official of the FDA in the District of Maryland. Defendant Shah states that he regularly traveled to Rockville, Maryland to the FDA, when he was employed by Quad. Shah states that he traveled through the District on his way to the FDA in Rockville, and slept at hotels in the District. On two occasions, Shah joined Patel and Brancato for dinner in the District of Columbia, at which allegedly a bribe was paid. As was the case with Patel, the Court finds that these District of Columbia activities do not rise to the level of continuity and substantiality required to establish that Shah "transacted his affairs" in the District of Columbia.

Found

HN15[] In order to be "found" within the District, for the purposes of *15 U.S.C. § § 15* and *22*, a corporation must engage in greater activities than required to be "transacting business" **[*32]** there. *Chrysler Corn. v. General*

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[24] The Court notes, without deciding on this basis, that several courts have questioned whether or not the contacts by a particular defendant with a district can be based on anything other than the defendant's personal affairs, not the affairs transacted on behalf of his employer. *See*, e.g. *Anchor Glass Container Corn v. Stand Energy Corp., 711 F. Supp. 325, 329 (S.D. Miss. 1989)* and *Bulk Oil (USA), Inc. v. Sun Oil Trading Co., 584 F. Supp. 36, 39 (S.D.N.Y. 1983)*. *But see* *Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1289 (D.C. Wisc. 1985)*.

Motors Corp., 589 F. Supp. 1182 (D.D.C. 1984) (citation omitted). A corporation is found in a district where it has presence and continuous local activities. Caribe Trailer Systems v. Puerto Rico Maritime, 475 F. Supp. 711 (D.D.C. 1979) (citation omitted). The Court has already found that there is no basis for venue in the District of Columbia over corporate defendants PBI, Akzo, or Par under the "transacts business" prong of 15 U.S.C. § 22 since none of these defendants transacted business in the District of a "substantial character." The Court has also found that venue is improper under the "transacts his affairs" prong of 18 U.S.C. § 1965(a). For the same reasons, the Court finds that defendants PBI, Akzo, Par, Azeem, Vegesna, Matkari, Patel, and Shah are not "found" in the District of Columbia for purposes of 15 U.S.C. § § 15 and 22. None of these defendants maintains a presence in the District of Columbia, nor do they have continuous local activities in the District of Columbia.

Agent

There is no basis for venue in the District of Columbia under the "agency" clauses of 15 U.S.C. § § 15 and 22 or 18 U.S.C. § 1965(a). Mylan's agency arguments **[*33]** rest on the theory that as co-conspirators, the defendants are agents of each other. The Court has repeatedly stated that it does not accept this theory for finding venue proper in the District of Columbia.

The RICO venue provision, 18 U.S.C. 1965(b)

The Court further finds that the ends of justice do not require that all of these defendants should be brought before this Court. **HN16**[] 18 U.S.C. § 1965(b) provides:

In any action under section 1964 of this chapter [28 U.S.C. § 1964, "Civil Remedies"] in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

HN17[] Section 1965(b) operates as a waiver of applicable venue requirements if the "ends of justice" so require. Anchor Glass Container Corp., 711 F. Supp. 325, 331 (S.D. Miss. 1989). The Court has found that venue is improper in the District of Columbia as to the eight defendants who filed a motion to dismiss based on improper venue. Given the absence of contacts **[*34]** with the District of Columbia by so many of the defendants and the absence of any need to litigate the case in the District of Columbia, the Court can think of no reason that the "ends of justice" would *require,* or even suggest, that the Court keep this action in the District of Columbia. Accordingly, the Court will decline plaintiff's invitation to find venue proper in the District based on 18 U.S.C. § 1965(b).

Transferring this Action to Maryland

Even though this Court has found that venue is improper in the District of Columbia, [25] it may transfer this case to the United States District Court for the District of Maryland, pursuant to **HN18**[] 28 U.S.C. § 1406(a), which provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

[25] Even had this Court found that venue in the District of Columbia was proper as to some of the defendants, the Court would still exercise its discretion and transfer this case to the United States District Court for the District of Maryland, pursuant to 28 U.S.C. § 1404(a).

[*35] The Court is at a loss to discern why this case was brought in the District of Columbia, except, perhaps, for the fact that plaintiff's attorneys are located here. [26] Mylan's assertion that "[t]he District of Columbia is at the center of the controversy upon which this civil action is based" [27] is close to misleading. Mylan's argument for keeping this action in the District focuses primarily on the fact that the congressional subcommittee which is investigating corruption in the approval of generic drugs controls many of the relevant documents. However, if congressional investigation into the subject matter of a lawsuit could be the basis for maintaining an action in the District of Columbia, this Court would be inundated with law suits.

Instead, this Court finds persuasive the fact that all of the criminal proceedings involving the alleged bribery of FDA officials have taken place in the United States District Court for the District of Maryland. FDA is located in Maryland, and is the location of **[*36]** the application and approval process which Mylan complains was corrupted by the alleged conspiracy. The two former FDA officials who have been sued in this lawsuit reside in Maryland. The claims arose in Maryland. Most of the documentary evidence is located at the FDA, in Maryland. Although plaintiff argues that witnesses are "likely" to reside in the District of Columbia, the Court notes that they are just as "likely" to reside in Maryland, and potential FDA witnesses certainly work in Maryland. Not a single defendant named in this action resides in the District.

Further, this Court will not ignore state boundaries in deciding where a claim arose. [28] **[*37]** Merely because parties or witnesses may be closer to the United States District Court for the District of Columbia than to the United States District Court for the District of Maryland, located in Baltimore, Maryland, is not enough to keep this case in this Court. *Reuber v. United States, 750 F.2d 1039, 1053 (D.C. Cir. 1984)*. [29]

For the foregoing reasons, this entire case shall be transferred to the United States District Court for the District of Maryland in the interest of justice, pursuant to *28 U.S.C. § 1406(a)*. Although the complaint was hastily drafted, serious allegations against the defendants are raised. This case is only at its preliminary stages, even though it was filed in June, 1989, almost nine months ago. Despite the preliminary stage of litigation, numerous pleadings have been filed, and the case is progressing. The resources of the parties and the judiciary would be wasted were this action to be dismissed, with the need to have it refiled in Maryland.

CONCLUSION

For the foregoing reasons, the Court finds that venue is improper in the District of Columbia as to defendants Akzo, Azeem, Matkari, Par, Patel, PBI, Shah and Vegesna. In the interest of justice, the Court shall transfer this case to the United States District Court for the District of Maryland. An order accompanying **[*38]** this memorandum opinion is issued herewith.

Date: *26th March 1990*

ORDER - March 27, 1990, Filed

In accordance with the memorandum opinion issued herewith, and for the reasons stated therein, it is this *26th* day of March, 1990,

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[26] ***HN19***[↑] The convenience of the plaintiff is not a factor in determining proper venue. *Leroy, 443 U.S. at 185*.

[27] *See* Mylan's Opposition to Matkari's Motion to Dismiss at 4.

[28] Mylan asserts that "[i]t is difficult to see why the ends of justice would require the empty *formality* of moving this proceeding such a short distance [to Maryland]." Mylan's Opposition to the Motions of Patel, Shah and Azeem to Dismiss at 18 (emphasis supplied). The Court rejects Mylan's characterization of moving this case to the District of Maryland as an "empty formality."

[29] The Court also notes that the United States District Court for the District of Maryland in Baltimore will consider sitting in Prince George's County or Montgomery County for the convenience of the parties.

ORDERED that this case shall be transferred to the United States District Court for the District of Maryland.

[First & First, Inc. v. Dunkin' Donuts, Inc.]

United States District Court for the Eastern District of Pennsylvania

March 27, 1990

Civil Action No. 90-1060

Reporter

1990 U.S. Dist. LEXIS 7432 *; 1990-1 Trade Cas. (CCH) P68,989

FIRST AND FIRST, INC., ET AL. v. DUNKIN' DONUTS, INC., ALLIED-LYONS, PLC; INTERNATIONAL MULTIFOODS CORP.; and MISTER DONUT OF AMERICA, INC.

Core Terms

Donut, shops, supermarkets, sales, chains, cross-examination, franchise, coffee, prices, franchisees, products, customers, convenience store, bakeries, fast food, Plaintiffs', breakfast, Burger, advertising, markets, consumer, restaurants, compete, competitors, retail, buy, fresh, places, chart, sells

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN1[] **Sherman Act, Claims**

To establish a violation of *§ 1* of the Sherman Act, codified at *15 U.S.C.S. § 1*, plaintiffs must prove that (1) defendants contracted, combined or conspired among each other; (2) the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) the objects of the conduct pursuant to that contract or conspiracy were illegal; and (4) they are injured as a result of that conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

Mergers & Acquisitions Law > Antitrust > Remedies

HN2[] **Sherman Act, Claims**

To establish a violation of *§ 2* of the Sherman Act, codified at *15 U.S.C.S. § 2*, plaintiffs must prove (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN3[] **Antitrust, Horizontal Mergers**

See *15 U.S.C.S. § 7*.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN4[] **Clayton Act, Remedies**

A plaintiff must prove a probability of success and irreparable harm to obtain injunctive relief under the Clayton Act.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN5[] **Clayton Act, Jurisdiction**

Section 15 of the Clayton Act (Act), codified at *15 U.S.C.S. § 15*, provides that the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN6[] **Remedies, Injunctions**

See *15 U.S.C.S. § 16*.

Mergers & Acquisitions Law > Antitrust > Market Definition

HN7[] **Antitrust, Market Definition**

Plaintiffs have the burden to allege and prove both the relevant product and geographic markets as essential elements of their antitrust claims.

Mergers & Acquisitions Law > Antitrust > Market Definition

HN8[] Antitrust, Market Definition

Alleged market definitions that ignore obvious substitute products and suppliers are invalid.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN9[] Clayton Act, Claims

A private plaintiff must demonstrate "antitrust injury" in order to have standing under the Clayton Act to challenge a merger.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN10[] Injunctions, Preliminary & Temporary Injunctions

To obtain injunctive relief, plaintiffs must establish and the court must conclude that: (1) plaintiffs are likely to succeed on the merits; (2) plaintiffs are subject to irreparable harm pendente lite; (3) defendants will not suffer substantial harm from the grant of an injunction; and (4) the public interest requires that plaintiffs be accorded relief.

Counsel: [*1] H. Laddie Montague, Jr., Esq., David Berger, Esq., Howard Langer, Esq., Alan M. Sandals, Esq., Patricia D. Gugin, Esq., BERGER & MONTAGUE, P.C., Phila., Pennsylvania

DUNKIN DONUTS, INC., ALLIED-LYONS, PLC., INTERNATION MULTIFOODS CORP, & MISTER DONUT OF AMERICA, INC.

BY: Ralph W. Brenner Esq., Francis Patrick Newell Esq., Philadelphia, Pennsylvania, Patrick Ryan, Esq.

Opinion by: VAN ANTWERPEN

Opinion

DECISION AND ORDER

This non-jury antitrust matter arises out of a suit by numerous plaintiffs seeking a preliminary injunction barring a proposed acquisition by the owners of defendant Dunkin' Donuts, Inc. of 100% of the stock of defendant Mister Donut of America, Inc. Plaintiffs claim that this is a merger which violates *Sections 1* and *2* of the Sherman Act, *15 U.S.C.A. §§ 1*, *2*, and *Section 7* of the Clayton Act, *15 U.S.C.A. § 7*, and that it is contrary to state law. Suit is based upon the jurisdiction of this court, under *28 U.S.C.A. § 1331* and *28 U.S.C.A. § 1337*, and based upon the pendent jurisdiction this court may exercise over state law claims. The court entered an ex parte temporary restraining order late on Tuesday, February 13, 1990, and scheduled an immediate hearing on Thursday, February **[*2]** 15, 1990, to determine if the temporary restraining order should be continued and to provide evidence for any preliminary injunction that the court might later issue. After hearings on Thursday, February 15, 1990, and Friday, February 16, 1990, all counsel agreed to continue the temporary restraining order in full effect until an extended hearing on a preliminary injunction could be held starting on Monday, March 5, 1990. The court later extended the temporary restraining order until the date of this decision and ordered plaintiffs to post a $ 100,000.00 bond which they have done. The court ordered expedited discovery from February 16, 1990 to March 5, 1990, and conducted telephone conferences with counsel when necessary. Supplemental orders were issued on February 27, 1990 to clarify discovery matters and formalize the continuance of the temporary restraining order. Defendants have also filed a pretrial motion to dismiss claiming that the plaintiffs lack antitrust standing. We have deferred ruling on this motion until the writing of this decision. From the court hearings on February 15, 1990, February 16, 1990, and March 5, 1990 through March 16, 1990, as well as certain designated **[*3]** depositions, we make the following findings of fact and state conclusions of law pursuant to *Fed.R.Civ.P. 52(a)*:

FINDINGS OF FACT

1. This action is brought by 102 plaintiffs who are for the most part donut shop franchisees of Mister Donut of America, Inc. Plaintiffs are domiciled in the following states: Connecticut, Delaware, Florida, Indiana, Maryland, Massachusetts, Minnesota, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Texas, West Virginia and Wisconsin.

2. Defendant Dunkin' Donuts, Inc. ("Dunkin Donuts") is a Delaware corporation with its principal place of business in Randolph, Massachusetts. Dunkin' Donuts is a wholly owned subsidiary of defendant Allied-Lyons, PLC ("Allied-Lyons") which is a publically traded United Kingdon corporation.

3. Defendant Mister Donut of America, Inc. ("Mr. Donut") is a Delaware corporation with its principal place of business in Minneapolis, Minnesota. Mr. Donut is is a wholly owned subsidiary of defendant International Multifoods Corp. ("International Multifoods") which is a Delaware corporation with its principal place of business in Minneapolis, Minnesota.

4. One of plaintiffs' **[*4]** first and principal witnesses, James W. Bower, Sr. ("Bower") of Waynesport, Pennsylvania, was a Mr. Donut franchisee from 1965 until the 1980s when he sold his Mr. Donut franchise to his sons. He currently operates Christy Associates, which is a buying group that provides flour, shortening and other supplies to some 300 to 350 Mr. Donut franchisees. Bower also owns stock in a construction business which builds and remodels fast-food shops. Plaintiffs' counsel offered Bower as an expert witness regarding donut marketing. Defense counsel had no objection but noted that Bower is an interested witness.

5. In his Christy Associates supply business, Bower testified that he covers the Northeastern states to as far south as Florida and west to the Mississippi. He said he must remain current with the donut shop markets and their operating conditions. He strictly supplies the Mr. Donut system.

6. Bower testified that Dunkin' Donuts was the first to start a buying group for its franchisees and that this enabled them to lower prices. In the mid-1980s, Mr. Donut followed suit and started its own buying group, which Bower runs. Bower says that Christy Associates does pass its savings **[*5]** along to its franchisee-customers, but that Mr. Donut's buying group does not have the size or the full company support that the Dunkin' Donuts group has.

7. Bower testified as to the importance, to a donut shop, of fresh donuts and fresh coffee. Donut shops have their own bakery on the premises and, in his view, they should produce fresh donuts every four hours.

8. Bower testified that he had attended meetings between Dunkin' Donuts' officials and Mr. Donut franchisees. At these meetings, he said, Dunkin' Donuts informed the Mr. Donut franchisees about their intent regarding their system. Plaintiffs' Exhibits 1, 2, 3 were documents which Bower received at these meetings.

9. In his testimony, Bower discussed the differences in the Dunkin' Donuts and Mr. Donut franchise systems. He said that the Dunkin' Donuts system was "tighter" and that the Mr. Donut system was more "entrepreneurial". Both chains collect a percentage of their franchisees' income to finance advertising campaigns, but the percentage collected by Mr. Donut is lower. Also, the initial fee to start up a Mr. Donut franchise is much lower than the initial fee needed to set up a Dunkin' Donuts franchise. Dunkin' **[*6]** Donuts' contracts also provide for periodic costly remodelings. Mr. Donut's contracts do not so provide. Mr. Donut also provides its franchisees with "area protection" of a one-mile radius. Dunkin' Donuts tends to own the real estate upon which the shops are located and leases it to the franchisee; Mr. Donut does not.

10. Bower testified that some Mr. Donut franchisees had borrowed money to buy real estate upon which to locate their shops. This would create a problem for them if they were unable to convert their shops into Dunkin' Donuts shops. Bower estimated that a typical Mr. Donut shop, without the real estate, would cost approximately $ 75,000.00. With real estate, the total cost could run between $ 250,000.00 to as much as $ 750,000.00.

11. Bower testified that at meetings between Dunkin' Donuts' officials and Mr. Donut franchisees, he learned that Dunkin' Donuts would want remodeling done, e.g., replacing old-fashioned "W" roofs on Mr. Donut shops. He estimated the average remodeling cost to be about $ 50,000.00. He said that the remodeling costs could work great hardship on some Mr. Donut franchisees. He testified that Dunkin' Donuts did say that it would **[*7]** make money available (1 1/2% above cost) for remodeling of Mr. Donut shops.

12. Bower then testified as to the types of enterprises that might be considered competitors of Mr. Donut. He said that, in his opinion, convenience stores could not be considered true competitors because of the inferior quality of their coffee. Donut shops offer quality coffee from 6:00 to 11:00 A.M. and coffee sales represent from 35 to 55% of their business. Donut shops specialize in donuts and "line extensions" such as muffins. "Ancillary products" like soups and sandwiches have not worked as well in expanding business. Such ancillary products are usually sold at lunch time - after the 6:00 to 11:00 A.M. "peak" period.

13. Bower said that some convenience stores offer donuts from local bakeries but there is really no comparison, even though convenience stores have wanted to break into the breakfast market. Dunkin' Donuts also supplies some convenience stores with donuts, but the price is controlled by the supplying franchisee, so in his opinion this makes the convenience store little more then just another "outlet" for Dunkin' Donuts rather than a true competitor.

14. Bower told the court that **[*8]** fast-food chains are not competitors, either. McDonald's does a breakfast business, but it is not a coffee and donuts-type of breakfast business. He said that McDonald's breakfast items do not diminish donut sales. He also said that in what is overall a generally shrinking donut sales market, donut shops' sales volumes have actually gone up.

15. Bower also discounted supermarkets as competition. Since the most donut sales made by donut shops are between 6:00 and 11:00 A.M., very few customers would opt to stand in supermarket lines to buy donuts then. Also, supermarkets do not stock the same quality of donuts.

16. Bower said that Mr. Donut's major competitor is Dunkin' Donuts. He said that the goegraphic locations where head-on competition between the two chains exists are: New England, Pittsburgh, almost all major Northeastern cities, Providence, Rhode Island and Cleveland. Some smaller chains exist in these locales, but Bower said that it is almost impossible for a chain to break into the market. In the past, larger chains, such as Amy Joy, Donuts Galore and Spudnuts had existed, but these no longer exist. Winchell's is a Western donut chain with about 9% of the **[*9]** United States market, he said.

17. Bower expressed an opinion that, if the planned acquisition is consummated, Dunkin' Donuts will put Mr. Donut out of business, will add money to its advertising budget, will increase its franchisees' advertising fee, and will overwhelm the areas in which they are located. No one else will be able to get into that market, he said.

18. Bower stated that he had received a copy of Plaintiffs' Exhibit 4, a letter of January 29, 1990 from Ralph Gabellieri of Dunkin' Donuts, to all Mr. Donut distributors and suppliers. After receiving this letter, Bower said that he thought that it would just be a matter of time before there was no need for him or for his business.

19. Bower testified that some of his suppliers were concerned about the pending acquisition. Distributors have also called him about the situation and he promised to keep them apprised of developments.

20. In January, 1990, Dunkin' Donuts' officers (Robert Rosenberg, Tom Schwarz and Ralph Gabellieri) met with Mr. Donut franchisees at a meeting in Florida. In February, 1990, Dunkin' Donuts' officers also met with Mr. Donut franchisees, this time in Massachusetts. At the Florida meeting, **[*10]** according to Bower, the Dunkin' Donuts officers said that they would not grant new Mr. Donut franchises unless they were obligated to do so by contract, and that they wished to convert Mr. Donut shops to Dunkin' Donuts shops over a five-year period. Also, a 5% minimum advertising fee was mentioned. According to Bower, the Dunkin' Donuts officer did not answer the problems posed by closing Mr. Donut franchises, other than saying that the franchisees could always sell. At the subsequent Boston meeting, more particulars were discussed.

21. Bower expressed an opinion that the Dunkin' Donuts' policies enunciated in Florida and Boston would make the Mr. Donut chain, as we now know it, disappear in a short period of time, say five years. Some franchisees would be able to convert to Dunkin' Donuts shops, but others would go out of business. He estimated that there were 105 Mr. Donut shops, located in close proximity (within 2 miles) to Dunkin' Donuts shops, who would not be able to convert. Some thirty-seven Dunkin' Donuts shops are within one mile of a Mr. Donut shop. The heaviest concentration of shops is found in the Northeastern United States.

22. Bower expressed an opinion **[*11]** that most of the remaining Mr. Donut shops will try to convert, but some will be reluctant to do so since they have already paid for a Mr. Donut franchise. He also opined that customers and other donut shops will be affected. Dunkin' Donuts will come to dominate the market, especially in the East, since there will be no real competition. Prices will be affected as will variety of products. Bower also said that many franchisees had received letters from consumers praising the quality of Mr. Donut's products over those of Dunkin' Donuts.

23. Bower expressed an opinion that the management of a corporate parent is very important to a business. He said there would only be a skeleton force of Mr. Donut personnel, if the planned acquisition goes through.

24. Bower said that Mr. Donut possesses proprietary information from its franchisees, e.g., sales volume information. There are also provisions to protect the confidentiality of manuals. Mr. Donut's system is itself a proprietary system.

25. Bower stated that the value of the Mr. Donut trademark, prior to the planned acquisition, was $ 25,000,000.00. He had learned of that figure when he was at a meeting in Minnesota, where **[*12]** he learned that Mr. Donut was up for sale. Twenty-five Million Dollars is what they thought they could get. Bower himself tried to put together a financial package to buy Mr. Donut, but he could not raise a sufficient pool of money.

26. Plaintiffs' witness Albert Richmond ("Richmond") of Attleboro, Massachusetts, is a Mr. Donut franchisee and a bakery division manager at Perkins Paper which is a supplier to the Mr. Donut chain. (Perkins Paper serves primarily all of New England). Since he is also a Mr. Donut franchisee, Mr. Donut is his account at Perkins Paper. Richmond testified that Mr. Donut constitutes a large part of Perkins' business ($ 5,000,000.00 out of $ 12,000,000.00). This large volume of Mr. Donut business enables Perkins Paper to buy goods by the truckload and thus to save money; Perkins Paper is then able to pass its savings along to its customers. Richmond testified that if the Mr. Donut business were lost, Perkins Paper would lose this economic advantage and prices would increase for its customers.

27. Richmond also testified as to other stores which he services for Perkins Paper. There are eighteen Donut-Makers' stores and 33 Honey-Do stores. Prices **[*13]** in these small chains are slightly lower ($ .10 to $ .30 lower) than those found at Mr. Donut or Dunkin' Donuts but this does not give him concern. He said that if Mr. Donut

disappeared and Perkins Papers' prices went up, these stores would be hard pressed to compete with Dunkin' Donuts.

28. Richmond identified a map which he had prepared with a William Donovan. The map had colored pins which stood for Mr. Donut (blue) and Dunkin' Donuts (green) shops in Massachusetts. Mr. Donovan had ascertained the Dunkin' Donuts locations from a booklet (Plaintiffs' Exh. 2) listing all the Dunkin' Donuts shops in eleven state regions.

29. Richmond stated that in his Mr. Donut shop in Massachusetts, he sells 65% coffee, 30% donuts and 5% croissants, juice, sandwiches, etc. In his view, he does not compete with any convenience stores, supermarkets or fast food stores. The nearest Dunkin' Donuts to his shop is two miles away. He and his staff check Dunkin' Donuts' prices one to two times a month. In his supply job, he is able to check the prices at Donut-Makers and Honey-Do. He never checks prices at McDonald's.

30. Plaintiffs' witness Jeffrey Lipe ("Lipe") of Brodheadsville, Pennsylvania, **[*14]** operates two Mr. Donut shops: one is a donut producer shop and the other is a "satellite" shop. They are located in Stroudsburg and East Stroudsburg, Pennsylvania, respectively. Lipe described his initial contact with Mr. Donut as a baker. Lipe always wanted to have a donut shop and as a young man tried to obtain a Dunkin' Donuts franchise, but he was turned down because of his immaturity. In December, 1986, he obtained his original Mr. Donut shop from the prior owner. In September, 1987, he opened the satellite store with money borrowed from a bank. His first shop had cost him $ 115,000.00; his second had cost him $ 23,000.00. He put in $ 25,000.00 of his own money. He said that he now owes the bank $ 121,000.00. Both shops have recently been renovated. It would cost $ 35,000.00 to $ 40,000.00 more to remodel further. He does not know if he could afford to convert to a Dunkin' Donuts store. There is already a Dunkin' Donuts near him in East Stroudsburg. He does not wish to increase his debt. Were he to become a Dunkin' Donuts store, it would wipe out his and his wife's paychecks from the business.

31. Lipe and his wife operate the donut business. He is a named plaintiff **[*15]** in this action. He has incorporated as "L.J.D., Inc." He is the President of the corporation and he and his wife own all shares. Their business dictates their salaries. At present, he and his wife each make $ 350.00 per week salary. He also said that he and his wife are personally liable on the bank loans they have taken out. He is aware of the differences between the Mr. Donut and the Dunkin' Donuts contracts, e.g., that Mr. Donut charges its franchisees a lower percentage for advertising.

32. Lipe stated that he does not believe he competes with local supermarkets and their frozen donuts. There are McDonald's places in his area which sell coffee. He does not know their prices as opposed to his own. He does have a drive-by window and has noticed that some persons will buy coffee from him after buying breakfast at McDonald's. He said that he does watch Dunkin' Donuts' prices.

33. Lipe said that he sells about 60-70% coffee and 30-40% donuts from 6:00 to 11:00 A.M. His "satellite" store had been called "Micky's Donuts" and this was a store that had failed. Since East Stroudsburg is a tourist area, the "Mr. Donut" name has value to tourists. Lipe stated that Mr. **[*16]** Donut gets his weekly sales reports and 4.9% for the franchise and 0.5% for the advertising.

34. Lipe said that he had heard Bower's testimony regarding Dunkin' Donuts' offer to extend financing, but he has not asked for any. Lipe said that Dunkin' Donuts' cost for advertising was higher than that of Mr. Donut, but he did not know of the sales figure produced by the Dunkin' Donuts' advertising. He did not think that, in his case, the advertising distinction would make much difference. His store in East Stroudsburg and the Dunkin' Donuts store are in "close proximity" in sales. He estimated that the Dunkin' Donuts store probably does not make 20-25% above his.

35. Plaintiffs' witness Paul Sattler ("Sattler") of Pittsburgh, Pennsylvania, operates a Mr. Donut shop in Carnegie, Pennsylvania. Prior to this, he had worked for five and a half years as a Mr. Donut District Manager in charge of 35 to 37 stores in an area bounded by Pittsburgh, Erie, and Cleveland. When he was laid off from this job a year ago, he advised a Mr. Donut franchise for eight months. In November, 1989, he purchased this franchise himself. He did so, unaware of Mr. Donut's intention to sell itself to Dunkin' **[*17]** Donuts, even though there had been a public announcement of the sale. He said that he had seen no such information published in the newspaper.

36. Sattler said that as a District Manager, he visited Mr. Donut stores and Dunkin' Donuts stores. He did not visit McDonald's places or WaWa's, Seven-Eleven's, or Wendy's. He never went to supermarkets, either. He does not regard a local convenience store, which is trying to sell cheaper coffee, as a competitor. Such coffee has had no effect on his business. He does, however, watch the prices at the Dunkin' Donuts stores in his area. He regards Dunkin' Donuts as the predominant competitor. There are two Dunkin' Donuts stores near his store: one is four miles away and the other, three miles away. He said that his store has higher sales.

37. Sattler said he regularly submits confidential material, such as sales data, to Mr. Donut. Sattler said that he is a plaintiff in this section and he is not withholding any franchise fees to Mr. Donut since the planned acquisition. Richmond and Lipe were recalled to the stand and also testified that they were not withholding any franchise fees.

38. Plaintiffs' witness William Donovan **[*18]** ("Donovan"), is a plaintiff in this action who, with his brother, under the name "Donovan Services, Inc.", owns four Mr. Donut shops in the Boston area. He and his family are involved in operating these stores.

39. Donovan testified that he attended the Boston meeting with Dunkin' Donuts' officials. He acknowledged speaking at this meeting, but denied threatening to take any certain course of action. He said that, at that meeting, he had received the book marked as Plaintiffs' Exhibit 2 which he had used to advise Richmond as to the Dunkin' Donuts' locations in Massachusetts and Rhode Island. He also used Plaintiffs' Exhibit 10 for Mr. Donut franchisees in helping Richmond make the map.

40. Donovan also said that he had attended the recent meeting with Dunkin' Donuts' officials in Florida. Donovan stated that while it was possible he might make more money as a Dunkin' Donuts store, he anticipated problems if he should want to convert his stores into Dunkin' Donuts stores. He foresaw problems with interlocking restrictive covenants and obtaining money for conversions. He said that his stores are located a quarter-mile from Dunkin' Donuts' headquarters and 1/8 mile from their **[*19]** training school.

41. Donovan's other stores are within two miles of a Dunkin' Donuts store. He also said that Dunkin' Donuts had stated that a franchisee could not operate a Mr. Donut store and a Dunkin' Donuts store at the same time. For him and his brother, this would mean a simultaneous costly conversion of all four stores.

42. Donovan said that he believes that he would not be able to convert his stores because of the close proximity of existing Dunkin' Donuts stores to his. Donovan said that his bank debt is now between $ 600,000.00 and $ 700,000.00. Donovan testified that he has not stopped paying his franchise fees since the planned acquisition.

43. Plaintiffs' witness Sean Patrick O'Hanlon ("O'Hanlon"), is a plaintiff in this action, and operates five Mr. Donut shops in the State of Delaware. He produced a map showing the location of Mr. Donut stores and Dunkin' Donuts stores with appropriately colored dots. (Plaintiffs' Exh. 11). Three of his stores are located within one mile of a Dunkin' Donuts store; one is located within one and one-quarter mile from a Dunkin' Donuts store; and one is located ten miles from a Dunkin' Donuts store. A nearby previous competitor, **[*20]** Donuts Galore, went out of business less than two years ago.

44. O'Hanlon said that nearby McDonald's places offer breakfast specials, but he did not think that they were a big competitor in the way Dunkin' Donuts is. On cross-examination, however, he said that McDonald's pre-lunch food services market has influenced his products with consumers. He has had to react to McDonald's presence. McDonald's customers come to him for their coffee. He also said that he did not think that the WaWa convenience store's coffee sales affected his, either. To some extent, he thought that convenience stores who aggressively marketed coffee might have tapped into the Mr. Donut market. He said that it is Dunkin' Donuts which competes with him on the price of donuts and coffee and variety of products.

45. O'Hanlon estimated that he sells 70% coffee, 25% donuts and 5% "auxiliary" products. He believes that the "Mr. Donut" trademark is important to his business. In the late 1970s, when his profitability was sinking, he could only increase prices to some extent. To continue to increase them would risk losing customers. Dunkin' Donuts was present in the market then.

46. O'Hanlon said that **[*21]** at least 60% of his business is done by 11:00 A.M. He does not have a very strong donut sales base; 95% of his customers buy a cup of coffee. He serves freshly ground and brewed coffee in a china mug or take-out cup. Acmes do not have drive-by windows, places to sit, or china mugs. He also said that when McDonald's went into the breakfast business, he did not lose any of his donut and coffee business.

47. O'Hanlon said that local Acme supermarkets do have fresh bakeries. There is such an Acme within two miles of each of his locations. Such supermarket bakeries do offer donuts. He said, though, that one was unlikely to find anyone in an Acme at 10:00 A.M. buying coffee. He does not keep watch over Acme prices.

48. O'Hanlon said that when Acmes and convenience stores pursued the market, his sales did not go down. He added that he has not withheld any franchise fees since the planned acquisition. He does not think his store would be more profitable were it converted to a Dunkin' Donuts store. He already has a higher sales volume than Dunkin' Donuts. He also appreciates the Mr. Donut policy of allowing him to advertise locally. He thinks it gives him an advantage over **[*22]** competing Dunkin' Donuts.

49. Plaintiffs' witness Roche C. Burgio ("Burgio") of Bethlehem, Pennsylvania, owns a Mr. Donut shop in Easton, Pennsylvania. He is not a plaintiff in this action. He testified that he had gotten a Mr. Donut franchise in 1981 because it was a relatively inexpensive investment as compared with other franchises and he wished to create a business opportunity for his two sons. He has not been active in the running of the store since this January because of a heart ailment.

50. Burgio testified that he has a second business on his property, a miniature golf course, "Mr. Golf", which is located behind the Mr. Donut store. He said there are two Dunkin' Donuts stores located near his with whom he competes. A Dunkin' Donuts operator has expressed interest in buying his business and real estate, but he does not wish to sell the real estate. The real estate agents of Burgio and of this operator are currently talking about this matter. Burgio's asking price is $ 169,900.00.

51. Burgio said that he sometimes devises original donut varieties for his store. Dunkin' Donuts stores do not, he said. He estimated that 60% of his sales were for coffee and 40% for **[*23]** donuts, baked goods, soda and a breakfast "sandwich". He sells 80 to 90 dozen boxes of donuts a day. He has a drive-by window and does much business through it in the morning. Burgio estimated that he has a $ 290,000.00 investment in his Mr. Donut franchise at this time.

52. Plaintiffs' witness Thomas S. Muth ("Muth") of Wescosville, Pennsylvania, operates a Mr. Donut shop in Allentown, Pennsylvania. It is an older establishment with a "W" roof. He entered the donut business as a baker in 1976. He bought out the former owner's franchise for $ 100,000.00 and, by arranging financing with the former owner and by borrowing $ 25,000.00 from the bank, Muth said that he would not have the money to renovate his store in the future. He has not discussed financing for renovations with Dunkin' Donuts.

53. Muth is a plaintiff in this action. He said that if he were to add more debt and if his advertising fee were to increase, he could not afford to continue in business. He did not think that increased advertising would benefit him because his shop is located in a residential area. He said that he has not withheld any franchise fees since the planned acquisition.

54. Plaintiffs' **[*24]** witness Shirley First ("First") of West Chester, Pennsylvania, operates a Mr. Donut shop in that town. She is a plaintiff in this action. Four and a half years ago, she bought a Mr. Donut shop to run with her son. She borrowed $ 160,000.00 to do so; she owes $ 155,000.00 for the acquisition and remodeling of the shop. She also invested $ 20,000.00 of her own money. She has increased sales in her store by 32-33% since she took over.

55. First testified that the nearest Dunkin' Donuts store is nine-tenths of a mile away. She said that her store is better run and stocked with better donuts than her Dunkin' Donuts competitor. She estimated that she sold 50% coffee and 50% donuts. Although she has many fast food places near her, she does not check their coffee prices. She does, however, check the Dunkin' Donuts coffee prices. She has paid her most recent franchise fee.

56. First said that she had recently remodeled her shop. Based upon her understanding of Bower's testimony, her fear is that Dunkin' Donuts would require further costly ($ 70,000.00 to $ 80,000.00) renovations to conform to their specifications. Although she could raise capital to convert her store, she does **[*25]** not wish to remodel; she wishes to sell the shop and retire in the future. She also said that her loans are all personally guaranteed.

57. Upon cross-examination, First said that she was not aware that she would never be required to convert her store to a Dunkin' Donuts should the planned acquisition take place. Defense counsel referred her attention to a Dunkin' Donuts letter of January 18, 1990 to First. (Plaintiffs' Exh. 17). Defense counsel referred to the part of the letter in which Dunkin' Donuts promised to honor its contractual commitments to holders of options for Mr. Donut shops. First expressed some skepticism over this part of the letter; her contract with Mr. Donut would run out in six years. She wondered if honoring her contract would also entail honoring its renewal clause. She believed that it would be difficult to sell a non-renewable franchise. She also questioned the part of Dunkin' Donuts' letter which said that Mr. Donut would be run as a separate chain. That letter also stated that no new Mr. Donut franchisees would be solicited.

58. First said that she believed that, as a Mr. Donut franchisee acquired by Dunkin' Donuts, she would be part of a "dying **[*26]** chain". She would also lose out on the advantages of group buying opportunities. She also said that she no longer had plans for buying a Mr. Donut satellite store. She believed that Dunkin' Donuts' "no new franchise" policy for Mr. Donut would prevent this.

59. First identified Plaintiffs' Exh. 18, a letter signed by the Vice President and General Counsel of Dunkin' Donuts and by a signatory, Ms. Burns, of Mr. Donut, to Mr. Donut franchisees and option holders. That letter, dated January 16, 1990, said that Dunkin' Donuts "does not intend to actively solicit the sale of additional Mr. Donut franchises following consummation of the sale." First said that this phrase was one reason why she believed that further "franchises" as opposed to "franchisees" would not be permitted. Ralph Gabellieri of Dunkin'Donuts was given as the "contact person" for questions in the letter. First said that she did not pose any questions to Mr. Gabellieri because, at the time, he was the president of the chief competitor of Mr. Donut.

60. Plaintiffs' witness John G. Jones, Jr. ("Jones") of Allison Park, Pennsylvania, owns a Mr. Donut shop north of Pittsburgh. He belongs to a group of 22 stores **[*27]** in the area who pool their advertising dollars for the Pittsburgh market. In that area, Mr. Donut has a higher volume of sales than Dunkin' Donuts.

61. Jones said that, on January 11, 1990, he and other Pittsburgh area franchisees had attended a meeting with Dunkin' Donuts' officials, Steve Russo, Vice President of Development Operations, and District Manager, Cary Brown, in Pittsburgh. According to Jones, Mr. Russo said that Dunkin' Donuts, as the number one chain, wanted to combine that with the number two chain and have a chain of 2400 or 2500 stores, or whatever the number was at that time.

62. Jones said that his store makes $ 6,500.00 to $ 6,600.00 per week. He learned at the meeting referred to above that the average Dunkin' Donuts store makes $ 6,100.00 per week. Jones said that he has three Dunkin' Donuts stores within his immediate market area. The food costs of both chains were said to be 26%. He also noted that Dunkin' Donuts was the No. 2 donut business in Pittsburgh. Jones estimated that he spent 90% of his energies making donuts and coffee.

63. Dr. Gary L. French ("Dr. French") was called by the plaintiffs to testify as an expert witness. Dr. French holds **[*28]** a Ph.D. in economics and is currently employed as a Senior Consultant at Nathan Associates, Inc., an economic and management consulting firm in Washington, D.C. He specializes in the field of economics known as Industrial Organization Economics and he is also an Industrial Organization Associate Member of the American Bar Association. He said that Industrial Organization is the field of economics that is concerned with the study of individual business firms and the structure and organization of industries and markets and the whole realm of antitrust economics. He was first contacted with regard to this case by the plaintiffs approximately a week before his first appearance in court on February 16, 1990.

64. Dr. French stated that he had been requested by the plaintiffs to examine the data and information on donut shops and to determine the shares of the relevant sellers in the donut shop market. Marked as Plaintiffs' Exhibit 22 was a chart prepared by Dr. French and his assistants, entitled "Selected Information on Donut Shop Chains - 1988." It was created from information found in the 1989 Directory of Chain Restaurant Operators, published by Lebhar-Friedman, Inc. Dr. French **[*29]** stated that the only thing he would now alter about the chart is the sales and units of Dunkin' Donuts and Mr. Donut that are overseas. Mr. Donut had sold off its foreign operations after the Directory was compiled. Dr. French said that in the case of Mr. Donut, this alteration would reduce its shares by about 5 to 10%; in the case of Dunkin' Donuts, it would reduce its shares of units or sales around 5 or 6%.

65. Dr. French explained what the "Herfindahl-Hirschman Index ("HHI")" is. He described it as the sum of the squares of the market shares of each participant in the market. For example, if one company has ten percent of the market, squaring that yields the figure "one hundred". The HHI is preferable to the older method of comparing straight market shares in that it can tell the reader information about the overall diversity in the market and can provide an idea of how equally sized the different competitors are. The HHI attempts to look at the concentration in the hands of one or a few sellers better than just looking at the raw shares themselves, Dr. French said. The HHI is used by the Department of Justice and the Federal Trade Commission to divine concentration and **[*30]** the likely indications of concentration for competition in markets.

66. Dr. French referred to U.S. Department of Justice guidelines using the HHI which the department uses in reviewing potential mergers. Dr. French said that if the index is over 1800, then the Justice Department or the Federal Trade Commission would become greatly concerned about concentration.

67. Dr. French said that in the chart, the pre-merger HHI in units is 2969; the post-merger HHI in units is 4761 - an increase of some 1700 to 1800 points. The pre-merger HHI in sales is 3763 and the post-merger HHI in sales is 5955. This, too, is more than the 100-point increase which Dr. French said would attract the attention of antitrust enforcement officials. Allowing for the elimination of the foreign sales, Dr. French estimated that these figures would be 2900 to 3000 instead of 3763 in pre-merger sales, and 4700 instead of 5955 in post-merger sales - still, he said, a significant figure that represents a high degree of concentration.

68. Dr. French said that the chart was prepared upon plaintiffs' counsel's assumption that there is a "donut shop market." The chart also represents nationwide shares. He said **[*31]** that all 21 chains on the chart do not compete in all markets; in most markets, just Mr. Donut and Dunkin' Donuts are competing.

69. Under cross-examination, Dr. French explained why he had listed only 21 chains on the chart. He had chosen those - and not other places, such as Acme supermarkets - because those sold premium quality coffee and donuts. This list, he said, is comprised of donut shops "as traditionally thought of."

70. Dr. French, upon cross-examination, spoke of some of the factors used to determine the existence of a relevant market. He said that in the trade literature and the way data and information are kept, donut shops are reported on as a separate category and there is a separate Standard Industrial Classification (SIC) code for them. The Department of Commerce collects sales and other information on donut shops separately from others. This, he said, suggests that there is something which they have in common which they do not have in common with any other category. Another important factor, said Dr. French, is the economic substitution that would go on between the products of donut shops and the products of any other retailers. He said that he had not **[*32]** yet carried out research on economic substitution.

71. On cross-examination, Dr. French said that there are many relevant geographic donut shop markets and these would tend to be of a local nature. He stated that the nationwide HHI is only an indication of what the local market ones would be. He said that, most likely, HHI's computed in the local markets would even be higher than nationwide HHI's.

72. On cross-examination, Dr. French stated that he had not included "Mom and Pop" stores in his list of 21 chains. In addition to the Directory already referred to, he also based his list on other documents, Entrepreneur Magazine, Franchising Handbook, lists kept by the U.S. Department of Commerce.

73. Dr. French, upon cross-examination, said that he had not yet computed HHI's for any local markets. On cross-examination, Dr. French stated that he did not personally create the chart, nor had he had time to review the chart in comparison with the Directory upon which it was based. He said that he had directed two staff members and had told them what to look for in composing the chart.

74. On cross-examination, Dr. French said that in the chart, the sales of the franchisees **[*33]** had been aggregated for the purpose of doing an HHI study, to get an indication of the market power of the Mr. Donut and Dunkin' Donuts' branded products. "Market power", he said, was the seller's ability to raise prices.

75. On cross-examination, Dr. French said that he has not yet done an HHI for the following: the sale of donut shop franchises of national donut chains in the United States as a whole; the sale of donuts, coffee and related limited menu products through franchised national donut chain donut shops in the United States as a whole; the sale of donut shop franchises in the United States as a whole; the sale of donuts, coffee and related limited menu products through franchised donut shops in the United States as a whole; and the sale of donuts, coffee and related limited menu products to the donut shops in the United States as a whole.

76. Upon cross-examination regarding the Directory used to compile the chart, defense counsel challenged Dr. French's selection of only 21 chains for the chart when there were 83 companies in the Directory's index under "Donut". Also, under "fast food" in that index, there were 1,000 companies, according to defense counsel, including **[*34]** both Dunkin' Donuts and Mr. Donut. Dr. French replied that he had taken the section with the subheading regarding donuts, donut chains in composing the chart. He stated also that any entry that looked as though it were primarily a hamburger shop that sold donuts in addition to hamburgers was excluded. When questioned as to whether Dunkin' Donuts and Mr. Donut could be categorized as "fast food", he said that since the Directory lists the donuts' sub-heading under the broader heading "fast food", the Directory could arguably designate them as both.

77. Upon cross-examination, Dr. French said, with regard to consulting the Directory in order to compose the chart, that he was interested in a "donut shop market", so he wanted donut shops as normally thought of, of the type like Mr. Donut and Dunkin' Donuts. To do so, he looked at a list of companies under the subheading "Donuts".

78. Upon cross-examination, Dr. French was asked why he listed 21 companies when there were 83 companies in the Directory offering fast food donuts. Dr. French explained that those other companies were excluded when the more specific information on the company indicated that, while donuts were in their **[*35]** menus, they were obviously a much more full menu fast food operator than a donut company. Also, the companies were excluded if they appeared to be a franchise of one of the chains. Then, only the franchisor was counted.

79. Upon cross-examination, Dr. French explained that he had not listed individual states in the chart for Dunkin' Donuts and Mr. Donut because there were so many states that those two chains were in. Instead, he created verbal descriptions of areas.

80. Upon cross-examination, Dr. French, when asked if there might be a market called fast food service, said that there might be. Dr. French explained that even though there might be 1,718 companies categorized as fast food service, he did not include these on the chart because they were not donut shops and he was assuming a donut shop market when the chart was prepared. He stated that the chart is only relevant if there is a donut shop market. He also said that he has only just begun to do research on the concept of a "donut shop market."

81. Upon cross-examination, Dr. French stated that, were the number of traditionally defined donut shops 8500, instead of 3900, then he would not want to rely upon the chart.

[*36] 82. When asked by the court whether he had an opinion on the relevant market as to whether or not the donut shop market is the correct market, Dr. French stated that he had a preliminary opinion. He said that there probably is a product market, that is, the products of coffee and donuts or donut shops. He has not yet examined the relevant geographic markets. Upon cross-examination, he refined that statement, to say that the product market is a group of products that basically is the premium donuts and premium coffee sold by donut shops. His professional opinion regarding convenience shops was that they sell a lower quality coffee and donuts at prices so different from donut shops that they are not likely in the same market.

83. Upon further cross-examination, Dr. French said that other types of retailers who sell coffee or donuts to consumers compete with donut shops in a fringe sort of way. The real question, he said, was whether there was economic substitution, i.e., if donut shops raise their prices would they lose significant volumes of sales to these retailers. He has not yet finished his analysis on this question.

84. Plaintiffs' witness Beverly Heimberger ("Heimberger") **[*37]** of Saltsburg, Pennsylvania, has been a franchisee of Mr. Donut since 1978. She presently operates two Mr. Donut shops; one in Kittanning and the other in South Greensburg, Pennsylvania. In order to enter this business, she borrowed money from a bank; at present, she owes $ 281,000.00. She has not withheld any franchise fees to Mr. Donut.

85. Heimberger said that a Dunkin' Donuts shop is located approximately two and a quarter miles away from her Greensburg store. At her shops, she sells 62% donuts and 31% coffee and other drinks. "Other drinks" would comprise only 4 1/2%. She also sells about a dozen breakfast sandwiches a day.

86. Heimberger said that she attended the recent Florida meeting held with Dunkin' Donuts officials. While there, she took notes which were introduced as Plaintiffs' Exhibit 23. These notes were taken as the officials were speaking. Dunkin' Donuts' Chief Executive Officer ("CEO") Robert Rosenberg, Dunkin' Donuts' President Thomas Schwarz, and Dunkin' Donuts' Vice President of Operations and Development Ralph Gabellieri all spoke at this meeting.

87. According to Heimberger's notes, Mr. Gabellieri was quoted as saying that Dunkin' Donuts wanted **[*38]** to convert all the Mr. Donut shops; if someone did not want to convert, he could sell.

88. When asked by plaintiffs' counsel whether Rosenberg had made any comments on the advantages to size of the business, Heimberger said that Rosenberg had said at the meeting that bigger is better.

89. Heimberger said that, at the meeting, Gabellieri said that there was a seven-year plan for conversions. He said that Dunkin' Donuts hoped to convert thirty to forty Mr. Donut shops to Dunkin' Donuts shops the first year and fifty the second year and so on.

90. Heimberger stated that, at the meeting, Schwarz had said that Dunkin' Donuts had wanted to acquire Mr. Donut to add more muscle to the chain and to keep Japanese investors from acquiring Mr. Donut.

91. Heimberger said that, at the meeting, there were said to be fifteen percent of Mr. Donut shops within a one mile radius of a Dunkin' Donuts store. Thirty-seven stores were said to be in exclusive territory of the other.

92. Heimberger stated that, at the meeting, it was said that, after the acquisition, holders of Mr. Donut options would be able to put in Mr. Donut stores. Options were described as documents negotiated with Mr. Donut **[*39]** for a territory in which to locate a Mr. Donut store.

93. Heimberger testified that she had such an option to develop a site for a third store. She has expended $ 50,000.00 to develop this additional site in the Greensburg area. Initially, she had been slowed down in her aims by a sewage problem at the site. Heimberger also said that, in October, 1989, Mr. Donut intended to withdraw the site. After negotiations, however, Mr. Donut offered assistance in developing the site in late November or early December. Then, in mid to late December, Mr. Donut indicated to her that the site would not be developed and that she could make a minimal claim ($ 1,000.00) for her expenses and to inform Mr. Donut of her expenses. This lack of approval is what now prevents her from developing the site.

94. Heimberger said, at the meeting, Rosenberg had said that the number one competition in the donut business is supermarkets, number two is convenience stores and number three is fast food breakfast places. She believes, however, that her competitor in the donut business is other donut stores. She has no desire to become Dunkin' Donuts stores and her customers have often expressed to her their **[*40]** preference for Mr. Donut products.

95. Upon cross-examination, Heimberger said that, at the meeting, she had heard Rosenberg say that Dunkin' Donuts would honor all contractual obligations, that it would keep its word, and that no one would be forced to do anything. She also said that, at the meeting, Schwarz had said that financing would be provided in connection with any conversions and that Dunkin' Donuts would keep an "open mind" regarding conversions. She also said that she had heard that options would be honored.

96. Upon redirect examination, Heimberger stated that she would not make business decisions based upon Messrs. Rosenberg's and Schwarz's assurances in light of the comments, also made at the meeting, by Gabellieri.

97. Heimberger testified that she had received written assurances that Dunkin' Donuts would honor all existing contractual obligations of Mr. Donut in Plaintiffs'' Exhibits 17 and 18. Heimberger said she was concerned about the validity of these assurances when compared with the intention of Dunkin' Donuts to convert the stores acquired into Dunkin' Donuts within seven years.

98. Defendants' witness Susan Burns ("Burns") is currently Vice President **[*41]** of Operations, Franchised Operations, for Mr. Donut of America. She said that since January, 1990, she has seen approximately $ 18,000.00 to $ 20,000.00 per day in reduced cash coming into the corporation from the franchise network. She said that, as a result of this shortfall, Mr. Donut had had to borrow money from International Multifoods to pay for their expenses. She said that they were continuing to "grow" an intercompany account with a debt increasing $ 18,000.00 to $ 20,000.00 per day. Such account, as a result of the pending acquisition, has a "ceiling" on it, she said. She explained that Dunkin' Donuts has agreed to buy the stock of Mr. Donut for a certain price and to reimburse International Multifoods for the intercompany debt owed it - but not exceeding a certain "ceiling". If Mr. Donut's debt exceeds that ceiling, it will not recover those monies, she said.

99. Burns also testified that other monetary injury existed to International Multifoods from delay in consummating the sale: the inability to redeploy the purchase price in other parts of the company's business. She also said that delay in closing the deal was hurting the people she worked with. She also **[*42]** expressed concern that Dunkin' Donuts might renounce the sale, pursuant to a "walk away" clause in the contract, if the sale is not consummated by March 31, 1990.

100. Burns stated that, according to the last report she had seen, there were 8700 donut shops in the United States. Of these, approximately 500 of them are Mr. Donut shops. Burns said that she had been impressed with the number of years' experience amassed by Dunkin' Donuts' senior officers and other management people. She thought that such experience would benefit the franchisees of Mr. Donut.

101. Burns, when handed her letter of January 16, 1990 marked Plaintiffs' Exhibit 18, said that she believed that Dunkin' Donuts would honor all existing contractual obligations of Mr. Donut. Dunkin' Donuts, she said, had told her that they were going to provide the financial support and the technical expertise to continue to grow the business for the franchisee. She said that she believed that many Mr. Donut franchisees had received a great deal of misinformation which, she hoped, would be resolved by closer exposure of the franchisees to the Dunkin' Donuts organization.

102. On cross-examination, Burns said that, after **[*43]** the acquisition, she would remain an employee of International Multifoods in another area. The majority of the fifty-five persons she worked with had all accepted or been offered employment with Dunkin' Donuts. Persons who worked in the Mr. Donut Minneapolis headquarters office would either be placed within International Multifoods or assisted with out placement.

103. Upon cross-examination, Burns stated that Gabellieri had not told her specifically what he was going to do with those thirty-seven Mr. Donut franchisees who are within exclusive areas already granted to Dunkin' Donuts' franchisees and the 15% who are within one mile of Dunkin' Donuts. Nor had he ever told her that he would reduce the advertising allowances required on the Dunkin' Donuts' contracts should any Mr. Donut convert to a Dunkin' Donuts.

104. On cross-examination, Burns also said that Mr. Donut had, over the last few years, been consistent in its position that its competition is supermarkets, in-store bakeries, convenience stores and retail bakeries. This is a

universe of 80,000 convenience stores, 20,000 in-store bakeries, and the 8700 retail donut shops in the United States. She said that she had **[*44]** not heard that competition recognized by the plaintiffs' witnesses she had heard.

105. Burns said, upon cross-examination, that she was aware of a decline in the donut consumption market, but not of the percentage. She said that during that period there were increases in sales in both the Dunkin' Donuts chain and the Mr. Donut chain.

106. Upon cross-examination, Burns said that sales of Mr. Donut's ancillary products (croissants, brownies, cookies, etc.) total or average approximately 12-15% of the sales on a consolidated basis for the Mid-Atlantic, New England and Southeast regions.

107. Burns, upon cross-examination, said that in the last couple of years Mr. Donut had maintained a flat store count, if not a deteriorating store count. She said that the Mr. Donut system was performing very well this year. She acknowledged that it is important to continue expansion for the benefits that the franchisees reap from group buying power, advertising, etc., but she added that the franchisees who converted to Dunkin' Donuts would have a bigger universe and would benefit from those numbers. She said that the approximately 230 stores in the large buying co-op contribute probably 35 **[*45]** to 40% of sales in the chain.

108. Upon cross-examination, Burns stated that the "ceiling" on the intercompany account is approximately $ 3,000,000.00. She said that she first began to notice the cash flow problems in December, 1989 and January, 1990, continuing into February. Routine collection practices are in place at the moment. She said that she had had no franchisee write to her to tell her that he or she was withholding any payment because of the pending acquisition.

109. Upon cross-examination, Burns said that, as of that day, the intercompany account balance was estimated to be between $ 2.6 million and $ 2.7 million. She admitted that as to this first $ 2.7 million, none of it could be attributable to the entry of the current TRO. She also said that this trend in negative cash flow began appearing before the sale to Dunkin' Donuts was even publicly announced. She added that the deterioration came about when a potential for a sale was announced, not specifically a sale to Dunkin' Donuts.

110. Upon cross-examination, Burns said that she had found the 8700 donut shop figures in the CREST Research Reports. She does not know on a firsthand basis how many of these **[*46]** are comparable to the Mr. Donut or Dunkin' Donuts shops, which are of very high quality. She said that while major donut shop chains have continued to grow, the independents, the single store operators, have shrunk or disappeared. Even the Winchell's Company store chain on the West coast has fared rather poorly.

111. Burns, on cross-examination, said that International Multifoods was a Fortune 500 Company, one of the biggest food conglomerates in the world. It did not surprise her to hear that the last FTC report listed it as having $ 30,000,000.00 cash on hand.

112. Defendants' witness, F. Ralph Gabellieri (Gabellieri"), is presently Senior Vice President at Dunkin' Donuts. He said that, today, Dunkin' Donuts competes with 80,000 convenience stores and 20,000 fresh supermarket bakeries. They are also competing with fast food places like McDonald's and Wendy's. He also said that Dunkin' Donuts' menu has become more diverse to compete in this changed marketplace. Products such as muffins, cookies, soups, sandwiches on croissants and other baked goods now account for 25-30% of Dunkin' Donuts' business.

113. Gabellieri stated that he will be responsible for the implementation **[*47]** of the acquisition of Mr. Donut by Dunkin' Donuts. He would become the President of Mr. Donut and, he said, he would tend to the concerns of the Mr. Donut franchisees and try to do all he can to ensure success with their businesses. He said that Dunkin' Donuts was very willing to honor the contracts that exist between Mr. Donut and its franchisees.

114. Gabellieri stated that, contrary to First's concerns regarding being unable to open up a "satellite store", Dunkin' Donuts is rapidly developing new satellite stores. He also said, with regard to Muth's concerns regarding his "W" roof, that Dunkin' Donuts had not yet decided whether they would have to be changed. He stated, too, that remodeling converted stores would probably focus on the consumer areas and not the kitchens, and that any

remodeling costs would vary between $ 10,000.00 to $ 100,000.00, depending upon the age of the last remodeling effort. He also said that Dunkin' Donuts' advertising money is largely spent in local markets.

115. Gabellieri testified that all conversions would be done on a voluntary basis. He said that Dunkin' Donuts wanted, first, to "test" the concept of conversion with approximately forty **[*48]** shops over a broad geographic area. This will probably take six months to inaugurate. Then, once the test is in effect for six months, they will evaluate the sales results. Those sales, plus the return on investment made by those franchisees who had converted, would then determine the fate of future conversions. Past conversions of twenty-one to twenty-two independent donut shops, he said, have resulted in a greater than 50% increase in sales.

116. Gabellieri said that his letter of January, 1990 marked as Plaintiffs' Exhibit 17, was correct when it said that Mr. Donut would be run as a separate chain in the indefinite future. He said that he feared that the longer the period of uncertainty exists, the greater the danger to the Mr. Donut franchise.

117. On cross-examination, Gabellieri said that Dunkin' Donuts has very high quality specifications for its coffee and a requirement that fresh donuts be sold. He said that Dunkin' Donuts allowed its franchisees the opportunity to exercise ingenuity in creating a new variety of donut. An innovations program, in which Dunkin' Donuts reimburses a franchisee if his innovation fails, is also available.

118. Upon cross-examination, **[*49]** Gabellieri said that Allied-Lyons had paid $ 33,000,000.00 to purchase Dunkin' Donuts. Gabellieri said that, at the Florida meeting, he had said that it would take approximately five to seven years to complete a conversion, assuming that the "test" proved successful.

119. Upon cross-examination, Gabellieri said that as the President of Mr. Donut, he would be paid through the Mr. Donut subsidiary of Allied-Lyons. He said that the new Mr. Donut offices will possibly be in the same building in Randolph, Massachusetts, as the Dunkin' Donuts' headquarters. He said that he had not decided what he would do in seven years, if a successful conversion plan had been achieved.

120. Upon cross-examination, Gabellieri said that they would maintain two separate and distinct organizations between Dunkin' Donuts and Mr. Donut. But, he reiterated that conversion over a seven year period would take place only with those shops that agree to be converted and only after the conversion concept has been proven a success.

121. Upon cross-examination, Gabellieri said that decisions regarding those Mr. Donut stores located either in exclusive territories of Dunkin' Donuts or within close proximity **[*50]** of them would be made on an individual basis. He suggested that some Dunkin' Donuts' franchisees and Mr. Donut franchisees could buy one another out or that territories could be altered. Also, exclusive contracts are generally for a five-year period.

122. Upon cross-examination, Gabellieri said that he did not know what would happen if the conversion plan were not successful. Continuing to grow the Mr. Donut chain was one alternative, he said.

123. Upon cross-examination, Gabellieri said that the goal was to integrate the two firms. Gabellieri said that he might learn some proprietary information as head of Mr. Donut, but he also said that he had known much of it already.

124. Upon cross-examination, Gabellieri said that Hardee's purchase of Burger Chef was an example of a franchise chain that bought out a direct competitor. He said that most Burger Chef's did convert to Hardee's and those that did not may have vanished.

125. Upon cross-examination, Gabellieri said that if receivables continued to mount, Dunkin' Donuts might have to take a different look and approach to the transaction. He had first learned of the negative cash flow, referred to by Burns, about two weeks **[*51]** before.

126. When asked by the court about the fate of the one hundred or so Mr. Donut shops within a mile of an existing Dunkin' Donuts shop, he repeated that each one would be analyzed on an individual basis. Dunkin' Donuts already has many shops that are within a mile of each other.

127. Upon cross-examination, Gabellieri said that Allied-Lyons bought Mr. Donut on behalf of Dunkin' Donuts. Mr. Donut will be a subsidiary of Dunkin' Donuts. As President of Mr. Donut, Gabellieri will report to a corporate superior at Dunkin' Donuts.

128. Plaintiffs' witness Gregory L. Tingley ("Tingley"), is the co-owner of a supermarket, Riverside Market, in Williamsport, Pennsylvania. His supermarket sells fresh-baked donuts. These come to him in a frozen state and he fries them. This is done once a day. He offers about a dozen varieties and on an average day sells about 20 to 25 dozen donuts. He sells no fresh brewed coffee, because he does not feel a need to sell such coffee in his business. Everything in his store must be paid for first at the check-out line.

129. Tingley's supermarket sells the donuts packaged, off a table, in half-dozen amounts. His busiest times are from **[*52]** 3:00 to 7:00 P.M. The Riverside Cooperative Group is a group of seventy-seven franchisees of whom four are located in the Williamsport area. They combine to run ads; two to three times a month they run a donut "special" of a half-dozen for $ .99. Tingley said that he never checks donut shop prices.

130. Tingley testified that an extremely small percentage of his baked goods sales are donuts. He sells mostly cakes. In September, 1988, a donut shop located one mile south of his supermarket closed. Tingley said that its closing had no effect on the sales of baked goods in his supermarket. Although his records for the six months before and after the closing of this donut shop was not broken down in such a way as to reveal on their face what donut sales did, Tingley could recall independently of these documents that he had noticed no significant increase in the number of donuts baked or sold in his supermarket.

131. Tingley said that there are no donut shops, convenience stores, fast food places or bakeries near his supermarket. Tingley said he is acquainted with James W. Bower, Jr., whose family owns some Mr. Donut shops in the Williamsport area.

132. Plaintiffs' witness, **[*53]** James W. Bower, Jr. ("Bower, Jr."), is the son of the first plaintiffs' witness in this action. Bower, Jr. owns three Mr. Donut stores; two in Williamsport, Pennsylvania, and one in Danville, Pennsylvania. Bower, Jr. is the past recipient of many of Mr. Donut's top awards. He has not withheld any franchise fees because of the planned acquisition.

133. Bower, Jr. owned the donut shop located near Tingley's supermarket, which closed in September, 1988. He said that when that store closed, it had last done $ 324,000.00 worth of business. Its closing increased sales "dramatically" at his other Williamsport store, (the "Newberry store").

134. Bower, Jr.'s ledger for sales from July, 1987 to January, 1990, were brought with him to court. He took figures for eleven months prior to and after the closing of his store near Tingley's supermarket. He prepared a chart which showed an increase in sales in the Newberry store.

135. Bower, Jr. testified that, although Weiss and Riverside Supermarkets sell donuts individually and per dozen cheaper than his, he would not think to lower his prices. Although he believes that the supermarket donuts are baked there, he does not believe **[*54]** that they are a product comparable to his.

136. Bower, Jr. testified regarding video ads shown for Mr. Donut on T.V. These were furnished to him by Mr. Donut and he added the tag line at the end. (The attorneys stipulated that a discounted price was mentioned at the end of the ads - the first and last ones on the tape were introduced into evidence). Such promotions are done during January and February, he said. He also added that the discounts here were for four years ago. He has also used coupons to generate sales during slow periods and estimated that he spends 3% of his income on various sorts of advertising, e.g., radio, television, etc.

137. Bower, Jr. stated that he does not view convenience stores, supermarkets or fast food places as competition. The quality of his coffee is superior, he said, to a McDonald's.

138. Bower, Jr. estimated that items like sausage and cheese, soup, chili, biscuits make up only 1-3% of his sales; muffins make up 5-8% of his sales. Bower, Jr. testified that it takes about six months to train a baker to make a good donut consistently. This plays a part in being able to tell when it is time to take donuts off the shelf and bake some **[*55]** more.

139. Upon cross-examination, Bower, Jr. denied competing with offerors of non-donut items, such as soups, oat bran muffins, and egg, ham & cheese combinations. He said that in the case of the latter, his product is different from that produced by McDonald's because it is baked with a donut dough. He maintained that, even though Dunkin' Donuts does not have any shops in his community, he still competes with them because they have a desire to expand their presence. He also said that he does not compete with other food entities in his community, because they do not do the same thing that he does.

140. Bower, Jr. said that yogurt, a relatively new product, makes up 6-8% of sales in one of his stores. He said that he does not compete with yogurt sold in supermarkets. Nor does he compete with yogurt sold in the TCBY yogurt chain; theirs is higher cost and there is no such store near him. He said that with Mr. Donut, one has to consider what it stands for, coffee, donuts and other little things used to build up overall service. Upon cross-examination, when told that he had stated in answers to interrogatories that non-donut items made up 25% of his sales, he said that such **[*56]** a percentage is made up of many little parts.

141. Bower, Jr. stated that he initiated a kind of "fast feeder" concept when he adopted service to customers over a counter in front of display cases. He still has a sit-down counter, however.

142. Bower, Jr. said that he and the other plaintiffs are more financially interested in the outcome of his litigation than his father is. His father runs the Mr. Donut buying group, referred to above, and also owns stock in a construction company. This company, Keystone Construction, remodeled Bower, Jr.'s store. Bower, Sr.'s income was suggested by defense counsel to be $ 150,000.00 to $ 200,000.00 a year.

143. Bower, Jr. said that he closed his other donut store because of water and sewage problems, growth away from it and a disadvantageous beltway location. He had highly paid bakers who baked four times a day. He closed the store because, in order to cope with all this, he would have had to lower some of his standards, he said.

144. Bower, Jr. stated that fresh-baked donuts, even if sold in a convenience store owned by Sheetz, a Mr. Donut franchisee himself, would not constitute competition for him because such donuts are not baked **[*57]** four times a day and are not rotated. He said that, in his store, donuts could sit out as long as eight hours, as long as they were still fresh.

145. Bower, Jr. estimated that 1 to 1 1/2% of his sales at the Danville store were of Delaware donuts, a donut pastry/egg/bacon, etc. creation. He had confined selling it to one store because preparing it for immediate sale slowed down service to other customers. He sells about 10-30 Delaware donuts a day as opposed to 140-310 dozen donuts a day.

146. Bower, Jr. estimated that 1/4% of his sales were of chili. Its sales have not done too well, although it has been offered for seven years. He estimated that chili, soup, and Delaware donuts would account for approximately 3% of his sales. Seventy-five percent of his sales are of donuts and coffee. Twenty-two percent, he said, consists of various other drinks, yogurt, etc. He said that he works off the reputation of his donuts and he has to maintain that reputation.

147. Bower, Jr. testified that his father would not worry about his livelihood, whether the planned acquisition took place or not. He is in the construction business and there was the potential for remodeling jobs. **[*58]** Other plaintiffs' livelihoods do depend, he said, on whether the transaction goes through.

148. Plaintiffs' witness Joseph Hodin ("Hodin"), of Scranton, Pennsylvania, operates seven Giant Supermarkets. He is President of Giant Markets, Inc. One store has a bakery and it makes donuts for three other stores that do not. These donuts are made from scratch - a procedure atypical of supermarkets. Usually, Hodin said, supermarkets buy donuts in a frozen unfried or a frozen fried state and then prepare them. He said he sells 12-15 varieties of donuts. He does not sell fresh coffee or coffee for take-out.

149. Hodin said that in four stores, 2 to 4 1/2% of sales are of fresh bakery goods. Of that percentage, 5 to 7% are donuts. In the store closest to Mr. Donut, 4 1/2% would be sales of fresh bakery goods.

150. Hodin said, that while an operator of the Giant Supermarket with the bakery, he sold land to a Mr. Donut franchisee for a Mr. Donut shop one block from the supermarket. He said he did not fear loss of any donut sales.

151. Hodin stated that when the nearby Mr. Donut ran a donut "special", this did not make his sales decline. He also stated that he accepts ads for **[*59]** donut shops on the back of his register tapes from an advertising company because he does not regard donut shops as competitors.

152. Hodin testified that 50% of his customers frequent his store from 11:00 A.M. to 4:00 P.M.; 15% come in from 8:00 to 11:00 A.M. and 35% come in from 4:00 to 9:00 P.M. While 3% would be the average sales of fresh bakery products in his stores, 5-6% is the total bakery products (fresh-baked plus commercially baked from an outside source, especially commercial breads). Muffins make up 1/2% of his sales. A customer could come in and buy a few donuts or muffins and nothing else, but that would be unusual, he said. He said that one could not buy donuts and eat them there in his store. When his store ran a donut special, it did so to compete with other supermarkets and not with Mr. Donut. His stores do not accept Mr. Donut coupons.

153. When questioned by the court as to why his stores did not try to sell donuts like Mr. Donut does with eat-in and counter service, Hodin explained that this would require special equipment, would take up space and increase labor costs. Supermarkets often have unionized workforces and the responsibility of employee benefit **[*60]** plans that would increase labor costs. Plaintiffs' law firm has represented Hodin on two prior occasions.

154. Plaintiffs' witness Bruce Frey ("Frey"), of Harborcreek, Pennsylvania, works for Target Marketing Co., a firm that solicits ads from advertisers and that solicits the right to run these ads on the back of supermarkets' cash register tapes. The supermarkets decide which ads will be run. Giant, IGA, and Acme in Northeastern Pennsylvania are some of his customers. Most of these stores (over half) have in-store bakeries and sell fresh and packaged donuts. Donut shops are among those businesses whom he solicits for ads, e.g., Dunkin' Donuts, Mr. Donut, Donuts Delight. None of these ads were ever rejected by a supermarket. Supermarkets, he said, generally prohibit him from offering ads from those whom they regard as competitors.

155. Plaintiffs' witness Arthur H. Griffiths ("Griffiths"), of Dallas, Texas, is presently the Vice President of Development for Pier One Imports. In the past, Griffiths has held positions as a site selector for several fast food chains, including Burger King, Scott's Fried Chicken, and Pizza Hut. He also worked in this area for TGI Friday's, **[*61]** a more "upscale" casual restaurant focused primarily on the lunch and dinner business. He holds memberships in the National Association of Corporation Real Estate Executives (NACR) and the International Counsel of Shopping Centers (ICSC). Griffiths was offered by the plaintiffs as an expert in the area of fast food restaurants, retailing and locations. The court permitted him to testify in his area of expertise - site selection - but did not permit him to testify as to future economic consequences.

156. Griffiths stated that he knew of unsuccessful recent attempts by Burger King and McDonald's to sell donuts from bakeries and donut shops. Such attempts were unsuccessful because of lack of variety, display problems, and problems with the perception of "freshness". He said that he believed that these two chains did not enter the breakfast trade to obtain the donut and coffee customer. He stated that the cost of these items would not have justified the investment in labor and other costs. He said that the two chains had not entered the breakfast trade before the 1970s because of their fear that customers would patronize a fast food restaurant only once, and they would thus lose **[*62]** some of their more lucrative lunch business.

157. Griffiths cited the Dairy Queen chain as an example of a business that had originated as an ice cream store that later branched out into the hamburger offerings. To do so, however, they had to divide their store space into separate ice cream and hamburger service areas.

158. Griffiths said that in his work as a site selector, he had never included a donut shop in his competition analysis. He said that he had recently conducted a "cannibalization" study for a Burger King lawsuit. A "cannibalization" study involves determining how much business will be taken away from existing stores in a chain by the addition of a new one in the chain. In doing his recent study for Burger King, he did not consider any donut shops. Burger King's "presentation packet" does not list donut shops as competition.

159. Griffiths said that there were many differences between fast food places and donut shops from a real estate point of view. Fast food places have larger lots, more square footage, and more parking. Donut shops are smaller, offer less seating, and are less costly. Griffiths expressed an opinion regarding whether fast food restaurants **[*63]** and donut shops are in the same market. He said that he does not believe that they are competing for the same properties. He, therefore, does not believe that they are in the same marketplace. He does not believe that they are competing for the same customers.

160. Griffiths testified that impersonal contact, and a segmented assembly-line preparation of the product are some things that separate a fast food place from a donut shop. For a donut shop to enter the fast food business, it would need further equipment, which would be quite expensive, and a larger building with more seats. He thought it difficult to retrofit existing buildings in order to do this. He also said that the names of donut chains would undercut their ability to move into the afternoon meal segment. Furthermore, given the heavy advertising expenditures of a McDonald's or a Burger King, donut shop chains could not compete in advertising.

161. When asked whether he thought that donut shop chains could enter the fast food market, Griffiths opined that, to do so, they would have to have larger properties and far more advertising. He did not think that Dairy Queen was a very successful hamburger entity. **[*64]** It is not perceived, he said, as one of the benchmarks to follow in the fast food industry.

162. Griffiths said that certain factors would militate against Burger King or McDonald's putting in a line of donuts. There are existing space constraints. Donuts would require the installation of donut-making equipment and displays. Stores would have to be enlarged. Maintaining freshness would be a problem, as would offering enough variety to satisfy customers. At present, he said, McDonald's and Burger King require that a new product must do at least 3% of sales in order to survive. Also, now, these chains try to add products that can be prepared in the store with existing equipment, as best they can.

163. Griffiths said that many factors would make it difficult for some new chain to enter the donut field in a large regional or national basis. He based his opinion on this in his experience in helping a prior employer, TGI Friday's, in its decision regarding the possibility of opening a new fast food restaurant concept called "Stripes". Also, before testifying, he had reviewed a Goldman Sachs offering from Dunkin' Donuts, a study of the donut industry prepared by a research company, **[*65]** and the offering statements of Dunkin' Donuts and Mr. Donut. He said that a new donut chain would have to contend with the market price for a large number of locations, competition with the advertising of the "established players" in the industry, and convincing the public on the idea that it is offering something new or proprietary.

164. Griffiths further stated that the costs of a fast food restaurant were far more than those for a donut shop. Burger King or McDonald's would require $ 250,000.00 to $ 300,000.00 worth of equipment versus a donut shop chain's $ 75,000.00 to $ 100,000.00 worth. Also, a Burger King or a McDonald's would require liquid cash of $ 300,000.00, while a donut shop chain would require $ 50,000.00 to $ 100,000.00. Also, since more employees are needed for a Burger King or a McDonald's, training is longer and labor costs are higher. Upon cross-examination, he said that he had no knowledge of the liquid assets of any plaintiff or of any Mr. Donut or Dunkin' Donuts franchisee and no knowledge of how many Dunkin' Donuts or Mr. Donut franchisees own more than one shop. He said that if a person had enough money to qualify for a Burger King franchise, it would **[*66]** not matter if an applicant had multiple donut shops or not.

165. Griffiths stated that there are many advantages to a franchisee in the expansion of a franchise chain. A larger chain generates more money, which can be tapped for advertising, and it also generates increased buying power for the group. Based on his experience in chain store development, Griffiths had an opinion regarding whether Mr. Donut franchisees would be injured as a result of an acquisition by Dunkin' Donuts. That opinion was, over a period of years, Mr. Donut stores would become Dunkin' Donut stores with the consequent public perception that something was wrong with Mr. Donut. This would work to the disadvantage to the existing Mr. Donut stores that remained. A smaller advertising budget would also result and there would be a potential for buying power to diminish. Furthermore, conversion of stores would cause a disruption in business. Certain brand-loyal customers might also stop patronizing a converted store.

166. Griffiths again explained what "cannibalization" studies are. He said that one almost never sees two McDonald's on the same street because that entity would be sharing the same customer. **[*67]** Griffiths said that a Mr. Donut converted to a Dunkin' donuts would have no guarantee that it would suddenly do the average business of another store's name. One must consider the individual store in an individual trade area for that store.

167. Griffiths stated that McDonald's buys its danish pastries from outside sources.

168. Griffiths said that a donut organization would regard McDonald's as substantial competition for the breakfast dollar, but not necessarily in the things that the donut shop would sell.

169. Griffiths stated that the increase in the number of stores in a franchise chain might be a detriment if most of them were in close proximity to the existing franchise organization. He did say, however, that if the Dunkin' Donuts franchise chain were to increase by approximately 350 units, it could be an advantage to Dunkin' Donuts franchisees. He also said that, depending on their costs of conversion, it could be an advantage to 350 Mr. Donut franchisees to convert to Dunkin' Donuts. There would be a detriment, however, in the loss of advertising dollars to the remaining Mr. Donut stores. On redirect examination, he said that if a Mr. Donut store were doing more **[*68]** sales at present than a Dunkin' Donuts store, conversion would not help them.

170. On cross-examination, Griffiths stated that although he had referred to diminished buying power previously, he had not had the opportunity to look at the actual prices the franchisees received. He also said that he had no idea whether remodeling would be done all at once or in stages during a conversion and that a customer's rapport with store personnel might be a factor in the continuation of that customer's patronage.

171. On cross-examination, Griffiths mentioned various places, e.g., fast-food restaurants, cookie shops, delicatessens, convenience stores to which he might go for items like sandwiches, croissants, soups, assorted beverages, bagels, cookies, chili, etc. Some of these items, he said, are also offered by Dunkin' Donuts. He said that, in the broad sense, Dunkin' Donuts is competing with Burger King, delicatessens, and Jack-in-the-Box places for ham and cheese on a roll. He also said that some people might go to Dunkin' Donuts for cookies rather than to a cookie store, or grocery and, thus, Dunkin' Donuts would be in competition with these thousands of stores. He was also **[*69]** questioned in the same vein regarding oat bran muffins, seafood salad, and brownies. He said that franchisees periodically expand product lines mainly to increase sales dollars. He also stated that when they go into a new product line, they are competing with anyone who sells that product line. He agreed with the statement that when Dunkin' Donuts goes into a hot sandwich, hot soup, cold beverage campaign, it is competing with those who sell lunch. He also agreed that when Dunkin' Donuts or Mr. Donut sells croissants, bagels, cookies, brownies, coffee, etc., it is fair to say that they are competing with sellers of that product.

172. Griffiths said that he knew that CREST (Consumer Restaurant Eating Share Trends) reports were a publication well-subscribed to in the restaurant industry. These reports concern segments of the consumer population who buy different products. He said that he did not consult any CREST work for his testimony.

173. Griffiths, on cross-examination, was cited to parts of a 1987 market study of the retail donut market prepared by a group from Washington, D.C., for Dunkin' Donuts. This document was one which he reviewed prior to testifying. He said **[*70]** that he had read these two sentences found in the study: "The effect of fast food chains offering breakfast has also negatively affected growth in the doughnut market" and "The source at Mister Donut

noted that the entrance of fast food chains into the breakfast food market has contributed to market saturation. Ten years ago, doughnut shops owned the breakfast business. Now, however, we need to be more aggressive marketers since fast food chains such as McDonald's have entered the breakfast market."

174. Plaintiffs' witness James W. Meinecke, Jr. ("Meinecke"), of Johnstown, Pennsylvania, has owned a Mr. Donut shop since November, 1987. The shop is located in Somerset, Pennsylvania. Prior to running the shop, Meinecke was a District Manager (Maryland, Virginia, District of Columbia and Northeastern Pennsylvania), a Regional Finance Manager (Maryland to Florida, Puerto Rico to Indiana), and a Regional Director of Development for Mr. Donut. He said that he has not paid franchise fees to Mr. Donut for almost a year. Sales are low in his store, in part because the intersection in front of his store has been closed in connection with road construction. He anticipates a brighter **[*71]** future when a nearby shopping mall opens in April, 1990.

175. As part of his duties as Regional Director of Development, Meinecke came into contact with persons who expressed a desire to become a Mr. Donut franchisee. He said that most of these persons had investigated Dunkin' Donuts and Mr. Donut franchises, but he did not recall anyone saying to him that he was looking at any other kind of franchise opportunity. He said that of seventy persons with whom he might have spoken regarding Mr. Donut franchises, perhaps ten or eleven actually bought franchise options. Not all of these may have become franchisees. He knew of two such persons who had opened franchises.

176. Meinecke identified several in-house documents and memoranda from Mr. Donut, which he had received as a Regional Director. These documents contained information referring to Dunkin' Donuts. Meinecke testified that he had not seen similar market analyses or annual reports of supermarkets, convenience store chains, or any fast food restaurant franchisor.

177. While employed by Mr. Donut, Meinecke occasionally filled out analyses of new locations. In small towns, he was instructed to include as "competition", **[*72]** convenience stores or supermarkets, i.e., anyone nearby who sold a donut. Personally, he did not believe that these were competition. In the larger market, such entities were not customarily included in that category, he said. He testified that while he priced Dunkin' Donuts stores, he did not price supermarkets.

178. Upon cross-examination, Meinecke read into the record sentences from various documents he had received. One was a "Mister Donut Focus Group Study, Pittsburgh Marketplace, April, 1980, reprinted for use Pittsburgh ADI Meeting, January 9th, 1985." (An ADI is an "area of dominant influence." An ADI group meets to discuss advertising plans). From that document, Meinecke read this sentence: "The qualitative research was designed to, number two, determine the image of various fast food restaurants, including McDonald's, Burger King, Taco Bell, Dairy Queen, Arthur Treacher's, Mister Donut, Dunkin' Donuts and Independent Bakeries." Also, the existence of this sentence was acknowledged by Meinecke: "Doughnut shops are frequented less often than other fast food establishments." Upon redirect examination, however, Meinecke read what was underneath that sentence: "Approximately **[*73]** five percent of time spent in fast food establishments is spent in a donut shop. This is because it is a specialty shop or a dessert shop, according to the panelist. Complete meals are not available." On re-cross examination, Meinecke acknowledged that this group study was prepared ten years ago.

179. Upon cross-examination, Meinecke acknowledged that a document regarding customer profile and site selections prepared by Melaniphy and Associates included "McDonald's" in the answer to this question: "Where else items similar to those bought at Mister Donut (Washington) are bought?" This was also a document Meinecke received at the ADI meeting referred to above. Upon redirect examination, Meinecke was asked to read from this document the percentage of people who answered "Nowhere else" to this question. That figure was 48.1%. Only 4.6% had answered "McDonald's". On recross-examination, however, Meinecke said that this study was approximately eight years old and that the marketplace for quick service restaurants had changed significantly.

180. Upon cross-examination, Meinecke acknowledged that he had written in the Store Visitation report for Charles Sheetz's Mr. Donut store **[*74]** in Punxsutawney, Pennsylvania, that a new supermarket with a full bakery had hurt his Mr. Donut shop.

181. Plaintiffs' witness, Morton Levin ("Levin"), of Northwood Manor, New York, is the retired President of Tempty Donuts, a wholesale donut bakery in Brooklyn, New York. He sold donuts to distributors in New Jersey, Connecticut and Pennsylvania. They, in turn, sold the product to restaurants, luncheonettes and lunch trucks. These donuts were somewhat larger and took 18 to 24 hours to reach the consumer. They were made from scratch, by machine, in fifteen varieties. In the heyday of the 1980s, he made 8,000 fresh donuts a day.

182. Levin stated that a retail donut was of better quality. Also, a frozen dough donut is inferior to a donut made from scratch at a donut store, he said. He never perceived himself as competing with donut shops and had never received a customer's request that he lower his prices in order to enable them to compete against retail donut shops.

183. Plaintiffs' witness, Charles H. Sheetz ("Sheetz"), was presented by videotaped deposition played to the court on March 6, 1990. Sheetz is the Real Estate representative and Director of Restaurant Operations **[*75]** for Sheetz, Inc., which runs six to seven restaurants and approximately 158 Sheetz convenience stores in Pennsylvania, Maryland and West Virginia. The Sheetz stores also own two Mr. Donut stores, one in Punxsutawney, Pennsylvania, and the other in Wilkinsburg, Pennsylvania. Currently they are seeking to sell the Mr. Donut shops in order to concentrate on their convenience stores. Sheetz was called by the plaintiffs to testify as to the differences between convenience stores and donut shops. Sheetz said that at the Sheetz convenience stores, he sells 1.8% in donuts and 2.5% in coffee. About 1/3 of his convenience stores offer donuts supplied in a branded display case, by a program with Dunkin' Donuts; the other 2/3 of the stores offer donuts supplied by a neighboring bakery or donut shop. Sheetz said that, several years ago, certain Sheetz stores sold Mr. Donut donuts. Sales of donuts went up with these; when the Mr. Donut donuts were discontinued, donut sales fell back. Sheetz also two locations, Wilkinsburg and Tyrone, Sheetz stores were located right next door to the Mr. Donut shops. In neither Sheetz store did the sales of donuts ever increase and he noticed no "cannibalization" **[*76]** of business between the Sheetz store and the Mr. Donut shop.

188. Sheetz said that Sheetz, Inc. also owns three "Sandwich Saloons" and one "Chicken Charlie's." These shops sell sandwiches, beer, and hoagies. They also sell a muffin, egg, ham combination for breakfast, plus coffee. Their Mr. Donut stores sell the Delaware donut, plus muffins, cookies, brownies and croissants. He did not think that the Mr. Donut shops were in competition with these sandwich shops. He said that he offered non-donut items in the Mr. Donut stores to help increase sales.

189. There are no on-premises bakeries at the Sheetz stores or at these sandwich shops, Sheetz said. At one time in 1984, Chicken Charlie's had sold fresh-baked goods, but that practice was discontinued.

190. Sheetz was shown Market Data Surveys and Store Evaluation reports for some of the Mr. Donut stores. While "competition" in these documents listed supermarket in store bakeries, Sheetz said that he would disagree with that. Nor does he perceive Burger King or Uni-Mart convenience stores to be donut shop competition either. He also said that he would not accede to the accuracy of this statement on his Punxsutawney Mr. Donut **[*77]** store Visitation Report: "New supermarket with full bakery has hurt sales. Also, right behind the shop there's a Riverside with full bakery and the Comet Market with a full bakery." The supermarket bakeries mentioned sell cake and not yeast donuts, he said. He added that since people do buy donuts in supermarkets, as well as donut shops, he would guess that is competition.

191. Sheetz said that once his company had briefly owned a Haagen Daz ice cream store. When they were considering buying a Mr. Donut franchise, he said that they had considered a Dunkin' Donuts franchise but no other franchises. He said that the motivation behind acquiring the Mr. Donut stores was extra space on land that Sheetz, Inc. already had.

192. Sheetz estimated that the Mr. Donut shops have about 1% sales in Delaware donuts. He also said that Mr. Donut sales broke down this way: one-third coffee, one-third donuts, and one-third baked goods. He said that baked goods are on the increase. He testified that there would be no room in the Sheetz stores to install on-premises bakeries. Also, increasing square footage and labor would not comport with the principles of a convenience store.

193. Sheetz **[*78]** testified that he did not believe that Mr. Donut stores in any way cannibalize the Sheetz stores' business. As regards individual bakeries near the Wilkinsburg Mr. Donut, Sheetz said that, although these bakeries' prices were cheaper, the Mr. Donut stores were still able to sell dozens and dozens.

194. Plaintiffs' witness Gary Oden ("Oden"), of Lewistown, Pennsylvania, owns three Mr. Donut stores, for which he has won several Mr. Donut awards. He has also been active in the Mr. Donut Advisory Council, has been a past president of the Mr. Donut National Dealers' Association which helped found The Buyers' Cooperative, and he has also devised a computerized program for Mr. Donut operators. He said that there is no Dunkin' Donuts store in Lewistown. According to his business records for the Lewistown store from 1977 to 1989, when Donuts & More, a store selling strictly coffee and donuts, moved in two and one-half miles away from him, his sales dropped. While that store was in existence from 1983 to May, 1985, his sales declined. Upon its closing, however, he said his sales had increased.

195. Oden stated that in 1980 a Weis supermarket opened near him in Lewistown. That supermarket **[*79]** had a full-line bakery, but it did not have any affect on his sales, he said. He also said that when a Weis supermarket opened in 1987 with a full-line bakery and donuts in showcases near his Lock Haven store, his sales did not decline, but increased.

196. Oden said that he had once been part of an experimental Mr. Donut program that sold sandwiches. After trying the program for nine months to a year, he discontinued it for lack of sales. The same was true, he said, of his efforts to sell Delaware donuts.

197. Oden testified as to his Lemoyne store, located in the Harrisburg area, which opened in 1988 and which lost money in the first two years of operation. It is earning money this year, however. Oden said that there are five Dunkin' Donuts stores already in the Harrisburg area and is the only other major chain. He would like to open another store in the Harrisburg area, but fears that that would not work because, even if he converted to a Dunkin' Donuts, the other Dunkin' Donuts would be in too close proximity to him.

198. Oden testified that Mr. Donut allows him to spend 2% annually on advertising for a store. An extra 1/2% goes to Mr. Donut itself. He appreciates **[*80]** the flexibility given him by Mr. Donut as to choice of media. Dunkin' Donuts, he says, requires its franchisees to "pool" their advertising.

199. Oden, upon cross-examination, said that 5-6% of his sales were of yogurt in the Harrisburg store, 4 1/2-5% in his northern store, and 1.7% in his Lewistown store. The Lewistown store had competition in the form of Dairy Queen and "Mom and Pop" shops.

200. Oden said that he, too, had received Gabellieri's letter promising to respect Mr. Donut's contractual commitments.

201. Oden stated, upon cross-examination, the entities near his Lewistown shop that either had fresh bakeries or serve quick service breakfast products. These included Sheetz convenience stores, Rubel's donut shop, McDonald's, Kentucky Fried Chicken, Wendy's, Hardee's, Arby's, Mini-Mart, Giant and Weis supermarkets. Near his Lock Haven store are McDonald's, Burger King and a Weis supermarket with a bakery. In the same town as his Lemoyne store are a Giant supermarket with a bakery, several McDonald's, a Hardee's, a Carne's supermarket with a bakery, Handi-Marts, Uni-Marts, a Pennsylvania bakery and three Dunkin' Donuts within two and one-half miles of his store and **[*81]** two Dunkin' Donuts stores on the other side of town.

202. Oden said that, in 1977, he had inquired about a Dunkin' Donuts franchise, when he was first thinking of his own business. He also said that he had considered going into the chair manufacturing business.

203. On cross-examination, Oden was presented with various store evaluation reports prepared by district sales managers. A 1989 report listed as yogurt competition for the Lock Haven store: TCBY, Baskins, and Dairy Queen. A 1986 evaluation report for the Lemoyne store said that the closing of a nearby Wendy's for breakfast helped to increase the Lemoyne store's sales. Oden said that he did not agree with that statement. A store report regarding the Lock Haven store, which has a Weis supermarket behind it, stated that sales had dropped "drastically" after

Weis opened a new bakery in 1985. Oden said that, to his recollection, sales did not do so. He said that was also the year when Piper Aircraft closed down.

204. An evaluation report for his Lewistown store had contained a remark regarding a steady decline in sales. Oden said that different times of the year prompt concerns about business. He followed a suggestion **[*82]** that his store stay open longer hours. He also said that he might have gone with a Mr. Donut representative to price the fresh-baked product in Giant and Weis supermarkets. He said that it would constitute competition if Weis and Giant sold donuts at $ 1.49 and he at $ 1.99. On redirect examination, he said that he does not regularly check the price of supermarket donuts and that his sales for the Lewistown store had gone up since 1985.

205. Oden said that the proposed acquisition would have a detrimental effect on him whether he remained a Mr. Donut store or converted to a Dunkin' Donuts store. He foresaw diminished buying power, sales and image, if he remained a Mr. Donut shop. He also thought he would lose out, should he convert. On cross-examination, he was read a sentence from a letter he had written to his own employees. This letter had said that the acquisition would not affect the stores at all, that Dunkin' Donuts would honor all contractual commitments and that everything should remain the same. Oden explained that he had written the letter to calm the upheaval among his employees and to forestall the resignation of his Lemoyne store's manager. The letter was **[*83]** also published in the Lewistown Sentinel, as a result of a brief telephone conversation Oden had with a reporter. Oden stated that this letter had been written after the Florida meeting of Mr. Donut franchisees with Dunkin' Donuts' officials. Other franchisees had told him about the Dunkin' Donuts plans for Mr. Donut mentioned at that meeting.

206. Oden was shown Market Data Surveys for his three stores. Although the price of donuts was cheaper in supermarkets, he said he did not price his donuts against theirs and did fear he would lose customers to the supermarkets. Although he ran coupon specials from time to time, he estimated that his coupon sales were only 7-9% of his business.

207. Plaintiffs' witness, Jerome B. Ruenheck ("Ruenheck"), testified via videotaped deposition shown to the court on March 7, 1990. At present, Ruenheck is a franchisee, under various corporate names, of multiple Burger King stores in Florida and the Pacific Northwest. He described Burger King as an entity that offered an array of fast food service items, primarily hamburgers, but including chicken, fish, fries, pie, drinks, coffee and breakfast (eggs, bacon, sausage). He had begun his **[*84]** association with Burger King in the late 1960s as a franchisee. He occupied various positions with Burger King, the most significant being: Division Manager, Company Stores Division (1970-1973); Vice President and Division Manager -- Division III (1973-1977); Group Vice President, Restaurant Operations; Executive Vice President, Restaurant Operations; President, Burger King, U.S.A. (1980-1982); and President and Chief Operating Officer, Burger King Corporation (1982-1985). Upon leaving the last-named position, he began his association with the multiple franchises mentioned above.

208. Ruenheck stated that, while employed in operating positions at Burger King, he had been involved with formulating marketing plans, developing advertising concepts, formulating menu strategy, selecting sites, reviewing competitor's activities, reviewing franchise packages offered to potential franchisees and monitoring those of others.

209. The court accepted Ruenheck as a fact witness and as an expert in the fast food business.

210. Ruenheck stated that there had been changes in the fast food industry within the past five years, e.g., the proliferation of various kinds of competition like **[*85]** pure drive-through places and regional chains going national. He characterized Burger King as a "fast food restaurant", but would not so characterize Dunkin' Donuts or Mr. Donut. He said that he and current Burger King executives, such as President Ron Petty, do not consider donut shops direct competition. He said that donut shops do not appeal to the same customer base that fast food restaurants appeal to. Burger King, he said, does not monitor donut shops.

211. Ruenheck said that he does not personally know the menu at a donut shop, although he assumes it would offer donuts, coffee and juice. He does not know the donut shops in his area, nor does he visit them. He monitors prices in places like McDonald's, Wendy's, etc., but not in donut shops.

212. Ruenheck said that in both his experience as a Burger King executive and as a franchisee, advertising would be monitored for fast food places like McDonald's or Hardee's, but not for Dunkin' Donuts, Mr. Donut or any other donut shop.

213. Ruenheck discussed factors involved in site selection. It would be advantageous for a Burger King to be located near a McDonald's, he said. In making site selections for his current business, **[*86]** he never considers Dunkin' Donuts or Mr. Donut locations because he does not worry about their impact on his business because they do not appeal to the same customer.

214. Ruenheck stated that when Burger King inaugurated its breakfast menu in 1977, they considered primarily what McDonald's was offering. To his knowledge, no one at Burger King considered what donut shops were offering. Burger King wanted to attract customers for a full-line breakfast, e.g., bacon, eggs, hash brown potatoes, toast, pancakes, etc. He said that, since he had not been in a Dunkin' Donuts store, he really did not know if there were a similarity between their offerings and Burger King's breakfast. To the best of his knowledge, neither he nor any other Burger King executive had to ascertain what would attract customers of donut and coffee shops to Burger King for breakfast.

215. Ruenheck said that in his Florida Burger King franchises, he does 12-14% of his business in breakfast; 60-65% in lunch, and the rest in dinner. His average breakfast ticket is $ 2.60 and breakfast business runs from 7:00 to 10:30 A.M.

216. Ruenheck stated that there has never been an attempt by Burger King to make **[*87]** donuts a national entree offering even on a test basis. He said that he does not see that adding or subtracting donuts would add another customer to the bottom line.

217. Ruenheck said that Burger King does not serve fresh ground coffee. A Yuban "test" did not generate sufficient sales to justify its cost and so that brand was not continued.

218. Ruenheck was asked this question: based on his experience in the hamburger and fast food industry, would it be realistically feasible for a donut and coffee chain to enter the fast food market in the same sense that a Burger King is a fast food restaurant? He said that such entry would be extremely difficult and listed such obstacles as the existence of good competition; need for larger lots, kitchens and dining rooms; need for more equipment and for retraining management and crews; the need for massive marketing; and the need for more parking spaces.

219. Ruenheck also opined that for donut shops to offer a full-line breakfast, it would still be a challenge. Kitchen space and equipment would be a problem. More training would be necessary, as would more marketing against McDonald's and Burger King. He said that a company needs **[*88]** to find a "hook" to give it a leg up over the established competition. Not even Burger King has been able to knock out McDonald's for breakfast.

220. Ruenheck said that it would not be economically feasible for a company like Burger King to introduce the concept of fresh-baked donuts. Donut shops have quality, he said. He said that his franchises were not planning to offer fresh-baked donuts in the next two or three years. Burger King, he said, was not focusing on "ancillary" breakfast products, including fresh-baked donuts, for the next two or three years, either. Making donuts would require floor space most restaurants do not have. There would also be a need for costly equipment like a new venting and hood system, as well as refrigerated storage and new display cases. Training would also be involved. The cost could run to $ 25,000.00, he said. Moreover, Burger King does not have a consumer image as a source of fresh-baked donuts and premium coffee.

221. Ruenheck defined a franchise as a license to operate under a specific trademark within the parameters of the franchise agreement. A franchisee buys someone else's expertise, marketing and system. He said that a Burger **[*89]** King franchisee needs a one to one and-a-half debt equity ratio exclusive to real estate. The land and building could run about $ 650,000.00 to $ 725,000.00. The equipment package could cost $ 215,000.00 to $ 240,000.00. Burger King would choose a site for a new franchisee. He and his Burger King colleagues reviewed other fast food franchise package offerings, but none for Dunkin' Donuts, Mr. Donut or other donut and coffee shop chains.

222. Ruenheck said that there were differences between the type of candidate attracted to a fast food franchise like Burger King and a Dunkin' Donuts or Mr. Donut franchise. Burger King demands greater net worth. With the donut shop franchise, the property is smaller, the equipment less expensive and the labor, training, and marketing less intensive. A Burger King would demand more complicated managerial skills.

223. Ruenheck stated that he could think of only a couple of persons who had expressed an interest in a donut shop franchise as well as a Burger King. Burger King, he said, would regard as comparable franchises Hardee's, Denny's, Sambo's and fast food franchises offering hamburgers, chicken or fish. He said that Burger King does **[*90]** have franchisees who have also had some donut chain franchises at the same time; Burger King did not consider these a same or similar business. Burger King, he said, thinks it competes in the franchise category with the fast food hamburger chains.

224. Ruenheck listed the various breakfast items at Burger King. Bagels, danish and croissants were among them. Pancakes have been offered from time to time and donuts have been test marketed. Ham has also been offered. He estimated his gross breakfast sales to be about $ 110,000.00.

225. Ruenheck agreed that who his competitors are may vary according to the parts of the day. He also said that, as a franchise owner, he looks at local and national markets.

226. Ruenheck was cited to certain parts of a recent CREST Report. He said that he would not change his opinion regarding donut shops as not part of his competition even though a 1989 CREST report had said that donut shops have lost ground in the breakfast market since 1985, in particular, to hamburger and convenience stores. He said that he would have to lose customers to the donut shops to consider them his competition and that lost business would have to include gross volume. **[*91]** He said that his customers generally do not come in just for a danish or donut and a coffee. Donut shop and fast food customers want different things.

227. Ruenheck said that a 1989 CREST report statement that Burger King had a larger share of that breakfast market than Mr. Donut did would not change his opinion as to not knowing whether or not donut shops consider Burger King as competition.

228. Ruenheck testified that a 1989 CREST Report statement that consumption of donuts and sweet rolls went up in 1989, but these gains were primarily realized by hamburger shops and not donut shops, would not change his opinion that he does not compete with donut shops.

229. When asked to name franchises less costly than a Burger King, Ruenheck mentioned no dining room, double drive through fast food restaurants like Checkers, a Kentucky Fried Chicken, an Arthur Treacher's, or a Long John Silver.

230. Plaintiffs' witness Henry W. Roever ("Roever"), of Scranton, Pennsylvania, operates three Mr. Donut stores. One of them was sold to him by witness Hodin, who operates a supermarket on block away. Roever stated, that when Hodin ran a donut special in January, 1990, that did not affect **[*92]** his donut sales. Roever also said that he puts Mr. Donut ads on the back of supermarket cash register tapes, even where the supermarkets have bakeries that sell donuts. He stated that he does not survey donut prices in supermarkets or convenience stores nor does he survey coffee prices in convenience stores or fast food places. He checks prices at Dunkin' Donuts and Donut Delight once a year or so. He said that when Donut Delight first opened, he noted a drop in sales. Roever stated that he has had a recent test program for croissant sandwiches. Initially, he sold fifteen per week per store; sales are lower now.

231. The areas explored in Roever's direct and cross-examinations were similar to those explored with other witnesses who were owners of Mr. Donut stores. He was questioned from the Market Data Surveys for his stores. He testified as to the generally lower supermarket prices for donuts and lower convenience store prices for coffee and lack of customer complaints about his somewhat higher prices. He also testified that he sells other baked items in addition to donuts and listed them, such as pie squares, cheese cake, muffins, etc. He estimated that he makes about **[*93]** 58% of his sales in coffee, about 18% in donuts and about 15% in other pastry products and about 10% in juice and sodas.

232. Roever said that there is one Dunkin' Donuts and five Donut Delights in the Scranton area. He defined a competitor as someone who was a seller of coffee and donuts for about 24 hours a day. He said he would view McDonald's as a competitor if they started selling fresh-baked donuts. He said that there would probably be a problem in freshness if such donuts were transported and then stocked in McDonald's display cases.

233. Roever acknowledged making this remark: "I understand fully that sales have been dropping and can assure you that I am as concerned as you because I believe 100 percent, the times are changing and we must offer a full line of quality baked goods along with doughnuts in order to assure our place in the market." He explained that "market" meant his community.

234. Roever stated that his egg and meat combination on a roll would compete with similar products sold by others in the community. When asked by the court how he prepared the Delaware donuts he used to sell, Roever replied that it was done in the oven. He also stated, in response **[*94]** to a question by the court, that this aroma would affect the "smell" of a donut shop. The court inquired whether he could prepare burgers for breakfast. He answered that since he had no grills, he would have to install a lot of equipment.

235. Plaintiffs' witness Richard J. Haefner ("Haefner"), of Cape May Courthouse, New Jersey, owns a Mr. Donut shop there. Haefner testified that many of his customers had expressed concern to him regarding the proposed sale of Mr. Donut to Dunkin' Donuts. He also said that he, too, offers a broad product line in his store.

236. Plaintiffs' witness O'Hanlon was recalled to the stand. He is the inventor of the Delaware donut. He described to the court how he invented it, how it takes four hours to make, and how it is a more labor intensive and complicated product. He estimated that his stores sell 3-6% in Delaware donuts. He testified that the opening of nearby supermarkets with fresh bakeries did not hurt his sales. When Dunkin' Donuts stores opened, however, he lost sales. Customers tender Dunkin' Donuts coupons to him but not fast food or convenience store coupons.

237. O'Hanlon estimated that he made only 5% profit on Delaware donuts **[*95]** as opposed to a 15 to 18% profit margin with donuts. He acknowledged that in deposition testimony he had said that supermarkets sell the same type of muffins as he does. He also testified that he would not introduce hamburgers into his store because that would take his store out of the realm of the basic coffee and donut business. He said that the Delaware donut, although comprised of meat, did not really have an overwhelming smell in a donut shop.

238. Plaintiffs' expert witness, Dr. French, resumed the stand on March 8, 1990, and plaintiffs moved to quality Dr. French as an expert in the field of economics and antitrust analysis in the field of acquisitions and mergers and as an expert in the field of survey research. (A separate plaintiffs' expert was to be heard as to the admissibility of the survey work French did for the instant case). Defendants did not object to his qualification as an expert with respect to the field of economics. Dr. French's testimony was accompanied by Plaintiffs' Exhibits 300 to 346.

239. Dr. French discussed the research he had done in preparation for this litigation. In addition to discussions with some of the plaintiff franchisees, reviewing **[*96]** documents provided by the defendants, and interviewing other parties, including six or eight donut shop franchisors other than the defendants, Dr. French conducted field research in two Pittsburgh areas and one Allentown area. He collected information on donut shops, convenience stores, supermarkets, bakeries, and other retailers. He also designed and collected -- with the assistance of four associates from his firm -- a donut shop store survey of donut shop customers at three Mr. Donut shops in the same communities where he did other field research. The three shops he chose belonged to plaintiff-franchisee Jones, plaintiff-franchisee Muth, and a non-plaintiff named Berardi. The survey was intended to study the attitudes and behavior of donut shop customers. He said that there were no significant differences in the results from the three shops.

240. This survey, Dr. French said, was mainly conducted by four associates. All of them had college degrees and some had post-graduate degrees; none of them had had very much experience in conducting surveys, however. On cross-examination, Dr. French acknowledged that these associates were aware that this survey was connected to the **[*97]** instant case. While in the field, Dr. French discovered an error in one of the skip pattern instructions and endeavored to correct it. He corrected some and his associates corrected the rest. He told the interviewers to make

sure that the change was made before they used the instrument. The erroneous skip instruction occurred between numbers 8 and 9 of the survey and originally read: "If No or Don't Know, Go to No. 10"; it should have read: "If Yes, Go to No. 10."

241. Dr. French said that the survey had been started at 6:00 or 6:30 A.M. on February 22 and had been concluded on the morning of February 24, 1990. Copies of the 366 completed survey questionnaires were produced to the court.

242. On cross-examination, Dr. French acknowledged that there were some 560 Mr. Donut shops, but he had chosen three of these. He said that time was limited for a survey. He was cited to a remark in a deposition of another professional, Dr. Myron Glassman, who had said that according to accepted survey techniques, it would be preferable to avoid taking a survey at the store of a franchisee-litigant whose customers had already expressed their support for him. Dr. French stated that he had **[*98]** chosen the shops he did for reasons of time and practicality. He had asked plaintiff Jones to select two stores in Pittsburgh; plaintiff Muth he had spoken to himself. He estimated that there were eight to nine thousand donut shops in the United States. He said that even without the survey, he would still have reached his conclusions.

243. On cross-examination, Dr. French said that he would not want it to happen that the erroneous skip instruction should not be changed. He was, however, confronted with numerous errors found among the survey questionnaires. In 135, the skip instruction between questions 8 and 9 was either not corrected or erroneously corrected. A few other questionnaires also contained other errors. Dr. French said that he had not personally reviewed each questionnaire. He and Marilyn Hand, a research associate at his firm, did a summary of the survey data. He did not personally check the data entry and coding into the computer.

244. Dr. French stated that he had subcontracted the interview process to professionals in a survey done in a Michigan case for Pop-Eye's Fried Chicken. He said that he has never given testimony before any court regarding a face-to-face **[*99]** field interview for which he was responsible. He would not sell himself as an expert in sample design, like Dr. Glassman, he said, but he does create sampling results in his work. Dr. French said that he has never held himself out for hire solely as a market research surveyor. He was never hired, he said, just to conduct a public consumer survey. This is the first time he has done an on-premises, public face-to-face consumer survey. Dr. French stated that, while it is not perfectly done, he believes that that does not mean that it does not have meaningful results. He said that, to the extent that Mr. Donut customers are typical of other doughnut shop customers, it is fairly representative.

245. On redirect examination, Dr. French stated that, during a break given for that purpose, he had reviewed the questionnaires with the erroneously corrected skip instruction and had concluded that in all but four instances, the instructions were followed regardless of this. On a later redirect examination, Dr. French said that he had had the chance to review the vast bulk of the questionnaires and caught perhaps five or six more errors. So, he said, there were now ten to fifteen errors **[*100]** out of the total 3000 possible responses.

246. The court, despite some concerns over the survey, permitted Dr. French to testify and to rely upon the poll.

247. Dr. French summarized for the court his conclusions concerning the relevant markets in the instant case. His conclusions addressed the end product market and the franchise market. He said that the end product market for donut shop products is the cluster of products and services typically provided by donut shops, the most important of which are donuts and coffee. He went on to say, that while he has not focused as much on the franchise market as he has on the end product market, he had concluded that there is a market for low cost, highly specialized menu, prepared food franchises.

248. Dr. French stated that the geographic dimensions of the end product markets are quite localized, including many markets within one metropolitan area. He said that he had not been able to ascertain the geographic dimension of the franchise market. He concluded nonetheless that there would be an effect on competition on these two markets by the proposed acquisition. He said there would be quite harmful competition that would be

sustained **[*101]** for an intolerably long time on the end product market if the acquisition goes through. He also stated that there might well be an adverse effect on competition in the franchise market as well.

249. Dr. French explained the nature of the donut shop business. He said that donut shops sell mostly coffee and donuts. From a Mr. Donut Market Data Survey, it is clear, he said, that over 80% of their sales are strictly coffee and donuts. Adding in other beverages like milk, fruit juices, etc. - items which he characterized as part of the classical components of what a donut shop sells - would boost the percentage to 88.2% products that the donut shops have always sold before the trend toward menu diversification had begun. He characterized muffins, brownies, cookies, and croissants as products "complimentary" to the traditional donut and coffee products. Adding their sales would come to 92.7%. Finally, he said that adding in categories of products that might be considered as consumable for lunch or dinner, such as Delaware donuts and biscuits with sausage, would add only 1%, and soup and chili only less than 1%. This brings the computation up to 94%, he said. All other products **[*102]** would equal only 5.7%. He also remarked that from the Dunkin' Donuts data he had received these results were similar.

250. Dr. French stated that the Mr. Donut chain does 55% of their sales between 6:00 A.M. and noon, and he found this point significant. He said that the fact that they sell coffee, donuts and complimentary products in the early morning hours before most other potential competitors would even be open has a great deal to do with his conclusions about there being a separate donut shop market. He also said that the aspects of quality and freshness, the service offered in a donut shop, the display cases and even the aroma constitutes a particular kind of franchise concept, a particular mix of products and services that is unique and that no one else duplicates except in another donut shop. This also plays a part, he says, in his finding that there is a separate market.

251. Dr. French stated that in both the Mr. Donut chain and the Dunkin' Donuts chain there are a high percentage of regular customers.

252. Dr. French testified that there were a total of 8557 donut shops in the United States. In his prior appearance before the court he had presented a chart with **[*103]** the total of approximately 4000 such shops; he now corrected this figure. He said, though, that 3121 of the 8557 were mostly single store operators in one local market. Chains like Winchell's and Daylight have no stores east of the Mississippi River. He said that in the eastern part of the United States, there are only Dunkin' Donuts and Mr. Donut that are really competing head-to-head. Other larger chains tend to be only regional ones. The really small chains, he said, are likely to compete only in one or a few states.

253. Dr. French stated that Dunkin' Donuts is the only really nationwide chain. Since many chains are quite local or regional, they are not all competing against each other, so the 8500 units around the country is not meaningful for existing competition, he said.

254. Dr. French stated that the competitive effects of this proposed acquisition would be felt most heavily in the eastern part of the United States, since both Dunkin' Donuts and Mr. Donut have a disproportionate share of their total number of units in the east and they have, separately and together, larger shares of the number in sales of donut shops in the east. He said that although Dunkin' **[*104]** Donuts has only 20% of the donut shops (1700), it has 33% of the nationwide sales. Mr. Donut has 5% of such sales. He said that Dunkin' Donuts is in a better position in the industry than any other chain.

255. Dr. French testified that Dunkin' Donuts had a 25% share of the number of donut shops in Mr. Donut's six census region areas in 1988; Mr. Donut had a 10.7% share. This indicated to him that Mr. Donut is a stronger competitor, at least in terms of numbers, against Dunkin' Donuts in the east, in the regions of the country where it operates, than it is all across the country.

256. Dr. French also stated that, from examining donut shop "occasions", i.e., payments of checks, Dunkin' Donuts had 57% of them and Mr. Donut, 5.2% of them in the Northeast. Thus, their total share in this part of the country would be 62%. For other regions, it was: 63% for Dunkin' Donuts and 7% for Mr. Donut for 70% in the Mid-Atlantic region; 26.3% for Dunkin' Donuts and 13.6% for Mr. Donut for 30.9% in the East North Central region; and 47.6%

for Dunkin' Donuts and 19.8% for Mr. Donut for 67.4% in the South Atlantic. Dr. French further stated that, when one limits "occasions" to one category **[*105]** like donut shops, occasions are a very close approximation of sales.

257. Dr. French was asked to describe to the court what a relevant product market is. He said that such a phrase as "competing for the breakfast dollar" would not be the term used by an economist. What was important, he said, was trying to determine what would happen if one type of seller raised its prices. To whom would that seller lose customers? He tried to see if donut shops would lose sales to fast food restaurants, mid-scale restaurants, convenience stores or supermarkets, and any other entity selling coffee and donuts, if donut shops raised prices. The idea, he said, is to find all available evidence of what the substitutability would be in response to a relative price change. Once that is determined, one can define the relevant markets. He said that there is not a separate market that could be defined as all eating establishments that sell breakfast.

258. Dr. French testified that all fresh donuts sold by all retailers are not in the same relative market. The question, he said, is whether these other sellers of fresh donuts would be able to restrain prices. He stated that he did not think that **[*106]** if donut shops as a group raise their prices to some degree, that they would dramatically lose sales to other fresh donut retailers. A "small" price change might be 5%, he said, but that figure could vary according to the particular industry's custom. Dr. French further remarked that the "uniqueness" of a donut shop with its particular cluster of products and services might in and of itself insulate them from competing with some other entities.

259. Dr. French discussed his visits to convenience stores, fast food places, diners, restaurants and supermarkets near donut shops in the Pittsburgh and Allentown areas to see on what basis they sold donuts and coffee. He wished to see whether they could compete with donut shops if these donut shops raised their prices. The data on this issue was collected by him and three associates. He found the coffee inferior in quality and freshness at convenience stores; their donuts lacked volume, many varieties and frequent delivery. Supermarkets did not offer fresh-brewed coffee and their unpackaged donuts were limited in variety. The hours of supermarkets were also important. Many opened only at 7:00 or 8:30 A.M. He concluded that convenience **[*107]** stores and supermarkets do not sell donuts or coffee in a way that is likely to restrain the prices of a donut shop.

260. Dr. French testified that convenience stores lack volume in donuts and would have to change the way they currently operate to offer more. They would also need extra labor to keep the coffee freshly brewed. With supermarkets, a customer could not sit down to relax and eat a donut. They could only compete for the carry-out business and the sales in dozens rather than singles. The "image" of a donut shop is the sale of fresh donuts and very high quality, fresh coffee.

261. Dr. French stated that he had visited some fast food restaurants and diners. The former offered some danish pastries, but no donuts. Coffee was brewed, but not freshly ground; he could not judge its freshness in the fast food places. Diners also had brewed coffee and carried a limited number of donuts. Dr. French said that he did not see how these entities could restrain donut shop prices without drastic changes in their product mix and method of operation. He said they certainly could not do this quickly enough to offset the kind of competitive harm he believes this acquisition would **[*108]** cause.

262. Dr. French had also done price comparisons for donuts and coffee in the Pittsburgh and Allentown areas. Supermarkets offered fresh donuts at lower prices. This indicated to him that they and donut shops were not in competition. Were that so, he said, customers would be going to supermarkets for their fresh donuts now. He said that the qualitative difference of a donut shop plus its cluster of products draws customers in. He said that supermarkets are not price-competing and would be unlikely to restrain donut shop prices. He also found that fast food places do not stress coffee in their franchise concept and offer it as a complimentary product. He said that the same might be said at diners. He believed that neither fast food places nor diners could restrain donut shop coffee prices. He also added that convenience stores might have higher prices, but then they primarily sell "convenience". He said that price comparisons also led him to believe that there is a separate donut shop market. None of these entities, he said, would restrain donut shop prices.

263. Dr. French testified that another indication that consumers would not view fast food products as substitution **[*109]** for donut shop products lies in the higher price differential of the average fast food ticket as opposed to the donut shop ticket.

264. In 1987, Dunkin' Donuts had authorized an attitude and usage survey. Dr. French referred to this study which inquired as to why consumers bought donuts from donut shops and why they bought them from supermarkets. This study indicated that the vast majority bought donut shop donuts for quality (84%) rather than convenience (20%). Supermarket donuts were rated lower on quality (14%) but higher on convenience (82.8%). This indicated to Dr. French that the public might perceive supermarket donuts as not as good as their donut shop counterpart. It also indicated to him that people bought donuts in supermarkets because they were already there. He believed that this, too, indicated that supermarkets would be unlikely to restrain donut shop prices.

265. Dr. French had categorized the responses he had received from his survey questionnaires into tables. He summarized for the court what his respondents had conveyed regarding their purchases at the Mr. Donut shops, their reasons for going there, and their likelihood of continuing to patronize the **[*110]** shops, were prices to increase, and certain other matters. Dr. French said that his survey indicated that coffee and donuts were the products most often purchased. Since this result was close to data compiled by Mr. Donut and Dunkin' Donuts themselves, he thought that his respondents were pretty typical of donut shop customers. His respondents were also found to be frequent patrons. Dunkin' Donuts attitude and usage survey also found frequency of patronage in their shops. Most respondents were aware that they could buy donut shop products cheaper at a McDonald's or a supermarket, but they said they would buy the donut shop products mostly for qualitative reasons and occasionally for convenience. This was akin to the results in the Dunkin' Donuts attitude and usage survey that the public believes in the superior quality of their product. When asked if they ever go to a convenience store, supermarket or McDonald's for coffee, donuts or another donut shop product, 60% said that they never go. This indicated to Dr. French that there is a large core of donut shop customers who would not make a special trip to another type of retailer just to buy these. It also indicates, he said, **[*111]** that there is a core of customers who perceive donut shops as quite different from other eating establishments. Seventy-six percent of the respondents said "less often" when asked the frequency of their purchasing donut shop products at McDonald's, supermarkets or convenience stores vis-a-vis Mr. Donut. Also, 87% said that they would still buy coffee and donuts at slightly higher prices ($ .05 to $ .10 for coffee; $ .05/each and $ .25/dozen for donuts). Of these, 87.2% said they would still buy as much or come as often. This indicated to Dr. French that there is brand loyalty to the products or the concept of the donut shop and to a Mr. Donut shop, in particular. Dr. French said that this survey reveals a very strong price insensitivity and loyalty to the brand and to the shop. He thought this true of Dunkin' Donuts' customers and those of other donut shops, as well. He said that all of this indicated that donut shops could raise their prices without a tremendous shift of customers to fast food places, supermarkets or convenience stores.

266. Dr. French testified that other testimony buttressed his conclusion that there is a relevant product market in the donut shop concept. **[*112]** He mentioned the prior testimony of witnesses from supermarkets, convenience stores and Burger King. While the trade literature indicates that donut shop franchisors think that they do compete with these entities, he believes that this might only be true in a very broad sense of competing for "the breakfast dollar", he does not think it true in the economic sense. Donut shops compete with other donut shops. Over a very long period of time, supermarkets and other entities might offer the same thing as a donut shop, but until that occurred, he believed that donut shops could keep prices high enough for a long enough period to extract monopoly profits from the public.

267. For the end product market, Dr. French defined the geographic market for each donut shop as its local trading area. In the survey, he had inquired as to how far the respondent drove to get there. From the results, he concluded that the primary trading area would be within three miles of the donut shop and the secondary trading area would be within five miles of it. In researching trading areas, he also chose the Pittsburgh and Allentown areas for his field work on existing donut shops: Mr. Donut, Dunkin' Donuts **[*113]** and independent donut shops. To assist the court, Dr. French had prepared maps of these areas with varied colored pins to indicate the locations of Dunkin' Donuts (red), Mr. Donut (green) and independent (yellow) donut shops. Dr. French also prepared charts of distances between these various shops and estimates of the impact of the proposed acquisition on competition and the

number of shops. (See e.g., Plaintiffs' Exh. 340). Dr. French stated that what the chart indicated was that competition would be eliminated or reduced in a number of trading areas. He added that this would assume that the Mr. Donut brand is eliminated or converted to a Dunkin' Donuts and that some other brand is not replacing Mr. Donut in the same trading area.

268. Dr. French was asked about the possibility of entry into trading areas by other donut shop operators, either chains or independent shops. He thought this unlikely to happen, especially in the eastern markets where Dunkin' Donuts and Mr. Donut are already concentrated. He thought it critical that these are the two largest donut shop chains with the most markets and most mature franchise system in the industry who are merging. Potential **[*114]** competition from these two into any existing markets is much greater than from other chains. He said it was unlikely that a smaller existing chain in another part of the country could jump to the eastern half of the country and enter all of these different local markets that will be affected by the merger. Some of the difficulties that regional chains would face involve management, distance, product distribution, advertising, and the need for a large number of shops to achieve economies in purchasing power. Even if such chains could penetrate these five hundred odd trading areas affected by the acquisition over time, they could not do so quickly enough to eliminate the possibility of monopoly profits for a period unsatisfactory to economists.

269. Dr. French stated that he did not think that independent donut shops could replace or restore the competition represented by Mr. Donut, since these shops often already find their situations difficult. They lack economies of advertising, purchasing and distribution. He also said that convenience stores and supermarkets would have to change radically to replace the type of donut shop concept of a Mr. Donut. Even if they decided to **[*115]** do so, implementation would not occur overnight. Nor could McDonald's or another fast food restaurant step in successfully. He cited need for more space, equipment, and advertising.

270. When queried as to whether McDonald's or another corporation could develop a separate donut shop chain of its own, Dr. French said that it would take years and considerable investment in real estate and product development to do so. Usually, he said, an entrepreneur and not a corporation develops such a concept. He also said that it would not be possible to recoup the investment if the project failed.

271. Dr. French thought the barriers to entry very significant. In many markets, there will be a reduction in the number of brands because Mr. Donut will not exist there. If it is not replaced by another important strong competitor, there will be a reduction in competition in many local markets. Any restored competition would take years to accomplish and, in the meantime, Dunkin' Donuts would likely have a monopoly, he said.

272. When asked to address the franchise market issue, Dr. French said that buyers for low cost franchises would be a different group from buyers of full-line menu franchises. **[*116]** He thought that the number of sellers in the low-cost franchise group was likely to remain static. He compared the costs of certain low-cost franchises like Mr. Donut, Dunkin' Donuts and Baskin-Robbins with those of fast food restaurant franchises like McDonald's. The former were far less costly than the latter. In terms of affordability, he said, many potential franchisees could not buy the fast food franchises. He acknowledged that Mr. Donut, Dunkin' Donuts and Baskin-Robbins were just representative of low-cost franchises and that there were a lot of other low-cost franchise concepts. A low-cost franchise is also less labor intensive and is often family run. He admitted that he had been unable to test this low cost, limited menu item franchise market in the way he had tested his belief in the end product market. Time constraints prevented him from so doing, he said. On cross-examination, he said that his conclusions regarding a separate low-cost prepared food retailing franchise were fraught with concerns.

273. Dr. French testified that, if this acquisition went through, defendant Allied-Lyons would have 5500 outstanding franchises in the low-cost franchise market. **[*117]** He, therefore, said that there was a potential for some lessening of competition in this market, too. Allied-Lyons currently owns Dunkin' Donuts and Baskin-Robbins. French said that he thought that the acquisition of Mr. Donut would have an impact on the franchise market in that, Allied-Lyons, with three of the top chains in the low-cost franchise market under its control, might have a chance to exercise some degree of market power.

274. Dr. French had prepared a chart for "Net Profit Margins of Restaurant Franchisors in the Value Line." He noted the very high net profit margin of Dunkin' Donuts. He said that if a company is exercising any degree of monopoly power, the ability to charge higher than competitive prices in any fashion, it will tend to earn higher profits in more competitive enterprises. Dr. French said that the high figure for Dunkin' Donuts made him wary of allowing it to acquire its second largest competitor when it is making a very high return compared to other franchisors in the industry.

275. On cross-examination, Dr. French agreed with the Department of Justice criteria that a price increase could be made unprofitable by any of four types of demand or supply **[*118]** response: consumers' switching to other products; consumers' switching to the same product made by firms in other areas; producers of other products switching existing facilities to the production of the product; and producers entering into the production of the product by substantially modifying existing facilities or by constructing new facilities. He added that there would have to be enough significant substitution to bring the price back down.

276. On cross-examination, Dr. French was asked whether the complaint contends that the franchise markets are somewhat different from the way that Dr. French defined them. Counsel for plaintiffs agreed that insofar as the complaint alleges franchise markets different from those testified to, the complaint shall be amended accordingly.

277. On cross-examination, Dr. French was asked about expanding his list of firms in the franchise market. He was read a number of food chains that comprised 7336 outlets. He agreed that Domino's Pizza, with its 4738 outlets, should certainly have been on his list. He explained that his chart was just intended to show the court that there are a sizeable number of these low-cost, prepared food franchise **[*119]** systems, but there are a more limited number of sizeable ones with any kind of distribution and regional or nationwide brand awareness. He added that there may be 25,000 to 35,000 franchises from different chains that are not on his list. He said that perhaps his concern is not as serious as he first thought in the franchise market.

278. Dr. French said, on cross-examination, that it is also possible to buy an existing franchise from a franchisee. Also, one could buy an independent business. The latter, however, lacked the continuing support and other long-term advantages of the franchise system. He agreed that the ability of the consumer to switch to non-franchise powers of non-franchise products could make unprofitable any exercise of a franchisor's market power. He agreed that established franchise chains are expanding and new chains are formed every year.

279. On cross-examination, Dr. French was presented with a chart he had prepared for a previous case in Detroit for Pop-Eye's Fried Chicken. In that chart, he had included other fast food restaurant franchises that were twice as costly as Pop-Eye's. He said that he did not include entities twice as costly as donut **[*120]** shops with donut shops, because he believed that the typical buyer would be a "Mom and Pop" type of buyer.

280. On cross-examination, Dr. French was asked which factor he thought was restraining any increase in Muth's donut prices in Allentown. He replied: the possibility that someone might try to enter that area. Dr. French was also questioned as to the number of convenience stores, bakeries, supermarkets, etc. he chose when investigating their capacity to restrain Muth's prices. He said he only visited a "representative" group. He narrowed down retail bakeries and convenience stores because of their great number in the telephone directory. He acknowledged to counsel that he did not purport this to be a scientific sampling. In Allentown, he went into perhaps 10% of the outlets in the area.

281. On cross-examination, Dr. French was asked a hypothetical regarding convenience store's offering quality coffee and donuts and its effect on restraining Muth's prices. He replied that only if that concept multiplied would it restrain prices. He did not believe this would occur because of barriers he had already discussed.

282. Dr. French was asked by the court about an HHI and **[*121]** the geographic markets. Dr. French replied that the real geographic markets are the little local trading areas. He did not calculate an HHI because he did not have the individual sales data for each year in an HHI. He said that if there are only six sellers with equal market shares, the 1800 threshold is reached. In almost all of these trading areas, he said, there are fewer than six with probably unequal sales, so it would be hard to imagine that there would be many, if any, that would not exceed the 1800

threshold. He did not think it necessary to try to calculate it. Moreover, he said, he could not literally calculate it because he did not have the individual store sales figures. Upon cross-examination as to the figure "six", he said that there might be some other sellers similar enough to a donut shop that perhaps could have been included in the analysis.

283. Upon cross-examination, Dr. French discussed the trading area and its five mile radius which he acknowledged could be rather large (75 miles). Dr. French reiterated that from the entities he had studied in the area of Muth's donut shop in Allentown, he did not think that they influenced Muth's prices to the degree **[*122]** necessary to restrain them. If coffee prices were similar at local convenience stores, quality was a factor that had to be considered.

284. On cross-examination, Dr. French was asked many questions regarding how one ascertains how consumers view other products as close substitutes for donut shop products. Dr. French agreed that if consumers view other products as close substitutes for donut shop products, those other products should be included in the relevant product market if that means that they would react significantly to a change in the relative prices between donut shop offerings and other sellers. He was asked about McDonald's danish pastry. He said that if there were significant switches to this, when a donut shop changed its prices, that could constitute economic substitution and then it would be in the relevant market. He said it would not hurt to see if there is some substitution going on between donuts and danish pastry in response to the relative prices.

285. On cross-examination, questions addressed to Dr. French focused on the issue of what products, like danish, would be substitutes for donuts. Dr. French said that convenience stores and supermarkets could **[*123]** not stock sufficient volume and the coffee and danish offered by McDonald's was unlikely to attract the donut shop customer because the quality was not the same.

286. Upon cross-examination, Dr. French agreed that if donut shops had lost business to McDonald's that that would be an indication that they are competing for the breakfast dollar. He added that he could not conclude from that alone that this would restrain prices. He would say that donut shops and McDonald's are in the same market only in a very general kind of way, competing for the total breakfast morning occasion market.

287. Upon cross-examination, Dr. French was presented with a copy of an affidavit which he had submitted in connection with a case in Detroit for Pop-Eye's Fried Chicken and with a copy of a trial transcript of his testimony for Pop-Eye's Fried Chicken in a case in the Eastern District of Pennsylvania. Defense counsel pointed out inconsistencies between his prior opinions for Pop-Eye's and the opinions he had given in the instant case. In one part of the affidavit, he acknowledged that he had included donut shops in all "fast food" because they happened to be in CREST data which he had utilized. **[*124]** Dr. French agreed that, had he to do that part of the affidavit over again, he would have excised the category of data containing donut shops and recompute the percentage. In the trial transcript, he had also concluded for Pop-Eye's that all fast foods, all brands, all types of fast food sales, are in one market. In the affidavit, he had also defined the franchise market more broadly than he did in the case at bar. He had opined in the Pop-Eye's case that Pop-Eye's could not exercise economic and monopoly power in the market for fast food franchises, "in view of the large number of fast food franchisors and Pop-Eye's tiny share of the market for fast food franchisors." In the trial transcript, he had stated that results of his study showed that all fast food were considered alternatives or competing goods or substitute goods among the buying public.

288. Cross-examination of Dr. French yielded certain information about his survey questionnaire for the instant case. It did not make any effort to ascertain whether there were any products other than coffee and donuts which the customers regarded as alternatives. The wording of the questionnaire was phrased to exclude all people **[*125]** who bought anything at a supermarket in addition to donuts. If respondents did not go, for example, to the supermarket, just to buy donut shop products, it excluded them. In this respect, the survey results did not parallel those of the CREST data upon which he relied in the Pop-Eye's litigation. The questionnaire's question regarding paying a higher price was left open to interpretation as to whether other outlets were also charging higher prices. The question regarding distance driven to reach the shop could have been replaced with the more precise method of having the respondent locate his trip on a map. The determination regarding the radius of trading areas was reached, in part, by combining information from the two Pittsburgh areas and the one Allentown area, although

driving distances for customers in Pittsburgh were longer than those for customers of Muth's store in Allentown. Dr. French said that the trading area may be smaller than three to five miles.

289. Defendants' witness, Malcolm M. Knapp ("Knapp"), is the head of Malcolm M. Knapp, Inc., Marketing Research and Analysis. For the past twenty years, he has done estimates and forecasts for the size and scope of **[*126]** the food service industry for the National Restaurant Association, among other clients. He has also been an advisor to the U.S. Department of Census on the definitions to be used in the restaurant field. He said that he is responsible for the definition of a restaurant as opposed to a fast food restaurant. His data has been included in the Statistical Abstract of the United States, published by the U.S. Department of Commerce, Bureau of Census. His published material is also in the National Restaurant Association, America's large trade organization relating to the food services industry. He testified that his census estimates of eating places is generally regarded as highly accurate. Knapp was qualified to the court as an expert in the food services industry. He was presented by the defendants to give expert testimony on the effect on competition in the food services industry of the consummation of the proposed acquisition.

290. Knapp opined that, in his professional opinion, the effect of the proposed acquisition, if any, would be to increase competition in the food services industry. He said that "food service" is viewed as all food consumed on premises for immediate consumption **[*127]** or consumed or bought and carried out for immediate consumption. He described how there was a phenomenal growth in the food services industry beginning in the 1970s, fueled by the entry of working wives into the workforce. Today, he said, that growth is slowing down and the industry is maturing.

291. Knapp stated that the food services industry now breaks down into four "day" segments: breakfast, lunch, dinner and snack times. McDonald's had successfully broken into the breakfast segment when only coffee shops and hotels were offering breakfast. They did it by heavy advertising of a basically good product. McDonald's now does 18-20% of its business in breakfast. He said that Dunkin' Donuts currently has a breakfast half of business and has lunch as another "day" part plus an afternoon snack market. When asked to express an opinion as to the extent, scope and vigor of the competition in the United States in the breakfast segment, Knapp replied that it is becoming an extremely competitive segment. Since it has peaked and stopped growing, competition gets much more intense and there is a fight for market share.

292. Knapp explained why he thought that the proposed acquisition **[*128]** would enhance competition in the breakfast day part of the marketplace. He said that being large was an important component of being able to survive and to be successful. It increased the ability to do more advertising and to increase distribution outlets. He said that the strategy of the major fast food players has been to try to dominate markets so that they can increase advertising. In effect, he said, the proposed acquisition will increase competition because the increased dollar volume will increase advertising and expand distribution.

293. Knapp testified that Winchell's, a donut shop chain on the West Coast, was having financial difficulties and had sold off certain units to Pizza Hut. Winchell's, because of an absence of Mr. Donut or Dunkin' Donuts, had the donut shop market largely to itself and still they could not succeed. He said that they were competing with all the fast food and coffee shop businesses.

294. Knapp testified as to the issue of the lunch trade. He said that Dunkin' Donuts was going through a menu and product proliferation to try to get more out of its investment base. He said that, for the most part, fast food and sandwich places were Dunkin' **[*129]** Donuts' competitors for the lunch trade. He also said that the theory that customers would only eat once in a fast food restaurant was not really true; they do come more than once a day.

295. Knapp described the snack times of the day as 10:30 to 11:30 A.M., late afternoons, and 9:30 to 11:00 P.M. Competitors in this market are ice cream and yogurt places, donut shops, cinnamon bun shops, convenience stores and grocery stores and supermarkets with snack bars. Pizza would also be included.

296. On cross-examination, Knapp was read the definition of a fast food restaurant found in the census bureau definition and the SIC codes. In his prior deposition, Knapp had said that the Dunkin' Donuts restaurant was

something unique in that it did not fall neatly in any one definition; it straddles both the fast food and restaurant definitions because of the existence of some sit-down counter service. When asked about the inclusion of donut shops in the SIC code for bakeries, Knapp stated that the retail chief of the census bureau had recently told him that donut shops would fall into the restaurant rather than the bakery category. Knapp, on redirect examination, said that in the restaurant **[*130]** classification they compete with all other providers of meals and snacks in the day parts, i.e., breakfast and lunch.

297. On cross-examination, Knapp agreed that a donut shop shares certain attributes of a fast food restaurant, of a restaurant, and of a bake shop.

298. On cross-examination, Knapp was asked if Dunkin' Donuts competed with places like Denny's and Friendly's Ice Cream for the "mid-scale market" given their average ticket price. Knapp said they did in the breakfast and snack segments.

299. On cross-examination, Knapp stated that he had not made an analysis of the effect of the proposed acquisition on the price of fresh donuts to customers of donut shops. He also said that if the acquisition does not take place, it is not necessarily true that competition will decrease; it might stay the same. He had not studied the issue as to who else could buy Mr. Donut with a resulting increase in competition.

300. Defendants' witness, George Rice ("Rice"), is a founder of the CREST Report. Prior to his association with CREST, he had been employed by other companies, including Dunkin' Donuts in the 1960s, and had reached the rank of Regional Vice President for the **[*131]** Midwest Region. CREST is an acronym for "Consumer Reports on Eating Share Trends". He described the CREST Report as an authoritative source designed to track all away-from-home consumer purchase behavior with regard to foods prepared away from home and consumed either in restaurants or outside of restaurants. Virtually every major food chain is a subscriber to it, he said. So, too, are food service manufacturers. Currently, he is Chairman and Chief Executive Officer of GDR Enterprises, a marketing consulting company specializing in consulting to the restaurant industry. One of his clients is CREST, to whom he provides product development, marketing and public relations services.

301. Rice explained what the CREST data bank is. CREST uses the "diary panel" in its research. CREST has 17,000 households that have been preselected as part of this panel. Care is taken to achieve a geographic and demographic balancing. By tracking this group's particular purchasing behavior, it becomes an effective projection device to indicate what the 94 million households in the United States would be doing. Data is collected from these households eight weeks a year. He said that there are **[*132]** over 400,000 "occasions" of dining, i.e., customer visits, for an annualized period within this data base. He also said that the data base would have over one million food and beverage items reported. He stated that no other data base in the country has the size and comprehensiveness that CREST does.

302. Rice stated that the major chains in the restaurant industry use CREST data, as do major food service suppliers. Rice described the CREST data as an industry service.

303. Rice was introduced by the defendants to provide expert testimony in the following areas: (1) the evolution of the restaurant industry in the United States from 1970 to the present; (2) the competitive environment in the restaurant industry in the United States during the period; (3) the quick service or fast food restaurant community as relevant to the businesses of Mr. Donut and Dunkin' Donuts; (4) the market relevant to competition in which Mr. Donut and Dunkin' Donuts exist; and (5) proper survey techniques in conducting face-to-face intercept interviews in the field.

304. Rice stated that the restaurant industry is broken into three major segments: quick service, midscale, and upscale. Mr. Donut **[*133]** and Dunkin' Donuts would belong in the quick service category, he said. He stated that it is important to remember that in the restaurant business, one is running a series of businesses, a series of segments that add up to the total business, rather than one business that is comprised of many segments. He said that there are four segments: breakfast (including the morning snack); lunch; dinner; the afternoon or evening

snack. One must also consider whether food is consumed on or off-premises and whether it is consumed on the weekday or the weekend.

305. Rice testified that he had prepared, in 1987, a "Mr. Donut Consumer Opportunity Analysis, July 17th, 1987" ("1987 Analysis") (Defense Exh. 19). Excerpts of his conclusions were read to the court. The document had said that hamburger restaurants filled a convenience weekday need that was previously being filled by donut shops in the quick service restaurant (QSR) segment. It also stated that donut category companies had let this critically important meal segment escape by not reacting to the potential consumer need for a convenience breakfast. Competition encroachment had victimized the carry-out donut category. This analysis **[*134]** also found the overall industry in disarray since 1983. It said that industry saturation in most areas had been reached, leaving the assessment and strategy development at the unit trade area level to become far more critical. Furthermore, this analysis stated that this was a market share environment and that market penetration and dominance will make the big become bigger and drive out all other players.

306. Further excerpts were read from this 1987 Analysis, which had found that sales in the donut category from 1983 had lagged behind the QSR segment. This document said that numerous chain companies were emerging within individual regions and would represent significant direct competitive threats against which marketing strategies should be planned. It found the Mr. Donut donut category to be very reliant on the breakfast-morning snack meal period. The analysis also concluded that the competitive encroachment had not come so much from direct competitors as from indirect fast food competitors in the hamburger sandwich categories.

307. This 1987 Analysis declared that the donut category had not kept pace with the rest of the food service industry and that Mr. Donut was faced **[*135]** with some difficult marketing decisions. The changing marketplace and competitive saturation were the likely cause of a steady loss of market. In varying degrees, all donut category concepts have to compete with a limited and narrow product line which is not the focal point for the primary business segments in which they have high market share needs and where increasing costs of market expansion make the realization of acceptable margins extremely difficult. Donuts, it said, are questionable as a means of independently supporting an entire retail positioning effort.

308. The 1987 Analysis further remarked that competition, while coming from product line competitors, also comes from indirect business segment competitors like fast food, hamburger and convenience stores that satisfy weekday need and midscale varied-menu places that satisfy weekend need. This competition, with its much broader business base, has major resources to improve consumer awareness.

309. The 1987 Analysis listed under "Competitive Environment" food service industry companies, bakery companies and retail supermarkets. Also, competition was found in fast food retail outlets who specialize in breakfast **[*136]** along with other meal occasions.

310. According to the 1987 Analysis, in 1983, and in 1987, McDonald's sold more donuts or sweet rolls than Mr. Donut did. McDonald's, in a five year period, sold seven to eight times the amount of coffee sold by Dunkin' Donuts and Mr. Donut together. McDonald's domestic outlets numbered 7500; Dunkin' Donuts and Mr. Donut combined numbered about 2000. Rice said that simply having more stores would not account for McDonald's selling seven to eight times the amount of coffee.

311. Rice identified the "Mister Donut Consumer Opportunity Analysis, May 18, 1988" ("1988 Analysis" found at Defense Exh. 20) as a report he had prepared for Mr. Donut in 1988. Excerpts were once again read from this document. Many of the same ideas about competition were expressed here and the late afternoon/late evening snack segment was also found to be subject to major share gains by hamburger and retail categories. The 1988 Analysis did not find Mr. Donut well-positioned for the 1990s. It concluded that the product line was too narrow and that reliance on breakfast created a vulnerability. It stated that the donut category's only real strategic point of difference **[*137]** is questionable freshness of a higher quality product that can be bought from non-donut specialty retailers. The 1988 Analysis recommended either expanding in a retail environment by repositioning or, if not so inclined, the development of a divestment plan.

312. According to the 1988 Analysis, in the 1983-1988 period, McDonald's sold more donuts or sweet rolls than Mr. Donut. McDonald's, Hardee's and other fast food restaurants sold more coffee than did Mr. Donut during this period. Forty percent of cakes, pastry and tortes are sold through quick service restaurants and, of that 40%, 8 1/2% are sold through hamburger category chains, and 9.3% are sold through convenience stores and supermarket food service outlets. Donut shops did not make the chart because their volume did not warrant it.

313. According to the 1988 Analysis, 64% of cookie servings are done through quick service restaurants; of that 64%, 21% are in the hamburger chains. Donut shops, once again, were not listed because their volume did not warrant it. Nor were they listed for the same reason when it came to soft-serve ice cream. Eighty-two percent of that is sold through quick serve restaurants. Forty-eight **[*138]** percent of croissants are sold through quick service restaurants; 17% of that figure is sold through hamburger chains. Donut shops sell only 7.4%.

314. Rice identified for the court "Mister Donut Consumer Opportunity Analysis, June 1989" ("1989 Analysis", found at Defense Exh. 24), a document he prepared for Mr. Donut in 1989. He had also made a verbal presentation to Mr. Donut regarding this report. Rice had told Mr. Donut in 1989 that while the quick service restaurant category, as a whole, increased during the period 1985-1989, the donut segment suffered a decline. The increase was attributable to increases in the hamburger chains and the retail or convenience store segments.

315. According to the 1989 Analysis, again McDonald's sold more donuts or sweet rolls than Mr. Donut. Dunkin' Donuts' share had declined while that of McDonald's and Hardee's had gone up. Also, McDonald's, Hardee's and other fast food restaurants all served more coffee than Mr. Donut and Dunkin' Donuts combined. The results for sales of cakes, pastries, tortes, cookies, soft ice cream, and croissants were the same as for the other prior analyses: donut shops' percentage of sales were either insufficient **[*139]** to be on the chart or were always much smaller. The analysis concluded that a significant restructuring of the restaurant industry was taking place with many of the old trends and correlations changing. Rice said that he still held that opinion today.

316. Rice described to the court how, in recent years, the quick service restaurant industry, in which Mr. Donut and Dunkin' Donuts operate, has changed. Before 1979, the industry was categorized by the primary products it sold. Demand far outstripped supply. In the 1979-1983 period, supply and demand started to catch up. Customers became more sophisticated. The industry first started to lose customers and had to make modifications. From 1984 to the present, there has been a battle for the market share. Today, the market is in competition with itself. The year 1989 showed a growth of only .5%, while units grew at around 5%. Costs, meanwhile, have increased. Rice said that today growth lies in off-premise consumption. The traditional on-premise restaurant has declined every year since 1984, he said. Recently, too, supermarkets have posed a challenge. Some chains are beginning to enter the food service business. He cited **[*140]** to partially baked products that can be finished at home. He said that supermarkets had an impact on businesses that focus on bakery products because supermarkets provide an opportunity for a fresh-made product of a much wider variety sold to a consumer while they are doing something else they have to do. They do not need to go to a Dunkin' Donuts or a Mr. Donut shop. He foresaw future competition by supermarkets. He thought it important to realize that the consumer has a choice of a variety of products and marketing must take that into account.

317. Rice was asked what effect the proposed acquisition would have on competition in this market. He believed that it would create a much stronger chain by combining together Mr. Donut and Dunkin' Donuts. The ability to create a larger penetration of restaurants within particular markets allows every dollar spent to build consumer awareness and preference for particular products. He did not think that the proposed acquisition would have any effect on the price of donuts.

318. Rice was asked questions about Dr. French's face-to-face survey of customers at three Mr. Donut stores. He thought it preferable to hire independent professionals **[*141]** for such a task and also thought taking a survey at Muth's store too fraught with concerns about bias to provide reliable data.

319. On cross-examination, Rice was asked if he knew any Dunkin' Donuts persons because of his prior employment with that company many years ago. He said that he had an acquaintanceship with Tom Schwarz and

Robert Rosenberg. He had reported to Schwarz while he was at Dunkin' Donuts. He is also acquainted with Fred Huggins, until recently the President of Mr. Donut.

320. On cross-examination, Rice said that he had not done a customer sharing analysis for the instant case. Such a study takes the buyers of a particular chain and determines their purchase behavior when they are not there.

321. On cross-examination, Rice was asked by plaintiff's counsel what would happen in his prior analyses, if coffee servings at places like Pop-Eye's or Kentucky Fried Chicken were taken out. He said that it would create a data base that was left strictly with direct competitors to Dunkin' Donuts and Mr. Donut, which would make the situation look even worse. He did say that coffee sales at dinner in such places as Burger King, Denny's, etc. were included in his **[*142]** analyses.

322. On cross-examination, Rice stated that his reports do not indicate at what level of price a customer would shift from a donut shop to another purveyor. Rice also said that quick service restaurants have had a significantly negative impact on the donut category, a segment that is now declining, not growing.

323. On cross-examination, Rice was asked questions from figures on his 1989 Analysis about the percentages of breakfast, lunch, dinner and evening snacks served at Mr. Donut and at quick service restaurants. Eighty-five percent of Mr. Donut's business was in breakfasts, as opposed to 11% for quick service restaurants. Mr. Donut did 5% lunch business and quick service restaurants did 37%. Mr. Donut did 10% afternoon, dinner and evening snacks and quick service restaurants did 53%. He also added that Mr. Donut had virtually no dinner business. He said that some coffee and cake sales in his chart would be made in the dinner meal figure in his chart, but he saw no reason to exclude these from his charts.

324. On cross-examination, Rice's attention was directed to a chart following his 1989 Analysis dealing with "Meal Occasions" and distribution of customer **[*143]** traffic. This chart showed an increase in the Breakfast/AM snack percentage from 1984 to 1989, while the lunch percentage remained the same and the afternoon-evening snack percentage declined.

325. On cross-examination, plaintiffs' counsel pointed out to Rice that his charts for the 1989 Analysis indicated that the vast majority of Mr. Donut and Dunkin' Donuts' customers were buying donuts and sweet rolls (mostly donuts) and that the figures in sales stayed roughly the same in the period covered by the Analysis. The 1989 Analysis also showed that a third of the time a customer walked into a Mr. Donut store he purchased a cup of coffee. The figures also indicated that very few customers would walk into a Mr. Donut or a Dunkin' Donuts for a breakfast sandwich. He agreed that there are a significant number of people who go to donut shops to buy coffee and donuts. Rice added, though, that other entities who had entered the breakfast market were costing donut shops a market share because some customers would be satisfied with a breakfast sandwich, coffee and juice where previously they would have gone to a donut shop.

326. On cross-examination, Rice stated that he had not previously **[*144]** done a review of the average check size of McDonald's or Burger King.

327. On cross-examination, Rice stated that there were six census regions where Mr. Donut has significant unit distribution and the New England, Mid and South Atlantic states were three major regions.

328. On cross-examination, Rice's attention was directed to the "Strategic Options" part of his 1988 Analysis for Mr. Donut. Among the options were: concentrate expansion efforts in highly penetrated markets with best ratios of consumer demand against supply/competition and support stronger marketing programs and the existing franchisee base; acquisition of existing regional donut shop competitors to replace market share rather than development of new franchises to "steal" market share; sell the Mr. Donut chain to a breakfast/snack marketer. This part also said that, given the fragmented nature of the competitive marketplace, Mr. Donut could quite readily become the dominant marketer in this donut shop category.

329. On cross-examination regarding these "Strategic Options", Rice's attention was also directed to the statement that Mr. Donut had great potential strength in the product, financial and information **[*145]** resources of

International Multifoods. He acknowledged that although the "Strategic Options" section mentioned doing a series of consumer and concept exploration research efforts regarding the "repositioning" of the current concept of Mr. Donut, Mr. Donut had not asked him to do so. Nor had they asked him to do a study regarding expanding to a broad-based bakery-type concept, another possibility found in "Strategic Options". The same was said of the "Strategic Options"' concept of identifying current consumer perceptions, awareness and reasons/use of donut and other compatible bakery and snack products by consumer type within alternate competitive retail areas. Nor was he asked to estimate the type, size, cost, etc. of potential retail options which might emerge from further study. He acknowledged that Mr. Donut had also not asked him to do a comparison between supermarkets, convenience stores and donut shops in terms of consumer preference, but he added that Mr. Donut already had amassed a variety of information on its own.

330. On cross-examination, Rice's attention was directed to more sanguine excerpts from his 1989 Analysis in the "Competitive Environment" section, e.g. **[*146]** , improvement in donut category performance in 1989 over that of 1988, with Mr. Donut's performance exceeding the donut category with significant gains in both sales and traffic, a 3.6% increase in the number of commercial donut shops in the United States in 1988; and a significant increase in average check eater which enabled the donut category to rebound from the prior year with an overall 6.4% gain.

331. On cross-examination, Rice's attention was directed to a statement from the Offering Memorandum on Mr. Donut Business in United States and Canada, October, 1989, which reported an increase of 5% in the same store sales over the previous year. His attention was also directed to the 1989 Goldman Sachs & Co. Offering Circular prepared for Dunkin' Donuts with its summary of systemwide sales. Rice said, though, that any increase would reflect increases in whatever new units were added each year.

332. On redirect examination, Rice was asked to name the competitors of Mr. Donut and Dunkin' Donuts in each of the day parts for which he compiles data. He said that, in the breakfast day part, for in-store or on-premise consumption, it would be a range of sandwich or hamburger shops **[*147]** in particular and convenience stores. For the off-premise breakfast, it would be, in large part, all other retail bakeries, all supermarkets, and again all quick service entities such as the hamburger and sandwich category outlets. In the afternoon and evening snack, which is the second largest part, it would be a considerably different group of competitors. It would be everyone who really sold a snack product. It would include a Mrs. Field's cookie; it would include everyone who is in the bakery business. It would include Dairy Queen's selling ice cream products. It would also include a wide range of snack items, which would be alternatives to eating a donut. As to the lunch business, Dunkin' Donuts and Mr. Donut's business is considerably smaller. Both have made a concerted effort to get into this business. It provides them an opportunity to utilize a facility in a fixed cost investment.

333. The court inquired of Rice what advice he would give to the president of Dunkin' Donuts or Mr. Donut or some other donut chain regarding the handling of their stores in the future and any prospective diversification in products. Rice replied that, in the case of Mr. Donut, his feeling **[*148]** was that, with the resource offered by International Multifoods, the appropriate course of action would be to broaden the base to more of a bakery-type of environment and possibly to add on certain types of products, such as cold sandwiches, salads, and a variety of similar items. Given Multifoods' understanding of the bakery marketplace, they could probably bring to the table a product development capability that would be rather unique. They could get Mr. Donut up and operating with a line of products, because they, as a food conglomerate, make all these products for other competitors in the marketplace, a line of products that would give them a much more defendable base. Of the three options, this was the one which he had strongly encouraged them to follow.

334. Dr. French resumed the stand for continuation of his cross-examination after the appearance of witness Rice. Dr. French said that, in examining the competitive effects of the proposed acquisition, International Multifoods' role as a supplier to donut shops and other food retail organizations might be relevant. It might also be relevant, he said, to examine whether International Multifoods might have sold the stock **[*149]** of Mr. Donut to someone other than Allied-Lyons.

335. Dr. French, on cross-examination, reiterated his views on the following: no "national" markets for the sale of donut shop products; local markets with a three to five mile radius; the importance, in this case, of the "cluster" of

products sold by a donut shop with regard to the relevant market; the donut shop "image"; the considerable probability that this proposed acquisition has for causing donut shops (Dunkin' Donuts, Mr. Donut, and independents) to raise coffee and donut prices; unlikelihood that other business entities, e.g., convenience stores, would restrain these prices; factors, like quality, which explain a customer's purchase of Mr. Donut coffee, even if it is higher than coffee at a convenience store; that only intense competition from other donut shops now restrains prices; his refusal to "unbundle" a donut shop's products in assessing competition in this case; his conclusion that donuts and coffee are free from that effective competition other than from other coffee shops in general.

336. On cross-examination, Dr. French said that he had seen trade literature expressing the view that the entry of the fast **[*150]** food chains into the breakfast sector and the proliferation of bakery deli sections exposed donut operations to increased competition. He said that he had not seen any trade literature expressing a view one way or another as to whether donut shops are not constrained by the prices of other entities.

337. On cross-examination, Dr. French reiterated his views that convenience stores would be unlikely to compete as sellers of donuts, either branded or unbranded, although he acknowledged that he was aware that some convenience stores have gotten into the baking business in a "big" way.

338. On redirect examination, Dr. French stated that even if Muth initially lost customers after he converted to a Dunkin' Donuts, after a transition period he could probably regain most of them. He also said, in response to a hypothetical, that Muth might be charging less for his coffee than Dunkin' Donuts does because he fears competition from Dunkin' Donuts.

339. On redirect examination, Dr. French said that, after hearing Rice and Knapp, he does not feel less strongly about his description of the relevant market in this case. He said that he believes that at some point in the future donut shops **[*151]** will evolve into something quite different than what has heretofore been known and that other fast food restaurants may also change their format substantially. He added, though, that he does not think this affects the relevant market in this case, since these changes take a long time to come about. During that time, he said, the remaining donut chain would have the potential to exercise market power. He did not believe that there was any imminent danger that donut shops would disappear in the immediate future.

340. On redirect examination, French stated that the relative market share data would not be an accurate indication of whether donut shops were losing out in the battle for market share, because there is a separate market for donut shops which is different from the overall market for QSR occasions presented by Rice.

341. On redirect examination, Dr. French's attention was directed to certain trade magazines. In Restaurant Business, reference was made to the donut category. French said that the literature had been affected by Rice and his definitions. He has a donut category and others tend to use his data and thus adopt that category. Quotes were read from Baking **[*152]** Magazine regarding the expensive equipment convenience stores would have to buy to bake their own donuts and the prospect that this would not earn back enough profit to be feasible. Dr. French said that this was consistent with the views he had previously expressed.

342. On redirect examination, Dr. French's attention was referred to Sheetz's videotaped deposition and his testimony that his removal of Mr. Donut donuts from his convenience store caused sales to fall back down. Dr. French stated that this was an indication that the buying public would prefer branded products.

343. On redirect examination, Dr. French testified that the fact that one can quickly and easily buy donuts in a carry-out style from a donut shop has an effect on the substitutability of donuts sold at supermarkets. If supermarkets are considered "convenient", he said, that would only be in the situation where the customer was already in the supermarket to begin with.

344. On redirect examination, Dr. French testified that the proposed acquisition would have a broader effect than just the effect on local markets. Since Dunkin' Donuts and Mr. Donut are the two biggest donut shop chains, the proposed **[*153]** acquisition would cut from two to one the number of potential entrants into new markets.

345. On redirect examination, Dr. French said that there was a possibility that the proposed acquisition could have an effect on competition from regional chains, "Mom and Pop" stores and small donut chains in that suppliers might choose to sell to the big chain over them.

346. On redirect examination, Dr. French said that an important consideration from a Justice Department or judicial point of view as to whether the proposed acquisition should take place is whether there are other large potential purchasers who could sustain the Mr. Donut chain through investment.

347. On redirect examination, Dr. French expressed some reservations about Rice's option for Mr. Donut in purchasing regional chains, but agreed that, with International Multifoods' bakery products experience, it was possible that Mr. Donut could grow and become a significant challenger for the top spot in the donut business.

348. On redirect examination, Dr. French stated that he had viewed danish prices in the area around the courthouse to see how McDonald's and other fast food danish prices compared with donut prices of **[*154]** Dunkin' Donuts. The former were about $ .20 higher than the latter and that indicated to him that danish is not competing with the donuts. On cross-examination, he said that such a review was not a scientific survey, but only his observations.

349. On redirect examination, Dr. French stated that even if Dunkin' Donuts ran Mr. Donut as a separate trademark or company, he did not expect the same kind of intensive competitive rivalry to be maintained. Dr. French also explained that including every possible fast food outlet in the Pop-Eye's litigation in describing the relevant market was done because Pop-Eye's share would be smaller, the greater the number of restaurants included.

350. On redirect examination, Dr. French was asked a question regarding the "others" category, in a table in his "Pop-Eye's Share of Fast Food Franchises" affidavit, in the Pop-Eye's litigation. He said he did not include any donut shop or any ice cream shop or other very limited menu snack type place in there unless he had reason to believe that they also served a wider range of products and one could buy a meal there.

351. On recross-examination, Dr. French was asked regarding a chart he had prepared **[*155]** for Reasons for Purchasing Donuts at Dunkin' Donuts and Supermarkets (found at Plaintiffs' Exh. 323). He acknowledged that the source of this chart was American Consulting Corporation, Dunkin' Donuts Attitude and Usage Survey, February 1988, as reported in a memorandum of August 27, 1987 to Sid Feltenstein from Kim Lopdrup. Defense counsel quoted from that memorandum to the effect that "Supermarkets are our leading competitor for donut sales." The memorandum then cited percentages: 29.7% of respondents who purchased donuts from Dunkin' Donuts in the past year said they would have gone to supermarkets if Dunkin' Donuts were closed; 29.1% would have gone to other donut shops and much less would have gone to other competitors. Respondents who purchased a dozen or more donuts on their last purchase named supermarkets by 35.9% to 29.6% over donut shops, thus indicating that supermarkets are especially strong competitors for large quantity purchases. Females named supermarkets over donut shops by 35% to 24.5%. Dr. French explained that these percentages assume the hypothetical that Dunkin' Donuts is closed, not that it raises its prices. He is, thus, not sure how meaningful these **[*156]** results are for substitution in relation to relative prices. He also found the response card to be somewhat leading. He said, though, that he had not ignored these responses in his analysis. On redirect examination, French stated that in many trading areas, a supermarket may be the only alternative source for donuts.

352. On recross-examination, Dr. French was again cited to a section of the August 27, 1988 memorandum that expressed the conclusion that supermarkets were Dunkin' Donuts major competitor and that this role would likely grow due to the rapid growth of supermarket in-store bakeries. Dr. French stated that this conclusion by Dunkin' Donuts would come from their looking at competition for the breakfast dollar rather than what an economist looks at in defining relative markets.

353. On recross-examination, Dr. French acknowledged that he looks at competition more in the terms of franchisee Muth than in the terms of Rice, Knapp, Mr. Donut or Dunkin' Donuts. He would not, however, embrace Muth's narrow definition of competition as persons who do "exactly the same" as he.

354. On recross-examination, Dr. French agreed that if two entities compete with one other, they **[*157]** belong in the same market.

355. On recross-examination, Dr. French said that he might still choose Muth's store to include in his survey, had he to do it over again. He is not sure how many of Muth's customers even know about the merger, let alone have strong feelings about it.

356. On redirect examination, Dr. French testified that from the quarterly marketing reports he had seen from Dunkin' Donuts, the relationship between the price of supermarket donuts and donut shop donuts supports his conclusion as to whether supermarkets are competitors, or are viewed as competitors, by Dunkin' Donuts in the way they undertake pricing of donuts.

357. Defendants' witness, Dr. J. Walker Smith ("Dr. Smith"), holds a doctorate in mass communications research from the University of North Carolina at Chapel Hill. He is presently a Vice President and Chief Operating Officer for Marketing Spectrum, which is a full-service customer research firm in the marketing research industry. This work includes interviews with consumers and the design of customized research to address marketing and, sometimes, research and development issues of their clients. About half of their business has been with **[*158]** food service clients, largely fast food and midscale restaurants. He is also Vice President Elect of the Marketing Research Division of the American Marketing Association.

358. Dr. Smith was retained by the defendants to examine and to review the consumer field study conducted by Dr. French. He was offered to the court as an expert in the field of consumer field survey market research, for this limited purpose of commenting upon Dr. French's survey.

359. Dr. Smith first discussed generally accepted survey principles. Dr. Smith then testified that he had assessed Dr. French's survey as to design and implementation. He concluded that the data are not of the sort that would allow one to draw reliable conclusions from that information. He found the following fatal flaws: no scientific sampling procedure, e.g., choice of interviewees at stores where the managers and customers were interested in the litigation; the choice of inexperienced interviewers from Dr. French's own staff who had some knowledge of this litigation; lack of care with which the field work was supervised; some leading questions included in the survey questionnaire; construction of the questionnaire in such **[*159]** a way that it is likely to generate data that is not objective and neutral with respect to issues in this case; and failure to utilize the types of measures that would have ensured reliable predictions about consumer behavior.

360. Dr. Smith said that, given these flaws, the Dr. French survey provided no basis upon which to make generalizations of these particular interviews back to the population of donut shop customers in the United States.

361. Dr. Smith testified as to the flaws he found in the survey questionnaire's questions. These flaws included: failure to make question one's response categories mirror the menu board; no instruction to the interviewers regarding recording the amount of an item purchased; failure to use a map with interviewees when asking the distance driven in order to ascertain a "density plot" to determine a trading area; failure to include on the questionnaire instructions to the interviewers; and errors in interviews conducted by Dr. French himself, e.g., failure to initial changes, an error in following a skip instruction on three sheets, a failure to correct a skip instruction, a failure to record interviewees' names for later verification, **[*160]** and inconsistent behavior in recording answers from interview to interview.

362. Dr. Smith stated that he did not think it appropriate to conduct interviews at stores operated by plaintiffs in the litigation. The purpose of the sample was to further testimony on behalf of the plaintiffs in this litigation.

363. Dr. Smith also testified that the "Do you know. . ." questions on the questionnaire would pressure an interviewee towards a certain response, in violation of generally accepted survey principles. He also found the order of the questions created a pressure in favor of one set of data. He found certain questions to put the interviewee on the defensive.

364. Dr. Smith testified that he had reviewed the survey questionnaires themselves and had found around 15% of them to contain errors. This, he said, was not an acceptable figure and constituted a "red flag" as to the ability of the particular interviewer to collect data appropriately.

365. Dr. Smith said that the 15% of the questionnaires he found containing errors were not simply due to the failure to correct the erroneous skip instruction. That failure, he said, was not really fatal; the interviewers might have gotten **[*161]** it right, even though they did not instruct themselves properly.

366. Dr. Smith's attention was directed to sections of a deposition taken of a Dr. Myron Glassman, a Marketing Professor at Old Dominion University and a survey expert retained by the plaintiffs to comment on Dr. French's survey. he agreed with Dr. Glassman's statements that interviewers who are ill-trained could produce unreliable results, and that a store like Muth's is one he would try to avoid for interviews.

367. Dr. Smith said it was possible to find companies and individuals to whom one could contract out interview work. He said it was possible to do a valid, reliable survey in a very short period of time.

368. Dr. Smith opined that the results of Dr. French's survey are of such a highly questionable nature that one would be very hard pressed to draw any reliable conclusions based upon these data.

369. On cross-examination, Dr. Smith said he had not done a marketing survey to test whether Dr. French's data was accurately done. He would not choose that approach; he would recommend a survey to find out what people's opinions are. He did say, also, that Dr. French should have conducted a telephone survey **[*162]** rather than an in-store survey. Such a telephone survey could be done through random-digit dialing procedures.

370. On cross-examination, Dr. Smith's attention was directed to excerpts from Dr. Glassman's deposition which approved of the questions found on Dr. French's survey and the choice of stores in the survey. Dr. Smith continued to adhere to his previous opinion about the methodology and accuracy of Dr. French's survey.

371. Defendants' witness, Robert Rosenberg ("Rosenberg"), is the Chairman of the Board of Dunkin' Donuts. He estimated the current sales of that company to be One Billion Dollars.

372. Rosenberg was shown by defense counsel the annual report filed by Dunkin' Donuts with the Securities and Exchange Commission on Form 10-K. That report stated that Dunkin' Donuts competes with national, regional and local firms offering similar products and services, as well as with supermarkets and convenience stores. When asked to identify these, Rosenberg said that Dunkin' Donuts competes against other fast food feeders, convenience stores, bakeries, supermarkets, other kinds of restaurants and coffee shops. He mentioned that supermarkets are viewed as one of their **[*163]** primary competitors.

373. Rosenberg said that he believed that Dunkin' Donuts competed against the fast feeders for customers who buy coffee or a portable product "to go". It competed against bakeries, donut shops and supermarkets for customers who buy dozens of donuts.

374. Rosenberg testified that he had recommended the proposed acquisition of Mr. Donut to his management and to his stockholders. He thought such a move the true answer to future survival to build market strength through advertising and distribution. The combining of Mr. Donut and Dunkin' Donuts will create a system that will be stronger for both parties, with greater profitability to the company and to the franchisees, and greater benefit to the consumer. Failure to take this step, he said, involved the possibility of having their enterprise eliminated by the stiff competition coming from supermarkets and fast feeders.

375. Rosenberg said that, before any conversion of Mr. Donut to Dunkin' Donuts would take place, the concept would first have to be tested. He foresaw benefits for the Mr. Donut franchisee in the proposed acquisition, e.g., increased sales, enhanced value of the franchise, increased resources **[*164]** for advertising to be able to compete with places like McDonald's, better training and research, and development activities.

376. Rosenberg said that conversion would be done on a case-by-case basis. For any remodeling, Dunkin' Donuts intended to provide a financing package and other assistance.

377. Rosenberg testified as to the dramatic changes he had seen in the marketplace in the past twenty-seven years. He cited the increased involvement of fast food places in the breakfast trade, bakery, and supermarket donut offerings, the growth of convenience stores. Keeping the donut business vital, he says, is essential.

378. Rosenberg stated that Dunkin' Donuts is committed to ensuring the preservation and maintenance of the contractual rights that all Mr. Donut franchisees had bargained for with International Multifoods. Dunkin' Donuts, he said, was committed to the success of the Mr. Donut stores, irrespective of conversion.

379. By stipulation of counsel before the court on March 15, 1990, it was agreed that there were other substantial bidders for Mr. Donut.

380. On cross-examination, Rosenberg testified that since Dunkin' Donuts' acquisition by Allied-Lyons last year, **[*165]** the operation of the company had basically remained unchanged. He said that Allied-Lyons had a long tradition in the food business and the food service business and the franchising business.

381. On cross-examination, Rosenberg testified that Allied-Lyons also owns a company called DCA. DCA is sometimes a bidder for Dunkin' Donuts' business for fillings, mixes and sugars. He said that Dunkin' Donuts had made it clear to Allied-Lyons that its purchasing system was a cooperative one owned by its franchise owners and that it saw no change in this system at all. He also said that Allied-Lyons had been given to understand that Dunkin' Donuts does business on a competitive bid basis.

382. On cross-examination, Rosenberg stated that if Mr. Donut had not been for sale, Dunkin' Donuts would have tried to continue to grow and to buy other companies.

383. On cross-examination, Rosenberg's attention was directed to sections of the Goldman Sachs & Co. offering prepared for Dunkin' Donuts. Rosenberg acknowledged that one paragraph spoke of growth during the past fourteen years, but he said that the following paragraph spoke of changing conditions and the need for a change in strategy. **[*166]** He said that the rate of growth in "same store sales" had fallen, over the past five years, from 6% to 2 or 3%.

384. On cross-examination, Rosenberg agreed that Dunkin' Donuts' revenues for 1988 were approximately $ 112 Million, which was an increase over the $ 105 Million of the preceding year. Although he acknowledged that only .5% of this was spent on research and development, he said that redesigning Dunkin' Donuts took more than just that, but also involved distribution development, price and marketing and other factors. If research and development is reduced in the future, he says, that is because Dunkin' Donuts has a large backlog of new product development. He added that expanded distribution was also considered the best way to improve franchise owner profitability.

385. On cross-examination, Rosenberg said that Dunkin' Donuts sales were $ 850 Million and Mr. Donut's $ 168 Million.

386. On cross-examination, Rosenberg testified that he thought that, after the conversion "test", most Mr. Donut franchisees would convert to Dunkin' Donuts. Dunkin' Donuts would not allow any Mr. Donut franchisees to abrogate the restrictive covenant in their contracts that prohibits **[*167]** them from opening independent donut shops within a certain area of their stores following the termination of their contracts.

387. Upon cross-examination, Rosenberg's attention was directed to the stock purchase agreement for Mr. Donut which contains "non-compete" covenants imposed upon the "seller", Damca International Corporation, and upon International Multifoods. Non-competition was demanded in the "doughnut/coffee shop retail franchise" business and in the "donut/coffee shop retail business". Rosenberg said that he was not personally familiar with these provisions and believed that this document had been inspired by tax considerations.

388. On cross-examination, Rosenberg was asked about convenience stores as competitors. He said that even though a prior memorandum (found at Plaintiffs' Exh. 104) had reported no "cannibalization" when Dunkin' Donuts' franchisees provided convenience stores with their product, it was important to remember that there is a broad array of customers and many potential customers are driven by convenience. The convenience store often offers, for many people, a more convenient way to get a breakfast or a morning snack than does going to a donut **[*168]** shop. It, therefore, makes sense, he said, for Dunkin' Donuts to stock their product in convenience stores rather than to lose customers.

389. Upon cross-examination, Rosenberg said that Dunkin' Donuts' franchisees provide the donuts to the convenience stores. He was asked if prices ran higher in the convenience stores intentionally. He said that it is important to remember that Dunkin' Donuts cannot dictate prices to their franchisees; all they can do is to suggest a pricing. The franchisees, themselves, he said, set the prices for donuts, coffee, sandwiches and all the other products sold in Dunkin' Donuts stores.

390. Upon cross-examination, Rosenberg was asked Dunkin' Donuts' intentions regarding those thirty-three Mr. Donut shops that fall within the exclusive development territories already granted to Dunkin' Donuts shops. Rosenberg replied that this depended upon the success of the conversion "test". He added that this "exclusivity" ran only for a limited time. At maximum, it would be for five years. Most of these exclusive development territories have already run for several years and should be expiring in a short period of time. He described the situation as **[*169]** being highly fluid and flexible. He said that the existence of these exclusivity provisions in no way precludes conversion.

391. On cross-examination, Rosenberg was asked about the one hundred and three Mr. Donut stores within a one mile or a half-mile area of a Dunkin' Donuts store. He said that Dunkin' Donuts currently has two hundred fifty shops within a mile of existing stores. Since the franchisee owners themselves set the prices in their stores, two closely situated stores could be competing with each other.

392. On cross-examination, Rosenberg was asked about any future increase in sales of Mr. Donut shops that were already doing better sales than Dunkin' Donuts shops. Rosenberg said he believed that such increases would occur, should they convert to Dunkin' Donuts.

393. On cross-examination, Rosenberg was asked about the Mr. Donut franchisees who also have their own exclusive development area options. Rosenberg said that they would honor these, but the franchisees would have to review these with Ralph Gabellieri on a case-by-case basis. There was also some question as to how many of these were set to expire in the near future.

394. Upon cross-examination, Rosenberg **[*170]** was asked about conversion costs. He said that $ 50,000.00 was a hypothetical number. He said one would have to look at conversions on a case-by-case basis. He was shown a Dunkin' Donuts document entitled "Estimated Cost to Retrofit Mister Donut Shops" (found at Plaintiffs' Exh. 133). This document estimated costs for a new shop at $ 51,000.00, for a remodeled shop at $ 75,000.00 and for an old shop at $ 146,000.00. Rosenberg said that this was only a very early study. He added that one could not assume that remodeling costs would not have to be spent by Mr. Donut franchisees even if Dunkin' Donuts were not buying Mr. Donut.

395. Upon cross-examination, Rosenberg testified that Gabellieri was allaying any fears expressed to him by some Dunkin' Donuts franchisees about possible "cannibalization" of their business by any nearby Mr. Donut shops that would be acquired.

396. Upon cross-examination, Rosenberg stated that, at the moment, the plan is to keep the areas where they compete directly, such as the operations, marketing and research departments of Mr. Donut and Dunkin' Donuts separate. Certain administrative tasks such as accounting and records would be combined for greater **[*171]** efficiency.

397. On cross-examination, Rosenberg said that if the conversion "test" does not work out, Gabellieri's responsibility, as head of Mr. Donut, will be to maximize return for the company and the franchisees by running Mr.

Donut as well and as profitably as he can. He agreed that, if the test fails, Gabellieri's experience and expertise with Dunkin' Donuts would be able to be used competitively against Dunkin' Donuts.

398. Upon cross-examination, Rosenberg was challenged as to the number of breakfast sandwiches sold by Dunkin' Donuts in relation to such sandwiches sold by Hardee's, McDonald's, etc. Rosenberg said that their Dunkin' Donuts number had risen from .4% to 1.7% in the 1984-1989 period; it had, thus, quadrupled and become a $ 16 Million product.

399. On cross-examination, Rosenberg said that, despite the difficulties, Dunkin' Donuts was committed to building up the day-part of its business, to establish in the consumer's mind that Dunkin' Donuts is the place to come for sandwiches, soup and a light snack.

400. On redirect examination, Rosenberg testified that Mr. Donut's research and development was only approximately one-tenth that of Dunkin' Donuts. **[*172]** He added that Dunkin' Donuts' advertising expenditures are also ten times larger than those of Mr. Donut. Such size would benefit Mr. Donut franchisees, he said.

401. On redirect examination, Rosenberg was asked whether he agreed with the testimony of certain plaintiffs that they did not compete with supermarkets, convenience stores, and fast food chains. He said that he very much disagreed with this. He also disagreed with the plaintiffs and Dr. French who had said that the cluster of products sold in a donut shop competes only with donut shops and not with any other kind of retail establishment.

402. On redirect examination, Rosenberg stated that he was aware that Mr. Donut had closed more stores than it had opened within the past four or five years. Mr. Donut, he said, has also been selling off its international operations.

403. On recross-examination, Rosenberg said that advertising was one part of the marketing "mix" and that McDonald's and some other fast food chains, with their heavy advertising budgets, would enjoy an advantage in that regard.

404. On recross-examination, Rosenberg testified that a Mr. Donut franchisee who became a Dunkin' Donuts franchisee could **[*173]** not take his share of the collective advertising dollar for his own advertising, but could spend additional dollars, if he chose to.

405. Defendants' witness, Dr. Bruce R. Snapp ("Dr. Snapp"), holds a doctorate in economics from the University of Michigan. Following his graduate studies, he was employed at the Economic Policy Office of the Antitrust Division at the U.S. Department of Justice, chiefly as a senior economist. He said that the Economic Policy Office is responsible for the economic analysis of virtually all of the antitrust matters that come before the Antitrust Division. He was, for one year, Acting Chief Economist and Assistant Director of the Economic Policy Office. Where mergers were concerned, it would be the responsibility of economists at the Antitrust Division to analyze relevant economic markets and to prepare an analysis of other issues and to make recommendations as to whether or not suit should be brought. As a senior economist with the Economic Policy Office, he participated in investigations of proposed mergers. Dr. Snapp said that he was with the Antitrust Division for ten and a half years. During that time, he was involved with some merger investigations **[*174]** of a consumer good: beer.

406. After leaving the Antitrust Division in 1984, Dr. Snapp entered the private sector where he was also involved in analyzing mergers. Presently, he is employed by Economists, Incorporated, where his duties also involve merger investigations. Dr. Snapp was proffered by the defense as an expert witness in the field of antitrust economics.

407. Dr. Snapp testified that, although his early job experience was with the Antitrust Division of the Justice Department, he said that he was familiar with the procedures used by the Federal Trade Commission (FTC) because the Antitrust Division and the FTC overlap in their area of responsibility and because of his contact with members of his present firm who have worked for the FTC.

408. Dr. Snapp described the sources he had relied upon for his testimony in the instant case. He relied upon publicly available materials, books, the trade press, interviews with executives at International Multifoods, Mr. Donut, and Dunkin' Donuts, and documents generated in discovery (found in Defendants' Exh. 128).

409. Dr. Snapp summarized the conclusions he had reached from his research. He said that the proposed acquisition **[*175]** will not reduce competition in any relevant market, either for franchises or for the products produced by the franchisees. With regard to the market for franchises, he found that market a very broad one, including a broad variety of franchise opportunities. He found that Dr. French had focused on a relatively narrow set, based upon the characteristics of the businesses involved and on the capital requirements. This restricts the number of suppliers in the market and this, he thought, was not economically appropriate to do. He also said that the proposed acquisition would not have an impact on the market for the products sold by the franchisees because, following this transaction, the number of independent decision makers in that market is going to remain the same. He explained that the purpose of the antitrust laws is to prevent mergers that might create or enhance the exercise of market power by reducing the number of independent suppliers in the market where concentration is high. In this market, he said, the independent decision makers are not the franchisors, but the independent business men. They are the ones who set the prices and, after the proposed acquisition, there **[*176]** will still be the same number of these.

410. Dr. Snapp defined market power as the ability of firms to raise and to sustain prices for a significant period of time, usually one to two years. Market power may be impossible for one of these reasons, he said: ability of consumers to turn to products they view as close substitutes; the ability of consumers to turn to other firms in other areas to get the same product; and the existence of firms producing related products or who are capable of supplying the product in a relatively short period of time.

411. Dr. Snapp explained that it is important to define the relevant product market and the relevant geographic market. An improper definition of either, he said, can cause erroneous results regarding the lawfulness of the transaction. It is also vital to identify what firms should be included in the market, i.e., other suppliers of the product, suppliers of close substitutes, suppliers who could quickly enter the market, although they are not now producing the goods. Next, one would have to measure the market share; in consumer goods that are branded or differentiated, one uses sales to measure market sale. For a particular **[*177]** firm, one takes its sales and divides it by the sales of all the firms identified in the relevant market. The next step would be to calculate concentration using the HHI. Dr. Snapp explained what the HHI and how the various levels, e.g., under 1000, between 1000 and 1800, or over 1800, trigger or do not trigger antitrust concerns.

412. Dr. Snapp testified that even an HHI of between 1000 and 1800, which is considered moderately concentrated, would only prompt the Antitrust Division to investigate further. Other factors, such as an industry with rapidly changing technology, might mitigate market power, he said.

413. Dr. Snapp testified that he disagreed with Dr. French's market definition for the product sold by the franchisees. First, Dr. French did not consider whether related products sold in these franchisees' stores might also be in the relevant product market or might be considered substitutes by consumers, e.g., cinnamon rolls or pastries. Second, Dr. French posited a very limited view of suppliers of very similar products; he excluded supermarkets, retail bakeries, convenience stores and other types of quick service restaurants. Dr. French had restricted suppliers **[*178]** to donut shops. Third, Dr. French had failed to take into account the possibility of supply substitution. Fourth, Dr. French addressed the issue, using a "cluster" approach. He said that these products are not packaged in bundles, but priced and offered for sale individually. Also, Dr. Snapp testified that Dr. French was trying to leverage such aspects of product differentiation as quality and image into a market definition, when that is inappropriate.

414. Dr. Snapp said that products that are differentiated may properly be included in the same relevant product market. He also agreed that the fact that one supplier of a product may offer a different mix of products than another supplier will not necessarily put their comparable products in different relevant markets.

415. Dr. Snapp testified that a too narrow definition of the relevant product or geographic market can cause the erroneous conclusion that concentration is too high and that firms could raise prices.

416. Dr. Snapp discussed how he had arrived at his conclusion that Dr. French had excluded relevant product market suppliers from his analysis. Dr. Snapp said that he has found that company documents are the **[*179]** best source of information about the issues relevant to product market and the impact on competition. Businessmen must find out who it is they compete with, what their customers want, and who is selling substitutes.

417. Dr. Snapp referred to several of these documents in his testimony. A 1981 "Supermarket Competition" study (found at Defendants' Exh. 128) reveals, he said, that the market for retail donut sales is viewed as including food service, retail bakeries, and supermarkets. A "1983 Doughnut Industry Study" prepared for Dunkin' Donuts, listed donut shops, retail bakeries, food service and grocery markets as part of their market. It also referred to the expansion of Entenmann's, which is a wholesale bakery producer of packaged donuts. Other studies also included in-store bakeries in either convenience stores or supermarkets. Another source indicated that the Great Atlantic and Pacific Tea Company (A&P) believes it competes directly against Dunkin' Donuts and other donut shops. The Huntley-Jiffy convenience stores also identify supermarket bakeries and donut shops as their primary competition. Huntley-Jiffy operates bakeries in ninety-six convenience store locations. **[*180]** Co-Go's Food Stores of Pittsburgh also identified Mr. Donut as a real competitor with an impact on its donut sales. From all of this, Dr. Snapp concluded that there are a large number of entities supplying donuts in competition with donut shops.

418. Another company document, Dr. Snapp said, identified big fast food chains as awesome competition with a huge advertising budget to spend against the breakfast segment. Competition from convenience stores with deli counters and ovens was also mentioned. Another company document referred to donut price checking at supermarkets.

419. Dr. Snapp testified that the companies view themselves in a bifurcated market: in the morning, competing for the breakfast customer, they compete with other quick service restaurants; in the rest of the day, they compete in the sale of sweet goods in a bakery market where the principal competition comes from retail and in-store bakeries.

420. Dr. Snapp also found significant Dunkin' Donuts' internal memoranda regarding the percentage of customers who said they would turn to supermarkets if the Dunkin' Donuts were closed. This study also indicated that supermarkets were particularly strong competitors **[*181]** for large quantity purchases. In 1987, a Dunkin' Donuts' document sent to its franchisees urged them, before making pricing decisions, to visit every food service outlet and supermarket with which they compete before deciding prices.

421. Dr. Snapp also referred to Dunkin' Donuts' quarterly marketing reports which track advertising and other competitive actions by Mcdonald's, Burger King and other fast food restaurants. He also mentioned the trade press's references to the competitive climate as including a far wider market. There was one prediction about the rapid expansion of the sale of bakery products in convenience stores.

422. After discussing these company documents, reports, studies, etc., Dr. Snapp said that, what all of this reveals is that the companies' perception and the consumers' perception is that the products sold in donut stores face competition from a broad range of suppliers who are, in some cases, selling virtually identical products. Were donut shops to increase their prices, consumers could very easily substitute and find a new source of supply at a lower price.

423. Dr. Snapp was asked to comment upon Dr. French's approximation of the relevant geographic **[*182]** market as being within a radius of five miles or less around each store. Dr. Snapp said that it would be preferable to plot out where the customers for the shops of the merging firms actually come from and then attempt to see to which suppliers these customers could then turn.

424. Dr. Snapp was asked how to obtain information regarding various markets, e.g., the "United States", Boston, Cleveland and Providence. He agreed with Dr. French's assessment that there is not a national geographic market. He decided first to look at the number of different types of establishments that do or could sell donuts. He consulted the Boston, Massachusetts Metropolitan Area Yellow Pages and identified the number of firms under the heading

"Doughnuts" and found fifty-eight different firms with 124 different stores. Under "Bakers - Retail" were 257 firms with a total of 304 stores. (He noted that Dunkin' Donuts and Mr. Donut and some other apparent donut shops listed themselves under this heading, as well as under "Doughnut"). He continued in this vein for Cleveland, Pittsburgh, and Providence. The Snow White Donut Company, Inc. appeared to be the largest donut chain in Cleveland. Also, **[*183]** he consulted the 1987 Census of Retail Trade, which includes grocery stores, convenience stores and other eating places. He concluded that in most neighborhoods one would find entities offering some form of donut, pastry or muffin and a cup of coffee. Even if entities near a donut shop did not offer close substitutes now, they could do so within a year.

425. Dr. Snapp disagreed with Dr. French's opinion that the proposed acquisition would probably result in donut shops' raising their prices of coffee and/or donuts. He said that the product market is not just limited to individual products like donuts, but would include other products like pastries, bagels, cinnamon rolls. Also, there appear to be a large variety of alternative outlets selling donuts and donut shop products. Also, it is possible for convenience stores and other competing entities to upgrade the quality of their products, expand supply, or increase advertising. To the extent that consumers view them as substitutes, they will be motivated to make the shift. Consumers can also view similar sorts of products as viable substitutes, e.g., the consumer who chooses a danish and coffee at McDonald's.

426. Dr. **[*184]** Snapp testified that he thought it possible for convenience stores to offer donuts successfully. In many instances, they already have display cases that would ensure freshness and prominent display. Display cases cost anywhere from $ 100.00 to $ 1,600.00, he said. It is even possible that wholesale or retail bakeries would split the cost in order to get a new sales outlet for their products.

427. Dr. Snapp spoke of the existence of independent donut shops. In a particular region, one might find regional chains or local chains or even independent entrepreneurs who could start up their own donut shop. In some parts of the country, it is not unusual for wholesale bakeries to have donut shops as a retail outlet, he said.

428. Dr. Snapp testified that, at the moment, in-store bakeries are one of the fastest growing segments within grocery stores. The number of in-store bakeries being put in has been increasing at a much faster rate than the growth of either donut shops or retail bakeries, approximately 10% a year. In 1986, their sales increased 22%. In remodeling stores, in-store bakeries and larger bakery sections are often included.

429. Dr. Snapp stated that this proposed **[*185]** acquisition would not reduce competition in any market in which the franchisees compete. He said that it was probably potentially pro-competitive to the extent it allows both Dunkin' Donuts franchisees and any converted Mr. Donut franchisees to realize cost savings, to spread out certain fixed costs in advertising and promotion and to be more effective competitors against these other sources of supply.

430. On cross-examination, Dr. Snapp acknowledged that this is the first matter he has worked on specifically focused on franchising issues.

431. On cross-examination, Dr. Snapp testified that he had not gone into the marketplace and talked directly to people who eat donuts because his experience has taught him that dealing with consumers in this particular type of context is not an especially enlightening source of information. He was especially critical of Dr. French's survey questionnaire regarding the hypothetical increase in the cost of donuts. Dr. French had neglected to include a context where prices elsewhere stayed the same. He was not quite sure that Dr. French's hypothetical accurately measured the way consumers think about relatively low priced products.

432. On **[*186]** cross-examination, Dr. Snapp testified that profitability is what would influence firms to enter the market.

433. On cross-examination, Dr. Snapp was presented with a document, Mister Donut Fiscal Year 1991 and 1995 Phase One Plan (found at Defendants' Exh. 128). Plaintiffs' counsel said that, according to that document, donut sales of in-store bakeries were declining and, as of 1988 data, donut sales accounted only for 12% of the average in-store bakery sales. Dr. Snapp replied that the percentage could be declining even though the absolute amount is

increasing. This figure, he said, tells the reader nothing about the absolute amounts. He added that the important question is what would happen to donuts and their sale if donut shops were to raise their prices.

434. On cross-examination, Dr. Snapp's attention was directed to the Dunkin' Donuts attitude and usage survey which indicated what percentage of customers would turn to supermarkets for donuts if Dunkin' Donuts were closed. Dr. Snapp's attention was directed to the part which said that only 6.4% of the respondents cited price as a reason for buying from supermarkets. Approximately 10% of the respondents cited price **[*187]** as a reason for buying donuts at Dunkin' Donuts. Dr. Snapp said that these data only reflected current market realities. What is important, he said, is how consumers would react if one group changed its prices relative to everyone else.

435. The court inquired of Dr. Snapp if he would accept Dr. French's figure of a 5% increase in prices as significant. Dr. Snapp replied that what is important is how big the price is relative to the profit margin. The chief consideration was really whether these sellers could profitably raise prices without consumer substituting and new entry moving in.

436. On cross-examination, Dr. Snapp said that if prices were raised, the donut shops might not lose their cadre of loyal customers, but would lose their marginal ones. He said that even Dr. French's survey that showed a 13% loss in customers was of interest. He said that Dr. French did not present any evidence as to whether the store could afford to lose 13% of its customers. Dr. French's study also revealed that another 11% said they would come less often or buy less in response to increased prices. Even at 5% of such customers, he said, this would mean an 18% loss and prices would have **[*188]** to be raised a great deal to make up for that lost profit.

437. On cross-examination, Dr. Snapp testified that he had spoken to Dunkin' Donuts' Feltenstein about such a loss. Feltenstein had said that no donut shop could afford to lose 13% of its customers. A sustained increase could lose even more customers over time, Feltenstein had said. Even a later reduction would win customers back only a long time later.

438. On cross-examination, Dr. Snapp's attention was directed to an article from Business Week in 1982. The article concerned the breakfast market of McDonald's, Burger King, and Wendy's and then stated: "But these new competitors expanded the breakfast market dramatically creating a wave of new business that actually boosted Dunkin's result. For the year ended October 31st, 1981, Dunkin' and its franchisees posted record worldwide sales of 390 million dollars, up 21 percent over 1980." Dr. Snapp replied to this that, although donut shop sales have, in fact, increased over time, the relative market share is falling. He posited the question of how big would the donut shops' share of the breakfast market have been, if it were not for these alternative sources of **[*189]** supply.

439. On cross-examination, Dr. Snapp testified that donut shops expand their product lines to bring in customers who are not interested in donuts and to offer their loyal customers something like a sandwich at lunch to prevent their going to McDonald's where they might also learn about McDonald's coffee and danish.

440. On cross-examination, Dr. Snapp was asked about the entry of other possible suppliers. He reiterated his opinion that convenience stores might see an opportunity if donut shops raised their prices. If the convenience store operator were already thinking of remodeling, he might decide to remodel so as to offer fresh donuts, either by installing a bakery or by increasing display capacity and getting donuts from a wholesale or retail bakery. The same could be said of supermarkets.

441. On cross-examination, Snapp was asked about the prospect of fast food places baking donuts on the premises. He said that they might not have to, given substitutes like their danish. Also, it would not be difficult for them to find a nearby retail or wholesale bakery who would supply them with fresh-baked, quality donuts.

442. On cross-examination, Dr. Snapp was asked **[*190]** about the existence of intrabrand competition if all the donut shops became Dunkin' Donuts shops. Dr. Snapp said that in most cases a company tries to make sure that it locates its franchises in such a way as to avoid cannibalizing each other's sales. He agreed that it would be a problem if Dunkin' Donuts' franchises were put too close by one another.

443. On cross-examination, Dr. Snapp acknowledged that he had not actually examined the competitive health or vigor of any of the regional chains in any of the markets he had testified about.

444. On cross-examination, Dr. Snapp testified that he thought it possible that one wholesale bakery could be the start of a new retail chain over a long period of time. It would take a much shorter time, though, for many wholesale bakeries to put in one store a piece, he said.

445. On cross-examination, Dr. Snapp was asked about Dr. French's concept of the cluster of goods and services. He agreed that such a concept was a part of the body of ***antitrust law***. On direct examination, he had said that there could not be a cluster unless the products and services were tied together in some way. Dr. Snapp said that he did not dispute that complementarity **[*191]** of demand, i.e., purchase of donuts and coffee, exists or that it is not relevant. But, he said that the important question is: who is the supplier in that market.

446. On cross-examination, Dr. Snapp's attention was directed to selections from various judicial opinions and questions were extracted from these selections. He said that what consumers view as substitutes is what is most important. Although he had not spoken personally to consumers of donuts, he had tracked consumers' perceptions as reflected in companies' documents. In answers to other questions, based on case law, Dr. Snapp basically reiterated replies he had given before.

447. Upon cross-examination, Dr. Snapp was asked a number of questions challenging the accuracy of the Dunkin' Donuts Attitude and Usage study (found at Plaintiffs' Exh. 348) and other company documents and studies upon which he had relied. Dr. Snapp explained that smaller chains might perceive competition differently and might perceive a chain like Dunkin' Donuts as their major competition. He said that the question remains who does Dunkin' Donuts consider as its competitors and whom do they take into account when they set their prices. **[*192]** If other donut shops follow Dunkin' Donuts, then it does not matter whether they themselves review prices in grocery stores.

448. Upon cross-examination, Dr. Snapp's attention was directed to a Retail Doughnut Market Survey by the Research Council of Washington, Inc., November 24, 1987 (found at Plaintiffs' Exh. 105). He said that a Mr. Donut interview which estimated the breakdown of the market to be 85% retail donut shops, 10% convenience stores and 5% supermarkets appeared to contradict other estimates he had seen. This interview also spoke of market saturation, the need for operators to be better off financially to open a franchise, and the repositioning of the same products rather than new product introductions.

449. On cross-examination, Dr. Snapp's attention was again directed to the same Retail Doughnut Market Survey and information from interviews with supermarkets, such as Giant, was read to Dr. Snapp by plaintiffs' counsel. These excerpts dealt with the perception held by these supermarkets of the identity of their competition. While Giant said that it competed with other supermarkets for the in-store bakery market, it also said it modeled its in-store bakeries **[*193]** after retail donut shops and that it kept Dunkin' Donuts in mind when it did pricing, as well as other supermarkets. Certain supermarkets did not mention retail donut shops as competitors. Super Value Stores, Inc., of Atlanta, Georgia, stated that retail donut shops did not compete with them because they each attracted different types of customers. Dr. Snapp did say that the report itself seemed to think that supermarkets and donut shops did compete. Dr. Snapp maintained his conclusion that there is a market for donuts that includes supermarkets, as well as donut shops and many other sources.

450. On cross-examination, Dr. Snapp was questioned about Dunkin' Donuts' own studies of the difference between prices in supermarkets and prices in their own stores. His attention was directed to Dunkin' Donuts' Mid-Atlantic Quarterly Marketing Reports for 1986, 1988, 1990 (found at Plaintiffs' Exhs. 254,266,272). Dunkin' Donuts' prices were said to be higher than those of supermarkets and coffee shops. Dr. Snapp found such pricing consistent with pricing in a price-sensitive market. Even though the 1988 and 1990 Reports said that Dunkin' Donuts price in the Mid-Atlantic market was **[*194]** not competitive with donut/coffee shops or supermarkets, Dr. Snapp said why would Dunkin' Donuts monitor supermarket prices, if these entities were not competitors. Dr. Snapp also said that a higher price may merely reflect Dunkin' Donuts' particular competitive niche. If they go too

high, he said, they will lose business. Dr. Snapp also pointed to language in the 1988 Report that listed supermarket, convenience stores, fast food places, etc. as the competition.

451. On redirect examination, Dr. Snapp reiterated that the franchisors might give some advice about pricing, but they have no control over the prices set in the stores.

452. On the last day of the proceedings, Dr. French was recalled by plaintiffs' counsel to testify as to the results of his survey, recomputed so as to exclude errors in the questionnaire, such as failure to initial corrections, to include respondents' names or phone numbers, or to correct skip instructions properly. Dr. French testified that, even with this exclusion, there was no difference in the results.

453. On the final day of the proceedings, excerpts of depositions from the following individuals were read to the court: Lipe, Roever, O'Hanlon, **[*195]** Richmond, Sattler and Muth. Plaintiffs' counsel supplied counter-designations to these excerpts and added excerpts from First's deposition, as well. These excerpts provided material already amply supplied to the court during twelve days of testimony. Of note, however, was the testimony of Lipe, Roever, O'Hanlon and First as to doing their own pricing and Muth's testimony as to making fresh coffee every 15 to 20 minutes and throwing out donuts twice a day.

454. Defendants' witness, Sidney J. Feltenstein ("Feltenstein"), is the Senior Vice President for Marketing at Dunkin' Donuts of America. He has held this position for the past eleven years. He said that for 1990, Dunkin' Donuts had a $ 32 Million advertising budget, of which 50% will be allocated to donuts, and 35% to sandwiches and new sandwich extensions in order to build that business further. The balance will be allocated to muffins, coffee, cookies, brownies and other ancillary products.

455. Feltenstein testified that, since the early 1980s, Dunkin' Donuts had been acutely aware of the increasing competition from supermarkets, with their in-store bakeries, convenience stores, fast food places and producers like Sara **[*196]** Lee. He said that he views these entities, as well as other donut shops, as Dunkin' Donuts' competitors. A new threat, he added, is coming from take-home foods that can be microwaved. This segment has grown 140% in the past year. Also, from the early 1980s onward, he said, Dunkin' Donuts saw the necessity for an expansion of its product line, for example, a line of croissant sandwiches, in order to keep old customers and add new ones.

456. Feltenstein stated that, around 1987 or 1988, Dunkin' Donuts perceived that it was in the middle of a fierce market share battle. Dunkin' Donuts, therefore, introduced a sandwich line, started offering donut sales through convenience stores, and began to focus advertising and promotion against supermarkets.

457. Feltenstein testified that he knew of two donut sales "tests" made fairly recently by Burger King and McDonald's. The Burger King cake donut was made on premises and sold for $ .35 each or $ 2.79 a dozen. These were tested in the Youngstown market up to 6 or 8 months ago and sold 15 to 20 dozen a day. Both Burger King and McDonald's had discontinued their tests, but Feltenstein expressed great concern that this did not necessarily **[*197]** mean that this idea had been abandoned and that, in the future, these chains could introduce this product into their stores. On cross-examination, he said that Ruenheck's opinion that adding donuts at Burger King would not attract customers did not assuage his fears; he said that he doubted that Ruenheck was privy to all information at Burger King.

458. Feltenstein also testified that there are 21,250 retail bakeries and 22,288 in-store supermarket bakeries as opposed to approximately 1700 Dunkin' Donuts shops in the United States. He said that he was aware of 72,000 convenience stores, as well. Feltenstein said that Dunkin' Donuts recognized that it could only advise its franchisees regarding pricing and that pricing decisions were really the franchisees' to make.

459. Feltenstein testified as to the activities of fast food restaurants to enter the breakfast segment or to improve their performance in it. He cited Burger King's intention to introduce mini-muffins.

460. Feltenstein testified that Dunkin' Donuts, working with its advertising agency, had to face the changed competitive environment in the advertising arena. Various ads of Dunkin' Donuts and of such competitors **[*198]** as

McDonald's, Burger King, Hardee's, Cumberland Farms, Winchell's, Mr. Donut, and Sara Lee were played to the court to demonstrate the level of competition. McDonald's, he said, would spend $ 150 Million this year promoting and advertising their breakfast business. Dunkin' Donuts' advertising budget is $ 32 Million, he said.

461. On cross-examination, Feltenstein said that, even at 4% of sales, sandwiches represented a significantly welcome dollar volume to Dunkin' Donuts' shops.

462. On cross-examination, Feltenstein testified that in-store physical barriers to tapping into the lunch sandwich market were not insurmountable. He said that about 60% of the stores in the Dunkin' Donuts chain is now configured to a more traditional hamburger store configuration with a counter to place an order and seating to consume it. Also, he said that about 600 to 700 Dunkin' Donuts stores have drive-through windows - a critical addition to compete with fast food chains, convenience stores, supermarkets and other donut shops.

463. Feltenstein was asked by the court his idea as to what Dunkin' Donuts would do if the conversion "test" did not work out. He said that there was considerable **[*199]** confidence that it would work out. He did not know of any contingency plan.

DISCUSSION

Introduction

The defendants in this matter, Dunkin' Donuts and Mr. Donut, each operate chains of franchise donut stores. Defendant Dunkin' Donuts has approximately 1370 stores in the United States while defendant Mr. Donut has approximately 540 stores in the United States. The defendants have reached an agreement under which Allied-Lyons, the owner of Dunkin' Donuts, will acquire 100% of the stock of the Mr. Donut chain from International Multifoods making Mr. Donut a wholly owned subsidiary. This agreement provides that it must be consummated by no later than March 31, 1990. After that date, each party is free to go its own way. Plaintiffs are more than one hundred Mr. Donut franchisees and a franchisee supplier who seek a preliminary injunction preventing the consummation of this agreement on the grounds that the proposed merger will directly injure them and restrain trade in violation of federal antitrust laws.

We begin by noting that it has been exactly one hundred years since the post Civil War enactment of the Sherman Act, 26 Stat. 209 (1890), as amended, *15 U.S.C.A. §§ 1-7* ***[*200]*** *(1990)*. *Section 1* of the Sherman Act provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." *Section 2* of the Sherman Act makes it unlawful to "attempt to monopolize". Section 4 of the Sherman Act provides that "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act . . . ."

HN1[] To establish a violation of *Section 1* of the Sherman Act, plaintiffs must prove that (1) defendants contracted, combined or conspired among each other; (2) the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) the objects of the conduct pursuant to that contract or conspiracy were illegal; and (4) they are injured as a result of that conspiracy. *Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81-82 (3rd Cir. 1977)*. ***HN2***[] To establish a violation of *Section 2* of the Sherman Act, plaintiffs must prove "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as **[*201]** distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)*.

In the early part of the 20th Century, a perceived need for more detailed and effective legislation led to the enactment of the Clayton Act, 38 Stat. 730 (1914), as amended, *15 U.S.C.A. §§ 12-27 (1990)*. ***HN3***[] *Section 7* of the present Clayton Act provides that:

> No person [1] engaged in commerce . . . shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another person engaged also in commerce . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or . . . create a monopoly. (Emphasis supplied).

The words "may be substantially" indicate a concern with "probabilities" not certainties. *Brown Shoe Co.* ***[*202]*** *v. United States, 370 U.S. 294, 323 (1962)*. ***HN4***[] A plaintiff must prove a probability of success and irreparable harm to obtain injunctive relief under the Clayton Act. *United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957)*; *Tasty Baking Co. v. Ralston Purina, Inc., 653 F.Supp. 1250, 1257 (E.D. Pa. 1987)*; *15 U.S.C.A. § 16*.

Section 7A of the Clayton Act was enacted in 1976 and requires that before acquisitions of certain sizes take place a notification shall be filed with the Federal Trade Commission [2] and Department of Justice. Following the filing, the acquisition is placed on hold during a waiting period which is usually thirty days (15 days for cash tender offers) unless extended. The defendants in the matter before us have complied with said notice requirement and the time period passed on February 16, 1990, without any governmental action to preclude the merger from taking place. [3]

[*203] ***HN5***[]

Section 15 of the Clayton Act, *15 U.S.C.A. § 15*, provides that "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act . . . ." and, ***HN6***[] *Section 16* of the Clayton Act, *15 U.S.C.A. § 16*, provides that "Any person, firm, corporation, or association shall be entitled to sue and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, [4] including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . and upon the execution of proper bond . . . and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . ."

As already noted, **[*204]** plaintiffs are proceeding under only two statutes: *28 U.S.C.A. § 1331*, which provides that, "The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States", and under *28 U.S.C.A. § 1337(a)*, which provides, in relevant part that, "The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . ." Furthermore, there can be no diversity claims if the citizenship of the parties prevents the diversity from being complete. This appears to be the case in the instant matter. [5] Accordingly, the state law claims are all pendent in nature and can only exist in this

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[1] *Section 1* of the Clayton Act deems the word "person" to include corporations.

[2] In 1914, the same year the original Clayton Act was enacted, Congress also passed the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, *15 U.S.C.A. §§ 41-58 (1990)*, which prohibits "unfair methods of competition . . . and unfair or deceptive acts or practices", and creates the Federal Trade Commission to prevent such acts and practices. See *15 U.S.C.A. § 5(a)*.

[3] FTC review provides no immunity from private suit and is of no moment whatsoever in a subsequent private civil action. See *R.C. Bigelow v. Unilever, 867 F.2d 102, 104 (2d Cir. 1989)* (staying acquisition); *State of California v. American Stores, 872 F.2d 837, 843 (9th Cir. 1989)*; ***Consolidated Gold Fields v. Anglo American Corp., 713 F.Supp. 1457, 1460 (S.D. N.Y. 1989)***.

[4] The term "antitrust laws" as defined in *Section 1* of the Clayton Act includes the Sherman Act.

court if plaintiffs establish valid and substantial federal causes of action. *United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)*; *Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 196 (3d Cir. 1976)*. Nevertheless, at this preliminary stage, plaintiffs have asked us to examine their right to injunctive relief under state law claims even if no federal cause gives rise to a right to injunctive **[*205]** relief. Absent a dismissal at this point, we must do so, but we shall examine plaintiffs' federal claims first.

For a further understanding of the broad pronouncements of the Clayton Act, we must turn to the ample decisional law which attends this statute. As Chief Justice Warren said in *Brown Shoe Co. v. United States, at page 334*:

> An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as "horizontal". The effect on competition of such an arrangement depends, of course, upon its character and scope. . . . Where the arrangement effects a horizontal merger between companies occupying the same product **[*206]** and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated. *Section 7* of the Clayton Act, prior to its amendment, focused upon this aspect of horizontal combinations by proscribing acquisitions which might result in a lessening of competition between the acquiring and the acquired companies. The 1950 amendments made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition generally in an economically significant market.
> Thus, again, the proper definition of the market is a "necessary predicate" to an examination of the competition that may be affected by the horizontal aspects of the merger . . . ."

Although *Section 7* of the Clayton Act does not use the word market, it is clear that "line of commerce" signifies a product market and "section of the country" refers to a geographic market. *United States v. Bethlehem Steel Co., 168 F.Supp. 576, 588 (S.D. N.Y. 1958)*. With regard to a product market, consisting of relevant lines of commerce, the court, in Brown, stated, at page 325:

> The outer boundaries of a product **[*207]** market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593-595*. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *n.*43 Because *§ 7* of the Clayton Act prohibits any merger which may substantially lessen competition "in any line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed. *n.*44

*n.*43 See generally Bock, Mergers and Markets, An Economic Analysis **[*208]** of Case Law 25-35 (1960).

[5] We say appears because plaintiffs have alleged domicile rather than citizenship as required by *28 U.S.C. § 1332*. Nevertheless, three corporate defendants are incorporated in Delaware and have principal places of business in Massachusetts and Minnesota, and there are plaintiffs domiciled in each of these states.

*n.*44 *United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 592, 595*; *A. G. Spalding & Bros. v. Federal Trade Comm'n, 301 F.2d 585, 603* (C. A. 3d Cir.); *American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524, 527* (C. A. 2d Cir.); *United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 603* (D.C. S. D. N. Y.).

The Third Circuit cited the foregoing language with approval in *American Bearing Co., Inc. v. Litton Industries, 729 F.2d 943, 949 (3d Cir. 1984)* cert. denied *469 U.S. 854 (1986)*. With regard to a geographic market, the court, in Brown, stated, at page 336:

Congress prescribed a pragmatic actual approach to the definition of the relevant market and not a formal legislative one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area. *United States v. Columbia Pictures Corp., 189 F.Supp. 153, 193-194* (D.C. S.D. N.Y.); *United States* ***[*209]*** *v. Maryland & Virginia Milk Producers Ass'n, 167 F.Supp. 799* (D.C. D.C.), affirmed *362 U.S. 458*. The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, in itself, place the merger outside the scope of *§ 7* of the Clayton Act. That section speaks of "any . . . section of the country" and if anti-competitive effects of a merger are probable in "any" significant market, the merger - at least to that extent - is proscribed.

HN7[] Plaintiffs have the burden to allege and prove both the relevant product and geographic markets as essential elements of their antitrust claims. *United States v. Marine Bancorporation, Inc. 418 U.S. 602, 618 (1974)*; Thurman Industries, Inc. v. Pay ' *N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989)*. "The outer boundaries of a product market are determined by the reasonable interchangeability of use between the product itself and substitutes for it." *American Bearing Co. v. Litton Industries, supra, at 949*. As the Court of Appeals said in *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 713 (11th Cir. 1984)*:

[*210]

> In United States v. E.I. DuPont de Nemours & Company, the Supreme Court considered whether DuPont was guilty of a monopoly because it controlled the cellophane market. The Court found that the relevant product market was the market for flexible packaging materials and not for cellophane alone because other flexible packaging materials are reasonably interchangeable with cellophane for the purposes for which cellophane is produced, taking price, use, and qualities into consideration. Similarly, this court finds that the relevant product market for determining whether Waffle House is engaged in a monopoly is restaurants similar to Waffle Houses -- those with similar menus, similar hours, and similar service. The court does not find that the relevant product market is all restaurants of every type, but it does find that there are other restaurants in the market available to consumers as reasonable substitutes for Waffle Houses. It is these restaurants which, along with Waffle Houses, constitute the relevant product market

In the recent case of *Dunafon v. Delaware McDonald's Corp., 691 F.Supp. 1232, 1241 (W.D. Mo. 1988)*, the court found the relevant geographic **[*211]** market to be the general vicinity of the mall where the McDonald's store was located, and found the relevant product market to be the inexpensive food products usually served for breakfast, lunch and dinner and snacks which were reasonable substitutes for McDonald's menu items. See also *Philadelphia Fast Foods, Inc. v. Popeyes Famous Fried Chicken, Inc., 647 F. Supp. 216 (E.D. Pa. 1986)*.

With the foregoing broad principles in mind, we shall examine representative portions of our detailed findings of fact.

Donut Shop Characteristics

Both sides agree that there are a total of more than 8500 donut shops in the United States (Finding of Fact [hereinafter "FF"] 100,104,110,252), along with 80,000 convenience stores and 20,000 in-store bakeries (FF104,112; Defendants' Exh. 90). There are seventeen franchised chains that operate forty or more shops, and 154 other chains that operate at least three shops (Plaintiffs' Exh. 305). In 1988, the sales of donuts in donut shops alone was approximately Seven Hundred Million Dollars (Defendants' Exh. 83). Moreover, the sale of donuts through donut shops accounts for only 18% of all donut sales (Defendants' Exh. 83). Donuts **[*212]** are sold at donut shops for both on-premise and off-premise consumption. This can take the form of dozens or half-dozens (Plaintiffs' Exhs. 52 at 5 and 199 at 76,122). Plaintiffs' Exhibit 305 reads as follows:

Number and Size of Donut Shops in the

United States, 1988

Largest Chains:	**Number of Shops:**
Dunkin' Donuts	1,374
Winchell's	766
Mister Donut	540
Daylight	429
Subtotal	3,109
Larger Chains:	
Yum Yum	111
Krispy Kreme	98
Shipley	95
Bosa	91
Donut Hole	81
Dawn	65
Foster's	53
Tastee Donuts	53
Donut Factory	50
Donut King	49
Donutland	45
Bess Eaton	45
Paradise	43
Subtotal	879
Smaller Chains:	
50 chains with 10 to 39 shops	966
Smallest Chains:	

Number and Size of Donut Shops in the

United States, 1988

Largest Chains:	**Number of Shops:**
104 chains with 3 to 9 shops	482
All Other Shops:	3,121
Total	8,557

Source: GDR Enterprises, Inc., "Mister Donut Consumer Opportunity Analysis June 1989," p. 26.

Plaintiffs' Exhibit 306 reads as follows:

Number of States Operated In By

Donut Shop Chains

Donut Shop Operators a	**Number of States**
Dunkin' Donuts	41
Daylight Corporation	28
Mister Donut of America	27
Spudnuts, Inc.	16
Dixie Cream Flour Company	15
Winchell's Donut House	15
Krispy Kreme Doughnut Corp.	13
Donutland, Inc.	7
Bosa International, Inc.	6
Southern Maid Donut Flour Company	5
The Whole Donut Group	5
Shipley Do-Nut	4
Bess Eaton Donut Flour Co.	3
Honey Fluff Donuts	3
Jolly Pirates Donut and Coffee Shops	3
Tastee Donuts, Inc.	3
The Donut Hole	3
Dawn Donut Systems, Inc.	2
Donut Maker	2
Donuts N' Coffee	2
Wal-Bon of Ohio, Inc.	2
Cinnamon Corner Bakery and Deli	1
Daily Donuts, Inc.	1
Donut Inn, Inc.	1
Donuts Galore, Inc.	1
Dutch Maid Donuts	1

Number of States Operated In By

Donut Shop Chains

Donut Shop Operators a	Number of States
Foster's Donuts	1
Huck Finn Donuts	1
Hunt's Quality Donuts, Inc.	1
Johnson Investment Co.	1
Rolling Pin Donuts, Inc.	1
Yum Yum Donut Shops	1
And,	
1,561-3,121 donut shop operators	1

[*213] * Donut shop chains of which the number of states with operations are known

Source: 1989 Directory of Chain Store Operators; Franchise Opportunities Handbook, January 1987; and Research Counsel of Washington, Inc. Retail Doughnut Market Study, November 24, 1987.

Bower testified that fresh donuts and fresh coffee were very important (FF7) and that 35-55% of all donut store sales are of coffee (FF12). Richmond said that in his Mr. Donut store in Massachusetts sales are 65% coffee, 30% donuts and 5% croissants, juice, sandwiches, etc. (FF29). Lipe said his two Mr. Donut stores in Pennsylvania sell 60 to 70% coffee and 30 to 40% donuts (FF33), and O'Hanlon said his five Mr. Donut stores in Delaware sell 70% coffee, 25% donuts and 5% auxiliary products (FF45). O'Hanlon later said that Delaware donuts (a donut sort of sandwich) were 3-6% of his business, but he did not think a donut shop could sell hamburgers (FF237). Roever agreed that a donut shop would have to put in a lot of equipment and retrain people to sell hamburgers. He was also concerned about possible odor problems (FF234). O'Hanlon also noted that 95% of his customers buy a cup of coffee (FF46).

Burgio said that **[*214]** his Mr. Donut store in Pennsylvania sells 60% coffee and 40% donuts (FF51), First said that in her Mr. Donut store in Pennsylvania she sold 50% coffee and 50% donuts (FF55), and Jones said that in his Mr. Donut store in Pennsylvania he spent 90% of his time in his store making coffee and donuts (FF62). Heimberger testified that she sells 62% donuts and 31% coffee and other drinks (FF85) at her three stores in Pennsylvania. Bower, Jr. also has three stores in Pennsylvania and said 75% of his sales are donuts and coffee (FF146) and that other products sold were Delaware donuts, 1 to 1 1/2% (FF145), muffins, 5-8%, and sausage, cheese, soup, chili, and biscuits, 1-3% (FF138).

Sheetz, a large convenience store executive with 158 stores in Pennsylvania, Maryland and West Virginia, estimated that his Mr. Donut shops sell 33 1/3% coffee, 33 1/3% donuts, and 33 1/3% other brand goods (FF192). Oden noted a lack of success in his three Mr. Donut stores in Pennsylvania in selling sandwiches and Delaware donuts (FF196). He put his yogurt sales at 1.7% to 6%, depending on the store (FF199). Roever said that in his three donut stores in Scranton, Pennsylvania, approximately 58% of his sales **[*215]** are coffee, 18% of his sales are donuts, about 15% is pastry and 10% is juice or sodas (FF231).

Ideally, donuts should be made fresh every four hours from scratch (FF7); however, several franchisees said they baked only twice a day and that is the frequency of resupply of many satellite donut stores. Muth testified at his deposition that he throws out donuts twice a day and muffins once a day. Coffee is brewed fresh every 15 to 20 minutes (FF453). While the donuts are undoubtedly of good quality, volume and variety, the four hour freshness standard appears to be an exaggeration. Examining the range given by Mr. Donut franchisees and others for coffee and donuts, we obtain approximately:

Store Owner	Coffee	Donuts
Bower	55%	--
Richmond	65%	30%
Lipe	65%	35%
O'Hanlon	70%	25%
Burgio	60%	40%
First	50%	50%
Heimberger	31%	62%
Sheetz	33%	33%
Roever	58%	18%
Unweighted Average	54%	37%

Obviously, coffee and donuts are presently major Mr. Donut products, with coffee clearly predominating. This is consistent with the testimony of plaintiffs' expert, Dr. French (FF249,260), and defendants' expert, Rice (FF306), discussed later in this decision. It would **[*216]** not seem difficult for virtually any convenience store, restaurant or fast food store to supply excellent fresh coffee if they wanted to. Fresh donuts would obviously require more equipment and training; however, they could be supplied from a central location twice a day as is done in a number of donut satellite stores.

Mr. Donut and Dunkin' Donuts shops do not sell only coffee and donuts. Many of them also sell muffins, cinnamon rolls, cookies, brownies, bagels, bread products, pies, cakes, pastries, croissants, various sandwiches (made of various bakery-product carriers with combinations of egg, cheese, bacon, sausage, ham, chicken, tuna and beef), soup, chili, yogurt, soft drinks, hot chocolate and tea (Plaintiffs' Exh. 105; Defendants' Exhs. 1-8). In fact, Dunkin' Donuts says its franchisees realize $ 225 Million annually in sales of non-donut, non-coffee food products that account for approximately 25-30% of their revenues (FF106,112). Mr. Donut has apparently been less successful with menu diversification, but non-donut and non-coffee sales appear to be about 10% of sales for the typical Mr. Donut franchise according to our calculations.

In terms of dayshare or the time **[*217]** of day products are sold, the morning breakfast hours appear to predominate (FF7). Bower put the peak period at 6:00 to 11:00 A.M., during which few ancillary products (soups and sandwiches) are sold (FF12,15). Lipe said he sells his donuts and coffee during a similar period (FF33), as did O'Hanlon, who does 60% of his business prior to 11:00 A.M. (FF46). Dr. French said that the Mr. Donut chain does 55% of its business from 6:00 A.M. to 12:00 noon (FF250). He also said that Mr. Donut shops attract a core group of regular customers (FF251). Donut shops appear to do most of their business when they serve breakfast, or a snack which is eaten in addition to breakfast. Obviously a lot of places other than donut stores also serve breakfast as well as lunch and dinner.

According to Dunkin' Donuts Zone Quarterly Marketing Reports for 1986, donut shop prices are close to each other (Plaintiffs' Exhs. 252,253,272,273). However, pricing evidence varied (FF231,450). Dunkin' Donuts' June, 1989 Quarterly Report showed prices at parity with supermarkets on dozens while, at the same time, the report concluded, "The Retail Price Analysis reflects that Dunkin' Donuts in the Mid-Atlantic is **[*218]** not competitive with supermarkets but are competitive with other donuts coffee shops" (Plaintiffs' Exh. 271).

Neither Dunkin' Donuts nor Mr. Donut establish prices for the products sold by the independent franchisees (Plaintiffs' Exh. 1 at 41; Plaintiffs' Exh. 40). Both sides agree that prices are set by the franchisees themselves. Bower stated this (FF13), as did Lipe, Roever, O'Hanlon, First, and Senior Vice President Feltenstein of Dunkin' Donuts (March 16, 1990, afternoon transcript pp. 163,165,166,167,289,292). Thus, in any given geographic market, these franchisees compete with each other and with the rest of the marketplace in setting their prices. Under such circumstances, it is difficult to see how a merger between two chains would make it possible to fix prices when each chain could not fix prices before. Even if donut stores only competed with each other, there would still be approximately the same number of stores to compete with each other.

The Proposed Merger

Following a bidding process with other substantial bidders (FF379) on January 10 and 12, 1990, International Multifoods entered into Stock Purchase Agreements to (1) sell the stock of Mr. Donut **[*219]** to Dunkin' Donuts, a subsidiary of Allied-Lyons, and (2) sell the stock of its Canadian Mr. Donut subsidiaries to Canadian subsidiaries of Allied-Lyons. The aggregate purchase price is comprised of $ 23,825,000.00 for the United States subsidiary (Defendants' Exh. 123), $ 4,800,000.00 for the Canadian subsidiary (Defendants' Exh. 124), and up to $ 3,000,000.00 for reimbursement of certain intercompany accounts (Defendants' Exhs. 123 & 124). The Canadian aspect of this transaction is not challenged by plaintiffs. It is, however, conditioned on closure of the United States portion of the agreement. As noted, the agreement calls for consummation by March 31, 1990.

Plaintiffs, who constitute less than twenty percent of Mr. Donut's United States franchisees, mobilized to block the sale. Plaintiffs petitioned their elected officials and together with their counsel visited the Antitrust Division of the Department of Justice and the Federal Trade Commission, submitting to each agency detailed written objections to the proposed merger (Defendants' Exh. 10). They also expressed several concerns in open court.

Haefner noted that many of his donut shop customers in Cape May Courthouse, **[*220]** New Jersey, are concerned about the merger (FF235). The customers of one donut shop presented the owner with a sign indicating that they did not want the merger to take place (Plaintiffs' Exh. 70A). Furthermore, like Dunkin' Donuts, Mr. Donut's advertising is financed by collecting a percentage from each franchisee, but Mr. Donut is less restrictive and collects a lower amount (FF9). The Dunkin' Donuts fee was put at 5% by Bower (FF20), which he thinks will give Dunkin' Donuts overwhelming advertising power (FF17) if the merger is consummated. Lipe testified that any increased costs will pose a problem for him (FF30), and that increased advertising expenditures will be of little assistance and the increased advertising charges of Dunkin' Donuts will be a problem (FF30,34).

O'Hanlon said his five stores already have higher sales than Dunkin' Donuts and that increased expenditures for advertising will assist him very little (FF48). Muth said the increased Dunkin' Donuts advertising fee would put him out of business (FF53). Jones noted that the twenty-two Mr. Donut stores in Pittsburgh pool their advertising and out sell Dunkin' Donuts (FF60). Bower, Jr. estimated he spends 3% **[*221]** of his income on Mr. Donut advertising on radio, television, etc. (FF136). Oden testified that Mr. Donut is flexible and allows him to spend 2% annually on advertising, with an extra 1/2% going direct to the franchisor, Mr. Donut (FF198).

The court viewed advertisements of both Mr. Donut and Dunkin' Donuts and while both were acceptable and effective, the Dunkin' Donuts ads appeared to be more sophisticated. The Dunkin' Donuts chain has current sales of approximately One Billion Dollars (FF371). The well-known sleepy little man who says "Time to make the donuts" is a Dunkin' Donuts advertisement which has been placed in the advertising hall of fame (Defendants' Exh. 117). There is also an increasing emphasis on selling products other than donuts.

In addition to advertising costs, Mr. Donut franchisees are also worried about the need to make expensive alterations if they convert to Dunkin' Donuts. Dunkin' Donuts would want the old-fashioned "W" shaped roofs still on some of the Mr. Donut stores replaced at an average cost of $ 50,000.00 (FF11). Dunkin' Donuts did say it would make money available for renovations at 1 1/2% above cost (FF11). Lipe said conversion costs would **[*222]** wipe out all his income from his two stores (FF30). Donovan saw problems for his four stores which have a high bank debt (FF40,42). Muth has one shop with a "W" roof and insufficient funds to make renovations (FF52). First recently remodeled her shop and although she could raise capital to meet her estimate of $ 70,000.00 to $ 80,000.00 for conversion renovations, she would rather sell the shop and retire (FF56). She admitted on cross-examination that Dunkin' Donuts had said they would honor all of Mr. Donut's contractual commitments (FF57). Vice President Burns of Mr. Donut confirmed this (FF101), as did Senior Vice President F. Ralph Gabellieri of Dunkin' Donuts (FF113) and Chairman of the Board Rosenberg (FF378).

Mr. Donut franchisees also are concerned about whether it is possible to convert those Mr. Donut stores which fall within Dunkin' Donuts exclusive franchise areas. Bower said that Mr. Donut provides its franchisees with a one mile radius area of protection (FF9). Bower also said that one hundred five Mr. Donut shops were within two miles of a Dunkin' Donuts shop and thirty-seven were within one mile (FF21). Donovan said he had stores within two miles of a Dunkin' **[*223]** Donuts store (FF41) and feels he would not be able to convert his four stores for this reason (FF42). Heimberger noted a plan to convert most stores in seven years (FF89) and reiterated that thirty-seven stores were within one mile of existing Dunkin' Donuts stores (FF91). Vice President Burns of Mr. Donut confirmed that no firm decision has been reached as to what to do with these thirty-seven stores (FF103). Senior Vice President Gabellieri of Dunkin' Donuts said this would be handled on a case-by-case basis and that the so-called exclusive areas were only granted for a limited time, which will soon expire (FF121).

Vice President Gabellieri said that after the stock acquisition, Mr. Donut would be run by him as a separate business organization (FF116). Conversion of "W" roofs has not been decided upon (FF114), and any conversion which does take place will be voluntary with a test being run on approximately forty shops (FF115). Dunkin' Donuts Chairman of the Board Rosenberg confirmed this test and a case-by-case approach (FF375,376). This should increase sales (FF115). Vice President Gabellieri said he does not know what they will do if the conversion test does not work (FF122,463).

[*224] Defendants initially claimed that in response to the proposed merger plaintiffs are intentionally withholding their franchise fees (FF98,109,125). However, all plaintiff owners who took the stand denied any such withholding of franchise fees (FF37,42,48,55,84,132). Meinecke has been doing so for one year, but only because of poor financial conditions in his store (FF174). Accordingly, there is no reason to deny relief on these grounds.

Donut Shop Competition

Bower said that convenience stores wanted to break the breakfast market by offering donuts from local bakeries, but that there is no comparison between their donut and a donut shop donut (FF13). He said Dunkin' Donuts supplies some convenience stores with donuts, but the supplying franchisee sets the price (FF13). Bower said fast food chains are not competitors for donut shops because although McDonald's does a breakfast-type business, it is not a coffee and donuts type business (FF14). He acknowledged that the donut market is shrinking (FF14) and that larger chains such as Amy Joy, Donuts Galore and Spudnuts no longer exist (FF16).

Bower said Mr. Donut's major competitor is Dunkin' Donuts, particularly in **[*225]** New England, Providence, Pittsburgh, Cleveland and almost all Northeast cities, and that it is almost impossible for a new chain to break into this market (FF16). Winchell's is a western donut chain with about 9% of the market there (FF16), while Dunkin' Donuts is dominant in the eastern market (FF22).

Richmond monitors prices at a nearby donut shop, but not at McDonald's. In his view, he does not compete with any convenience stores, supermarkets, or fast food stores (FF29). Lipe also checks prices at Dunkin' Donuts, but not at McDonald's which does sell coffee (FF32). In his opinion, he does not compete with local supermarkets (FF32). Sattler said, that as a former District Manager for Mr. Donut, he used to check prices for Dunkin' Donuts and Mr. Donut, but that he did not check McDonald's, WaWa, Seven-Eleven, Wendy's or supermarkets for their prices and that he does not regard them as competitors (FF36). O'Hanlon said he does not watch Acme prices although there is one with a fresh bakery within two miles of each of his five stores (FF47), and that when these stores and convenience stores pursued the donut market, his sales did not go down (FF48). First says she checks prices **[*226]** at a Dunkin' Donuts less than a mile away, but not at nearby fast food places (FF55). Heimberger disagreed with a statement by the Chairman of Dunkin' Donuts that the number one competition in the donut business is supermarkets, number two is convenience stores, and number three is fast food places (FF94). Roever testified that he does not check prices in supermarkets, convenience stores, or fast food places and that his sales were not affected by a recent supermarket sale on donuts (FF230). He does check prices once a year at local donut stores (FF230). Roever noted that supermarket donut prices are lower than his prices (FF231).

Tingley is a supermarket owner in Williamsport, Pennsylvania, and testified that he sells fresh-baked packaged donuts, but no fresh brewed coffee (FF128). His busiest hours are from 3:00 to 7:00 P.M. and he says he does not check prices at the local donut shop (FF129). Donuts are an extremely small part of his sales and the closing of a donut shop one mile away had no measurable effect on Tingley's sales (FF130). There are no convenience stores, fast food places or bakeries near Tingley's supermarket (FF131).

Bower, Jr. testified that he owned the **[*227]** donut store near Tingley's supermarket which closed in 1988 and that this dramatically increased sales at his other Mr. Donut store (FF133,134). Bower, Jr. does not consider fresh-baked supermarket donuts to be comparable to his, although they are cheaper (FF135), and does not view convenience stores, fast food places or supermarkets as competition (FF137). Hodin operates seven Giant supermarkets in Scranton, Pennsylvania; one store has a bakery where fresh donuts are made from scratch, although most supermarkets make fresh donuts from frozen materials (FF148). Hodin said that while operating this market, he sold land to a donut store only one block away without fearing any loss of donut sales (FF150). Hodin said that specials at the donut shop do not affect his sales and since he does not regard donut shops as competitors, he allows their advertising coupons on the back of his register tapes (FF151). His hours break down as follows: 8:00 to 11:00 A.M., 15% of customers; 11:00 A.M. to 4:00 P.M., 50% of customers; and 4:00 to 9:00 P.M., 35% of customers (FF152). He does not accept Mr. Donut coupons and does not sell donuts to be eaten in the store (FF152) because this would require **[*228]** special equipment and increase the labor costs in his union workers (FF153). Frey, who sells cash register tapes with ads on them, noted that supermarkets such as Giant, IGA, and Acme in Northeastern Pennsylvania, all permit donut ad coupons on their cash register tapes (FF154).

Levin, the former owner of Tempty Donuts, a major wholesale bakery in Brooklyn, New York, which sells to New Jersey, Connecticut and Pennsylvania, stated that his donuts are larger than donut shop donuts and that he never perceived himself as competing with donut shops (FF181,182). His donuts are sold in restaurants, diners, and the like (FF181) and usually reach the customer within 24 hours.

Sheetz said that, in his opinion, neither his convenience stores nor stores like Burger King compete with donut shops (FF190,193). Oden stated that the opening and closing of Weis supermarkets near his donut shops did not affect his sales, but that the opening and closing of another donut shop did (FF194,195).

In Clause 6.06 of the Merger Agreement (Defendants' Exh. 123), there is a non-competition provision which prevents International Multifoods from opening "any doughnut-coffee shop retail franchise business **[*229]** . . . similar to the business being conducted by [Mr.] Donut." Plaintiffs argue that this shows that defendants think of the market as being composed only of donut stores. The agreement was reached at arms length and we feel certain that International Multifoods had a vested interest in keeping definitions reasonably narrow. Other evidence discussed below confirms that this is not the product market as the defendants see it.

Ruenheck, the former President of Burger King, does not consider donut shops or fast food restaurants as direct competition (FF210), and does not monitor their prices or advertising (FF211,212). He said donut shops have no effect on his new shop site selection decisions (FF214) and that Burger King wanted to offer a full line type of breakfast and was not concerned about what donut shops were doing (FF214). He sees serious obstacles to donut shops entering the full fast food market such as lot size, store size, and the need for new equipment and training (FF218). In similar fashion, he sees similar problems with Burger King entering the fresh on-site cooked-from-scratch donut market (FF220). We do not doubt that entities as large as Burger King and McDonald's **[*230]** have traditionally not been too concerned about donut shop competition, however, this does not mean that the reverse is true.

In reviewing the foregoing, we are compelled to find that the fact testimony was mixed, at best, with witnesses often taking restrictive views of the meaning of the word competition or giving inconsistent answers. Sattler said his Mr. Donut store in Carnegie, Pennsylvania, makes more money than the two nearby Dunkin' Donuts stores (FF36). However, Donovan acknowledged that if he converts to Dunkin' Donuts he might make more money (FF40). Bower said conversion would put him out of business (FF18), although his son said just the opposite (FF147). This had to raise obvious questions about the credibility of both witnesses and further questions about Bower's motivation in bringing this suit since he was previously unsuccessful in buying the Mr. Donut chain (FF25). O'Hanlon testified that McDonald's prelunch food services have influenced him and he has had to react to their presence (FF44). To some extent, convenience stores might have also tapped this market (FF44). He feels constraints on his ability to increase prices (FF45).

Oden disputed a report that **[*231]** his sales dropped drastically when a new supermarket opened (FF203) and admitted that he might have checked prices in a supermarket (FF204). Oden also wrote a letter to his employees and told the local newspaper he was not concerned and that the merger would not affect his stores in any way. He later denied this was so (FF205) and said he only did this to calm any fears, his employees or the public might have.

Meinecke admitted that when he was a Mr. Donut District Manager, he was instructed to include convenience stores and supermarkets as competition although he now says he does not believe they are competition (FF177,178). Roever said he only competed with other donut shops (FF232), but confirmed that sales are dropping and that donut shops must now offer a full line to maintain their place in the community (FF233). He also agreed that his egg and meat products would compete with similar products in the community (FF234).

Knapp is a well known authority on food service and the head of a leading marketing research firm. He testified for the defense and was qualified as an expert on the effect that the proposed merger would have on food service competition (FF289). In his **[*232]** opinion, consummation of the merger could only increase competition (FF290), or at the least, keep competition the same (FF299). Knapp testified that the increased advertising and number of store outlets would help the resulting donut chain compete with the major players in the food service industry (FF292). Small donut chains are having a hard time surviving and Winchell's, on the West Coast, had to sell off some of its assets (FF293). Breakfast, for instance, has become very competitive in the food service industry and McDonald's now does 18 to 20% of its business at breakfast. In addition to this competition at lunch time, donut stores compete with sandwich and fast food places (FF294). There is also competition for snacks from 10:30 to 11:30 A.M., and from 9:30 to 11:00 P.M. (FF295). Major competitors for the snack market are places selling ice cream, yogurt, donuts, cinnamon buns; groceries and pizza; as well as convenience stores and supermarkets (FF295).

Defendants also called Rice, who was a founder of the well known consumer reports on eating share trends (CREST) (FF300). Rice was qualified as an expert in several areas (FF303) and testified that the restaurant industry **[*233]** is broken into three major segments: quick service, midscale and upscale (FF304). There are four daily segments: breakfast and morning snacks, lunch, dinner, and afternoon or evening snacks (FF304). A 1987 report prepared by Rice for Mr. Donut found the overall food industry in disarray since 1983 with saturation having been reached (FF305). The report said that hamburger restaurants filled a convenience weekday need that was previously filled by donut shops in the quick service industry segment (FF305,308). This has caused a decline in the donut shop segment of the fast food industry (FF314).

The 1987 report said that selling donuts alone is now questionable, and the donut category has not kept pace with the rest of the food service industry (FF307). The report listed donut shop competition as bakery companies, retail supermarkets, fast food places serving breakfast and other food service industry companies (FF309). McDonald's has 7500 outlets and in 1983 and 1987 sold more donuts and sweet rolls than Mr. Donut did, and over a five year period, constantly sold seven or eight times more coffee than Dunkin' Donuts and Mr. Donut could combined with about 2000 stores (FF310). **[*234]** Similar information was found in a 1988 report Rice prepared for Mr. Donut (FF311). Four percent of all cakes, pastry and tortes, and 64% of all cookie servings are sold through fast food restaurants (FF312,313). Twenty-one percent of the cookies were sold in hamburger chains, as was 8 1/2% of the cakes, pastry and tortes (FF312,313). Donut shops sold so little of these by comparison they didn't even make the list (FF312,313).

In the increased competition, supermarkets also offer a challenge (FF316). In Rice's opinion, the proposed merger would only serve to create a stronger chain and would not affect donut prices (FF317). While Rice obviously did his work for Mr. Donut, and knew people there and at Dunkin' Donuts (FF319), we found his testimony to be both consistent on cross-examination and credible (FF320-333).

Robert Rosenberg, Chairman of the Board of Dunkin' Donuts, testified that the annual report filed by Dunkin' Donuts with the Securities and Exchange Commission lists supermarkets, convenience stores, and national, regional and local firms offering similar products and services as its competitors (FF372). This also included fast food feeders, bakeries, other kinds **[*235]** of restaurants and coffee shops (FF372,373). He favored the merger to help both chains meet the growing stiff competition (FF374,377). Sidney Feltenstein of Dunkin' Donuts also testified about the growing threat to donut stores from supermarkets, fast food stores, convenience stores, other donut shops and microwave take-home food (FF454-463). He noted that both Burger King and McDonald's have tried selling donuts from their stores in a limited test (FF457). He said this concerns the donut store industry greatly, although others testified earlier in the trial that the tests were not very successful (FF156,216).

Expert Economic Testimony

Plaintiffs' expert, Dr. French, holds a Ph.D. in Economics (FF63) and testified first on February 16, 1990. On short notice, he prepared a chart (Plaintiffs' Exh. 22) which purported to show the market share of both Dunkin' Donuts and Mr. Donut in terms of the number of stores and sales (FF64). On the basis of this chart, he attempted to calculate a Herfindahl-Hirschman Index (HHI) by the usual method of squaring market shares (FF65). He attempted this although he did not know for certain at that time what the product and geographic **[*236]** markets were. The chart represented nationwide shares and assumed a "donut shop" market (FF68). The chart did not include supermarkets (FF69), "Mom and Pop" stores (FF72), fast food places (FF80), or convenience stores (FF82). Dr. French testified that the chart gave only an indication of what a local HHI would be (FF71,73) and that he would not rely on the chart if the total number of donut shops was 8500 rather than the much lower number he had assumed (FF81). In later testimony, Dr. French admitted that his lower number was incorrect and that there were, in fact, 8557 donut stores in the United States (FF252).

Dr. French stated that the real test of a relevant product market was whether or not there was economic substitution such that if donut shops raised their prices they would lose significant volumes of sales to others (FF70,83). He had only just begun his research on a product market when he first testified (FF80). Nevertheless, he was of the opinion that the geographical market was local in nature (FF71), although he had not fully examined this market either (FF82).

Dr. French testified again on March 8, 1990, after having reviewed considerable literature, interviewing **[*237]** plaintiffs, listening to testimony and conducting a limited survey (FF239). The survey was of 366 customers at two donut shops in Pittsburgh, Pennsylvania, and one in Allentown, Pennsylvania (FF239). The Allentown shop is owned by a plaintiff in this action and for this reason, the study method was criticized by defendants' expert, Dr. Smith (FF359-370). It was also criticized by Rice (FF318). It was noted that there was an error in the survey form instructions (FF240). However, this was negated when Dr. French analyzed the survey forms and found, at most, fifteen errors out of some three thousand questions (FF245). Criticism was also directed to Survey Question No. 3 which was somewhat leading. Dr. French felt that he could rely on the survey in part and that it was still meaningful (FF244). Although he did not consider himself an expert in conducting polls, Dr. French did regularly use polls in his work (FF244). The court noted the time constraints imposed by the March 31st deadline in the merger agreement, as well as the ten day time limit contemplated by *Fed.R.Civ.P. 65*. The court fully analyzed the survey in light of the criteria set forth by the Third Circuit in **[*238]** *Pittsburgh Press Club v. United States, 579 F.2d 751, 755-760 (3d Cir. 1978)*, and found that the requirements were sufficiently met to allow admission of the survey (FF246). The survey was not hearsay and probed a state of mind (FF239). Those conducting the survey were college graduates (FF240). The court noted that the results of all three studies were basically similar and the data was recomputed which lessened concerns about the inclusion of Allentown in the survey (FF239). The study was for limited purposes being only partly the basis for some of Dr. French's opinions. The survey found that donuts and coffee are more than 80% of donut shop sales (FF249), which confirmed fact testimony previously discussed in this decision. According to Dr. French, the study also showed that people were willing to pay more for donut shop donuts even though they knew cheaper donuts were available elsewhere (FF265).

At the same time, one survey undertaken for Dunkin' Donuts indicates that, among respondents who had purchased donuts from Dunkin' Donuts in the past year, 29.7% said they would have gone to a supermarket if Dunkin' Donuts was closed, and 29.1% said they would go to another **[*239]** donut shop, and others mentioned other types of competitors (Defendants' Exh. 53A). For respondents who purchased a dozen or more donuts, 35.9% named a supermarket as an alternative to Dunkin' Donuts (Defendants' Exh. 53A).

On the basis of the testimony and visits to a representative group of convenience stores, fast food stores, diners, restaurants and supermarkets in Pittsburgh and Allentown, Dr. French concluded that because of differences in hours, variety, quality, freshness, and volume, these establishments do not compete with donut stores (FF259-263). He also relied on a 1987 Dunkin' Donuts study which emphasized donut store quality (FF264). The representative group of stores he visited was selected from a telephone directory and in Allentown represented only some 10% of the establishments in the area (FF280). As a matter of common sense, we find it difficult to believe that other establishments could not, at the very least, compete with high quality coffee -- the major donut shop product -- if they wanted to.

Dr. French identified two relevant product markets in the instant case (FF247). This narrowed the initial three product markets which had been alleged in paragraph **[*240]** nine of the complaint. The first was the end product market for donut shop products consisting of a cluster of products and services typically provided by donut shops, the most important of which are donuts and coffee. He also attempted to identify an end product market for low-cost highly specialized prepared food franchises (FF247). This narrowed the two franchise markets alleged in paragraph nine of the complaint.

With regard to the geographic market, it was Dr. French's opinion that the end donut shop product markets were quite localized, including many markets within one metropolitan area (FF248). Dr. French referred to several large maps and further defined the geographic market for each donut shop as its local trading area with a primary trading area within three miles of a donut shop and a secondary trading area within five miles of it (FF267). There is no national market for donut shop products according to Dr. French (FF335). Dr. French has not been able to ascertain any geographic market for the so-called franchise market (FF248). He was of the opinion that there would be harmful competition sustained for an intolerably long time in the end product market if the **[*241]** merger goes through (FF248). This would be felt most heavily in the eastern part of the United States (FF254) where Mr. Donut and Dunkin' Donuts are the major big competitors (FF252). Dr. French thought it was unlikely that a smaller chain could enter this market (FF268), or that smaller independent stores could effectively compete (FF269,270).

Dr. French repeated his tests for a relevant product market, which involved an analysis of who donut shop operators would lose customers to (FF257). The idea, he said, is to find all available evidence of what the substitutability would be in response to a relevant price change (FF257). The question, he said, is whether other sellers of fresh donuts would be able to restrain prices at the donut shops. He said his opinion was based upon his view of what a customary 5% price increase would produce. He could not calculate an HHI because he did not have any local sales data but he estimated that if there were only six sellers in each local geographic area, the 1800 threshold would be reached (FF282). He admitted on cross-examination that a five mile radius trading area could be as big as 75 square miles depending on local geography (FF283). **[*242]** Dr. French also admitted, on cross-examination, that it would not hurt to see if products such as a McDonald's pastry could substitute for donuts (FF284), although he thought that convenience stores could not stock sufficient volumes and that other vendors' coffee quality would prevent economic substitution (FF285,286). He also admitted seeing trade literature expressing the view that the entry of fast food stores into the breakfast market had increased competition with donut stores (FF336).

Dr. French agreed with the standard Department of Justice criteria that a price increase for a particular product could be made unprofitable by any of four types of demand or supply response: (a) consumers switching to other products; (b) consumers switching to other suppliers of the particular product; (c) suppliers switching existing production facilities from other products to the production of the particular product; and (d) suppliers constructing new or substantially modifying existing facilities to produce the particular product (FF275).

With regard to the so-called franchise product market, Dr. French acknowledged that there were many types of low-cost franchises and that he had been **[*243]** unable to fully test his theories of a limited menu item franchise market (FF273). With the exception of a few people like Lipe, who said they were only interested in obtaining a donut shop franchise (FF30), there was no testimony concerning franchises which was sufficient to allow us to infer the existence of a franchise product market. There are, of course, differences in things such as working conditions and initial cash outlays, nevertheless, we feel that most people go into business to make money and would usually pick the type of franchise which gave them the best return for their money. As already noted, a geographic market could not be identified. We, therefore, must reject the so-called franchise market at this time because plaintiffs have not proven a sufficient basis for any finding of a probability of success.

Furthermore, attempts at narrow limitations on the market for the sale of franchises are usually rejected. See *Twin City Sportservices, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1273 (9th Cir. 1975)* (finding "a high degree of substitutability" in the market for the sale of franchises, and that no market exists limited to concession franchises for **[*244]** major league baseball teams); *Midwestern Waffles, Inc. v. Waffle House, Inc., supra, 734 F.2d at 713 (11th Cir. 1984)* (participants in relevant product market to evaluate alleged monopolization by franchisor must include all restaurants with similar menus, similar hours, similar service which all are reasonable substitutes); *Raceway Properties, Inc. v. Emprise Corp., 613 F.2d 656, 658*, (6th Cir. 1980) (relevant market for concession franchise owner at a race track was all concession franchises in stadia, arenas and airports); *Philadelphia Fast Foods, Inc. v. Popeyes Famous Fried Chicken, Inc., supra, 647 F.Supp. at 229* (market cannot be limited only to Popeyes' franchises).

We were more than mildly surprised to find that, according to the published opinion, plaintiffs' expert had testified in *Popeyes Famous Fried Chicken, supra*, as follows:

> In direct contrast to Dr. Shepherds testimony, the testimony of Gary French, an expert witness for Popeyes, on the relevant product market is well documented. Mr. French testified that the relevant product market was "fast foods at either the retail or franchisor level." Testimony of Gary French, May 6 Tr. **[*245]** at 82. Mr. French based his conclusion on an extensive independent study conducted by himself and his staff. *Id. at 88-102*. Specifically, Mr. French testified that Popeyes faces competition from all fast food outlets and that there are low barriers to entry and a high degree of cross elasticity of demand in the fast food market. He also stated that there was no product market in Popeyes' franchises, and if the market were to be defined in terms of franchises, it would have to include all fast food franchises.

Id. at 229. In Popeyes, Dr. French had included donut shops in the product market along with all other fast food establishments (FF287). Based upon this, the problems with the survey, the mixed nature of the fact testimony, and the nature of Dr. French's expert testimony, we feel we must have doubts about the reliability of Dr. French's opinions in this case. Furthermore, Dr. French has attempted to define a product market for plaintiffs consisting of "the cluster of products and services typically provided by donut shops . . . the most important of which are donuts and coffee" (FF247). This definition cannot withstand legal scrutiny under the facts **[*246]** in this case.

As a matter of law, clustering is appropriate only if the cluster is sufficiently inclusive to be meaningful in terms of trade realities. E.g., *United States v. Philadelphia National Bank, 374 U.S. 321, 356-57 (1963)*. There is no law requiring people to eat donuts or restricting the number of donut stores. Nor can donuts be called a necessity or a product for which there are no substitutes. As stated in 3 J. Von Kalinowski, Antitrust Laws and Trade Regulations, § 18.02[3], at 18-86 (1989):

> The courts have recognized that where one or more of the products or services included within the cluster do face effective competition from available substitutes, the cluster will be inappropriate because under-inclusive.

See also Thurman Industries, Inc. v. Pay ' N Pak Stores, Inc., supra, 875 F.2d at 1377 (rejecting "clustering" theory applied to home improvement stores where evidence showed that for any given product sold at such stores, identical or functionally equivalent products were available elsewhere); American MediCorp, Inc. v. Humana, Inc., 445 F.Supp. 589, 603 (E.D. Pa. 1977) ("[o]f the services enumerated by plaintiff [to **[*247]** be included in the cluster of services market], we find that the record to date establishes that all of these services are available from other sources").

The defense expert, Dr. Bruce Snapp, testified toward the end of the trial. Although he agreed that the geographic market was a local one, his testimony on the product market was opposite to that of Dr. French. Dr. Snapp holds a Ph.D. in economics from the University of Michigan and formerly worked as a Senior Economist in the Office of the Antitrust Division of the U.S. Department of Justice (FF405). Since leaving, he works in the private sector where he is also involved in analyzing mergers (FF406). He is also familiar with the policies of the FTC (FF407). He reviewed a number of materials to prepare for the instant case, including publically available trade publications and documents produced in discovery (FF416,417,418). He also interviewed executives of International Multifoods and Mr. Donut (FF408).

In Dr. Snapp's opinion, the proposed merger will not reduce competition in any relevant market for donut shop products (FF409). He said the same with regard to the so-called franchise market, which he feels is a very broad **[*248]** market (FF409). He also noted, as we did earlier, that prices are set by the individual franchisees, and said that the proposed merger could not impact the market in which donut shop products are sold because following the merger, the number of independent decision makers who set prices will still be the same (FF409). Dr. Snapp defined market power as the ability to raise and to sustain prices for a significant period -- usually one or two years (FF410). He agreed that market power can be rendered impossible for the traditional reasons considered by the U.S. Department of Justice (FF410). These were also agreed to by Dr. French (FF275). He reiterated the importance of defining both a relevant product and geographic market before attempting to calculate the HHI (FF411,415).

Dr. Snapp disagreed with Dr. French's product market definition because French failed to consider whether related products like rolls and pastry sold in the donut stores were also in the market, or might be substitutes for donuts (FF413). He said Dr. French took too limited a view of suppliers and excluded supermarkets, retail bakeries, convenience stores, and other quick service restaurants (FF413). **[*249]** He also said Dr. French did not take supply substitution into account and was incorrect in postulating a cluster approach because the products are sold individually (FF413). As we have already noted, we believe this position is legally correct.

Dr. Snapp reviewed in-house documents and testified that donut companies view themselves as being in a bifurcated market. In the morning breakfast market, they compete with quick service fast food restaurants (FF418,419). The rest of the day they compete in a bakery market where the principal competition comes from retail and in-store bakeries (FF419). He found significant a Dunkin' Donuts internal memorandum which indicated that customers would turn to supermarkets if Dunkin' Donuts ever closed (FF420).

Dr. Snapp agreed with Dr. French's assessment that for donut shop products there is not a national geographic market (FF424). He looked up the number of establishments that sell donuts in the Boston, Massachusetts Metropolitan Area Yellow Pages under "Doughnuts" and found 58 different firms with 124 different stores (FF424). Under "Bakers -- Retail", there were 257 firms with a total of 304 stores. He also did this for Cleveland, Pittsburgh, **[*250]** and Providence. Dr. Snapp concluded that in most neighborhoods one would find entities offering some form of donut, pastry or muffin, and a cup of coffee. Even if entities near a donut shop did not offer close substitutes now, they could do so within a year (FF424). He also felt that convenience stores could put in donut display cases for less than $ 1,600.00 (FF426). He noted that in-store bakeries are increasing at the rate of 10% a year, which is more than donut shops (FF428).

Dr. Snapp admitted on cross-examination that he has not conducted a survey of people who eat donuts (FF431). He was shown a Dunkin' Donuts survey in which only 6.4% of those surveyed said price was the reason they bought at supermarkets and only 10% said price was why they bought at a donut shop. Dr. Snapp felt that this was not important, but how they would react to a change in price was (FF434). He also said that even Dr. French's survey showed that even a 13% loss of customers was of interest to donut shops (FF436). He said that Dunkin' Donuts' President had told him that no donut shop could afford a 13% loss in customers (FF437). Although he was cross-examined at length, Dr. Snapp did not change **[*251]** his basic opinions (FF430-450).

The Preliminary Injunction

Taking an overview of all the facts, we are compelled to find, from the facts alone, that plaintiffs have not proven a product market, much less a probability of success as required by *Brown supra.* The fact testimony was mixed, at best, and the expert economic testimony clearly pointed to the broad product market proposed by defendants.

Plaintiffs, for various reasons, do not want the proposed merger to take place and they have tried to define a relevant product market in which Mr. Donut and Dunkin' Donuts were the principal participants and in which the proposed merger would seem, therefore, to eliminate substantial competition. We are not unsympathetic to their concerns, but a federal antitrust action is not the appropriate vehicle in which to air them. The federal courts have on many occasions rejected self-serving efforts to define away competition with proffered market definitions that resemble the proverbial "strange red-haired, bearded, one-eyed man-with-a-limp." *Belfiore v. New York Times Co., 654 F.Supp. 842, 846 (D. Conn. 1986)* (quoting *City of Detroit v. Grinnell Corp., 495 F.2d 448, 457* **[*252]** *n.4 (2d Cir. 1974)*, aff'd, *826 F.2d 177 (2d Cir. 1987)*, cert. denied, *484 U.S. 1067 (1988)*.

HN8[] Alleged market definitions that ignore obvious substitute products and suppliers are invalid. Thurman Industries, Inc. v. Pay ' *N Pak Stores, Inc., supra, 875 F.2d at 1375-77* (home specialty stores not a market where identical products available at other retail establishments); Belfiore v. New York Times Co., supra, 826 F.2d at 180 (affirming grant of summary judgment for defendant; rejecting market defined as "general interest daily newspapers directed primarily to upscale readers", because it was "implausible as a theoretical matter"); *G. Heileman Brewing Co. v. Anheuser-Busch, Inc., 676 F.Supp. 1436, 1463 (E.D. Wis. 1987)*, aff'd, *873 F.2d 985 (7th Cir. 1989)* (rejecting low alcohol beer submarket); *Shaw v. Rolex Watch, U.S.A., Inc., 673 F.Supp. 674, 679 (S.D.N.Y. 1987)* ("Court does not need protracted discovery to state with confidence that Rolex watches are reasonably interchangeable with other high quality timepieces"); *Frito-Lay, Inc. v. Bachman Co., 659 F.Supp. 1129, 1137-1138 (S.D.N.Y. 1986)* (market is salted snack foods, not merely corn chips). **[*253]**

Market distinctions based solely on "price/quality" have routinely been rejected as "unrealistic" and "economically meaningless", particularly if the differences "are actually a spectrum of price and quality differences." *Murrow Furniture v. Thomasville Furniture Industries, Inc., 889 F.2d 524, 528 (4th Cir. 1989)* (emphasis in original). See also *Brown Shoe, supra, 370 U.S. at 326*; *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., 614 F.2d 832, 840 & n.13 (2d Cir. 1980)* (collecting cases rejecting price/quality distinctions); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376, 1379-80 (9th Cir. 1981)* (holding Fiat brand competes with other automobiles); *Liggett & Myers, Inc. v. FTC, 567 F.2d 1273, 1274-1275 (4th Cir. 1977)* (premium and economy dog food compete in the same product market); Super Premium Ice Cream Distribution, supra, 691 F.Supp. at 1268 ("gradations among various qualities of ice cream are not sufficient to establish separate relevant markets for the purposes of determining market power"); *Mogul v. General Motors Corp., 391 F.Supp. 1305, 1313 (E.D. Pa. 1975)*, aff'd, *527 F.2d 645 (3d Cir. 1976)* (Cadillac **[*254]** brand is "interchangeable with other luxury automobiles" and "it competes with even the less expensive models of automobiles").

The cases relied upon by plaintiffs are not to the contrary. Thus, *Tasty Baking Co. v. Ralston Purina, Inc., supra, 653 F.Supp. at 1260*, the opinion of our Chief Judge most heavily relied on by plaintiffs, questioned the "premium" distinction in defining the market. Beatrice Foods Co. v. FTC, supra, also relied on by plaintiffs, emphasizes that "premium price" distinctions are an element of plaintiff's proof when the proof includes, rather than a spectrum of prices, "clearly separate price groupings that have little or no price sensitivity between them" and price distinctions "clearly indicative of such quality distinctions" that the products are no longer reasonably interchangeable. 540 F.2d at 309-310. See also *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 30* (3d Cir.) (price distinction significant only if accompanied by distinct use, physical properties and production methods), cert. denied, *439 U.S. 876 (1978)*. Plaintiffs rely on numerous cases, but they have offered no appropriate **[*255]** evidence to support those cases. Their case is heavy on legal theories and light on facts.

Accordingly, their request for a preliminary injunction must be denied, because plaintiffs have not met their burden of proof on their antitrust claims. The discovery was expedited, but it was also extensive, numbering in the hundreds of exhibits, and in spite of this, plaintiffs have been unable to produce factual evidence which would entitle them to relief. We have done everything in our power to be fair. We have supervised discovery when necessary, sat for extended hours and changed our entire court schedule. We have analyzed the testimony in great detail. Nevertheless, plaintiffs have been unable to prove their case and we think it is unlikely that they will ever be able to do so.

Motion to Dismiss

We have deferred until now our consideration of defendants' pretrial motion to dismiss plaintiffs' complaint, because plaintiffs' lack antitrust standing. Simply put, defendants claim that plaintiffs have not proven their standing, because they are not the Mr. Donut company or even its stockholders, but rather, they are almost all third party franchisees who could only stand to **[*256]** benefit if all franchise donut shops began charging higher prices. Bower, Sr. is, of course, not a franchisee, but a supplier to franchisees.

We agree with defendants that the federal antitrust laws impose additional standing requirements beyond those required by Article III of the Constitution. *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983)*. The law is clear that ***HN9***[] a private plaintiff must demonstrate "antitrust injury" in order to have standing under the Clayton Act to challenge a merger. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)*, reversing, *523 F.2d 262 (3d Cir. 1975)*; *Alberta Gas Chemicals Ltd. v. E. I . Du Pont de Nemours & Co., 826 F.2d 1235, 1239-40 (3d Cir. 1987)*, cert. denied, *486 U.S. 1059 (1988)*; *Treasurer, Inc. v. Philadelphia National Bank, 682 F.Supp. 269, 273-75* (D. N.J.), aff'd w/o opinion, *853 F.2d 921 (3d Cir. 1988)*.

At the same time, several cases have held that a target of a hostile takeover or acquisition or a competitor has standing to allege antitrust injury and to seek an injunction under *Section 16* of the Clayton Act in circumstances **[*257]** similar to the one sub judice. See *Consolidated Gold Fields, PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989)*; *R. C. Bigelow v. Unilever N.V., 867 F.2d 102 (2d Cir. 1988)*, cert. denied, *110 S.Ct. 64 (1989)*; *Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d Cir. 1981)*; *Marathon v. Mobil Oil, 669 F.2d 378 (6th Cir. 1981)* cert. denied, *455 U.S. 982 (1982)*; *Remington Products, Inc. v. North American Phillips Corp., 717 F.Supp. 36 (D. Conn. 1989)*; *Copeland v. Guste, 1989-2 CCH Trade Cases P68,712 (E.D. La. 1988)*. See also *Gearhart Industries, Inc. v. Smith Intern, 592 F.Supp. 203, 211*, Fn.1 (N.D. Tex. 1984)5 (citing cases); *Laidlaw Acquisition Corp. v. Mayflower Group, 636 F.Supp. 1513 (S.D. Ind. 1986)*. In particular, we note that Chief Judge Fullam rejected similar arguments to those advanced by defendants in *Tasty Baking Co. v. Ralston Purina, Inc., supra, 653 F.Supp. at 1255*, and in fairness, we take a similar approach and decline to dismiss plaintiffs' complaint at this point in time, although, as we have noted, we have serious doubts about plaintiffs' ability to prevail.

State Law Claims

Plaintiffs would have us enjoin **[*258]** the proposed merger on the basis of their alleged pendent state law claims for breach of contract and tortious interference with business relations. We do not believe that we may properly do so. As we have already noted, without a federal cause of action plaintiffs' state law claims must also fail. Our lack of confidence in plaintiffs' success on the federal antitrust claims causes us to have similar doubts that the pendent claims will survive. Our concerns, however, go well beyond that. The standard for injunctive relief in non-antitrust claims is basically the same as that for antitrust claims. *15 U.S.C.A. § 26*; *Tasty Baking, supra, 653 F.Supp. at 1276*. Injunctive relief is an "extraordinary remedy . . . which would be granted only in limited circumstances." *Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988)*.

HN10[] To obtain injunctive relief, plaintiffs must establish and the court must conclude that: "(1) plaintiffs are likely to succeed on the merits; (2) plaintiffs are subject to irreparable harm pendente lite; (3) defendants will not suffer substantial harm from the grant of an injunction; and (4) the public interest requires **[*259]** that plaintiffs be accorded relief." *Sullivan v. City of Pittsburgh, 811 F.2d 171, 181* (3d Cir.), cert. denied, *484 U.S. 849 (1987)*.

Accord *Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 356-57 (3d Cir. 1980)*. Plaintiffs' evidence fails to meet these standards.

We can find nothing in the plaintiffs' franchise agreements which prevents Mr. Donut from selling its stock (Plaintiffs' Exh. 12). Moreover, the facts give us a clear picture of defendants, who have said over and over again, that they will honor all contractual commitments of Mr. Donut (FF101,113,178). Beyond speculation, we have seen no proof that they will not and believe that if any violations ever do actually occur, they could be adequately handled in an action at law. In short, we find no breach, anticipatory or otherwise, or evidence of a lack of good faith or fair dealing.

According to their complaint, plaintiffs also claim tortious interference with their franchise agreements claiming first that the merger will result in Mr. Donut's contractual duties to its franchisees being assigned or delegated to Dunkin' Donuts, and secondly, that Dunkin' Donuts' intentions will interfere **[*260]** with these duties. Plaintiffs' first claim is against International Multifoods and Dunkin' Donuts. International Multifoods is a guarantor of the Mr. Donut franchise agreements and Dunkin' Donuts will be a successor to the contract. It is hornbook law that a party or successor party to a contract cannot tortiously interfere with its own contracts. *Peoples v. Pennsylvania Power & Light Co., 638 F.Supp. 402, 407 n.5 (M.D. Pa. 1985)*; *C&C Security Specialists, Inc. v. GTI-Superior, Inc., No. 86-1096, 1986 WL 7573, at 2-3* (E.D. Pa. July 1, 1986) ("basic principle that one cannot tortiously interfere with his own contract"); *Daniel Adams Assoc. v. Rimbach Publishing, Inc., 360 Pa.Super. 72, 519 A.2d 997, 1000*, app. dismissed, *517 Pa. 597, 535 A.2d 1056 (1987)* (tortious interference "necessarily involves three parties"); *Restatement (Second) of Torts § 766* (1979) (cause of action requires a third person).

Plaintiffs' second state tort claim against Dunkin' Donuts alone also fails because a claim for tortious interference requires that a defendant "induce[e] or otherwise cause[] [a] third person not to perform the contract" in issue. *Restatement (Second) of* ***[*261]*** *Torts § 766*. See also Koppers Co. v. Krupp-Koppers GmbH, 517 F.Supp. at 836, 851 (1981). That is, defendants must intend to prevent the completion of a contract, thereby harming plaintiffs and, as we have noted, they have not yet done so and say they never will.

CONCLUSIONS OF LAW

1. Under the facts and law, plaintiffs have not proven a product market for the sale of franchises.

2. Under the facts, plaintiffs have not proven a geographic market for the sale of franchises.

3. Under the facts and law, plaintiffs have not proven a product market for donut shop products as a cluster or otherwise.

4. Under the facts, plaintiffs have generally identified a geographic market for donut shop products, but under the facts and law, they have not proven the required specifics about said geographic market.

5. Under the facts and law, plaintiffs have not proven a probability of success and irreparable harm for their federal antitrust claims.

6. Under the facts and law, plaintiffs have not proven that with regard to their state law claims they are likely to succeed on the merits, that they will suffer irreparable harm, that the defendants will not suffer substantial harm, **[*262]** and that the public interest requires that plaintiffs receive injunctive relief.

7. Plaintiffs are not entitled to a preliminary injunction.

8. Plaintiffs are no longer entitled to a temporary restraining order.

9. Defendants are not entitled to a dismissal of the case at this point.

An appropriate order follows.

ORDER

AND NOW, this 27th day of March, 1990, the court having considered the motion of defendants Dunkin' Donuts, Inc., Allied-Lyons, PLC, International Multifoods Corporation, and Mister Donut of America, Inc. (collectively "defendants") for an order dismissing plaintiffs' complaint; and plaintiffs' motion for a preliminary injunction; and upon considering the parties' respective arguments in respect thereof, it is hereby ORDERED that plaintiffs' motion for a preliminary injunction be and hereby is DENIED; and it is FURTHER ORDERED that the ex parte temporary restraining order entered by the court on February 13, 1990, be and hereby is DISSOLVED AND VACATED; and it is FURTHER ORDERED that defendants' motion to dismiss plaintiffs' complaint be and hereby is DENIED WITHOUT PREJUDICE.

Berman v. Riverbay Corp.

United States District Court for the Southern District of New York

March 29, 1990, Decided and Filed

No. 89 Civ. 5538 (WK)

Reporter

1990 U.S. Dist. LEXIS 3372 *; 1990-2 Trade Cas. (CCH) P69,103

STEWART BERMAN, JOEL DANNENBERG, FRANCES IRIZARRY, IRVING NUSYNOWITZ, EVA PELLMAN, CHARLES ROSEN, HARRY and HETTA CARP and DOROTHY SCHNEIDER, for themselves and on behalf of all other residents of Co-op City, BRONX LIFESTYLES PUBLISHING CORP. and ALAN RIVLIN d/b/a Co-op Newspaper Delivery Service, Plaintiffs, v. RIVERBAY CORPORATION, Defendant

Core Terms

smartshopper, residents, advertisers, distributed, Sherman Act, monopolization, doorsteps, newspaper

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN1[] **Sherman Act, Claims**

A monopolization claim under § 2 of the Sherman Act consists of three elements: (1) possession of monopoly power in the relevant product and geographic market; (2) wilful acquisition or maintenance of that power; and, (3) causal "antitrust injury."

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Monopolies & Monopolization, Attempts to Monopolize**

A claim under the Donnelly Act requires a showing of an "arrangement" to monopolize. An "arrangement" has been defined as a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting term, "contract," "combination" or "conspiracy."

Counsel: **[*1]** ROBERT L. HOFFMAN, ESQ., Baden Kramer Huffman & Brodsky, P.C., New York, New York, for Plaintiffs.

ROBERT S. POWERS, ESQ., Phillips, Nizer, Benjamin, Krim & Ballon, New York, New York, for Defendant.

Opinion by: KNAPP

Opinion

MEMORANDUM & ORDER

WHITMAN KNAPP, UNITED STATES DISTRICT JUDGE

Defendant moves to dismiss. For reasons which follow, its motion is denied.

BACKGROUND

Plaintiff Bronx Lifestyles Publishing Corporation ("Bronx Lifestyles") publishes *smartshopper,* a weekly newspaper that is delivered free of charge to the residents of Co-op City, a cooperative high-rise housing complex located in the Bronx. Plaintiff Alan Rivlin d/b/a Co-op Newspaper Delivery Service is a resident of Co-op City and distributes *smartshopper.* The remaining plaintiffs, who sue individually and as representative of a class of Co-op City residents, are all readers of *smartshopper.*

Defendant Riverbay Corporation ("Riverbay") operates Co-op City. [1] Approximately 60,000 people live in Co-op City, which is designed to be a self-contained community with its own cooperatively-operated supermarkets, shopping centers, credit union, pharmacies, optical center, nurseries, centers for the elderly, power plant, post **[*2]** offices, garages and auditoriums. Riverbay employs its own maintenance crew and approximately 100 security guards who are registered with New York State as police officers and special patrolmen.

Riverbay distributes to the doorsteps of all residents a weekly newspaper called *The Co-op City Times,* the subscription price of which each resident is assessed as part of his or her monthly maintenance charges. *Smartshopper,* which is also delivered to residents' doorsteps, is free of charge. Both *The Co-op City Times* and *smartshopper* are delivered by Co-op City residents. Residents also receive *City News* free of charge, but through the mail. This difference is significant; because it relies on the postal system for distribution, *City News* goes to press earlier than *The Co-op City Times* and *smartshopper* and thus cannot compete for last-minute advertisements. Unlike **[*3]** such publications as *The New York Times, The New York Post, The Daily News, El Diario, The Amsterdam News* and *Jewish Week,* which have a general circulation, *The Co-op City Times, smartshopper* and *City News* are distributed exclusively to Co-op City residents, report news of particular interest to Co-op residents and carry the advertisements of local merchants seeking to win the residents' business.

The complaint alleges that, in March 1989, in response to competition from a predecessor to *smartshopper* that had also been published by Bronx Lifestyles, the Riverbay board of directors enacted a resolution punishing residents who delivered "advertising material" with a $ 50.00 fine for the first offense, a $ 100.00 fine for each subsequent offense, and possible eviction for multiple offenses. In July 1989, the complaint further alleges, Riverbay responded

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[1] The United Foundation, a non-profit organization empowered by the federal Mitchell-Lama Act, created Riverbay. In the 1960's, Riverbay, funded by the investments of thousands of moderate-income residents-to-be and a mortgage backed by bonds raised by the State of New York, built Co-op City.

to *smartshopper's* success in luring local advertisers away from *The Co-op City Times* by directing Bronx Lifestyles to desist from distributing *smartshopper.* At or about the same time, Riverbay wrote to *smartshopper's* advertisers and directed them to desist from advertising in publications that Riverbay **[*4]** did not authorize. In August 1989, the complaint maintains, Riverbay directed its security officers continuously to watch Bronx Lifestyle's offices and delivery personnel. On August 4 and 11, Riverbay personnel removed all publications of any sort except *The Co-op City Times* from residents' doorsteps. On August 12, a Riverbay security guard arrested a person who was delivering *smartshopper.*

DISCUSSION

Plaintiffs allege that Riverbay's actions give rise to claims under Section 2 of the Sherman Act, *15 U.S.C. § 15*; New York's Donnelly Act, G.B.L. *§ 340*; and *42 U.S.C. § 1983*. They seek treble damages; attorney's fees and costs; declaratory relief; and an injunction forbidding Riverbay to enforce its regulation, in a way so as to interfere with Bronx Lifestyles' relationship with advertisers, or otherwise to seek to restrain competition between *smartshopper* and *The Co-op City Times.*

A. *Antitrust Claims*

First, we turn to the claim under the Sherman Act. ***HN1***[] A monopolization claim under § 2 of the Sherman Act consists of three elements:

(1) possession of monopoly power in the relevant product and geographic market;

(2) wilful acquisition or maintenance of that power; and

[*5] (3) causal "antitrust injury." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc. (9th Cir.) 627 F.2d 919*, *cert. denied, (1980) 450 U.S. 921*.

Plaintiffs' allegations, if proved, could support a claim of monopolization. The relevant product and geographic market could be defined as newspapers that are distributed to the doorsteps of Co-op City residents and derive income from the advertising dollars of local merchants. [2] **[*6]** Certainly, in having at least the apparent authority to regulate such deliveries, Riverbay could be found to possess the power to exclude competitors and, based on the above-discussed allegations, could be found to have used such power to *smartshopper's* detriment. [3] We deny the motion to dismiss the Sherman Act claim.

Plaintiffs' second claim is lodged under the Donnelly Act, which is often known as New York's "mini Sherman Act." The Act generally has been interpreted with reference to federal ***antitrust law***. Unlike the § 2 monopolization and attempted monopolization claim discussed above, however, ***HN2***[] a claim under the Donnelly Act requires a showing of an "arrangement" to monopolize. An "arrangement" has been defined as "a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting term, 'contract,' 'combination' or 'conspiracy.'" *State v. Mobil Oil Corp. (1976) 38 N.Y.2d 460, 464, 381 N.Y.S.2d 426, 428*.

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[2] The complaint makes contradictory allegations regarding the relevant market. In paragraph 31, it asserts that the market is "businesses which utilize advertising and marketing services and goods in order to sell their goods and services specifically to residents of Co-op City." In paragraph 42, it states that Riverbay's actions "constitute an attempt to monopolize the distribution of news and advertising directly" to Co-op City residents. We see no point, however, in asking plaintiffs to go through the formality of amending the complaint so as to bring it in line with the arguments that have been developed during the arguments on this motion.

[3] In the alternative, but for essentially the same reasons, plaintiff's allegations could also support a claim of attempted monopolization under § 2. *See* *National Ass'n of Pharmaceutical Manufacturers v. Ayerst Laboratories (2d Cir. 1988) 850 F.2d 904, 915*; *International Distribution Centers v. Walsh Trucking Co. (2d Cir.) 812 F.2d 786*, *cert. denied,* ***(1987) 482 U.S. 915***.

Plaintiffs attempt to locate such an arrangement in Riverbay's relationship with advertisers and with its security officers. Given **[*7]** our definition of the relevant market-- that of newspapers that are distributed to the doorsteps of Co-op City residents and derive income from the advertising dollars of local merchants-- we cannot see that Riverbay's actions, which were allegedly designed to shut out competition for revenues from local advertisers, constitute an arrangement with those very same advertisers. Nor do we see an arrangement in Riverbay's alleged directions to its own employees, the security guards. [4] We therefore grant the motion to dismiss the Donnelly Act claim.

B. *Section 1983 Claims*

Plaintiffs allege that Riverbay, acting under the color of state law, has sought to deprive the resident plaintiffs of the right to read *smartshopper* and plaintiffs Bronx Lifestyles and Alan Rivlin of the right to distribute *smartshopper* in violation of the **[*8]** *First* and *Fourteenth Amendment*. Riverbay's motion to dismiss is predicated on its contention that plaintiff has failed to allege state action. *See Meyers v. Berman,* No. 82 Civ. 4525 (CSH), *aff'd without opinion* (2d Cir. 1983) *759 F.2d 1443*. [5]

We need not discuss the *§ 1983* claims in detail since practically the same discovery will be required to establish them as will be required to establish the antitrust claim and the issue of Riverbay's status as a state actor should await a full record. We note, however, that plaintiffs may be able to establish that Co-op City is the functional equivalent of the company town in *Marsh v. Alabama (1946) 326 U.S. 501, 66 S.Ct. 276* or otherwise to distinguish *Meyers.* We deny the motion to dismiss the *§ 1983* claims without prejudice to renewal at the close of discovery.

CONCLUSION

We dismiss the Donnelly Act claim (the fourth claim), but otherwise deny defendant's motion.

SO ORDERED.

New York, New York

March 29, 1990

End of Document

[4] The only case plaintiff cite in support of its contention that Riverbay security guards can form part of an "arrangement" with Riverbay has nothing to do with the Donnelly Act, and, in any event, did not discuss whether or not an employer can conspire with its employees. *Rojas v. Alexander's Department Store (E.D.N.Y. 1986) 654 F. Supp. 856*

[5] Some of the parties to that case are parties here. The issues in that case and those in this one are not sufficiently similar collaterally to estop those parties.

Oberndorf v. Denver

United States Court of Appeals for the Tenth Circuit

March 29, 1990

Nos. 88-2599, 88-2928

Reporter

900 F.2d 1434 *; 1990 U.S. App. LEXIS 4574 **; 1990-1 Trade Cas. (CCH) P68,979

DONALD OBERNDORF; LEO STERN; HARRY PAUL WERTHEIMER; CAROL BRODIE, Trust Administrator for Edith O. Wertheimer Trust; DOTTIE HAMMEL; and BLOCK 173 ASSOCIATES, a Colorado General Partnership, Plaintiffs-Appellants, v. THE CITY AND COUNTY OF DENVER: THE CITY COUNCIL OF THE CITY & COUNTY OF DENVER, by its council members of the City Council (not as individuals but as members of the City Council), T. J. Hackworth, J. L. Sandos, Stephanie A. Foote, Paul L. Swalm, John J. Silchia, Nieves Peres McIntire, Hiawatha Davis, Jr., Salvadore Carpio, Cathy Donohue, William R. Roberts, Robert L. Crider, Cathy Reynolds, William A. Scheitler: THE DENVER URBAN RENEWAL AUTHORITY; FEDERICO PENA, as Mayor of the City and County of Denver: and BCE DEVELOPMENT PROPERTIES, INC., a Colorado corporation fka OXFORD PROPERTIES, INC., Defendants-Appellees

Prior History: **[**1]** Appeal from the United States District Court For the District of Colorado, D.C. Nos. 86-C-1075 and 86-C-1445.

Core Terms

landowners, urban renewal, district court, blight, urban renewal law, public purpose, Municipal, developer, immunity, blocks, redevelopment, antitrust, downtown, condemnation, plaintiffs', financing, revitalization, conspiracy, rights, anti trust law, civil rights, state policy, co-conspirator, displace, urban

LexisNexis® Headnotes

Banking Law > Bank Activities > Securities > Municipal Underwriting

Governments > Public Improvements > Community Redevelopment

Tax Law > State & Local Taxes > Sales Taxes > General Overview

Governments > Public Improvements > General Overview

HN1[] **Securities, Municipal Underwriting**

Under Colorado law, a "tax increment financing" funding vehicle is available only as part of an urban renewal plan.

Governments > Public Improvements > Community Redevelopment

Governments > Legislation > Interpretation

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > General Overview

HN2[] **Public Improvements, Community Redevelopment**

Under *Col. Rev. Stat. § 31-25-107 (1)*, no urban renewal plan shall be undertaken unless the appropriate authority determines that the area is blighted.

Civil Procedure > Trials > Bench Trials

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] **Trials, Bench Trials**

An appellate court reviews a summary judgment order de novo.

Civil Procedure > Trials > Bench Trials

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Trials, Bench Trials**

An appellate court reviews the record in the light most favorable to a nonmoving party to determine if a genuine issue of material fact is in dispute; if not, an appellate court must determine if the substantive law was correctly applied.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Courts > Judicial Precedent

HN5[] **Antitrust & Trade Law, Exemptions & Immunities**

The Supreme Court holds that the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, does not apply to the anticompetitive conduct of a state acting through its legislature.

Evidence > Inferences & Presumptions > General Overview

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Public Improvements > General Overview

HN6[] **Evidence, Inferences & Presumptions**

To obtain exemption from antitrust liability, municipalities must demonstrate that their anticompetitive activities were authorized by a state pursuant to a state policy to displace competition with regulation or monopoly public service. The municipality need not point to a specific, detailed legislative authorization, but must show that it acted in accordance with a clearly articulated and affirmatively expressed state policy to displace competition with regulation. A state policy is considered clearly articulated and affirmatively expressed if the statutory provision empowering a municipality's action plainly shows that a legislature contemplated the kind of action complained of.

Governments > Public Improvements > Community Redevelopment

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Public Improvements > General Overview

HN7[] **Public Improvements, Community Redevelopment**

The statutory definition of blight is broad and encompasses not only those areas containing properties so dilapidated as to justify condemnation as nuisances, but also envisions the prevention of deterioration.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Public Improvements > Community Redevelopment

Governments > Public Improvements > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

The realities of the urban renewal process require early developer involvement to determine whether a public or private partnership is feasible.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Exemptions & Immunities, Noerr-Pennington Doctrine

Based upon the protections of U.S. Const. amend. I, the Noerr-Pennington doctrine exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Exemptions & Immunities, Noerr-Pennington Doctrine

Noerr-Pennington protects rights of association and petition that would be denied if groups with common interests could not, without violating the antitrust laws, use the channels and procedures of government agencies to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Public Improvements > Community Redevelopment

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Governments > Local Governments > Employees & Officials

HN11[] Antitrust & Trade Law, Sherman Act

The redevelopment process by its very nature allows for ex parte deliberations between decisionmakers and advocates of a particular view.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Governments > Public Improvements > Community Redevelopment

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] Exemptions & Immunities, Noerr-Pennington Doctrine

Noerr-Pennington does not provide immunity where legitimate lobbying efforts are accompanied by illegal or fraudulent actions.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Public Improvements > Community Redevelopment

Governments > Public Improvements > General Overview

HN13[] Fundamental Rights, Eminent Domain & Takings

The Supreme Court holds that the adoption of an urban renewal plan is a legislative act that must be upheld if there is any public purpose underlying it. The means of executing the project are for a legislature alone to determine once the public purpose has been found.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Public Improvements > Community Redevelopment

Constitutional Law > Substantive Due Process > Scope

Governments > Local Governments > Employees & Officials

HN14[] Fundamental Rights, Eminent Domain & Takings

So long as an urban renewal legislation is rationally related to a conceivable public purpose, the plan is valid and does not violate a plaintiff's civil rights.

Governments > Public Improvements > Community Redevelopment

Governments > Courts > Authority to Adjudicate

Governments > Federal Government > Property

Governments > Legislation > Enactment

HN15[] Public Improvements, Community Redevelopment

In reviewing whether legislative power is exercised for a public purpose, an appellate court exercises narrow authority.

Governments > Public Improvements > Community Redevelopment

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

Governments > Courts > Judicial Precedent

Governments > Federal Government > Property

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview

HN16[] Public Improvements, Community Redevelopment

Colorado recognizes that the acquisition of property for the planned elimination of urban blight constitutes a public purpose.

Counsel: James A. Clark of Baker & Hostetler (Bruce D. Pringle and Theodore Shih of Baker & Hostetler; Kenneth L. Starr and Michael Touff of Holmes & Starr, with him on the briefs), Denver, Colorado, for Plaintiffs-Appellants.

David R. Hammond of Davis, Graham & Stubbs (Dale R. Harris and Neil Peck of Davis, Graham & Stubbs; Stephen H. Kaplan, City Attorney; Robert M. Kelly, Donald E. Wilson, and Karen A. Aviles, Assistant City Attorneys; Marlin D. Opperman, William M. Schell and Linda A. Surbaugh of Opperman & Associates, P.C., with him on the briefs), Denver, Colorado, for Defendants-Appellees.

Judges: McKay, Moore, and Anderson, Circuit Judges.

Opinion by: MOORE

Opinion

[*1436] MOORE, Circuit Judge.

Plaintiffs-appellants appeal a summary judgment order which dismissed with prejudice all of their antitrust and civil rights claims against the defendants. We conclude that the district court properly found that there was no genuine issue of material fact in dispute. Because that court correctly applied the substantive law, we affirm.

I.

This case arises from the **[**2]** proposed Centerstone redevelopment project in downtown Denver. The plaintiffs-appellants, the Oberndorf family and Block 173 Associates (landowners), opposed the project which would have been constructed in part on their land. [1] The landowners also objected to the corresponding urban renewal plan adopted by the Denver Urban Renewal Authority (DURA) and the Denver City Council from which the Centerstone project emanates. The defendants-appellees are the City and County of Denver (the City), the City Council, Federico Pena, the Mayor of the City and County of Denver, Colorado, DURA, (collectively the Municipal defendants); and BCE Development Properties, Inc. (BCED). Seeking injunctive relief, a declaratory judgment, and damages, landowners claim alleged antitrust violations based on *§§ 1* and *2* of the Sherman Anti-Trust Act, *15 U.S.C. §§ 1* and *2* and alleged civil rights claims under *42 U.S.C. § 1983*. The district court's thorough recitation of the facts of this case obviates further recitation here. *See* *Oberndorf v. City and County of Denver, 696 F. Supp. 552, 554-56 (D.Colo. 1988)*. Therefore, we set out only those facts **[**3]** which are essential for this opinion.

In early 1983, the City and the Denver Partnership, Inc. (DPI), a non-profit civic and downtown business organization, began courting national retail developers and department stores in an effort to revitalize downtown Denver. City officials and DPI determined that some sort of public/private partnership with substantial public financing would be necessary to create a multiblock retail project on the Sixteenth Street Mall. In the summer of 1983, DPI formed the Sixteenth Street Retail Development Task Force to assist in forming such a partnership. Although the City and DPI contacted several potential developers, only BCED demonstrated sufficient interest and capacity to develop such a project. BCED proposed a two or three-block project to be constructed on Blocks 196, 173, and 206, including the block on which an existing department **[**4]** store is now located.

Following a December 1984 announcement by Mayor Pena and BCED about the proposed Centerstone project, discussions **[*1437]** among the City, BCED and others continued, focusing on available forms of public financing. It was determined that the best method was "tax increment financing," a form of public funding that allows sale of municipal bonds to raise money for public improvements. ***HN1***[] Under Colorado law, this funding vehicle is available only as part of an urban renewal plan. *See* *Urban Renewal Auth. v. Byrne, 618 P.2d 1374 (Colo. 1980)*. The City began taking actions to adopt an urban renewal plan as set forth at *Colo.Rev.Stat. §§ 31-25-101-115* (1986).

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[1] Subsequent events call into question whether the project will be completed, but neither party has suggested this case is consequently moot.

Critical to the entire project are the provisions of ***HN2***[] *Section 31-25-107(1)* that no urban renewal plan shall be undertaken unless the appropriate authority, here the City Council, determines that the area is blighted. In December 1985, the City Council passed a resolution ordering DURA to begin preparing an urban **[**5]** renewal plan and conducting a blight study to analyze a fifteen-block area in downtown Denver. In March 1986, the study concluded, finding numerous blight factors existed in the defined space. DURA also prepared a proposed urban renewal plan for the fifteen-block area.

In May 1986, the City Council considered the proposed urban renewal plan at a public meeting. Landowners and their representatives appeared and opposed the plan, disputing the existence of blight in the area. Enacting Ordinance 309, the City Council approved the plan.

In August 1987, DURA issued an Offering Prospectus and solicited proposals from prospective developers for redevelopment of all or part of the fifteen-block urban renewal area. Four prospective developers submitted proposals, but only those of BCED concerned the blocks on which BCED hoped to build the Centerstone project. DURA selected BCED and Centerstone for Phase I of the urban renewal plan.

Landowners then began this action, claiming the defendants illegally conspired to misrepresent the three-block area as blighted so that the property could be condemned under the Colorado Urban Renewal Law. They further claimed the urban renewal plan eliminated **[**6]** competition among buyers and developers in the three-block real estate market and thus amounted to a restraint of trade in violation of *§§ 1* and *2* of the Sherman Anti-Trust Act. Landowners also asserted claims under *42 U.S.C. § 1983* that the plan was a regulatory taking of property in violation of the due process and *equal protection clauses of the Constitution*.

Following discovery, all defendants filed summary judgment motions which the district court granted, dismissing all of the landowners' claims with prejudice. *Oberndorf, 696 F. Supp. at 561*. Shortly thereafter, the district court granted defendant DURA's motion to dismiss its counterclaims, and final judgment was entered for the defendants and against landowners. The landowners appeal the summary judgment order.

II.

HN3[] This court reviews a summary judgment order ***HN4***[] *de novo. Burnette v. Dow Chemical Co., 849 F.2d 1269, 1273 (10th Cir. 1988)*. We review the record in the light most favorable **[**7]** to the non-moving party to determine if a genuine issue of material fact was in dispute; if not, we must determine if the substantive law was correctly applied. *Osgood v. State Farm Mut. Auto. Ins. Co., 848 F.2d 141, 143 (10th Cir. 1988)*.

A. STATE ACTION IMMUNITY UNDER ANTITRUST LAWS

In ***HN5***[] *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, the Supreme Court held that the Sherman Act did not apply to the anticompetitive conduct of a state acting through its legislature. Subsequently, the Court rejected the proposition that municipalities are similarly immune from antitrust liability simply by their status as subdivisions of the state. *City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*. Rather, ***HN6***[] to obtain exemption, municipalities must demonstrate that their anticompetitive activities were **[*1438]** authorized by the state "pursuant to a state policy to displace competition **[**8]** with regulation or monopoly public service." *Id. at 413*. The municipality need not point to a specific, detailed legislative authorization, but must show that it acted in accordance with a "clearly articulated and affirmatively expressed . . . state policy" to displace competition with regulation. *Id. at 410, 415*. *See also Community Communications Co. v. City of Boulder, Colo., 455 U.S. 40, 51-52, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*. "A state policy is considered clearly articulated and affirmatively expressed if the statutory provision empowering the municipality's action plainly shows that 'the legislature contemplated the kind of action complained of.'" *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)* (quoting *City of Lafayette, La., 435 U.S. at 415*).

The district court found the cited actions of the defendants complied with the requirements of the Colorado Urban Renewal Law and were undertaken pursuant to a clearly articulated and affirmatively expressed state policy as embodied in that law. Therefore, the district court held that the defendants **[**9]** were immune from liability and granted summary judgment. In addition, the court found that the evidence of conspiracy produced by the landowners did not reach the required threshold level and that the undisputed evidence indicated that the defendants' actions were consistent with their permissible independent interests in pursuing the Centerstone project as an effort to revitalize the Denver economy.

Arguing that the district court refused to consider evidence that the legislative record was a sham, landowners contend that the district court applied the wrong legal standard by limiting consideration to a facial review of the legislative record made by the City Council and DURA. We conclude that the district court adequately considered all of the evidence and affirm the district court's holding that state action immunity protects the Municipal defendants and BCED.

Under the tests pronounced in *City of Lafayette* and *Boulder, supra*, we must consider two prerequisites to proper application of the state action exception to municipal action. We must first determine whether the Colorado General Assembly, through the Colorado Urban Renewal Law, authorized the challenged **[**10]** actions of the defendants. In addition, we must determine whether the legislature intended to displace competition with regulation. *See* P. Areeda & H. Hovencamp, ***Antitrust Law*** para. 212.3a (Supp. 1988). In this case, it is undisputed that the Colorado Urban Renewal Law represents a clearly articulated and expressly stated policy to displace competition. *See, e.g., Rabinoff v. District Court In and For City and County of Denver, 145 Colo. 225, 234, 360 P.2d 114, 119 (1961)* (describing how the Colorado Urban Renewal Law operates by condemnation of private property for public use or transfer to private ownership to be used for public purposes); *c.f. Scott v. City of Sioux City, Iowa, 736 F.2d 1207, 1213 (8th Cir. 1984)* (discussing how Iowa legislation contemplated that competition would be displaced by the operation of the Iowa urban renewal law), *cert. denied*, *471 U.S. 1003, 85 L. Ed. 2d 158, 105 S. Ct. 1864 (1985)*. Therefore, the focus of the inquiry is whether the City's actions were authorized by the Colorado Urban Renewal Law.

To support their contention that the City acted beyond the scope of the statute, landowners **[**11]** claim that defendants were not attempting to eliminate blight as required by the Colorado Urban Renewal Law. Specifically, landowners point out that no blight was found on the three downtown blocks which would compose Centerstone. They allege that defendants expanded the target area to fifteen blocks to compensate for the lack of blight in Blocks 173, 208 and 196. Landowners claim that the larger area was needed to generate tax increment financing funds necessary to deliver the approximately $ 60 to $ 80 million subsidy to BCED. In addition, landowners contend the Centerstone committee chose the larger area to avoid anticipated adverse changes to the tax-exempt status of bonds brought **[*1439]** about by the 1986 Tax Reform Act. Landowners allege the Centerstone committee was counseled that a smaller district, directed only at Centerstone, might be declared illegal; hence, it chose to expand the area to be developed. After reviewing the record, we conclude that the lack of blight on the Centerstone blocks and the landowners' asserted reasons defendants created the fifteen-block area are not sufficient to prove the blight study was a sham. We agree with the district court that the **[**12]** blight study comported with the statutory definition of "blighted area" as set forth in *Colo.Rev.Stat. § 31-25-103(2)* (1986). As the district court explained, blight need not exist on every block of the area examined. As interpreted by the Colorado Court of Appeals, ***HN7***[] the statutory definition of blight "is broad and encompasses not only those areas containing properties so dilapidated as to justify condemnation as nuisances, but also envisions the prevention of deterioration." *Tracy v. City of Boulder, 635 P.2d 907, 909 (Colo.App. 1981)*.

Claiming that BCED was selected as the developer of Centerstone long before the use of urban renewal was even contemplated, the landowners contend the selection procedure illustrates how the use of urban renewal was a sham. Landowners argue that the usual process of urban renewal requires that a developer be selected after council adoption of a plan and through a competitive bidding process.

Rejecting this contention, the district court held the fact that "defendant BCED may have been identified as the 'first choice' developer of the Centerstone **[**13]** Project before the financing method was selected and before the blight study was conducted, does not violate any statutory provision with respect to implementation of an urban renewal plan under Colorado law." *Oberndorf, 696 F. Supp. at 559*. We agree. Following the adoption of the urban renewal plan according to the procedures of *Colo.Rev.Stat. § 31-25-107*, DURA sent out a prospectus and conducted a competitive bidding process as described in *Colo.Rev.Stat. § 31-25-106(2)* (1986). DURA's selection of BCED does not by itself show that the process was a sham. Furthermore, ***HN8***[] the realities of the urban renewal process require early developer involvement to determine whether a public/private partnership is feasible. Consultation with BCED and other developers before the adoption of the urban plan merely gave the City information whether urban renewal and tax increment financing were appropriate mechanisms for revitalizing this section of downtown Denver.

Finally, landowners allege other indications that the Centerstone committee accomplished its goals in a dishonest manner. They **[**14]** suggest that at least one council member may have received financial gain from BCED. In addition, they contend that BCED "misrepresented" to the council its plans for condemnation and misled the public by the $ 60 to $ 80 million figures identified as the City's commitment when, in fact, the subsidy could be as much as $ 216.8 million of revenues otherwise available to the City. However, these allegations are not supported by sufficient evidence nor do landowners show how these instances of misrepresentation relate to their claims that the urban renewal plan was not authorized by state law. We agree with the district court that the Colorado Urban Renewal Law grants municipal officials authority to combat blight and authorizes DURA to facilitate redevelopment through urban renewal plans.

Because we affirm the district court's finding that the Municipal defendants were authorized by and acted in accordance with this affirmatively expressed state policy, we affirm the district court's conclusion that state action immunity applies.

B. *NOERR-PENNINGTON DOCTRINE*

Even assuming that the landowners have shown evidence of conspiracy and antitrust injury, the *Noerr-Pennington* doctrine **[**15]** provides immunity to BCED in this case. ***HN9***[] Based upon the protections of the *First Amendment*, the *Noerr-Pennington* doctrine exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition. *United Mine Workers* ***[*1440]*** *of Am. v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*. In its summary judgment order, the district court implicitly held that BCED's activities were "mere solicitation of government action" protected by the *Noerr-Pennington* doctrine. We agree.

Immunity under the *Noerr-Pennington* doctrine is designed to protect the right to petition and engage in political activity. ***HN10***[] *Instructional Systems Dev. Corp. v. Aetna Cas. & Sur. Co., 817 F.2d 639, 650 (10th Cir. 1987)*. *Noerr-Pennington* protects rights **[**16]** of association and petition, which would be denied if groups with common interests could not, without violating the antitrust laws, use the channels and procedures of government agencies to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors. *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*.

In this case, the actions of BCED fall squarely within the doctrine. When BCED participated in the Centerstone committee and met with City Council members, BCED merely represented its own business and economic interests in the proposed revitalization of downtown Denver. BCED's project proposals, models of Centerstone, comments on tax increment financing, and meetings with city officials were a legitimate use of the political process and the very kind of speech protected by *Noerr-Pennington*.

In *Boone v. Redevelopment Agency of San Jose, 841 F.2d 886* (9th Cir.), *cert. denied*, *488 U.S. 965, 109 S. Ct. 489, 102 L. Ed. 2d 526 (1988)*, the Ninth Circuit considered similar antitrust allegations **[**17]** that a developer and city officials had shadowy secret meetings and covert agreements in connection with the amendment of an urban renewal plan. The Ninth Circuit held that the conduct was protected by *Noerr-Pennington*, explaining that ***HN11***[] "the redevelopment process by its very nature, allows for ex parte deliberations between decisionmakers and advocates of a particular view." *Id. at 895*.

We reject landowners' contentions that BCED's conduct falls within two exceptions to *Noerr-Pennington immunity*.

1. Co-conspirator exception

Landowners argue that this court should adopt a "co-conspirator" exception to *Noerr-Pennington* and deny private participants protection where government officials or entities are co-conspirators in a scheme violative of the antitrust laws. *See Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1566 (5th Cir. 1984)*, *cert. denied*, *474 U.S. 1053, 88 L. Ed. 2d 766, 106 S. Ct. 788 (1986)*, and *Duke & Co., Inc. v. Foerster, 521 F.2d 1277, 1281-82 (3d Cir. 1975)*. However, **[**18]** *Noerr-Pennington* cannot be circumvented by merely alleging that a government official was involved in the alleged conspiracy. *Boone, 841 F.2d at 897*. We agree with the district court's conclusion that the landowners have not submitted any evidence indicating that any "deal" was made, bribe taken, or illegal conspiracy formed between the Municipal defendants and BCED. The landowners' allegations of secret meetings and covert agreements between the City and BCED are not supported by sufficient evidence of a conspiracy such that a possible co-conspirator exception be considered. Therefore, we need not address whether to adopt a "co-conspirator" exception to *Noerr-Pennington*.

2. "Illegal Activity" exception

In addition, landowners argue that *Noerr-Pennington* immunity should not be extended because BCED engaged in illegal or fraudulent activities separate and apart from any lobbying activities. ***HN12***[] *Noerr-Pennington* does not provide immunity where legitimate lobbying efforts are accompanied by illegal or fraudulent actions. *See Westborough Mall, Inc. v. City of Cape Girardeau, Mo., 693 F.2d 733, 746 (8th Cir. 1982)*, **[**19]** *cert. denied*, *461 U.S. 945, 77 L. Ed. 2d 1303, 103 S. Ct. 2122 (1983)*. **[*1441]** Landowners allege that BCED entered into covert agreements with the City which were unlawful and an abuse of the power delegated to the City under the Urban Renewal Law. Therefore, they contend that BCED cannot take advantage of *Noerr-Pennington*.

The district court correctly held that the state legislature authorized defendants' actions, and, consequently, there was no illegal activity. Moreover, alleged violation or misuse of an urban renewal law does not constitute the kind of illegal activity which can deprive a private party of *Noerr-Pennington* protection. *See Boone, 841 F.2d at 891, 893-97* (affirming dismissal based on *Noerr-Pennington* doctrine despite allegations that the redevelopment law was illegally used to redevelop non-blighted area). Although bribery, or misuse or corruption of governmental processes are outside the protection of the *Noerr-Pennington* doctrine, *Instructional Systems Dev. Corp. v. Aetna Cas. and Sur. Co., 817 F.2d at 650*, landowners do not allege any of these illegal activities.

C. CIVIL RIGHTS CLAIMS

[20]** The district court granted summary judgment in favor of defendants on landowners' civil rights claims, finding that there was not enough evidence to support their claim for a violation of civil rights and that the City's condemnation of plaintiffs' property was rationally related to a public purpose. Relying upon *Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954)*, the district court concluded the adoption of an urban renewal plan was a legislative act and that in order to establish an unconstitutional "taking," the landowners had to establish that no public purpose existed for the proposed urban renewal project. Because the district court found that the urban renewal plan was rationally related to the economic revitalization of downtown Denver, the district court held that no unconstitutional "taking" of landowners' property occurred.

Landowners appeal this ruling, arguing that the proper inquiry was whether the urban renewal plan sought to accomplish the purpose authorized by the Colorado Urban Renewal Law. Claiming that the district court's ruling ignored legal distinctions between states and municipalities, landowners contend that state authorization **[**21]** is an essential issue because cities are not entitled to the same deference as states.

We reject these arguments. The district court applied the proper standard when it inquired whether a proper purpose existed for the urban renewal plan, which was created by the legislative acts of DURA and the City Council. Whether the action was authorized by state law is a separate issue and is not part of the inquiry before the court when it looks for a rational relationship to a legitimate public purpose.

HN13[] The Supreme Court has held that the adoption of an urban renewal plan is a legislative act which must be upheld if there is any public purpose underlying it: "But the means of executing the project are for [the legislature and the legislature] alone to determine, once the public purpose has been found." *Berman v. Parker, 348 U.S. at*

33. In Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 771 F.2d 44 (2d Cir. 1985), *cert. denied*, *475 U.S. 1018, 89 L. Ed. 2d 317, 106 S. Ct. 1204 (1986)*, the Second Circuit affirmed the dismissal **[**22]** of a civil rights suit that sought to enjoin the condemnation of plaintiffs' land under an urban renewal plan. Claiming that their property was in no way blighted, these plaintiffs alleged that a private real estate developer, an urban renewal agency, and various city officials violated plaintiffs' civil rights by wrongfully including plaintiffs' land in an urban renewal plan. The Second Circuit affirmed the dismissal of the complaint, holding that ***HN14***[] so long as the urban renewal legislation was "rationally related to a conceivable public purpose," the plan was valid and did not violate plaintiffs' civil rights. Rosenthal & Rosenthal Inc., 771 F.2d at 46. The Ninth Circuit reached the same conclusion in *Boone v. Redevelopment Agency of San Jose, 841 F.2d at 892-93*, rejecting equal protection and due process challenges to an urban renewal plan:

> **[*1442]** [Plaintiffs] have not alleged that the interest of the city and agency in urban redevelopment is illegitimate. Such a claim would be patently frivolous. Moreover, the municipality's regulation **[**23]** of parking is facially "rationally related" to the ends of urban renewal. Thus we find no violation of the [plaintiffs'] equal protection or substantive due process rights.

Accord Scott v. City of Sioux City, Iowa, 736 F.2d at 1216 (affirming summary judgment on substantive due process and equal protection claims because there was a public purpose for the challenged urban renewal ordinance).

The district court also properly concluded that elimination of urban blight and economic revitalization of Denver were legitimate public purposes underlying the plan. ***HN15***[] In reviewing whether legislative power is exercised for a public purpose, this court exercises narrow authority. "It is not for the court to oversee the choice of the boundary line nor to sit in review on the size of a particular project area." ***HN16***[] Berman, supra, 348 U.S. at 35-36. Colorado has long recognized that the acquisition of property for the planned elimination of urban blight constitutes **[**24]** a public purpose. Rabinoff v. District Court, 145 Colo. at 234, 360 P.2d at 119. Similarly, in Thornton Development Authority v. Upah, 640 F. Supp. 1071 (D.Colo. 1986), the court upheld the condemnation of the plaintiff's land for urban renewal because statutorily recognized public purposes were the stated basis for the Thornton Development Authority's action. The court explained, "In this case such public purposes as increasing revenues, sales, commerce and employment cannot be gainsaid. The wisdom of decisions made in effectuating such purposes is not a matter given to the courts in our system to consider." 640 F. Supp. at 1081.

Landowners also argue that the district court improperly concluded that the landowners' claims that the defendants violated the Colorado Urban Renewal Law belong in state court and not in federal court. The district court ruled that whether defendants' actions complied with every detailed provision of the Urban Renewal Law in this instance was not properly before it in the context of the federal claims asserted. We agree with the district court that the violation of state law, if any, does not necessarily **[**25]** constitute a violation of the plaintiffs' constitutional claims. *Rosenthal & Rosenthal Inc.*, 605 F. Supp. at 618 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, *475 U.S. 1018, 89 L. Ed. 2d 317, 106 S. Ct. 1204 (1986)*. Similarly, we agree that the defendants "do not forfeit their immunity [under antitrust laws] merely because their execution of the powers granted to them under the redevelopment act may have been imperfect in operation." *Boone, 841 F.2d at 892*; *see also* P. Areeda & H. Hovencamp, *supra*, at para. 212.3b.

Although landowners allege that the public purposes set forth for the plan are fraudulent and that the Plan favored BCED, we do not find sufficient evidence in the record to support the landowners' claim for a violation of civil rights or their claim of conspiracy. The district court's order granting summary judgment is AFFIRMED.

Reazin v. Blue Cross & Blue Shield, Inc.

United States Court of Appeals for the Tenth Circuit

March 29, 1990

No. 87-1823

Reporter

899 F.2d 951 *; 1990 U.S. App. LEXIS 4565 **; 1990-1 Trade Cas. (CCH) P68,970

WALTER L. REAZIN, M.D.; HCA HEALTH SERVICES OF KANSAS, INC., d/b/a Wesley Medical Center; HEALTH CARE PLUS, INC.; and NEW CENTURY LIFE INSURANCE CO., Plaintiffs-Appellees v. BLUE CROSS AND BLUE SHIELD OF KANSAS, INC., Defendant and Counterclaim Plaintiff-Appellant, and HMO KANSAS, INC., Additional Counterclaim Plaintiff-Appellant v. HOSPITAL CORPORATION OF AMERICA, Additional Counterclaim Defendant-Appellee

Prior History: [1]** Appeal from the United States District Court for the District of Kansas, D.C. NO. 85-6027-K.

Core Terms

district court, termination, financing, healthcare, antitrust, plaintiffs', argues, monopoly power, market power, barriers, market share, competitor, monopolize, provider, anti trust law, instructions, contracting, damages, costs, expert witness fees, counterclaim, effects, unreasonable restraint, relevant market, subscribers, sufficient evidence, attorney's fees, private health, anticompetitive, consumers

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN1[] **Private Actions, Costs & Attorney Fees**

See 15 U.S.C.S. § 15.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN2[] **Private Actions, Standing**

See *15 U.S.C.S. § 26*.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Governments > Courts > Authority to Adjudicate

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN3[] **Judgment as Matter of Law, Directed Verdicts**

Motions for a directed verdict and for judgment notwithstanding the verdict are considered under the same standard.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN4[] **Trials, Bench Trials**

An appellate court may reverse the denial of motions for a directed verdict and for judgment notwithstanding the verdict only if the evidence points but one way and is susceptible to no reasonable inferences supporting the nonmoving party. An appellate court must construe the evidence and inferences most favorably to the nonmoving party. An appellate court may not weigh the evidence or pass upon the witnesses' credibility, or substitute its judgment for that of a jury. Thus, if reasonable minds could differ over a verdict, the motion for judgment notwithstanding the verdict is properly denied.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Healthcare Law > Payment Systems > Insurance Coverage > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN5[] **Trials, Judgment as Matter of Law**

An appellate court reviews a denial of a motion for a new trial under an abuse of discretion standard.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, prohibits every contract, combination, or conspiracy, in restraint of trade or commerce. This is interpreted to prohibit only "unreasonable" restraints.

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Healthcare Law > Payment Systems > Insurance Coverage > General Overview

HN7[] Judgment as Matter of Law, Judgment Notwithstanding Verdict

To affirm a district court's denial of a party's motions for judgment notwithstanding the verdict or for a new trial on a claim under 15 U.S.C.S. §1, there must be sufficient evidence supporting a jury's finding of an agreement which unreasonably restrained trade in the relevant market.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

The inquiry mandated by the Rule of Reason is whether a challenged agreement is one that promotes competition or one that suppresses competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > Trials > Bench Trials

Evidence > Inferences & Presumptions > General Overview

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A factfinder must decide whether under all the circumstances of a case the restrictive practice imposes an unreasonable restraint on competition. In making that decision a variety of actual market factors must be examined. A plaintiff bears the burden of proving an "adverse effect on competition." The adverse impact must be on competition, not on any individual competitor or on plaintiff's business.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Trials > Bench Trials

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

Courts consider a party's refusal to deal in light of its effect on consumers, not on competitors.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN11[] **Clayton Act, Claims**

Standing and antitrust injury are essential elements in a private antitrust damages action brought under § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN12[] **Private Actions, Standing**

The following factors are to be considered in determining antitrust standing: the causal connection between antitrust violations and plaintiff's injury; defendant's intent; the nature of plaintiff's injury; the directness or indirectness of the connection between plaintiff's injury and the allegedly unlawful market restraint; the speculativeness of plaintiff's damages; and the risk of duplicative recoveries or the danger of complex apportionment of damages.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Private Actions, Remedies**

An antitrust injury is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes a defendant's acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Private Actions, Remedies**

Where the injury alleged is an integral aspect of the conspiracy alleged, there can be no question but that the loss is precisely the type of loss that a claimed violation would be likely to cause.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Evidence > Inferences & Presumptions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN15[] **Private Actions, Remedies**

An antitrust plaintiff need not necessarily be a competitor or consumer. Where a plaintiff's injury is "inextricably intertwined" or so integral an aspect of the conspiracy alleged, plaintiff has established an antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] Monopolies & Monopolization, Actual Monopolization

15 U.S.C.S. §1 requires the existence of an agreement between allegedly conspiring parties.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] Regulated Practices, Price Fixing & Restraints of Trade

A business retains the right under 15 U.S.C.S. §1 to unilaterally announce the terms on which it will deal and refuse to deal with those who will not comply.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Evidence > Inferences & Presumptions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN18[] Monopolies & Monopolization, Conspiracy to Monopolize

The challenged agreement need not be in writing or even be explicit. Conspiratorial conduct may be established by circumstantial evidence.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] Private Actions, Remedies

Where evidence of a conspiracy is ambiguous, to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of 15 U.S.C.S. § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN20[] Sherman Act, Claims

An additional essential element in a claim under *15 U.S.C.S. § 1* is the existence of an unreasonable restraint of trade.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN21[] Regulated Practices, Market Definition

To demonstrate "market power," a plaintiff may show evidence of either power to control prices or the power to exclude competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN22[] Regulated Practices, Market Definition

Market power is to be distinguished from monopoly power, which requires proof of both power to control prices and power to exclude competition. Market and monopoly power only differ in degree. Monopoly power is commonly thought of as "substantial" market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Civil Procedure > Trials > Bench Trials

Evidence > Inferences & Presumptions > General Overview

HN23[] Monopolies & Monopolization, Actual Monopolization

Power over price and power over competition may, in turn, depend on various market characteristics, including the existence and intensity of entry barriers, elasticity of supply and demand, the number of firms in the market, and market trends.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN24[] Regulated Practices, Market Definition

Market share is relevant to the determination of the existence of market or monopoly power, but market share alone is insufficient to establish market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN25[] Regulated Practices, Market Definition

Courts have not completely agreed on whether a particular market share should be given conclusive or merely presumptive effect in determining market or monopoly power, or whether market share is only a starting point in the inquiry into market or monopoly power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN26[] Regulated Practices, Market Definition

While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70 percent and 80 percent.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Evidence > Inferences & Presumptions > General Overview

Governments > State & Territorial Governments > Licenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Patent Law > ... > Damages > Collateral Assessments > Costs

HN27[] Conveyances, Licenses

Entry barriers are relevant to the analysis of market or monopoly power. Entry barriers are particular characteristics of a market which impede entry by new firms into a market. Entry barriers may include high capital costs or regulatory or legal requirements such as patents or licenses.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Trials > Bench Trials

Evidence > Inferences & Presumptions > General Overview

HN28[] Regulated Practices, Market Definition

The significance of market power depends not only on its degree but also on its durability.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Trials > Bench Trials

Antitrust & Trade Law > Clayton Act > General Overview

HN29[] **Private Actions, Remedies**

While an antitrust damages award may not be the result of mere speculation or conjecture, it may be the result of a just and reasonable estimate of the damage based on relevant data.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN30[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN31[] **Monopolies & Monopolization, Actual Monopolization**

The elements of monopolization under *15 U.S.C.S. § 2* are the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN32[] **Monopolies & Monopolization, Actual Monopolization**

The fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown for a private litigant to recover on a claim of monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN33[] **Monopolies & Monopolization, Actual Monopolization**

While a "specific intent" to monopolize is necessary to establish an attempt to monopolize claim, general intent is all that is required to support a monopolization claim.

Civil Procedure > Trials > Bench Trials

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Standards of Review

HN34[] **Trials, Bench Trials**

When examining a challenge to jury instruction, an appellate court reviews the record as a whole to determine whether the instructions state the law which governs and provided a jury with an ample understanding of the issues and the standards applicable.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Trials > Bench Trials

Antitrust & Trade Law > Sherman Act > General Overview

HN35[] **Regulated Practices, Market Definition**

Courts must view entry barriers in terms of their relevance to the antitrust laws.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Trials > Bench Trials

Antitrust & Trade Law > Sherman Act > General Overview

HN36[] **Regulated Practices, Market Definition**

Market definition is a question of fact.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Trials > Bench Trials

Antitrust & Trade Law > Sherman Act > General Overview

HN37[] Regulated Practices, Market Definition

Definition of the relevant market requires first a determination of the product market. This inquiry necessitates an examination of which commodities are reasonably interchangeable for consumers for the same purposes. The relevant geographic market must also be determined.

Evidence > Inferences & Presumptions > General Overview

Torts > ... > Elements > Causation > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN38[] Evidence, Inferences & Presumptions

The elements of tortious interference under Kansas law are: (1) the existence of a business relationship or expectancy with the probability of future economic benefit to plaintiff; (2) knowledge of the relationship or expectancy by defendant; (3) that, except for the conduct of defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate cause of defendant's misconduct. Thus, improper conduct is a requirement.

Civil Procedure > Trials > Bench Trials

Evidence > Inferences & Presumptions > General Overview

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN39[] Trials, Bench Trials

A person may be privileged or justified to interfere with contractual relations in certain situations.

Civil Procedure > Trials > Bench Trials

Evidence > Inferences & Presumptions > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN40[] Trials, Bench Trials

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relations of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > Trials > Bench Trials

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Allen Charges

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN41[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Although it is a preferred rule of procedure that an Allen instruction be given the jury at the same time as other instructions, it is not a per se rule. Rather, Allen type cases must be reviewed on a case by case basis to determine the coercive effect of an instruction.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN42[] **Summary Judgment, Entitlement as Matter of Law**

Pursuant to *Fed. R. Civ. P. 56(c)*, summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN43[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment must be granted against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Procedure > Trials > Bench Trials

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN44[] **Trials, Bench Trials**

For a plaintiff to avoid summary judgment, there must be sufficient evidence from which a jury could find for the plaintiff. A mere "scintilla" of evidence is insufficient.

Civil Procedure > Trials > Bench Trials

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN45[] **Trials, Bench Trials**

A court must construe the evidence and draw all inferences in a light most favorable to the nonmoving party.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN46[] **Private Actions, Costs & Attorney Fees**

An attorneys' fee award by a district court will be upset on appeal only if it represents an abuse of discretion.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN47[] **Trials, Bench Trials**

Findings on underlying questions of fact are subject to the clearly erroneous standard of review.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > Trials > Bench Trials

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN48[] **Private Actions, Costs & Attorney Fees**

A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > Trials > Bench Trials

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN49[] **Private Actions, Costs & Attorney Fees**

If a plaintiff has obtained "excellent results," the attorney's fees should encompass all hours reasonably expended; no reduction should be made because a plaintiff failed to prevail on every contention. The result is what matters.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Costs > Costs Recoverable > Witnesses

Governments > Legislation > Interpretation

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN50[] **Private Actions, Costs & Attorney Fees**

28 U.S.C.S. § 1920 provides that a federal court may tax as costs against a losing party certain items, including fees and disbursements for witnesses. *28 U.S.C.S. § 1920(3)*.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Costs > Costs Recoverable > Witnesses

Governments > Legislation > Interpretation

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN51[] **Private Actions, Costs & Attorney Fees**

28 U.S.C.S. § 1821 defines the witness fees specified in *§ 1920(3)*. In addition to an attendance fee of $ 30 per day, *§ 1821* also permits a witness to recover for travel expenses to and from trial and provides a subsistence allowance if a witness must stay overnight to attend trial.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Civil Procedure > ... > Costs > Costs Recoverable > Witnesses

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN52[] **Costs & Attorney Fees, Clayton Act**

The Supreme Court holds that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witnesses as costs, federal courts are bound by the limitations set out in *28 U.S.C.S. § 1821* and *§ 1920*. Specifically, the Supreme Court holds that *Fed. R. Civ. P. 54(d)* does not permit an award of expert witness fees in excess of the limits contained in *§ 1821*.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

HN53[] **Costs & Attorney Fees, Clayton Act**

The costs recoverable under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, are limited to costs recoverable under *Fed. R. Civ. P. 54(b)* and *28 U.S.C.S. § 1920*.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN54[] **Private Actions, Costs & Attorney Fees**

The benchmark for awards under nearly all of the statutes awarding fees is that attorney's fee must be "reasonable." To determine what is a "reasonable" fee, a court must determine reasonable hours and reasonable rates for work done.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN55[] **Private Actions, Costs & Attorney Fees**

The first step in setting a rate of compensation for the hours reasonably expended is to determine what lawyers of comparable skill and experience practicing in the area in which litigation occurs would charge for their time.

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Robert H. Rawson, Jr., Jones, Day, Reavis & Pogue, Cleveland, Ohio (Robert M. Duncan, Joe Sims, and Joseph F. Winterscheid, Jones, Day, Reavis & Pogue, Cleveland, Ohio, and Donald R. Newkirk, Fleeson, Gooing, Coulson & Kitch, Wichita, Kansas, with him on the briefs), Attorneys for Appellees.

Judges: Moore, Anderson, and Brorby, Circuit Judges.

Opinion by: ANDERSON

Opinion

[*954] ANDERSON, Circuit Judge.

Blue Cross and Blue Shield of Kansas, Inc. ("Blue Cross") appeals an adverse verdict entered in an antitrust and state law tortious interference case. Both the antitrust and state law claims arose out of the same set of facts.

The parties have attempted to make this case very complex, but the antitrust issues are relatively straightforward. Plaintiffs' theory was that Blue Cross, alarmed by a **[**2]** perceived competitive threat from Hospital Corporation of America ("HCA") through its acquisitions of a major Wichita hospital now called HCA Health Services of Kansas, Inc. d/b/a Wesley Medical Center ("Wesley"), Health Care Plus, Inc. ("HCP"), and New Century Life Insurance Co. ("New Century"), determined to "hurt" Wesley and thereby send a message to other hospitals not to do business with entities Blue Cross believed were competitors. It did this by agreeing with Wesley's competitors, St. Joseph Hospital and St. Francis Hospital ("the Saints"), to terminate Wesley's contracting provider agreement and to reduce the maximum allowable payments it would make to the Saints, thereby increasing Wesley's costs of doing **[*955]** business and causing a shift of Blue Cross patients from Wesley to the Saints. The threatened termination of Wesley because of its affiliation with a Blue Cross competitor made other hospitals less willing to affiliate with, or enter into relationships with, Blue Cross competitors. The result was that Kansas health care consumers were restricted in their access to and benefits from health care financing arrangements involving entities other than Blue Cross, and **[**3]** were deprived of the benefits of competition in that arena. The jury agreed with plaintiffs and found multiple antitrust violations by Blue Cross.

Given our standard of review, we uphold the jury's verdict because we find sufficient evidence supports it. In so holding, we reach the following specific conclusions: (1) Wesley has standing to assert its antitrust claims and proved an antitrust injury; (2) Blue Cross entered into an agreement with the Saints which restrained trade in the market of health care financing; (3) Blue Cross had market and monopoly power and it willfully maintained its monopoly power; (4) Wesley adequately proved its damages; (5) the court properly instructed the jury on the various antitrust claims involved; (6) the court properly instructed the jury on plaintiffs' state law claims and sufficient evidence supports the jury's verdict on those claims; (7) Blue Cross suffered no prejudice from the court's supplemental "*Allen*" charges or any communications with the jury during deliberations; (8) the court properly granted plaintiffs' motion for summary judgment on the counterclaim; and (9) the award of attorneys' fees and costs is affirmed in all respects **[**4]** except we remand for a recalculation of the expert witness fees awarded.

PROCEDURAL HISTORY

Plaintiffs Walter L. Reazin, M.D., Wesley, HCP, and New Century brought this antitrust action against Blue Cross. Plaintiffs alleged violations of *sections 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2*, as well as violations of state law, arising out of Blue Cross' threatened termination of its contracting provider agreement with Wesley. They sought damages and other relief. [1] Blue Cross and its wholly-owned subsidiary, HMO Kansas, Inc. ("HMOK"), counterclaimed against plaintiffs as well as HCA, alleging: that HCA's acquisitions of Wesley, HCP, and New Century violated the antitrust laws; that HMOK's failure in Wichita was the result of an unlawful boycott and concerted refusal to deal or an unreasonable restraint of trade; that plaintiffs had monopolized, attempted to monopolize, and/or conspired to monopolize the market for health care financing and health care services; and, asserting tortious interference with prospective advantage, in violation of Kansas law. They sought damages and other relief.

[5]** Pursuant to plaintiffs' motion, the district court separated the trials of the complaint and the counterclaim. After a six-week jury trial on plaintiffs' complaint, and four weeks of deliberation, the jury returned a verdict in favor of Wesley, finding that Blue Cross had violated *section 1* of the Sherman Act by engaging in a conspiratorial restraint of trade, had violated *section 2* by monopolizing the relevant market, and had tortiously interfered with Wesley's present and prospective business relations in violation of Kansas law. It awarded Wesley $ 1,542,980 in actual damages for the antitrust violations and $ 1.00 in actual nominal damages and $ 750,000 in punitive damages for the tortious interference **[*956]** claim. [2]

[6]** Numerous post-trial motions followed. Ultimately, in a 124-page written opinion, the district court denied Blue Cross' motions to set aside the verdict and dismiss the case for lack of jurisdiction, for a directed verdict, and for judgment n.o.v. or for a new trial. *Reazin v. Blue Cross & Blue Shield, Inc., 663 F. Supp. 1360 (D.Kan. 1987)* ("*Reazin II*"). [3] It also denied plaintiffs' motion for injunctive relief against Blue Cross under Section 16 of the

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[1] As provided in section 4 of the Clayton Act:

> ***HN1***[] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which defendant resides . . . without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee."

15 U.S.C. § 15. Section 16 of the Clayton Act provides as follows:

> ***HN2***[] "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . ."

15 U.S.C. § 26.

[2] The jury found that HCP had suffered no injury as a result of the antitrust violations and concluded that HCP had failed to establish all the elements of tortious interference. The district court had earlier concluded that plaintiffs Reazin and New Century lacked standing to seek damages. *See* note 3, *infra*.

[3] In an earlier written opinion, the district court had granted in part and denied in part defendant's motion for summary judgment on plaintiffs' entire complaint. *Reazin v. Blue Cross & Blue Shield, Inc., 635 F. Supp. 1287 (D. Kan. 1986)* ("*Reazin I*"). The district court held that plaintiffs Reazin and New Century lacked standing to bring a private damage antitrust action under Section 4 of the Clayton Act, *15 U.S.C. § 15*. To that extent, the court granted defendant's motion for summary judgment. In all other respects, that motion was denied.

Clayton Act, *15 U.S.C. § 26*. After trebling the actual damages awarded Wesley, the court entered judgment in the amount of $ 5,378,941.00, plus interest. It awarded plaintiffs their requested sum of $ 2,176,983.75 in attorney's fees, and a total of $ 246,844.99 in other fees and costs. Finally, it granted plaintiffs' motion for summary judgment on the counterclaim. Blue Cross appeals essentially all of the district court's rulings, and is joined by HMOK with respect to the grant of summary judgment on the counterclaim.

[7]** FACTS

The complex facts and history of this case have been thoroughly recounted in the two district court opinions. *See* *Reazin I, 635 F. Supp. 1287*, and *Reazin II, 663 F. Supp. 1360*. We recite here only the basic undisputed facts relevant to this appeal.

Blue Cross, a non-profit company formed in 1983 by combining Blue Cross of Kansas, Inc. and Blue Shield of Kansas, Inc., is the largest private health care financing organization in Kansas. [4] It is chartered under a special enabling act. It is approximately fifteen times bigger than the next largest private health care financing organization, in terms of percent of earned health insurance premiums. Pl.'s Ex. 508K, Addendum to Answer Brief of Appellees Vol. I.

> "In 1985, all hospitals and approximately 90% of all physicians in [the Blue Cross] service area [which includes the entire state except for Johnson and Wyandotte Counties] were under contract with [Blue Cross] as providers of medical services to the company's subscribers. No other health insurance company has contracts with all of the hospitals in [Blue Cross'] service area. [Blue Cross] is also the federal Medicare **[**8]** intermediary in Kansas, administering the Medicare program throughout the company's service area; as well, it is one of the larger third-party administrators of self-insured programs in the state."

Reazin II, 663 F. Supp. at 1372 (citations to record omitted). Blue Cross is required under its enabling legislation to pursue cost containment as its primary goal.

Wesley is the largest, and "by far the strongest," hospital in Wichita. *Reazin I, 635 F. Supp. at 1297*. It is a major teaching hospital, as well as a provider of clinical services, medical research, and outreach care programs. There was testimony that Wesley is considered one of the premier hospitals in Kansas and has historically been a low-cost provider of quality health care. Wesley's competitors in Wichita are the Saints and Riverside Hospital.

HCP is a health maintenance organization ("HMO") founded in 1981, **[**9]** which provides private health care financing to businesses and individuals in Kansas, including Sedgwick County and Wichita. [5]

[10]** **[*957]** HCA, based in Nashville, Tennessee, "through its subsidiary corporations, is engaged in the business of providing health care services, private health care financing and hospital management services." *Reazin II, 663 F. Supp. at 1373*. In terms of the number of hospitals owned or managed, HCA is the largest for-profit hospital company in the United States. However, Dr. Thomas Frist, the chairman and chief executive officer of HCA, testified that HCA "[represents] less than three percent . . . of the hospital sector in this country [and] . . .

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[4] Blue Cross of Kansas, Inc. was formed in 1941 pursuant to special enabling legislation.

[5] HMOs and preferred provider organizations ("PPO"s) are so-called "alternative delivery systems" which have emerged as cost-effective alternatives to traditional indemnity insurance. HMOs and PPOs are prospective reimbursement arrangements, in which a member or subscriber pays a monthly amount to medical care providers who then oversee all the health care needs of the member. In an HMO or PPO, the member typically pays less for health care coverage than under a traditional indemnity insurance plan, but is limited in his or her choice of medical care providers. The district court, in its two opinions, described the trends and developments in the field of medical care which led to criticism of traditional indemnity insurance and to the development of alternative delivery systems and which provide the background to this case. *See* *Reazin I, 635 F. Supp. at 1297-99*; *Reazin II, 663 F. Supp. at 1372-75*.

close to fifty percent of [HCA's] revenues come through third-party insurers, of which Blue Cross is a large percentage." R. Vol. 32 at 3187-88.

New Century is a California corporation with its principal executive offices in Nashville. Its activities include the provision of private health care financing. In June 1983, it received its certificate of authority to do business in Kansas. [6]

[11]** The parties stipulated to the following additional and relevant facts:

> "On April 25, 1985, HCA consummated the acquisition of New Century Life Insurance Company.
> On July 11, 1985, HCA acquired Wesley Medical Center. The acquisition was effected through HCA Health Services of Kansas, Inc., a wholly-owned subsidiary of HCA.
> On August 14, 1985, HCA acquired Health Care Plus. The acquisition was effected through Health Care Plus of America, Inc., a wholly-owned subsidiary of HCA. Since its acquisition, Health Care Plus has continued to develop, market and sell health care financing products in competition with Blue Cross.
>
> On August 29, 1985, at a special meeting, the Executive Committee of the Blue Cross Board of Directors voted to terminate the existing contracting provider agreement between Blue Cross and Wesley, effective December 31, 1985. [7] **[**15]**
>
> **[*958]** On or about August 29, 1985, Blue Cross formally advised Wesley by letter of the decision of its Executive Committee to terminate Wesley's contracting provider agreement. On that same date, Blue Cross released details of the termination to the local media in Wichita. In an August 29 news release, Blue Cross

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[6] While New Century was determined on Blue Cross' motion for summary judgment to lack standing to seek damages, HCA's acquisition of New Century remained relevant to Blue Cross' Rule of Reason defense and to Blue Cross' counterclaim.

[7] The contracting provider agreement between Wesley and Blue Cross was part of a new agreement, the "Contracting Provider Agreement (Hospital) of the Competitive Allowance Program ('CAP')," which Blue Cross instituted in early 1984. The district court described CAP as follows:

> "The CAP program established the maximum amount [Blue Cross] would reimburse a medical provider for services within [a] particular diagnostic related group. Providers contracting with [Blue Cross] under the CAP program commit themselves to a maximum allowable payment ('MAP') for each service provided to the subscribers. The MAPs are based on uniform diagnostic-related groupings (DRGs) of medical services. . . . The 'hold harmless' provision ensures subscribers will not receive bills for covered medical expenses in excess of the contract amount [Blue Cross] pays a participating provider."

Reazin II, 663 F. Supp. at 1375 (citations to record omitted). The CAP contracting provider agreements also contained a "most favored nations" clause, pursuant to which participating providers agreed to promptly inform Blue Cross of, and make available to Blue Cross, any lower rates it charged to competing insurance companies. Thus, Blue Cross was assured of receiving the lowest rates its participating hospitals charged. Wesley had been a contracting provider with Blue Cross since the 1940s. In early July 1985, approximately two months before Blue Cross decided to terminate Wesley's contracting provider agreement, Blue Cross had renewed the agreement.

There was considerable testimony about the significant advantages in being a contracting provider hospital and the considerable disadvantages to not having that status. *See also* *Reazin I, 635 F. Supp. at 1295-96*. From the perspective of Blue Cross subscribers, Wesley's loss of its contracting provider status would mean that those subscribers using Wesley (1) would not have the same assurance of predictability of health care costs which the maximum allowable payment concept guarantees; (2) would not get the benefit of the "hold harmless" clause limiting their liability; and (3) would not have access to direct payment of claims from Blue Cross to the hospital.

The contracting provider agreement with Wesley was never, in fact, terminated because, pending resolution of this suit, the parties agreed to maintain Wesley's contracting provider status. The maximum allowable payments were, however, reduced for all hospitals, and Wesley agreed to accept those reduced payments. In 1986, before the trial in this case, HCA informed Blue Cross that it was withdrawing from the health care financing field and divesting HCP. Blue Cross thereafter signed a new contracting provider agreement with Wesley.

indicated **[**12]** that subsequent to the effective date of Wesley's termination as a participating hospital, Blue Cross payments would be sent directly to the subscriber and could not be assigned to Wesley.

On September 5, 1985, G. Wayne Johnston, President of Blue Cross, met privately with A.B. Davis, Jr., Chairman and Chief Executive Officer of Wesley, and Mr. Robert J. O'Brien, Wesley's executive Vice President -- Corporate Development, to discuss Wesley's termination. Also in attendance at the September 5 meeting was Marlon R. Dauner, Senior Vice President of Blue Cross.

On September 9, 1985, Mr. Johnston spoke with Mr. Davis.

On September 10, 1985, David G. Williamson, Vice Chairman of HCA, telephoned Mr. Johnston to discuss Blue Cross' decision to terminate Wesley.

On September 10, 1985, Blue Cross ran a full-page ad in the Wichita Eagle Beacon announcing that Wesley would be a noncontracting hospital effective January 1, 1986.

On or about September 10, 1985, Blue Cross issued a publication entitled "Health Plan" to certain subscribers in Kansas.

At a meeting of the Blue Cross Executive Committee held on September 19, 1985, Wesley sought reconsideration of Blue Cross' termination decision. **[**13]** Blue Cross has refused to reverse its decision to terminate Wesley's contracting provider agreement. At the September 19, 1985 meeting, Blue Cross' Executive Committee approved a reduction in the Peer Group V MAPs for all covered services. The reduction affects only Wichita hospitals in Peer Group V. The MAPs for other peer groups in Kansas remain unchanged.

By letter dated September 25, 1985, Donald A. Wilson, President of the Kansas Hospital Association, asked Blue Cross to comment on its termination of Wesley. Blue Cross issued a reply dated October 3, 1985, to all Kansas hospitals. [8]

By letter dated October 15, 1985, Administrative Services of Kansas, Inc., a subsidiary of Blue Cross, advised Wesley that effective January 1, 1986, said subsidiary would terminate its lease agreement with Wesley for electronic data processing equipment transmitting inquiries via telecommunication lines to said subsidiary. The lease agreement enabled Wesley to obtain prompt benefits verification. The lease agreement was being terminated because of the termination of **[*959]** Wesley's contracting provider agreement with Blue Cross. [9]

Blue Cross does not honor or recognize the assignment **[**14]** of benefits by subscribers to noncontracting hospitals under the terms of the subscriber agreements.

Part V.f. of the standard Blue Cross subscriber agreement provides that insurance proceeds will be paid directly by Blue Cross to participating hospitals, but that proceeds for medical services performed by nonparticipating hospitals will be paid directly to the subscriber and cannot be assigned to any other person or entity."

R. Vol. III, Tab 207 at Instruction 15 (paragraph letters omitted).

[16]** ANTITRUST ISSUES

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[8] The letter included, in pertinent part:

> "*We cannot stand idly by and watch insurance-hospital corporations, such as HCA, monopolize the delivery and financing of care by seeking to enroll Blue Cross and Blue Shield subscribers in their insurance programs*. Vertical integration is a strategy some hospitals may feel to be in their best interest. However, *if hospitals decide to compete with Blue Cross and Blue Shield in the manner that HCA is competing, Blue Cross and Blue Shield must make a business decision about its future relationship with these entities. Hospitals that wish to continue their current relationship with Blue Cross and Blue Shield, that do not seek to enroll subscribers in other programs, and that wish to cooperate with Blue Cross and Blue Shield as a major marketing arm of the hospital, will experience no change* in the contractual relationship that has historically served Kansans well."

Plaintiff's Ex. 468C, Addendum to Answer Brief of Appellees Vol. I (emphasis added).

[9] In fact, the lease agreement also was never actually terminated.

Blue Cross filed a motion under *Fed.R.Civ.P. 12(b)* to set aside the verdict and dismiss the case for lack of jurisdiction, asserting that its challenged conduct is exempt from the application of the antitrust laws under the McCarran-Ferguson Act, *15 U.S.C. §§ 1011-1015*. The district court disagreed, holding that no McCarran-Ferguson exemption applied and that it had jurisdiction. We affirm for the reasons set forth in the district court's discussion of this issue. *Reazin II, 663 F. Supp. at 1401-09*.

The district court denied Blue Cross' motions for a directed verdict, for a judgment n.o.v., or alternatively for a new trial. *Reazin II, 663 F. Supp. 1360*. ***HN3***[] "'Motions for a directed verdict and for judgment n.o.v. are considered under the same standard.'" *Zimmerman v. First Fed. Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988)* (quoting *Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 498 (10th Cir. 1984))*. **[**17]** ***HN4***[] We may reverse the denial of such motions "only if the evidence points but one way and is susceptible to no reasonable inferences supporting the [plaintiffs]; we must construe the evidence and inferences most favorably to the nonmoving party [plaintiffs]." *Zimmerman, 848 F.2d at 1051*. We "may not weigh the evidence or pass upon the witnesses' credibility, or substitute [our] judgment for that of the jury." *Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 498 (10th Cir. 1984)*. Thus, if reasonable minds could differ over the verdict, the motion for judgment n.o.v. was properly denied. ***HN5***[] We review the denial of Blue Cross' motion for a new trial under an abuse of discretion standard. *Patty Precision Prods., Co. v. Brown & Sharpe Mfg. Co., 846 F.2d 1247, 1251 (10th Cir. 1988)*; *Brown v. McGraw-Edison Co., 736 F.2d 609, 616 (10th Cir. 1984)*.

A. *Section 1*

Section 1 of the Sherman Act ***HN6***[] prohibits "every contract, combination **[**18]** . . . or conspiracy, in restraint of trade or commerce. . . ." *15 U.S.C. § 1*. This has been interpreted to prohibit only "unreasonable" restraints. *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 108 S. Ct. 1515, 1519, 99 L. Ed. 2d 808 (1988)*; *Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342-43, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*; *Drury Inn-Colorado Springs v. Olive Co., 878 F.2d 340, 342 (10th Cir. 1989)*. ***HN7***[] To affirm the district court's denial of Blue Cross' motions for judgment n.o.v. or for a new trial on the *section 1* claim, there must be sufficient evidence supporting the jury's finding of an agreement which unreasonably restrained trade in the relevant market -- private health care financing. [10]

[19]** **[*960]** The district court submitted plaintiffs' *section 1* claim to the jury under the Rule of Reason. "As stated by the Supreme Court, ***HN8***[] 'the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.'" *Smith Mach. Co. v. Hesston Corp., 878 F.2d 1290, 1298 (10th Cir. 1989)* (quoting *National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978))*, *cert. denied*, *493 U.S. 1073, 110 S. Ct. 1119, 107 L. Ed. 2d 1026, 58 U.S.L.W. 3526 (1990)*. ***HN9***[] The factfinder must "decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." *Maricopa County Medical Soc'y, 457 U.S. at 343*. In making that decision "a variety of actual market factors" must be examined. *Smith Mach. Co., 878 F.2d at 1298* (citing *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918))*. **[**20]** The plaintiff bears the burden of proving the "'adverse effect on competition.'" *Smith Mach. Co., 878 F.2d at 1298* (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 31, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984))*. As the above statements indicate, the adverse impact must be on *competition*, not on any individual competitor or on plaintiff's business. *See Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*, *cert. denied*, *486 U.S. 1005, 100 L. Ed. 2d 192, 108 S. Ct. 1728 (1988)*; *Christofferson Dairy v. MMM Sales, 849 F.2d 1168, 1172 (9th Cir. 1988)*. Additionally, "we must bear in mind that the purpose of the antitrust laws is the

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[10] The district court instructed the jury that "the relevant product market in this case is private health care financing." R. Vol. III, Tab 207 at Instruction 37. In denying Blue Cross' McCarran-Ferguson Act exemption claim, the court stated that "this case proceeded under all parties' agreement [that] 'private health care financing' includes 'self-insurance and self-insured administration' products." *Reazin II, 663 F. Supp. at 1403*. Additionally, the court noted that "the market for private health care financing embraces defendant's activities with and through its subsidiary, [HMOK]." *Id.* As discussed more fully, *infra*, Blue Cross argues that the court should have instructed the jury to make findings as to the products constituting the market of private health care financing.

promotion of consumer welfare. . . . HN10[] We consider [defendant's] refusal to deal in light of its effect on consumers, not on competitors." Westman Comm'n Co., 796 F.2d at 1220 (citations omitted).

The jury found that Blue Cross had engaged in a contract, combination, or conspiracy with St. Francis and/or St. Joseph **[**21]** Hospitals, encompassing within its terms the termination of Wesley as a contracting provider, and the reduction of the maximum allowable payments for the remaining Peer Group V hospitals. [11] *See* Reazin II, 663 F. Supp. at 1398. Blue Cross argues on appeal that the district court erred in denying its motions for judgment n.o.v. or for a new trial on the section 1 claim, asserting that (1) it engaged in independent, as opposed to concerted, activity when it terminated Wesley; (2) it did not unreasonably restrain trade in the health care financing market, and (3) it lacked market power. [12] It also argues that Wesley failed to establish antitrust injury, standing, or recoverable damages. We take up standing and antitrust injury first.

[22]** (i) Standing and Injury

Blue Cross argues that Wesley failed to establish antitrust injury and standing. HN11[] Standing and antitrust injury are essential elements in a private antitrust damages action brought under section 4 of the Clayton Act. *See* Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 110, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1523 (10th Cir. 1984), *aff'd*, 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985); Central Nat'l Bank v. Rainbolt, 720 F.2d 1183, 1187 (10th Cir. 1983). They are related, although they are often treated **[*961]** separately by courts. *See* Alberta Gas Chems., Ltd. v. E.I. Du Pont de Nemours & Co., 826 F.2d 1235, 1240 (3d Cir. 1987) ("It has been suggested that although standing is closely related to antitrust injury, the two concepts are distinct. Once **[**23]** antitrust injury has been demonstrated by a causal relationship between the harm and the challenged aspect of the alleged violation, standing analysis is employed to search for the most effective plaintiff from among those who have suffered loss."), *cert. denied*, *486 U.S. 1059, 100 L. Ed. 2d 930, 108 S. Ct. 2830 (1988)*. *See generally* Page, *The Scope of Liability for Antitrust Violations*, 37 Stan.L.Rev. 1445, 1483-85 (1985). The close connection between them has, however, been underscored recently. *See* Areeda & Turner, ***Antitrust Law***, para. 334.1 (Supp. 1989) (Recent Supreme Court cases "closely link standing to a showing of 'antitrust injury.'"); Bell v. Dow Chem. Co., 847 F.2d 1179, 1182 (5th Cir. 1988) ("Antitrust injury is a component of the standing inquiry, not a separate qualification.").

Plaintiffs argue Blue Cross has waived the right to object to Wesley's standing or the existence of compensable injury because it failed to so object in its motion for a directed verdict. [13] **[**25]** In denying Blue Cross' motion for

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[11] Peer Group V includes the four Wichita hospitals and "is one of two geographically determined peer groups in the state." Reazin I, 635 F. Supp. at 1294.

[12] In Westman Comm'n Co., 796 F.2d at 1229, this court stated that "section one of the Sherman Act does not proscribe refusals to deal absent a showing of monopoly or market power on the part of the manufacturer." Thus, Blue Cross argues that, absent proof of at least market power, its refusal to deal with Wesley does not violate section 1. *See also* Schachar v. Am. Academy of Opthalmology, Inc., 870 F.2d 397 (7th Cir. 1989) ("the first question in any rule of reason case is market power."); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1334 (7th Cir. 1986) ("Market power is a necessary ingredient in every case under the Rule of Reason."). In certain circumstances, it may be that a detailed market analysis is not required. *See note* 24, *infra*.

[13] Blue Cross did not challenge Wesley's standing in either its motion for summary judgment or the pretrial order. *See* Motion of Blue Cross and Blue Shield of Kansas, Inc. for Summary Judgment, R.Vol. I, Tab 50 at p. 2; Pretrial Conference Order, R.Vol. II, Tab 76. The district court noted that Blue Cross failed to challenge Wesley's standing in its motion for directed verdict. Blue Cross finally challenged Wesley's standing in its Alternative Motion for Judgment Notwithstanding the Verdict or New Trial. Defendants' Alternative Motion for Judgment Notwithstanding the Verdict or New Trial, R.Vol. IV, Tab 246 at 2.

Plaintiffs do not appear to object to the district court's rulings that plaintiffs New Century and Reazin lacked standing to pursue damages but had standing to seek injunctive relief. *See* Reazin I, 635 F. Supp. at 1309-20.

judgment n.o.v. or for a new trial, the district court concluded that Blue Cross was barred from challenging **[**24]** Wesley's standing under *section 1*:

> "Throughout this litigation, defendant has never challenged Wesley's standing under *§ 1*, and it may not do so now. Indeed, defendant's position at the summary judgment stage was that Dr. Reazin, New Century, and HCP lacked standing because Wesley was the *only* plaintiff with appropriate standing under *§ 1*. *Failing to raise this issue, either at summary judgment or on its motion for directed verdict, defendant is now barred from pursuing this contention on a motion for JNOV or new trial*."

Reazin II, 663 F. Supp. at 1425 (emphasis original in part, added in part) (citation omitted). [14]

Courts do not agree on whether antitrust standing can be waived. *Compare* *NCAA v. Bd. of Regents, 468 U.S. 85, 97 n.14, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* (Court did not address antitrust injury issue not raised by the parties); *General Inv. Co. v. New York Cent. R.R. Co., 271 U.S. 228, 230-31, 70 L. Ed. 920, 46 S. Ct. 496 (1926)*; *R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 154 (9th Cir. 1989)* (en banc) (Norris, J., dissenting); *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979)* (standing issue not raised below waived on appeal), *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*, *with* *R.C. Dick Geothermal Corp., 890 F.2d at 145* (majority opinion noted that standing **[**26]** is "not a jurisdictional question but one properly raised at any stage of the litigation"); *Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1461 (6th Cir. 1988)* (court addressed antitrust standing issue not raised below, as a matter of its discretion "'to be exercised on the facts of individual cases'") (quoting *Singleton v. Wulff, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976))*, *cert. denied*, *488 U.S. 880, 109 S. Ct. 196, 102 L. Ed. 2d 166 (1988)*.

[*962] We need not decide whether Blue Cross can now properly challenge Wesley's standing and the existence of antitrust injury because, applying the Supreme Court's guidelines set forth in *Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1987)*, *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, *Blue Shield v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*, and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, **[**27]** we conclude Wesley had standing and demonstrated the requisite injury. [15]

[28]** Wesley introduced evidence at trial that, because of Blue Cross' announced termination of Wesley as a contracting provider hospital, it (1) spent money on advertisements to reassure patients that Blue Cross subscribers were still welcome at Wesley, (2) reduced its prices in order to retain its market share, and (3) lost patients. Blue Cross responds that "none of these claimed injuries flowed from the exclusion of competition from the health care financing market, or from an increase in prices for consumers of health insurance." Brief of Appellants at 34. Blue Cross thus argues that, for example, Wesley's alleged injury resulting from its reduction of its maximum allowable payments in order to retain its market share is an injury resulting from increased competition and from action benefiting consumers and therefore is not antitrust injury.

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[14] While the district court did not specifically address antitrust injury, implicit in its discussion was its rejection of the combined argument Blue Cross made in its motion for judgment n.o.v. that Wesley failed to prove antitrust injury and lacked standing.

[15] Taken together, those cases reveal ***HN12***[] the following factors to be considered in determining antitrust standing: the causal connection between the antitrust violations and plaintiff's injury; the defendant's intent; the nature of the plaintiff's injury; the directness or indirectness of the connection between the plaintiff's injury and the allegedly unlawful market restraint; the speculativeness of the plaintiff's damages; and the "risk of duplicative recoveries . . . or the danger of complex apportionment of damages." *Associated Gen. Contractors, 459 U.S. at 544*.

The nature of the plaintiff's injury factor is designed to implement the requirement that only *antitrust* injuries are redressable under section 4. ***HN13***[] An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp., 429 U.S. at 489*. An injury which is merely causally linked in some way to an alleged antitrust violation is insufficient. *Cargill, Inc., 479 U.S. at 109*; *Brunswick Corp., 429 U.S. at 489*.

The Supreme Court has suggested that *Brunswick* should not be read overly narrowly -- "while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress, . . . that is not the only form of injury remediable under § 4." McCready, 457 U.S. at 482-83 **[**29]** (citation omitted). The Supreme Court specifically noted that "'the statute does not confine its protection to consumers, or to purchasers, or to competitors . . .'" Id. at 472 (quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)). [16] **HN14**[] "Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.'" McCready, 457 U.S. at 479 (quoting Brunswick Corp., 429 U.S. at 489); *cf.* Associated Gen. Contractors, 459 U.S. at 537-45 (union denied standing to argue that multiemployer association and its members coerced certain third parties and some of the multiemployer association's members to enter into business relationships with nonunion firms, thereby restraining the union's business activities.).

[30]** Blue Cross challenges Wesley's standing on the ground that it "was not in the relevant market selected by the court, health care financing, either as a consumer or as a competitor." Brief of Appellants at 33. While it is true that Wesley was not itself a direct participant in the provision of health care financing, it was, by virtue of **[*963]** its affiliation with HCA and HCP, a perceived competitor of Blue Cross. Indeed, as the district court stated, "that is the precise reason [Blue Cross] undertook the conduct at issue in this case." Reazin II, 663 F. Supp. at 1426 n.17. In any event, as the Supreme Court has specifically held, **HN15**[] an antitrust plaintiff need not necessarily be a competitor or consumer. *See* McCready, 457 U.S. at 472. Where the plaintiff's injury is "inextricably intertwined" or "so integral an aspect of the conspiracy alleged" plaintiff has established an antitrust injury. Id. at 484, 479. Here, Wesley's claimed injuries were an "integral aspect" of the conspiracy to restrain trade in the health care financing **[**31]** market. Indeed, Wesley was the direct victim of Blue Cross' actions. *See* Associated Gen. Contractors, 459 U.S. at 529-30 n.19. There was also evidence that Blue Cross specifically intended to harm Wesley.

(ii) Agreement

HN16[] Section 1 requires the existence of an agreement between the allegedly conspiring parties. *See* Fisher v. City of Berkeley, 475 U.S. 260, 266, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986); Smith Mach. Co., 878 F.2d at 1294; McKenzie v. Mercy Hosp., 854 F.2d 365 (10th Cir. 1988). We are well aware, as Blue Cross urges on us, that **HN17**[] a business retains the right under section 1 to *unilaterally* announce the terms on which it will deal and refuse to deal with those who will not comply. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919); **[**32]** Motive Parts Warehouse v. Facet Enterps., 774 F.2d 380, 386 (10th Cir. 1985).

HN18[] The challenged agreement need not be in writing or even be explicit. "Conspiratorial conduct may be established by circumstantial evidence." Cayman Explor. Corp. v. United Gas Pipe Line, 873 F.2d 1357, 1361 (10th Cir. 1989) (citing Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86, 93 (10th Cir.), *cert. denied*, *347 U.S. 976, 98 L. Ed. 1115, 74 S. Ct. 787 (1954)*); *see also* Monument Builders, Inc. v. American Cemetery Ass'n., 891 F.2d 1473 (10th Cir. 1989). **HN19**[] Where evidence of a conspiracy is ambiguous, the Supreme Court has stated, "to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting Monsanto Co., 465 U.S. at 764); **[**33]** *see also* Monument Builders, 891 F.2d at 1481 n.8 ("The [Supreme] Court [in *Matsushita* and *Monsanto Co.*] did not intend to end reliance on circumstantial proof of conspiracy, but rather to avoid reliance exclusively on evidence which is 'as consistent with permissible competition as with illegal conspiracy.'") (quoting Matsushita, 475 U.S. at 588). Blue Cross argues that the evidence failed to establish the existence of an agreement.

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[16] We are also aware that the Supreme Court may be concerned about reading section 4 of the Clayton Act too broadly. *See* Associated Gen. Contractors, 459 U.S. at 529-530 & n.19. We do not believe we have done so in this case.

We agree with the district court that sufficient circumstantial evidence supports the jury's finding of an agreement. *See* Reazin II, 663 F. Supp. at 1421-24. The evidence and testimony concerning the precise circumstances under which the Saints accepted the reduced maximum allowable payments and learned of the proposed Wesley termination were conflicting. However, the series of meetings between Blue Cross and the Saints during the spring and summer of 1985 concerning a new HMO program "established an existing forum" within which discussions relating to Wesley's termination and the maximum allowable payments reduction could, and eventually did, take place. Reazin II, 663 F. Supp. at 1422. **[**34]** John Knack, the vice-president of Blue Cross who was intimately involved in the proposed Wesley termination, testified in his deposition (read into the record at trial) that "right from the first meeting [the Saints] indicated they would consider a discount." R.Vol. 28 at 2602. Marlon Dauner, the senior vice-president of Blue Cross, also intimately involved in the entire Wesley termination decision, testified at trial that the three decisions -- **[*964]** to cancel Wesley's contracting provider agreement, to abandon the Choice Care program, and to seek reduced MAPs -- were "related." R.Vol. 19 at 970. [17]

[35]** The chief financial officer of St. Francis, Stephen Harris, prepared a memorandum dated September 3 to Sister Sylvia Egan, the chief executive officer of St. Francis, which stated in pertinent part:

> "When you left for Wisconsin [on August 16], we were working with Blue Cross on various options that would allow Blue Cross to cancel Wesley's Blue Cross contract. At that time, Blue Cross felt they needed a 25% discount from the 1986 MAPs in order to offer a large enough discount [to] the 'employer' so that the program would be supported and the 'Wesley Boycott' would work. After a lot of discussion involving several different scenario [sic], we agreed on a straight 20% discount from the 1986 MAPs."

Plaintiffs' Ex. 4, Addendum to Answer Brief of Appellees Vol. I.

St. Joseph's vice-president of administration, Edward Sullivan, wrote a memorandum to his superior, William Leeker, after this lawsuit was filed, in which he stated that "implementation of [the] *new* 1986 MAPs would be delayed if the HCA suit is successful in gaining a temporary injunction. In that case the *original* 1986 MAPs would be used." Plaintiffs' Ex. 5, *Id.* (emphasis original). **[**36]** In fact, the new reduced MAPs *were* implemented, even though Robert Pearcy, Blue Cross' former director of institutional relations, testified in his deposition, which was read into the record at trial, that there had been an agreement after this lawsuit was filed to utilize the original 1986 maximum allowable payments. Plaintiffs' Ex. 551 at p.64, Addendum to Answer Brief of Appellees Vol. II. Thus, there was ample evidence that the decision to terminate Wesley and the decision to reduce the maximum allowable payments were interrelated and part of a common design to increase Wesley's costs of doing business and to drain patients from Wesley to the Saints, thereby harming Wesley. [18]

Viewing the evidence in the light most favorable to plaintiffs, **[**37]** as we must, we affirm the district court's conclusion that sufficient evidence supports a finding of "'a conscious commitment to a common scheme,'" Monsanto Co., 465 U.S. at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981))*, sufficient to satisfy section 1's requirement of an agreement. [19]

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[17] Choice Care was a PPO which Blue Cross attempted to introduce into Wichita in 1985, after ceasing to market HMOK. Blue Cross solicited competitive bids from all Wichita hospitals for participation in the Choice Care program. Wesley and St. Francis were initially selected as the successful bidders. After Blue Cross altered some of the provisions of the proposed Choice Care program, Wesley was unhappy with its submitted bid. During June and July of 1985, Wesley and Blue Cross officials met in an effort to resolve these problems. Wesley wanted to submit a new bid but was not permitted to. On July 31, 1985, Wesley received the proposed Choice Care contract from Blue Cross. Blue Cross decided in August to abandon the Choice Care program in Wichita.

[18] Indeed, there was abundant evidence that the only reason the Saints agreed to the reduced maximum allowable payments was because they anticipated a shift of patients from Wesley to the Saints as a result of the termination of Wesley's contracting provider agreement.

[19] We likewise affirm the district court's rejection of Blue Cross' argument that there could be no agreement because the only Blue Cross agents with the authority to terminate the Wesley contract, the executive committee, had no knowledge of the alleged conspiracy in which Blue Cross' senior management staff may have participated.

(iii) Unreasonable Restraint of Trade

HN20[] An additional essential element in a *section 1* claim is the existence of an unreasonable **[**38]** restraint of trade. *See Dreiling v. Peugeot Motors of America, Inc., 850 F.2d 1373, 1381 (10th Cir. 1988)*; *Christofferson Dairy, 849 F.2d at 1172*.

The jury found an unreasonable restraint of trade in the private health care financing market. The district court concluded that **[*965]** ample evidence supported the jury's findings. It summarized the evidence as follows:

> "The market restraint alleged in this case is within private health care financing. [Blue Cross'] abandonment of its indemnity insurance in favor of a 'new PPO', under which it will contract only with providers not aligned with competing insurance companies, injects a market distortion. . . . [Blue Cross] discriminated against a particular class of medical provider, and there was abundant evidence from which the jury could have found defendant's conduct was undertaken with the intent and effect of preventing providers from contracting with other insurance companies. At issue in this case is not a pristine 'agreement to purchase services from certain sellers, and not from another.' Rather, substantial evidence demonstrated, and the jury apparently found, [Blue Cross'] **[**39]** conduct restricted the ability of other buyers (competing health care financing organizations) to purchase hospital services on a competitive basis through alternative delivery systems, thereby restraining competition in the health care financing market. . . ."

Reazin II, 663 F. Supp. at 1412-13. The court also emphasized the fact that there was "conduct involving at least in part a horizontal conspiracy between competing providers." *Id. at 1414*. It was further influenced by evidence that Blue Cross' motive for undertaking the conduct it did was anticompetitive.

Blue Cross argues there was no unreasonable restraint of trade in the private health care financing market because (1) Wesley, the only party the jury found to have been injured, was not in the health care *financing* market, but only in the health care *services* market; (2) no evidence demonstrated that the announced termination of Wesley's contract prevented hospitals from vertically integrating into health care financing or prevented health care financing businesses from contracting with hospitals; and (3) the effects in the health care financing market were procompetitive **[**40]** and proconsumer, in that insurer premiums for Blue Cross subscribers were reduced, new opportunities for Blue Cross competitors were created, and no consumers were restricted in their health care options.

We agree with the district court that sufficient evidence supports the jury's finding of an unreasonable restraint of trade in the market for private health care financing. It is not dispositive to us that Wesley was in the health care services market and not itself in the health care financing market. As plaintiffs argue and the district court noted, Wesley was, by virtue of its affiliation with HCA and HCP, a perceived competitor of Blue Cross. Indeed, in the Blue Cross Executive Committee meeting August 29, 1985, when the formal decision to terminate Wesley was made, Blue Cross' President Wayne Johnston specifically asked the Committee whether Blue Cross "[wished] to continue to do business with entities that openly desire to compete with the organization and enroll Blue Cross . . . subscribers in their programs." Plaintiffs' Ex. 10, Addendum to Brief of Appellants Vol. I. Further, Wesley *was* a competitor of Blue Cross' co-conspirators, the Saints. Thus, this case does **[**41]** not involve only, as defendants argue, the termination of a vertical relationship, akin to a dealer termination. Rather, this case also involves a horizontal conspiracy among competitors to harm another competitor. *See* *Business Elecs. Corp., 108 S. Ct. at 1525*.

Blue Cross argues that the jury specifically found that HCP, the only plaintiff in the relevant market of health care financing, had suffered no injury. According to Blue Cross, this establishes that no unreasonable restraint of trade occurred in the relevant market. The finding of no injury to HCP does not alter our conclusion that competition in the health care financing market was adversely affected. As the district court noted, HCP specifically made no effort to quantify its damages. The peculiar posture of this case, with the parties having voluntarily agreed to maintain the status quo and to delay actual termination of Wesley's contracting provider **[*966]** agreement pending resolution of this suit, may indeed explain why HCP continued to contract with other Wichita hospitals, including the Saints, after the threatened termination. [20]

[42]** We further disagree with Blue Cross' assertion that no evidence demonstrated that the announced termination of Wesley's contract prevented hospitals from vertically integrating into health care financing or prevented health care financing businesses from contracting with other hospitals. Indeed, several hospital administrators testified that Blue Cross' threatened termination of Wesley gravely concerned them and affected their involvement in private health care financing. [21] *Cf.* *R.C. Dick Geothermal Corp., 890 F.2d at 152* ("Dick Geothermal failed to provide testimony from a single other developer that the developer's investment decisions were in any way influenced by the defendants' level of production . . .").

[43]** Finally, we reject Blue Cross' argument that the evidence established that the effects of Blue Cross' conduct were procompetitive and proconsumer. While there was testimony that premiums for some subscribers were reduced following the threatened termination of Wesley and the implementation of the reduced maximum allowable payments, that does not convince us that Blue Cross' challenged actions were procompetitive and proconsumer. Indeed, two of plaintiffs' experts, William Guy and Dr. George Hay, plainly testified that Blue Cross' actions would, in the long run, harm consumers because they would slow down or inhibit the development of alternative delivery systems, thereby reducing the options available to consumers. They further testified that such systems would cause health care costs to decrease, thereby benefiting consumers. [22] Thus, sufficient evidence supports the jury's conclusion that Blue Cross' actions resulted in an unreasonable restraint of trade.

[44]** (iv) Market and Monopoly Power

Blue Cross argues that, absent a showing of market power, plaintiffs' *section 1* claim fails. Plaintiffs evidently assumed they must establish market power, as they presented considerable evidence relating to that issue. Thus, we review the evidence of Blue Cross' market power, noting that the Supreme Court has suggested that there may be situations in which a specific and detailed showing of market power may not be necessary in a *section 1* Rule of Reason case. *See* note 24, *infra*.

HN21[] "To demonstrate 'market power,' a plaintiff may show evidence of *either* 'power to control prices' *or* 'the power to exclude competition.'" *Westman Comm'n Co., 796 F.2d at 1225 n.3* (emphasis original). ***HN22***[] Market power is to be distinguished **[*967]** from monopoly power, which in this circuit requires proof of *both* power to control prices and power to exclude competition. *See* *Bright v. Moss Ambulance Serv., Inc., 824 F.2d 819, 824 (10th Cir. 1987)*; **[**45]** *Shoppin' Bag, Inc. v. Dillon Cos., 783 F.2d 159, 163 (10th Cir. 1986)*. Market and monopoly

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[20] One hospital administrator, however, testified that, after the threatened termination, his hospital proceeded with a proposed contract with HCP only because the contract contained a termination clause permitting the hospital to terminate the contract on six months' notice.

[21] Lynne Jeane, the executive director of Humana Hospital in Dodge City, Kansas, testified that Blue Cross' letter to all Kansas hospitals "confirmed what we understood was a threat. The announcement of the cancellation of Wesley's policy confirmed that they would carry out the threat. . . . We have taken a position that we will wait and see what the outcome of this situation is before we attempt to provide any product." R.Vol. 28 at 2547. Ingo Angermeier, the associate administrator of Asbury Hospital in Salina, Kansas, testified that he told Blue Cross' Marlon Dauner that he "was concerned that [his] right as a provider to compete was being threatened." R.Vol. 20 at 1248. He further testified that his hospital had "substantially slowed down [its] discussion about a PPO," as a result of the threatened Wesley termination and the letter to all Kansas hospitals from Blue Cross President Wayne Johnston letter. *Id. at 1292*. Dale Martin, the Administrator and Chief Executive Officer of Graham County Hospital in Hill City, Kansas, testified that his hospital "[has] not had any more discussions with anybody concerning HMOs or PPOs since [he] received [the Johnston] letter." R.Vol. 28 at 2645.

[22] In response to Blue Cross' argument that its actions only benefited consumers, we note that there was evidence that Wesley had historically been not only the largest, but also the premier and one of the most cost-effective hospitals in Wichita. In view of Blue Cross' mandate to pursue cost containment, we view with some suspicion the argument that the termination of the largest and one of the most cost-effective hospitals promotes cost containment and thereby benefits consumers, either in the short run or over the long run.

power only differ in degree -- monopoly power is commonly thought of as "substantial" market power. *See* Areeda & Turner, ***Antitrust Law***, para. 801 (1978). We discuss the two concepts together here, since the same evidence relates to each.

HN23[] Power over price and power over competition may, in turn, depend on various market characteristics, including the existence and intensity of entry barriers, elasticity of supply and demand, the number of firms in the market, and market trends. *See* *Shoppin' Bag, 783 F.2d at 162* (in evaluating market power, "many cases . . . look at market trends, number and strength of other competitors, and entry barriers"). [23]

[46]** ***HN24***[] Market share is relevant to the determination of the existence of market or monopoly power, but "market share alone is insufficient to establish market power." *Bright, 824 F.2d at 824*; *see also* *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 695 (10th Cir. 1989)*; *Shoppin' Bag, 783 F.2d at 162*; Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 947 (1981). It may or may not reflect *actual* power to control price or exclude competition. *See generally* *Ball Memorial Hosp., 784 F.2d at 1335*. ***HN25***[] Courts have not completely agreed on whether a particular market share should be given conclusive or merely presumptive effect in determining market or monopoly power, or whether market share is only a starting point in the inquiry into market or monopoly power. *Compare* *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 667* (7th Cir.) ("Without a showing of special market conditions or other compelling evidence of market power, the lowest possible market share legally sufficient to sustain a finding of monopolization is between 17% and **[**47]** 25%."), *cert. denied*, *484 U.S. 977, 98 L. Ed. 2d 486, 108 S. Ct. 488 (1987)*, *and* *Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 529 (5th Cir. 1982)* ("market shares in the range of 16 to 25 percent, such as those held by [defendant] are insufficient -- at least absent other compelling structural evidence -- as a matter of law to support monopolization"), *cert. denied*, *460 U.S. 1082, 103 S. Ct. 1770, 76 L. Ed. 2d 344 (1983)*, *with* *Hayden Publishing Co. v. Cox Broadcasting Corp., 730 F.2d 64, 69 n.7 (2d Cir. 1984)* ("a party may have monopoly power in a particular market, even though its market share is less than 50%") *and* *Broadway Delivery Corp. v. United Parcel Serv. of America, 651 F.2d 122, 128* (2d Cir.) ("The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence."), *cert. denied*, *454 U.S. 968, 70 L. Ed. 2d 384, 102 S. Ct. 512 (1981)*. *See also* Areeda & Turner, ***Antitrust Law***, para. 518.3c ("there is a substantial merit in a **[**48]** *presumption* that market shares below 50 or 60 percent do not constitute monopoly power.") (emphasis added). This court recently stated in dicta:

> ***HN26***[] "While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%."

Colorado Interstate Gas Co., 885 F.2d at 694 n.18 (citing 2 E. Kintner, *Federal* ***Antitrust Law***, § 12.6 (1980); Areeda & Turner, ***Antitrust Law***, para. 803). We do not **[*968]** view *Colorado Interstate Gas* as establishing a firm market share percentage required before a finding of monopoly power can ever be sustained. We prefer the view that market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate market or monopoly power.

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[23] In *Shoppin' Bag, 783 F.2d at 162*, we approved the following instructions on determining market strength:

> "Market strength is often indicated by market share. Market share alone, however, is not enough to determine a firm's capacity to achieve monopoly.
>
> Other factors you should consider include the number and strength of the defendant's competitors, the difficulty or ease of entry into the market by new competitors, consumer sensitivity to change in prices, innovations or developments in the market, whether the defendant is a multimarket firm, as well as other evidence presented to you that you may deem persuasive regarding defendant's market strength."

As indicated, ***HN27***[] entry barriers are relevant to the analysis of market or monopoly power. Entry barriers are particular characteristics of a market which impede entry by new firms into that market. Entry barriers may include **[**49]** high capital costs or regulatory or legal requirements such as patents or licenses. *See generally* *Colorado Interstate Gas Co., 885 F.2d at 695-96 n.21*; *Westman Comm'n Co., 796 F.2d at 1225-26 n.3*; L. Sullivan, ***Antitrust Law***, para. 23 (1977); Areeda & Turner, ***Antitrust Law***, para. 409 (1978) ("The principal sources [of entry barriers] are (1) legal license . . .; (2) control over an essential or superior resource . . .; (3) entrenched buyer preferences . . .; and (4) capital market evaluations imposing higher capital costs on new entrants. . . ."). As leading commentators have noted, "substantial market power can persist only if there are significant and continuing barriers to entry." Areeda & Turner, ***Antitrust Law***, para. 505; *accord* *Cargill, 479 U.S. at 119-20 n.15*.

The foregoing discussion illustrates that market power, to be meaningful for antitrust purposes, must be durable. *See* Areeda & Turner, ***Antitrust Law***, para. 505 ***HN28***[] ("the significance of market power depends not only on its degree but also on its durability. **[**50]** "). *See generally* *Colorado Interstate Gas Co., 885 F.2d at 695-96* & n.21; L. Sullivan, ***Antitrust Law***, paras. 22-32. The jury found that Blue Cross possessed both market power and monopoly power in the relevant market. The district court refused to disturb those findings. It concluded plaintiffs presented sufficient evidence that Blue Cross had both power over competition and power over price. [24]

[51]** Blue Cross argues on appeal that the jury and the district court erred in finding market or monopoly power for the following reasons: (1) plaintiffs' expert erroneously equated power to exclude competition with power over prices, in contravention to this court's analysis in *Shoppin' Bag, 783 F.2d at 163-64*; [25] (2) there was no evidence **[*969]** of Blue Cross' pricing power, and Blue Cross could have no such power in view of the fact that its rates were subject to approval and regulation by the Kansas Commissioner of Insurance; (3) entry barriers were nonexistent; and (4) Blue Cross' market share was insufficient to permit the inference of market power and, furthermore, it was declining.

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[24] The district court "[agreed] with plaintiffs' suggestion the finding of market power may well be unnecessary given the jury's findings of actual anticompetitive restraint of trade." *Reazin II, 663 F. Supp. at 1416*. The district court relied on *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*, in reaching that conclusion. The Supreme Court in *Indiana Fed'n of Dentists* suggested two situations where an elaborate analysis of market power may be unnecessary. First, "'the absence of proof of market power does not justify a naked restriction on price or output.'" *Id. at 460* (quoting *NCAA v. Bd. of Regents, 468 U.S. 85, 109-10, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984))*. Such a restriction "'requires some competitive justification.'" *Indiana Fed'n of Dentists, 476 U.S. at 460* (quoting *NCAA v. Bd. of Regents, 468 U.S. at 110*). Second, even where a restraint is not sufficiently "naked," "'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Fed'n of Dentists, 476 U.S. at 460-61* (quoting Areeda & Turner, ***Antitrust Law***, para. 1511 (1986)).

Indiana Fed'n of Dentists involved a horizontal agreement among Federation members to withhold dental X-rays from patients' insurance companies. Such an agreement could either be viewed as a "naked restraint" on output, or as resulting in such actual detrimental effects that, absent any procompetitive justification, it could be condemned without proof of market power. The Court agreed that ample evidence supported the finding that actual detrimental effects had been proven, because "in two localities . . . Federation dentists constituted heavy majorities of the practicing dentists and . . . as a result of the efforts of the Federation, insurers in those areas were, over a period of years, *actually unable* to obtain compliance with their requests for submission of x rays." *Indiana Fed'n of Dentists, 476 U.S. at 460* (emphasis added). We need not decide whether the restraint in this case is of such a nature or resulted in such effects as to obviate the need for detailed proof of market power, because plaintiffs *did* present detailed evidence as to Blue Cross' market power. We further express no opinion on the situations where such proof may be foregone.

[25] In *Shoppin' Bag, 783 F.2d at 164*, this court noted:

> "We believe that both elements have been necessary since the test's initial inception. While the concepts of price and competition are closely connected, it is conceivable that if a company has obtained control over prices that it still may not have the power to exclude other competitors from the market. . . . The differences between the elements will vary according to the factual scenarios which arise. Thus, easy distinctions between the concepts will not always be possible. It seems that in most instances a true evaluation of market power will not ultimately be possible without substantial data presented on both elements."

[52]** Noting once again our standard of review, we hold that sufficient evidence supports the jury's findings of market and monopoly power. Estimates of Blue Cross' market share varied. An internal memorandum prepared by a Blue Cross employee estimated that "60% of all medically insured Kansans are insured with Blue Cross and Blue Shield of Kansas." Plaintiffs' Ex. 41, Addendum to Brief of Appellants Vol. I. One of plaintiffs' experts, William Guy, testified that, based on his own calculations, Blue Cross' percentage of all medically insured Kansans, including self-insureds, was, "[conservatively]," forty-seven percent. R.Vol. 34 at 3393-94. Another of plaintiffs' experts, Professor Raymond Davis, testified that Blue Cross receives sixty-two percent of the insurance premiums in its service area compared to less than five percent for its next largest rival. Dr. George Hay testified that Blue Cross' market share was "somewhere between forty-seven and sixty-two percent." R. Vol. 35 at 3529. However measured, Blue Cross is by far the largest private source of health care financing in its service area. [26] **[**54]** By virtue of its size, Blue Cross has economic leverage over hospitals. As Blue Cross' **[**53]** president, Wayne Johnson, conceded, Blue Cross' membership base gives Blue Cross "clout" over hospitals. R. Vol. 18 at 780-81. While Blue Cross argues vigorously that self-insureds should be included in any estimates of Blue Cross' market share, and that inclusion of self-insurance lowers Blue Cross' market share from sixty percent to forty-five percent, inclusion of self-insurance would not significantly alter Blue Cross' relative dominance of the market. [27]

[55]** **[*970]** Blue Cross' market share is such that there could be at most a presumption of a lack of monopoly or market power. We disagree with Blue Cross that such a market share *prohibits*, as a matter of law, a conclusion of market or monopoly power. The fact that the share may have declined somewhat does not persuade us to the contrary. *See* *Oahu Gas Serv. v. Pacific Resources, Inc., 838 F.2d 360, 366-67* (9th Cir.) ("'A declining market share may reflect an absence of market power, but it does not foreclose a finding of such power.'") (quoting *Greyhound Computer Corp. v. IBM, 559 F.2d 488, 496 n.18 (9th Cir. 1977)*, *cert. denied*, *434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 (1978))*, *cert. denied*, *488 U.S. 870, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988)*. We turn, therefore, to other characteristics of the private health care financing market at issue and to more specific evidence of Blue Cross' power over price and competition.

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[26] In addition to receiving some 62% of all earned health insurance premiums in its service area, compared to less than 5% for other insurance companies, Blue Cross was the largest non-federal source of revenue for hospitals. For example, there was testimony that Blue Cross accounted for 16% of St. Francis' revenues, compared to less than 5% from Blue Cross' next largest competitor. Wesley's chairman and chief executive officer, Jack Davis, testified that Blue Cross accounted for approximately 18% of Wesley's revenues. R. Vol. 14 at 71. The same held true for hospitals outside Wichita. The associate administrator of Asbury Hospital testified that approximately 19% of Asbury's revenues came from Blue Cross, while the next largest insurance company accounted for at most 5%. R. Vol. 20 at 1231.

[27] "Self-insurance" refers to the situation where an employer, typically a large employer, itself performs the function of insurer for its employees. The employer often hires a third party, such as Blue Cross, to administer the program. In the testimony from various witnesses concerning Blue Cross' market share, substantial time was devoted to whether self-insurance and self-insureds should be included within the market of private health care financing, the market within which Blue Cross' market share was relevant.

Blue Cross' argument to this court is that the jury, as a result of the district court's failure to instruct on the make-up of the market, must have ignored self-insurance, because inclusion of self-insurance in the relevant market necessarily lowers Blue Cross' market share below that which could sustain a finding of market or monopoly power. We disagree. There was conflicting testimony on the proportion of all insureds who participate in a self-insurance program in Kansas. Plaintiffs' expert, Raymond Davis, testified that he was unable to obtain hard data on that question either from Blue Cross or from the Kansas Insurance Commissioner. There was testimony that on a national basis 39% of those insured were self-insured, but there was also testimony as to why that figure might not be an accurate reflection of the self-insurance situation in Kansas.

Thus, the jury heard substantial, and conflicting, evidence both as to the percentage of the total insurance market that self-insurance represented as well as the propriety of including self-insurance when measuring Blue Cross' market share. We cannot say that the jury could not have found market or monopoly power from the evidence presented.

Certain historical advantages contributed to Blue Cross' dominant position in Kansas. Blue Cross was the first health care insurance company in Kansas. It is chartered under special **[**56]** enabling legislation. [28] Until 1985, Blue Cross was the only insurance company with the ability to contract directly with hospitals, which gave it the unique ability to negotiate price, to establish maximum allowable payments, to impose a hold harmless clause, and to utilize its most favored nations clause. Until 1970, it had certain tax advantages not available to other insurance companies, R. Vol. 22 at 1487-90, which, while arguably not relevant as entry barriers to competition now, may have contributed to Blue Cross' initial dominance in Kansas. Blue Cross is also the only Medicare intermediary, and Medicare accounts for a substantial portion of each hospital's revenues. Plaintiffs' experts testified as to why Blue Cross had achieved its position of dominance and why it was unlikely that Blue Cross' dominant position in the market in this case would be eroded soon.

[57]** Plaintiffs' experts also testified as to Blue Cross' power over price and power to exclude competition. William Guy testified that alternative delivery systems were "the first real challenge to our traditional system of delivering financing of care." R. Vol. 34 at 3375. He testified that Blue Cross' most favored nations clause hindered the development of alternative delivery systems, thereby interfering with the introduction of competition. R. Vol. 34 at 3404. He further testified that, despite Blue Cross' average annual rate increase of 23.75% from 1980 through 1983, Blue Cross still maintained its dominance. The jury could reasonably infer from that testimony that Blue Cross had power over price.

Another of plaintiffs' experts, Dr. George Hay, similarly testified that Blue Cross' only real competition would come from alternative delivery systems. Blue Cross faced little challenge from other traditional indemnity insurance companies. Because Blue Cross was in a position to use its leverage over hospitals to exclude or slow down the development of alternative delivery systems, it thereby had power to exclude competition. He further opined that the power to exclude such alternative **[**58]** delivery systems gave Blue Cross power over price. [29]

[59]** **[*971]** Further, there was testimony that Blue Cross' threatened termination of Wesley in fact *did* exclude competition, in that it inhibited hospitals from pursuing alternative delivery systems. There was also considerable testimony on the effect of Blue Cross' most favored nations clause, and the jury could reasonably have concluded

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[28] The district court described that as "legislation giving it [Blue Cross] the state's imprimatur." *Reazin II, 663 F. Supp. at 1417*. There was also testimony that being a contracting provider with Blue Cross was viewed as the "Good Housekeeping" seal of approval.

[29] Dr. Hay testified:

> "These new forms of competition [alternative delivery systems], that's where the downward pressure on price is going to come from. That's what is going to cause health care costs to Kansas consumers to be lower, all right. If Blue Cross can stop that, can suppress it or can slow it down, that means that the cost of health care financing in Kansas is going to be higher than it otherwise would and that means that because Blue Cross has the power to do that, the power to stop it or slow it down, in a very real sense Blue Cross has the power over price, the power to prevent those price pressures, all right, from coming about to the advantage of Kansas consumers."

R.Vol. 35 at 3538-39. Blue Cross argues that Dr. Hay erroneously equated power over competition with power over price, in contravention of *Shoppin' Bag, 783 F.2d at 164*. However, in *Shoppin' Bag*, we specifically noted that the "concepts of price and competition are closely connected" and that "easy distinctions between the concepts will not always be possible." *Id.* Further, in *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*, the case relied on in *Shoppin' Bag* in its discussion of monopoly power, the Court specifically stated:

> "Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa."

Thus, we perceive no error in Dr. Hay's linkage of power over competition to power over price. Moreover, as we discuss further, plaintiffs introduced evidence of both Blue Cross' power over price and its power to exclude competition.

that that clause contributed to Blue Cross' power over price. [30] **[**60]** We reject Blue Cross' argument that Blue Cross could have no power over price because its rates were subject to approval and regulation by the Kansas Commissioner of Insurance. [31]

[61]** We further disagree with Blue Cross' argument that entry barriers in the relevant market were non-existent and that the existence of some 200 insurance companies operating in Kansas demonstrates that fact. While it is true that only capital and licensing were necessary to initially enter the health care financing market, the fact remains that no other entrant remotely approached Blue Cross' domination of the market. That evidence cuts against the argument that entry barriers were insubstantial. *See* *Oahu Gas Services, 838 F.2d at 367* ("The second entrant, Aloha Gas, did win some accounts, but the evidence that that firm remained very small could reasonably preclude a decision that Aloha's entry reflected a breakdown of barriers to entry."). Further, other peculiar characteristics of the health care financing market **[*972]** in Kansas, such as Blue Cross' unique ability, until 1985, to contract directly with hospitals, and the widespread impression that Blue Cross alone had the Kansas legislature's special imprimatur made it more difficult for other insurance companies to compete with Blue Cross. [32]

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[30] The fact that the First Circuit has recently concluded that, as a matter of law, a "Prudent Buyer" policy utilized by Blue Cross and Blue Shield of Rhode Island, essentially identical to the most favored nations clause in this case, did not constitute monopolization in violation of *section 2* does not alter our conclusion on the existence of Blue Cross' monopoly power here. *See* *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 883 F.2d 1101 (1st Cir. 1989)*. In *Ocean State*, Blue Cross conceded its monopoly power. *Id. at 1110*. The only question was whether Blue Cross violated *section 2*. By contrast, the most favored nations clause here is not itself challenged as unlawful monopolization. Rather, it is only considered as evidence of, or as contributing to, Blue Cross' market or monopoly power. We need not reach the question addressed in *Ocean State* of whether use of the most favored nations clause could itself violate *section 2*.

[31] The district court rejected this argument. The court opined that Blue Cross had waived that argument because, while asserted in Blue Cross' answer as a defense, it was abandoned in Blue Cross' motion for summary judgment and in the pre-trial order. Even if not waived, the district court concluded the argument was meritless under the immunity test of *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*.

Blue Cross does not make any broad immunity argument on appeal. It does, in passing, reassert the argument that, because Blue Cross' rates were subject to approval and regulation by the Kansas Commissioner of Insurance, Blue Cross could not control prices and therefore lacked monopoly, and possibly market, power. The district court rejected that specific argument, stating:

> "The factual predicate for such an argument is simply absent in this case. Defendant's own economic expert, Peter Hamilton, was specifically asked at his deposition two weeks prior to trial: 'What role, if any, does the fact that Blue Cross is regulated by the Insurance Commissioner of Kansas play in your opinions?' His unequivocal answer: 'None at this time.' (Hamilton Depo., p. 57). At trial, [Blue Cross] called Dr. Hamilton to present its best defense to market and monopoly power, Dr. Hamilton's testimony was utterly bereft of any reference whatsoever to state rate regulation."

Reazin II, 663 F. Supp. at 1419.

We agree with the district court that Blue Cross effectively abandoned this argument. Furthermore, Blue Cross does not direct us to any materials indicating the nature of the regulation at issue and has thus failed to prove that the Insurance Commissioner engages in the kind of regulation which might indicate that Blue Cross lacks any control over price. Finally, not only did Blue Cross' expert, Dr. Hamilton, fail to mention state regulation in his discussion of Blue Cross' monopoly and market power, but a number of Blue Cross employees, as well, testified about Blue Cross' pricing policies without mention of state regulation.

[32] We thus agree with the district court that *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325 (7th Cir. 1986)*, a case on which Blue Cross heavily relies, is distinguishable. In *Ball Memorial*, Blue Cross' market share was smaller (27% of all patients in Indiana) and the health insurance market was evidently more competitive, with some 1000 firms licensed to do business in Indiana, and more than 500 selling insurance at the time of the decision. To the extent that the *Ball Memorial* court opined that entry barriers in the health care financing market are *always* low, in any health care financing market in the country, we respectfully disagree. *See also* *Reazin II, 663 F. Supp. at 1420 n.16*; *Reazin I, 635 F. Supp. at 1328-31*.

[62]** In sum, bearing in mind our standard of review in this case, we conclude that sufficient evidence supports the jury's findings of monopoly and market power and we find no legal error in those findings.

(v) Damages

Blue Cross argues the damages award to Wesley should be set aside because Wesley's evidence of lost profits resulting from the loss of patients following Blue Cross' threatened termination of Wesley was speculative and unsubstantiated. [33]

"The Supreme Court has recognized that an antitrust plaintiff is rarely able to prove its damages with mathematical precision." *Aspen Highlands, 738 F.2d at 1525*. ***HN29***[] While an antitrust damages award may not be the result of mere "'speculation or conjecture,'" it may be the result **[**63]** of "'a just and reasonable estimate of the damage based on relevant data.'" *Id. at 1526* (quoting *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946))*.

Blue Cross specifically challenges the damages award for lost profits because it argues that Wesley's chief operating officer, Donald Stewart, presented "unsupported speculation" that Wesley's declining percentage of Blue Cross subscribers resulted from the announced termination. Blue Cross claims the evidence demonstrates merely a small decline in Wesley's market share which was simply coincidental with the announced termination. In other words, Blue Cross appears to argue insufficient evidence supported the necessary causal link between Blue Cross' challenged activities and Wesley's claimed damage. We disagree. We have carefully reviewed the damages evidence presented in this case and find that Wesley's claimed damages were supported by sufficient evidence.

Blue Cross makes only a passing reference in its appellate briefs to an argument it made strenuously below, that any damage award in this case would be speculative because the contracting provider agreement **[**64]** with Wesley was never terminated. [34] As did the district court, we note that the unique posture of this case necessarily altered plaintiffs' evidence of damages. Nonetheless, Wesley adequately documented the damages it actually sustained by virtue of the threatened termination of its contracting provider agreement.

[65]** B. *Section 2*

Section 2 of the Sherman Act provides:

> ***HN30***[] "Every person who shall monopolize, or attempt to monopolize, or combine or **[*973]** conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . ."

15 U.S.C. § 2. The jury was instructed on the elements of attempted monopolization, conspiracy to monopolize, and the completed offense of monopolization. It found Blue Cross guilty of the offense of monopolization.

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[33] Blue Cross does not appear to challenge on appeal the award of punitive damages under the state law tortious interference claim. Accordingly, we do not address it.

[34] As the district court noted in *Reazin I*:

> "The case is presently before the Court in a unique posture because of the parties' voluntary agreement to preserve the status quo, continuing to abide by the terms of the Wesley/[Blue Cross] contracting provider agreement pending the outcome of this suit. The Court perceives the case as primarily a declaratory judgment action which will be tried to the jury to determine whether what is now the proposed termination of Wesley's contract, along with the formation and effect of the revised [Blue Cross] contracting provider agreements with the remaining Wichita hospitals, would violate the antitrust laws if carried out."

Reazin I, 635 F. Supp. at 1316.

> HN31[] "The elements of monopolization under Section 2 are 'the possession of monopoly power in the relevant market' and 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'"

Bright v. Moss Ambulance Serv., 824 F.2d 819, 823 (10th Cir. 1987) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)); **[**66]** *see also* Aspen Highlands Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985). "Of course, HN32[] the fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown for a private litigant to recover on a claim of monopolization." Aspen Highlands, 738 F.2d at 1519 n.12. HN33[] While a "specific intent" to monopolize is necessary to establish an attempt to monopolize claim, "general intent is all that is required to support a monopolization claim." Id. at 1521 n.16.

We have already held that sufficient evidence supports the jury's finding of monopoly power. We have also already concluded that Wesley had standing and proved antitrust injury and damages. We turn, therefore, to whether sufficient evidence supports the finding that Blue Cross willfully acquired or maintained that power "as distinguished from growth or development as a consequence of a superior product, **[**67]** business acumen, or historic accident." Bright, 824 F.2d at 823 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)). We have little difficulty concluding that Blue Cross' total conduct in this case -- threatening to terminate Wesley's contracting provider agreement and reducing the maximum allowable payments for the remaining Peer Group V hospitals, thereby coercing other hospitals into not doing business with Blue Cross competitors -- constituted willful maintenance of its monopoly power. A general intent to do so is amply supported by the record.

C. *Jury Instructions*

Blue Cross argues that the court erroneously instructed the jury on certain of the elements necessary under sections 1 and 2.

> HN34[] "When examining a challenge to jury instruction, we review the record as a whole to determine whether the instructions 'state the law which governs and provided the jury with an ample understanding of the issues and the standards applicable.'"

Big Horn Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259, 1271 (10th Cir. 1988) **[**68]** (quoting Ramsey v. Culpepper, 738 F.2d 1092, 1098 (10th Cir. 1984)). We address each alleged error in turn.

During jury deliberations, the jury asked whether it could consider "the public interest" if it found the procompetitive and anticompetitive effects of Blue Cross' conduct "[balanced] out against each other." The court responded "yes," over Blue Cross' objection. Blue Cross argues the "court's answer impermissibly allowed the jury to consider matters other than market effects, and to find a violation where anticompetitive effects did not outweigh procompetitive effects." Brief of Appellants at 27.

This interchange between jury and court must be viewed in context. Instruction 46, to which Blue Cross did not object, stated in part:

> "To determine whether there was an unreasonable restraint, you need not find a specific injury, but must find conduct which appears to be reasonably calculated to, or tends to, prejudice the public interest. That public interest is that competition be open and unrestrained."

R. Vol. III, Tab 207 at Instruction 46. The jury's question was as follows:

> **[*974]** "If the jury finds, (in accordance with **[**69]** Instructions 47 through 52) that the reasonable and unreasonable (pro versus anti-competitive) effects in the market balance out against each other, is the fact that

> there did exist conduct [as per Instruction 46] which appeared to be reasonably calculated, or tended to prejudice the public interest, to be given any weight in deciding the question of unreasonable restraint?"

R. Vol. III at Tab 211.

We find no reversible error in the court's response. Instructions 46 through 52 made abundantly clear to the jury that they were to find an unreasonable restraint of trade only if they found an adverse impact on competition. The "public interest" referred to in Instruction 46 was specifically defined as "open and unrestrained competition." Thus, we do not view the court's response as inviting the jury to consider matters other than the effects of the alleged restraint on competition, nor as allowing a finding of an unreasonable restraint where the anticompetitive effects did not outweigh the procompetitive effects.

Again during deliberations, the jury inquired whether entry barriers encompassed simply "gaining a share of the market or does this refer to a new product simply **[**70]** being licensed into Kansas." R. Vol. III at Tab 211. The court responded:

> "Instruction 43 contains certain factors you may consider in determining Blue Cross' market power or monopoly power, if any. Factor 5 of that instruction inquires of you as to the ease with which new firms may enter the industry, and in the Court's view, is self-explanatory.
> In the interest of clarity, however, 'barriers to entry' fairly implies or assumes the ability to become a meaningful competitor."

Id. Blue Cross argues the court's answer was wrong because entry barriers only contemplate the prerequisites to entry and the concept does not require that a new entrant be able to compete meaningfully.

While we agree with Blue Cross that the antitrust laws do not guarantee any competitor the right to be a meaningful or significant competitor, ***HN35***[] we also must view entry barriers in terms of their relevance to the antitrust laws. Entry barriers are relevant to the inquiry into a defendant's market power. If entry barriers are substantial, a market participant may be able to achieve or maintain market **[**71]** or monopoly power and use that power anticompetitively because its actions can go unchecked by new competitors. Thus, the relevance of entry barriers stems from their impact on *competition* in a given market. *See United States v. Waste Management, Inc., 743 F.2d 976, 983 (2d Cir. 1984)* (in finding low entry barriers, court noted that new entrants could "compete successfully" with other companies). Where the particular "entry barrier" in question, such as regulatory approval, means no more than that a new entrant has a "ticket" or "pass" to enter the market, but where other substantial entry barriers prohibit the new entrant from ever gaining a sufficient share of the market to discipline anticompetitive action by other market participants, then the first kind of "entry barrier" is not meaningful in antitrust terms. Thus, we agree with the district court that it properly focused the jury's attention on barriers to meaningful competition -- competition which could inhibit anticompetitive conduct. *See Reazin II, 663 F. Supp. at 1435-37*.

Blue Cross makes two challenges to Instruction 18. First, Blue Cross argues that the court's instruction, over **[**72]** objection, that the issue was "whether Blue Cross' termination of Wesley and related actions and communications are likely to have a future anticompetitive effect in any relevant market," was wrong because the Sherman Act only prohibits past or existing restraints of trade, not future ones. Second, Blue Cross argues the court wrongly limited the jury's use of evidence of HCA's allegedly anticompetitive conduct by the following language:

> "I hereby instruct you that the evidence concerning HMO Kansas and surrounding circumstances in 1983 and 1984 was admitted for the limited purpose of allowing Blue Cross to set forth historical **[*975]** information about Wichita and the health care financing market. I further instruct you that this evidence is relevant only for that limited purpose and should not be considered for any other purpose. I further instruct you that it should be considered by you, if at all, only if you believe it helps you decide what will the likely future competitive impact of the Blue Cross conduct at issue in this case -- Blue Cross' announced termination of Wesley Medical Center and its related actions and communications."

R. Vol. III, Tab 207 **[**73]** at Instruction 18. Blue Cross argues that limiting instruction inhibited its legitimate Rule of Reason defense.

We find no error in Instruction 18. The peculiar posture of this case requires a finding of no error in the phrase concerning the "likely future competitive impact of the Blue Cross conduct." We likewise reject the argument that the instruction inhibited Blue Cross' legitimate Rule of Reason defense. As the district court noted, it had struggled throughout this case to walk the fine line between permitting Blue Cross to present its Rule of Reason defense, and thereby present evidence as to general market conditions, and yet not permitting a full trial of Blue Cross' counterclaim. We view the challenged instruction as simply reminding the jury of that distinction and properly channeling their attention toward the permitted use of the evidence of general market conditions -- Blue Cross' Rule of Reason defense.

Blue Cross also objects to the court's instruction on the product market in this case. The court instructed the jury that the relevant product market was "private health care financing." R. Vol. III, Tab 211 at Instruction 37. Blue Cross argues the court should have **[**74]** instructed the jury to make findings as to the products constituting the relevant market. In particular, Blue Cross' concern is whether the jury included self-insurance in the relevant market.

HN36[] Market definition is a question of fact. *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*. ***HN37***[] Definition of the relevant market requires first "a determination of the product market." *Id. at 1221*. "This inquiry necessitates an examination of which commodities are 'reasonably interchangeable for consumers for the same purposes.'" *Id.* (quoting *United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956))*. The relevant geographic market must also be determined. *Westman Comm'n Co., 796 F.2d at 1222*. The jury defined the geographic market in this case as the State of Kansas, excluding Johnson and Wyandotte Counties.

We find no error in the district court's refusal **[**75]** to specifically direct the jury to make findings as to the products constituting the relevant market. The jury heard ample, and conflicting, evidence as to the propriety of including self-insurance in the relevant market, the percentage of Kansans insured through self-insurance, and the effect that inclusion of self-insurance in the relevant market would have on the issues in this case. Thus, the issue of what "products" constitute the market of private health care financing was fairly before the jury.

In its instructions on unreasonable restraints of trade, the court stated, "if you find defendant possessed market power in the market, then any action taken by it with the actual or probable effect of foreclosing competition, *gaining a competitive advantage*, or destroying a competitor would be an unreasonable restraint of trade." R.Vol. III, Tab 207 at Instruction 47. Blue Cross objects to the highlighted portion of the instruction on the ground that it impermissibly allowed the jury to find an antitrust violation from the legitimate activity of seeking to gain a competitive advantage. Viewed in the context of all the instructions given the jury, we perceive no error. The jury **[**76]** was instructed on several occasions that the antitrust laws do not prohibit vigorous and successful competition and that merely attempting to succeed in business through vigorous competition is not unlawful. *See id.* at Instructions 12, 51. We are therefore unpersuaded **[*976]** that the jury would have taken that single challenged phrase and penalized Blue Cross for engaging in legitimate competitive activity.

Blue Cross further objects to the court's instruction that HCA's actions were "in and of themselves . . . not illegal or violative of the antitrust laws." *Id.* at Instruction 19. Blue Cross argues that instruction was not necessary and only served to prejudice Blue Cross. We disagree. While the legality of HCA's actions was an issue in the counterclaim, plaintiffs' complaint addressed only the legality of Blue Cross' actions, to which the legality of HCA's actions was irrelevant. The sentence preceding the challenged sentence correctly reminded the jury that "vertical integration . . . in and of itself is not violative of any law, including antitrust laws." *Id.* Viewed in context, this instruction simply reminded the jury that it could not consider any illegality **[**77]** by HCA as a defense to charges of anticompetitive conduct by Blue Cross.

Finally, Blue Cross charges that the court "repeatedly commented to the jury adversely concerning the evidence Blue Cross offered in support of its defense." Brief of Appellants at 31. It further charges that the court compounded the prejudice by refusing to instruct the jury that the court's comments were not evidence. After carefully reviewing the entire record in this case, we find no prejudice to Blue Cross resulting from any allegedly unfavorable comments by the district court to the jury concerning Blue Cross' evidence. Nor do we find any error in the district court's exclusion of evidence relating to HCA's activities in other parts of the country.

We therefore affirm the district court's denial of Blue Cross' motions for judgment n.o.v. or for a new trial on the antitrust claims.

STATE LAW CLAIMS

Plaintiffs also charged that Blue Cross' conduct in this case amounted to tortious interference with Wesley's present and future relations with Blue Cross subscribers, in violation of Kansas law. [35] The jury found for Wesley on its claim of tortious interference and awarded actual damages of $ 1.00 and **[**78]** punitive damages of $ 750,000. [36] The district court denied Blue Cross' motion for judgment n.o.v. or a new trial on that claim. Blue Cross appeals, arguing that the court erroneously instructed the jury on the elements of tortious interference and that the evidence fails to support the jury's verdict.

[79]** The district court instructed the jury as follows:

> "To find for plaintiff Wesley Medical Center on its claim of tortious interference by Blue Cross, Wesley must prove and you must find:
>
> 1. That there existed a present business relationship and/or the expectancy of a future relationship with economic benefits between Wesley and Blue Cross' subscribers;
> 2. That Blue Cross actually knew of this present business relationship and/or expectancy of future relationship;
> 3. That, but for Blue Cross' deliberate use of the media and other efforts to discourage its subscribers from using Wesley, plaintiff Wesley was reasonably certain to have continued in the existing relationship or realized future expectancies;
> 4. That Blue Cross undertook this conduct with the wrongful intent of injuring or destroying Wesley's business;
>
> **[*977]** 5. That Wesley suffered injury, loss or damages to its business relations as a direct or proximate result of Blue Cross' misconduct."

R.Vol. III, Tab 207 at Instruction 84. Blue Cross argues that that instruction permitted the jury to find tortious interference without finding that Blue Cross had engaged in misconduct.

[80]** ***HN38***[] The elements of tortious interference under Kansas law are:

> "(1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) that, except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate cause of defendant's misconduct."

Turner v. Halliburton Co., 240 Kan. 1, 722 P.2d 1106, 1115 (1986) (citing *Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250, 253 (D.Kan. 1984))*. Thus, improper conduct is a requirement. However, as the Kansas Supreme Court noted in *Turner*, ***HN39***[] "[a] person may be privileged or justified to interfere with contractual relations in certain situations." *Turner, 722 P.2d at 1115*. Or, put another way, defendant's conduct may not be improper. **[**81]** [37]

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[35] Plaintiffs initially argued Blue Cross' actions also interfered with Wesley's present and future business relations with patients, doctors, nurses, other medical personnel, administrators and staff, as well as with HCP's and New Century's present and future business relations with hospitals and other providers of health care services. The jury was only presented with a special interrogatory relating to Wesley's relationship with Blue Cross subscribers.

[36] The jury found that one of the elements of plaintiff HCP's tortious interference claim was not established. That element was the requirement that Blue Cross have undertaken its allegedly unlawful conduct "with the wrongful intent of injuring or destroying the business of" HCP.

The court in *Turner* required the plaintiff to prove "actual malice" to overcome the qualified privilege recognized there.

[82]** We conclude the jury instructions did not misstate Kansas law and permit the jury to find tortious interference without a finding of misconduct by Blue Cross. Instruction 84 itself includes the word "misconduct." Instruction 87 specifically states, "in order to find that Blue Cross tortiously interfered with the business relations of plaintiffs, you must find that the alleged interference was *both wrongful and intentional*." R. Vol. III, Tab 207 at Instruction 87 (emphasis added). That sufficiently informed the jury of the need to find misconduct by Blue Cross.

Blue Cross also argues the court "improperly permitted the jury to find liability based solely upon 'deliberate use of the media' even though all of the alleged statements of Blue Cross were factually true and not defamatory." Brief of Appellant at 36. Blue Cross argues its media communications were privileged under the *First Amendment* unless Wesley proved actual malice or knowledge of falsity.

The court's instruction No. 88, concerning competitive privilege, stated:

> "This competitive privilege is a qualified privilege, and if you find Blue Cross' conduct is motivated primarily by malicious, anticompetitive **[**83]** or predatory purposes, rather than legal, fair and reasonable competition, you must conclude defendant's conduct falls outside this qualified privilege, and is not justified."

R.Vol. III, Tab 207 at Instruction 88. We agree with the district court that the instruction "adequately informed the jury of the degree of motive it must find before it could impose liability upon defendant." *Reazin II, 663 F. Supp. at 1430*. Inasmuch as the jury found several antitrust violations by Blue Cross, which we have upheld in this appeal, sufficient evidence supports the jury's verdict of tortious interference.

"ALLEN" CHARGES AND COMMUNICATIONS WITH JURY

Finally, Blue Cross argues that the district court's supplemental *Allen* instructions, [38] **[*978]** given to the jury on the tenth and fourteenth days of deliberation, coerced the jury into reaching its verdict, thereby impermissibly prejudicing Blue Cross. We disagree.

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[37] The Kansas Supreme Court referred to the *Restatement (Second) of Torts § 767* (1979), which discusses whether conduct is proper or improper:

> ***HN40***[] "'In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relations of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference, and
>
> (g) the relations between the parties.'"

Turner, 722 P.2d at 1116-17.

[38] "An *Allen* charge derives its name from jury instructions approved by the Supreme Court in *Allen v. United States, 164 U.S. 492, 501-02, 17 S. Ct. 154, 157-58, 41 L. Ed. 528 (1896)*." *United States v. Porter, 881 F.2d 878, 888 n.9* (10th Cir.), *cert. denied*, ***493 U.S. 944, 110 S. Ct. 348, 107 L. Ed. 2d 336 (1989)***.

[84]** Blue Cross asserts that the supplemental *Allen* charges, given during jury deliberations, contravened *United States v. Blandin, 784 F.2d 1048 (10th Cir. 1986)*, in which this court, in dicta, stated, "If the *Allen* instruction is given at all, it should be incorporated into the body of the court's original instructions to the jury. It should not be given during the course of deliberations." *Id. at 1050*. As we have subsequently made clear, "*Blandin* did not adopt a *per se* rule prohibiting an *Allen* instruction once a jury commenced deliberations." *United States v. Mobile Materials, Inc., 881 F.2d 866, 878 (10th Cir. 1989)* (per curiam), *cert. denied*, *493 U.S. 1043, 110 S. Ct. 837, 107 L. Ed. 2d 833 (1990)*; *see also* *United States v. McKinney, 822 F.2d 946, 951 (10th Cir. 1987)* ***HN41***[] ("Although it is a preferred rule of procedure that an *Allen* instruction be given the jury at the same time as other instructions, it is *not* a *per se* rule") (emphasis original). Rather, "Allen-type cases **[**85]** must be reviewed on a case-by-case basis to determine the coercive effect of the instruction." *McKinney, 822 F.2d at 951*; *see also* *Mobile Materials, 881 F.2d at 878*.

After reviewing the facts of this case, we conclude that the *Allen* charges given in this case were not coercive and do not merit reversal of the jury's verdict. The language used by the district court is substantially the same as language this court has found to be non-coercive. *See, e.g.,* *United States v. Dyba, 554 F.2d 417, 420-21* (10th Cir.), *cert. denied*, *434 U.S. 830, 54 L. Ed. 2d 89, 98 S. Ct. 111 (1977)*; *Munroe v. United States, 424 F.2d 243, 245-46 (10th Cir. 1970)*; *United States v. Wynn, 415 F.2d 135, 137 (10th Cir. 1969)*, *cert. denied*, *397 U.S. 994, 25 L. Ed. 2d 402, 90 S. Ct. 1133 (1970)*. Any differences between the *Allen* charges given in those cases and the *Allen* charges given in this case do not alter our conclusion.

While the district court did remind the jury that plaintiffs labored under the preponderance of the evidence standard rather than the higher beyond a reasonable **[**86]** doubt standard, the court also directed the jurors to review carefully the court's original instructions, which set forth all the elements of plaintiffs' case. The court also reminded the jurors, as it did in its original instructions, that "no juror is expected to yield a conscientious conviction that he or she may have as to the weight or the effect of the evidence." R. Vol. III, Tab 207 at Instruction 97. In sum, while we continue to urge caution in the use of *Allen* instructions, we do not find, under the particular facts of this case, that the given instructions coerced the jury and prejudiced Blue Cross. [39]

[87]** Blue Cross also argues that the district court "erred in permitting private communications between its law clerks and the jury." Brief of Appellants at 17. We find no error. The court's communications with the jury all related to the progress the jury was making towards reaching a verdict and occurred after the jury had been deliberating for a considerable period of time. The record confirms the district court's conclusion that "nothing was done without the prior knowledge and approval, or at least acquiescence, of counsel. . . ." *Reazin II,* ***[*979]*** *663 F. Supp. at 1442*. [40]

COUNTERCLAIM

In their counterclaim, Blue Cross, along with HMOK, [41] charged that plaintiffs and HCA (1) engaged in a group **[**88]** boycott and concerted refusal to deal, *per se* in violation of *section 1*; (2) restrained trade in violation

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[39] Some three-and-one-half months after the verdict was returned, a juror submitted a letter to the court in which the juror claimed her verdict was coerced. *See* *Reazin II, 663 F. Supp. at 1443 n.20*. The court denied Blue Cross' motion for a hearing into the letter. Blue Cross argues that denial was error. We disagree. We regard this as a classic example of a juror attempting to impeach her own verdict, which we will not permit in this case. *See* *Tanner v. United States, 483 U.S. 107, 97 L. Ed. 2d 90, 107 S. Ct. 2739 (1987)*; *United States v. Miller, 806 F.2d 223, 225 n.2 (10th Cir. 1986)*; ***Holden v. Porter, 405 F.2d 878, 879 (10th Cir. 1969)***.

[40] Blue Cross made several motions for a mistrial during the jury's deliberations. In its third such motion, made four days before the jury returned its verdict, Blue Cross did not even raise the court's communications with the jury as a ground for the motion. *See* R. Vol. 44 at 85-86.

[41] HMOK was an HMO which Blue Cross attempted to introduce into Wichita in 1984. Ultimately, in 1985, Blue Cross withdrew HMOK from Wichita. The counterclaim largely revolves around the reasons for HMOK's lack of success in the Wichita market. The district court thoroughly explored the evidence relating to HMOK's failure in its two opinions. *See* *Reazin I, 635 F. Supp. at 1300-01*; *Reazin II, 663 F. Supp. at 1376-1377, 1465-68*.

of the Rule of Reason under *section 1*; (3) monopolized, attempted to monopolize, and/or conspired to monopolize the health care financing and health care services market in violation of *section 2*; (4) violated section 7 of the Clayton Act, *15 U.S.C. § 18*; [42] and *(5)* interfered with prospective advantage in violation of Kansas law. [43] **[**90]** As the district court noted, "with the exception of the § 7 claim, all of the claims in the counterclaim are based in whole or in part on the allegation HCA, HCP and physicians in Wichita conspired to boycott HMOK 'as a condition and in connection with [the] negotiation and sale of Health Care Plus to HCA.'" *Reazin II, 663 F. Supp. at 1460* (quoting R.Vol. I, Tab 25, Answer & Counterclaim at 20-21). [44] The district court granted plaintiffs' motion for summary judgment on the entire counterclaim. In so doing, it characterized the counterclaim as "a defensive ploy, a maneuver, probably suggested and instigated by defense counsel, to divert attention from plaintiffs' complaint." *Reazin II*, 663 F. Supp. at 1461. **[**89]** It further observed that it addressed the motion for summary judgment "in the extraordinary posture of having received the documentary evidence and having heard, firsthand, the live testimony of the witnesses." *Id. at 1462*.

HN42[] Pursuant to *Fed.R.Civ.P. 56(c)*, summary judgment is appropriate when "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Under the Supreme Court's recent guidelines for the granting of summary judgment, ***HN43***[] summary judgment must be granted against a party "who fails to . . . establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." **[**91]** *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. ***HN44***[] For a plaintiff to avoid summary judgment, there must be sufficient evidence from which a jury could find for the plaintiff. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. A mere "scintilla" of evidence is insufficient. ***HN45***[] We must, of course, construe the evidence and draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *McKenzie v. Mercy Hosp., 854 F.2d 365, 367 (10th Cir. 1988)*; *Key Fin. Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 638 (10th Cir. 1987)*.

After carefully considering all of the evidence in the light most favorable to Blue Cross and HMOK, we affirm the grant of summary judgment in favor of plaintiffs **[*980]** for substantially the reasons set forth in the district court's thorough treatment of the counterclaim. *See* **[**92]** *Reazin II, 663 F. Supp. at 1459-83*.

ATTORNEY'S FEES AND COSTS

Neither Blue Cross nor plaintiffs devote more than one and one-half pages of their respective 50-page briefs to the issue of attorneys' fees. Blue Cross' challenges to the award of attorneys' fees and costs are therefore somewhat conclusory.

Blue Cross argues (1) the district court erred in awarding "all expenses claimed by plaintiffs (*e.g.*, expert witness fees), regardless of whether the expenses were allowable under *28 U.S.C. §§ 1821* and *1920*;" (2) the fee award improperly included fees to plaintiffs who were not prevailing parties; (3) plaintiffs failed to apportion their time among claims on which they prevailed and claims on which they did not or between prosecuting the main claim and defending the counterclaim; and (4) the fees were excessive for the work done.

HN46[] "An attorneys' fee award by the district court will be upset on appeal only if it represents an abuse of discretion." *Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1201 (10th Cir. 1986)*; *see also* **[**93]** *Pennsylvania*

[42] Section 7 of the Clayton Act, *15 U.S.C. § 18*, prohibits acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."

[43] While Blue Cross listed it as an issue in its docketing statement, it does not brief the district court's grant of summary judgment on the interference with prospective advantage claim. We consider it abandoned.

[44] Blue Cross also argues the acquisitions violate *sections 1* and *2*, although the counterclaim itself was not completely clear on that point. Additionally, in the pretrial order, Blue Cross agreed that a remaining legal issue was "whether HCA acquired Wesley, Health Care Plus, and New Century in violation of section 7 of the Clayton Act." No mention was made of *sections 1* and *2*.

v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 561, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986). **HN47**[] "Findings on underlying questions of fact are subject to the clearly erroneous standard of review." Mares, 801 F.2d at 1201. Certain of Blue Cross' arguments are easily dismissed. Plaintiffs' Memorandum in Support of Plaintiffs' Application for Attorneys' Fees and Bill Costs, and supporting affidavits, specifically state that hours attributed to defense of the counterclaim were excluded. *See* Memorandum, R.Vol. 4, Tab 258 at 15; Affidavit of Joe Sims at 3; Affidavit of Donald R. Newkirk at 3. Furthermore, we see no need for Wesley specifically to apportion its time between claims on which it prevailed and on those on which it did not because Wesley was clearly a prevailing party under Supreme Court guidelines. *See* Texas State Teachers' Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 109 S. Ct. 1486, 1492, 103 L. Ed. 2d 866 (1989) **[**94]** **HN48**[] ("A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought . . ."). It does not matter that Wesley did not prevail on every issue or every claim brought. *See id.; see also* Ramos v. Lamm, 713 F.2d 546, 556 (10th Cir. 1983) **HN49**[] ("If the plaintiff has obtained 'excellent results,' the attorney's fees should encompass all hours reasonably expended; no reduction should be made because the plaintiff failed to prevail on every contention: 'the result is what matters.'") (quoting Hensley v. Eckerhart, 461 U.S. 424, 435, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)). All of Wesley's claims arose out of a common core of facts. The relief sought by Wesley was to have Blue Cross' anticompetitive actions stopped and to recover damages suffered because of such actions. On that it succeeded.

Blue Cross argues the fee award improperly included fees for certain plaintiffs (i.e. New Century, Reazin and HCP) who were not "prevailing" parties. We reject this argument for the reasons set forth in the district court opinion. **[**95]** *See* Reazin II, 663 F. Supp. at 1455.

Blue Cross' argument about expert witness fees allowed as costs is somewhat conclusory. We assume Blue Cross argues that the total amount awarded, $ 168,227.25, must exceed the $ 30.00 per-day limit set forth in 28 U.S.C. § 1821(b). [45] **[**96]** That, Blue Cross argues, contravenes Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987). [46]

[*981] The district court stated as follows **[**97]** concerning the expert witness fees:

> "Reasonable expert witness fees may be awarded if that expert testimony was reasonably necessary. Ramos, 713 F.2d at 559. Plaintiffs seek to recover $ 168,227.25 as expert witness fees paid to Dr. George Hay, Dr. Ray Davis, and William Guy. Each of these expert witnesses' testimony was indispensable for plaintiffs' recovery. These witnesses provided crucial testimony concerning central issues such as market definition, market power, and defendant's business practices and position in the market. They also provided invaluable foundation testimony regarding the nature of the health care industry and health care financing mechanisms. Their appearance and testimony was reasonably necessary; recovery of those fees is therefore granted."

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[45] ***28 U.S.C. § 1920*** **HN50**[] provides that a federal court may tax as costs against the losing party certain items, including "fees and disbursements for . . . witnesses." ***28 U.S.C. § 1920(3)***. 28 U.S.C. § 1821 **HN51**[] defines the witness fees specified in ***section 1920(3)***. In addition to an attendance fee of $ 30.00 per day, section 1821 also permits a witness to recover for travel expenses to and from trial and provides a subsistence allowance if the witness must stay overnight to attend trial.

[46] In *Crawford Fitting*, **HN52**[] the Supreme Court held that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witnesses as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and ***§ 1920***." Id. at 445. Specifically, the Court held that Fed.R.Civ.P. 54(d) did not permit an award of expert witness fees in excess of the limits contained in 28 U.S.C. § 1821. Blue Cross argues that same rule applies to 15 U.S.C. § 15(a) permitting a prevailing antitrust plaintiff to recover "the cost of suit." Thus, section 15(a) cannot permit costs beyond those expressly permitted in 28 U.S.C. § 1821.

Plaintiffs respond that *Crawford Fitting* is limited to cases where a court invokes Rule 54(d). It says nothing about awards of costs under 15 U.S.C. § 15.

Reazin II, 663 F. Supp. at 1457. The district court thus appeared to award the fees as part of the award of attorneys' fees under section 4 of the Clayton Act, *15 U.S.C. § 15*. In *Ramos*, the case relied on by the district court, we specifically awarded, as part of an award of attorneys' fees under *42 U.S.C. § 1988*, **[**98]** "reasonable expert witness fees" if the witness' testimony was "reasonably necessary." *713 F.2d at 559*.

Crawford Fitting has, however, caused many courts to reconsider the propriety of taxing expert witness fees against the losing party. As indicated, the Court in *Crawford Fitting* specifically addressed only the authority of a federal court under *Rule 54(d)* to tax expert witness fees beyond the statutory limits contained in *28 U.S.C. §§ 1920* and *1821*. Nonetheless the Court employed broad language. "We will not lightly infer that Congress has repealed *§§ 1920* and *1821*, either through *Rule 54(d) or any other provision not referring explicitly to witness fees." Crawford Fitting, 482 U.S. at 445* (emphasis added). This circuit has noted, even after *Crawford Fitting*, that "in the appropriate case, expert witness fees may be reimbursed as part of an attorneys' fee award." *Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1550 (10th Cir. 1987)*. [47]

[99]** The narrower question before us in this case, however, is whether the expert witness fees were properly allowed in full as part of "the cost of suit, including a reasonable attorney's fee" under section 4 of the Clayton Act, *15 U.S.C. § 15*. This court has not specifically addressed that issue, either before or after *Crawford Fitting*. Among those courts which have addressed the question, it appears the majority do not allow such fees in excess of the amount allowed by *28 U.S.C. § 1821*. *See, e.g., Barber & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276, 1282* (4th Cir.) ("we agree with the prevailing view that 'costs of suit' under § 4 [*15 U.S.C. § 15*] does not include expert expenses except in cases of exceptional circumstances"), *cert. denied*, *484 U.S. 823, 98 L. Ed. 2d 48, 108 S. Ct. 86 (1987)*; *Illinois v. Sangamo Constr. Co., 657 F.2d 855, 866 (7th Cir. 1981)* ("recovery of specific expenses pursuant to Section 4 of the Clayton Act [*15 U.S.C. § 15*] is governed by the recovery of costs under *Rule 54(d)* and *28 U.S.C. § 1920* **[**100]** "); *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 309 n.75 (2d Cir. 1979)* ("the only costs recoverable by a successful plaintiff in a private antitrust action suit are those normally **[*982]** allowable under *28 U.S.C. § 1920* and *Fed.R.Civ.P. 54(d)*."), *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*; *Ott v. Speedwriting Publishing Co., 518 F.2d 1143, 1149 (6th Cir. 1975)* ("the fees of expert witnesses are not included in the recoverable costs in an antitrust action"); *Seven Gables Corp. v. Sterling Recreation Org., 686 F. Supp. 1418, 1421 (W.D.Wash. 1988)* ("The court does not interpret the provision of the Clayton Act providing for recovery of attorney's fees as explicit statutory authorization for compensating plaintiffs for fees paid to experts beyond that authorized by the cost statutes"); *Arthur S. Langenderfer, Inc. v. S.E. Johnson, Co., 684 F. Supp. 953, 960 (N.D.Ohio 1988)* ***HN53***[] ("The costs recoverable under Section 4 of the Clayton Act are **[**101]** limited to those costs recoverable under *Fed.R.Civ.P. 54(b)* and *28 U.S.C. § 1920*"); *Int'l Wood Processors v. Power Dry, Inc., 598 F. Supp. 299 (D.S.C. 1984)*, *aff'd*, *792 F.2d 416 (4th Cir. 1986)*; *Beech Cinema, Inc. v. Twentieth Century Fox Film Corp., 480 F. Supp. 1195, 1198 (S.D.N.Y. 1979)*, *aff'd*, *622 F.2d 1106 (2d Cir. 1980)*; *see also Int'l Woodworkers v. Champion Int'l Corp., 790 F.2d 1174, 1180 (5th Cir. 1986)* ("a statute which provides only for an award of 'costs' or 'attorneys' fees' but which fails to address expert witness' fees will not be construed to authorize the taxing of expert witness fees in excess of the *§ 1821* amount"), *aff'd sub nom Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987)*; *but see Hasbrouck v. Texaco, Inc., 631 F. Supp. 258 (E.D.Wash. 1986)* (allowing expert witness fees as costs in antitrust case), *aff'd in part and rev'd in part*, *879 F.2d 632 (9th Cir. 1989)*. We see no reason to depart from that prevailing view, and we find support for that **[**102]** view in *Crawford Fitting*. [48] Because we cannot tell from the record before us what proportion of the

[47] In several diversity cases, however, we have stated that "absent express statutory or contractual authorization for the taxation as costs the fees of a party's expert witness, federal courts are bound by the limitations set out in *28 U.S.C. §§ 1821* and ***1920***." *Miller v. Cudahy Co., 858 F.2d 1449, 1461 (10th Cir. 1988)* (citing *Crawford Fitting*), *cert. denied*, ***492 U.S. 926, 109 S. Ct. 3265, 106 L. Ed. 2d 610 (1989)***; *see also Chaparral Resources, Inc. v. Monsanto Co., 849 F.2d 1286 (10th Cir. 1988)*; *Cleverock Energy Corp. v. Trepel, 609 F.2d 1358, 1363 (10th Cir. 1979)*, *cert. denied*, ***446 U.S. 909, 64 L. Ed. 2d 261, 100 S. Ct. 1836 (1980)***.

[48] In reaching this conclusion, we are aware that the question of whether expert witness fees should be viewed as "costs" or as expenses of litigation recoverable as attorneys' fees has engendered some disagreement among courts. And, particularly in view of *Crawford Fitting*, we are aware of the hotly contested issue of whether expert witness fees are recoverable as part of the

expert witness fees awarded in this case exceeded the statutory limits of *28 U.S.C. §§ 1920* and *1821*, we remand to the district court for a recalculation of the expert witness fees taxable against Blue Cross.

[103]** Finally, Blue Cross argues the attorneys' fees awarded are "excessive." It asserts that (1) the district court erroneously awarded as reasonable "whatever fees HCA paid to plaintiffs' counsel," allegedly contrary to *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986)*; (2) the fees awarded were four times the fees charged to Blue Cross; and (3) the hourly rates permitted greatly exceeded the hourly rates charged by counsel in the community for comparable work.

HN54[] "The benchmark for the awards under nearly all of . . . [the statutes awarding fees] is that the attorney's fee must be 'reasonable.'" *Id. at 562*; *Mares, 801 F.2d at 1201*. To determine what is a "reasonable" fee, the court must determine reasonable hours and reasonable rates for the work done. The district court carefully reviewed the hours spent on this case and determined that they were reasonable. We find no error in that determination.

The court then considered a reasonable rate for the hours spent. **[**104]** ***HN55***[] "The first step in setting a rate of compensation for the hours reasonably expended is to determine what lawyers of comparable skill and experience practicing in the area in which the litigation occurs would charge for their time." *Ramos, 713 F.2d at 555*; *see also* *Blum v. Stenson, 465 U.S. 886, 895, 79 L. Ed. 2d 891, 104* ***[*983]*** *S. Ct. 1541 (1984)*. [49] As the district court noted, the hourly rates requested and awarded to some of plaintiffs' attorneys "represent the actual current billing rates for the Jones, Day attorneys who represented them." *Reazin II, 663 F. Supp. at 1453*. Local Wichita counsel sought and received lower hourly rates than their normal billing rates. *Id.*

[105]** A lawyer's customary billing rate is not a conclusive factor. *See* *Spulak v. K Mart Corp., 894 F.2d 1150, 1990 U.S. App. LEXIS 581 (10th Cir. 1990)*; *Ramos, 713 F.2d at 555*. The district court specifically found that:

> "There is abundant evidence from which I find Wichita attorneys do occasionally charge $ 200.00 an hour or more for complex litigation. With all my respect and endearment for Wichita attorneys and law firms, it remains true there is neither a lawyer nor a firm in this town which could have devoted to this case the timely expertise, experience, and manpower put forth by Jones, Day."

Reazin II, 663 F. Supp. at 1454. We decline to disturb those findings. We therefore affirm the determination of hourly rates awarded to plaintiffs' attorneys.

Having concluded that the district court properly determined that both the number of hours requested and the hourly rates were reasonable, and finding no other reason to disturb the district court's award, we affirm the award of attorneys' fees, with the exception that we remand to the district court to recalculate the expert witness fees awarded.

CONCLUSION

[106]** We have carefully considered the multitude of arguments made by the parties in this appeal, addressing those we deemed appropriate. For the reasons stated in this opinion, we affirm the judgment of the district court in its entirety, with the sole exception that we remand the award of expert witness fees for further findings.

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attorneys' fees a prevailing party may recover under *42 U.S.C. § 1988*. *Compare* *Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989)* *with* *West Virginia Univ. Hosps., Inc. v. Casey, 885 F.2d 11 (3d Cir. 1989)*, *cert. granted*, 494, ***110 S. Ct. 1294, 108 L. Ed. 2d 472 58 U.S.L.W. 3545 (1990)***. Although this circuit has held that such expert witness fees can be included in an award of attorneys' fees under *42 U.S.C. § 1988*, we decline in this case to extend that reasoning to section 4 of the Clayton Act.

[49] In *Ramos*, we further stated that "absent more unusual circumstances than we see in this case, the fee rates of the local area should be applied even when the lawyers seeking fees are from another area." *713 F.2d at 555*. We thus contemplated the possibility that "unusual circumstances" might warrant a departure from local hourly rates. The district court in this case found such "unusual circumstances."

Blue Cross & Blue Shield Ass'n v. Group Hospitalization & Medical Services, Inc.

United States District Court for the Eastern District of Virginia, Alexandria Division

March 30, 1990

Civil Action No. 89-0999-A

Reporter

744 F. Supp. 700 *; 1990 U.S. Dist. LEXIS 10513 **; 1990-2 Trade Cas. (CCH) P69,224

BLUE CROSS AND BLUE SHIELD ASSOCIATION, Plaintiff, v. GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC., Defendant

Core Terms

Marks, blue cross, Plans, rights, registration, foreign country, ownership, register, license, abroad, brochure, subscribers, service mark, trademark, Counterclaim, parties, words, license agreement, memorandum, distributed, assigned, laches, identification card, task force, interim, business relationship, insurance company, own name, Lanham Act, contractual

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Governments > Courts > Authority to Adjudicate

International Law > Individuals & Sovereign States > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN1[] **Jurisdiction, In Rem & Personal Jurisdiction**

Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary which he could do voluntarily, to give full effect to the decree against him. Further, a U.S. court has the ability to order an individual over whom it has personal jurisdiction to do an act, or refrain from doing an act, abroad; and such an order does not involve a per se invasion of the sovereignty of the foreign country.

Trademark Law > ... > Infringement Actions > Jurisdiction > General Overview

Trademark Law > ... > Remedies > Equitable Relief > General Overview

HN2[] **Infringement Actions, Jurisdiction**

The Lanham Act (Act) confers broad jurisdictional powers upon courts of the United States. The district courts of the United States are granted jurisdiction over all actions arising under the Act, § 39, *15 U.S.C.S. § 1121*, and can award relief which may include injunctions, according to the principles of equity, to prevent the violation of any registrant's rights.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

International Trade Law > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Jurisdiction

HN3[] **Jurisdiction, Jurisdictional Sources**

Generally, in determining whether extraterritorial jurisdiction should be exercised, multi-step analysis has been devised. Courts consider the following factors: (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties; (3) Relative importance of alleged violation of conduct here compared to that abroad; (4) Availability of remedy abroad and pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if court exercises jurisdiction and grants relief. (7) If relief is granted, whether party will be placed in position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether court can make its order effective; (9) Whether order for relief would be acceptable in this country if made by foreign nation under similar circumstances; and (10) Whether treaty with affected nations has addressed issue.

Contracts Law > Contract Interpretation > General Overview

HN4[] **Contracts Law, Contract Interpretation**

Where all parties adopt and act on a certain construction of a contract, there is no better extrinsic evidence of their intention.

Trademark Law > ... > Factors for Determining Confusion > Similarity of Marks > General Overview

HN5[] **Factors for Determining Confusion, Similarity of Marks**

See *15 U.S.C.S. § 1114(1)*.

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > General Overview

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 4th Circuit Court

Trademark Law > ... > Factors for Determining Confusion > Intent of Defendant to Confuse > General Overview

Trademark Law > ... > Factors for Determining Confusion > Similarity of Marks > General Overview

HN6[] **Similarity of Marks, Appearance, Meaning & Sound**

Courts consider a number of factors in determining the likelihood of confusion: (1) the strength or distinctiveness of the marks; (2) the similarity of the marks; (3) the similarity of the goods/services the marks identify; (4) the similarity of the facilities the two parties use in their business; (5) the similarity of the advertising used by the parties; (6) the defendant's intent; and (7) actual confusion.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Trademark Law > ... > Infringement Actions > Defenses > General Overview

Civil Procedure > ... > Pretrial Judgments > Nonsuits > Voluntary Nonsuits

HN7[] **Affirmative Defenses, Laches**

The determination as to whether a claim is barred by laches is committed to the sound discretion of the trial court. In order for laches to bar an action, there must be a delay accompanied by facts indicating an intention to abandon the claim, and the delay must be unreasonable and injurious to the party asserting the laches defense.

Governments > Legislation > Statute of Limitations > General Overview

HN8[] **Legislation, Statute of Limitations**

See *Va. Code Ann. § 8.01-247*.

Trademark Law > ... > Remedies > Equitable Relief > General Overview

Trademark Law > ... > Infringement Actions > Defenses > General Overview

Trademark Law > Abandonment > General Overview

HN9[] **Remedies, Equitable Relief**

A defense of laches to a claim for injunctive relief under the Lanham Act requires plaintiff's knowledge of defendant's use of the mark; plaintiff's inexcusable delay in taking action; and the prejudice that will accrue if plaintiff is allowed to assert its right at this time. It is only where the delay is so prolonged and inexcusable that it amounts to a virtual abandonment of the right by the plaintiff for a long period of time that the balance of equities would favor the knowing infringer.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN10[] **Choice of Law, Forum & Place**

A federal court sitting in diversity is bound to apply the conflict of laws of the forum state. Pursuant to Virginia's conflict of laws rules, the rule of lex loci delecti is to be applied. In other words, the place of the wrong determines the right to recover.

Contracts Law > Breach > General Overview

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN11[] **Contracts Law, Breach**

Under District of Columbia law, the elements for intentional interference with third-party contracts are as follows: (1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of its breach by the defendant; and (4) damages resulting from the breach. Further, a party may lawfully engage in conduct which may interfere with a contract or contractual relations if it asserts in good faith a legally protected interest of his own or threatens in good faith to protect the interest if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN12[] **Intentional Interference, Elements**

With regard to a claim for interference with prospective business relations, this action applies only to expectancies which have not yet been reduced to contract.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN13[] **Sherman Act, Claims**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, provides that every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade of commerce among the several states, or with foreign nations, is declared to be illegal. To establish a violation of the Sherman Act (the Act) *§ 1*, a party bringing the claim must show: (1) the existence of a conspiracy or concerted action; (2) that the conspiracy resulted in adverse, anti-competitive effects within the relevant product and geographic market; (3) that the objects of and conduct pursuant to the conspiracy were illegal; and (4) that the party bringing the claim must have been injured as a result of the conspiracy. Concerted action is the essence of a *Section 1* claim.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Sherman Act, Claims**

Mere speculation as to the existence of a conspiracy, without more, is not sufficient to establish a violation of the Sherman Act (Act) *§ 1*, *15 U.S.C.S. § 1*. Further, it is well-settled that *section 1* of the Act does not proscribe independent action but only concerted action.

Antitrust & Trade Law > Sherman Act > General Overview

Trademark Law > ... > Infringement Actions > Defenses > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN15[] **Antitrust & Trade Law, Sherman Act**

A plaintiff has a right to protect its marks and not face the charge of antitrust violations. Good faith efforts to enforce trademark rights do not violate the Sherman Act, *15 U.S.C.S. § 1*. Indeed, vigorous enforcement of trademark rights is exactly the sort of aggressive competition and promotion that ***antitrust law*** seeks to protect.

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Group Hospitalization and Medical Services, Inc. Charles J. Steele, Jacqueline M. Saue, Sandra Hardgrove Andrade, Mary Atchley Jester, * Foley & Lardner, Washington, District of Columbia, Peter G. Mack, Foley & Lardner, Schwartz, Jeffery, Schwaab, Mack, Blumenthal & Evans, Alexandria, Virginia, Michael A. Grow, Ward, Lazarus & Grow, Washington, District of Columbia, Counsel for Group Hospitalization and Medical Services, Inc.

Judges: James C. Cacheris, United States District Judge.

Opinion by: CACHERIS

Opinion

[*702] MEMORANDUM OPINION

JAMES C. CACHERIS, UNITED STATES DISTRICT JUDGE.

* Counsel of Record.

Plaintiff Blue Cross and Blue Shield Association ("Association") filed this action on July 7, 1989 against the defendant Group Hospitalization and Medical Services, Inc. ("D.C. Plan") seeking a Declaratory Judgment and injunctive relief under the Lanham Trade-Mark Act, as amended, *15 U.S.C.* **[**2]** *§ 1114 et seq.*

Defendant D.C. Plan has denied plaintiff's allegations and has raised affirmative defenses of laches, estoppel, selected enforcement and waiver. In addition, in its Answer the D.C. Plan has asserted a counterclaim which alleges tortious interference with contractual relations and prospective **[*703]** business relations as well as a violation of the Sherman Act, *15 U.S.C. § 1*.

For reasons set forth below, Judgment is entered in favor of the Association on its Complaint for Declaratory Injunctive Relief. Judgment is also entered in favor of the Association on the counterclaims brought against it by the D.C. Plan.

I. *Findings of Fact*

After reviewing the pleadings, authorities, and arguments of counsel, the court finds the facts to be as follows:

The court adopts the corrected Stipulation of Uncontested Facts.

Plaintiff Blue Cross and Blue Shield Association ("Association") is a not-for-profit membership corporation organized and existing under the laws of the State of Illinois with its principal place of business in Chicago, Illinois. The Association was formed in 1982, through the merger with the former Blue Cross Association and Blue Shield Association. (Uncontested Fact **[**3]** para. 1)

The purposes of the Association are, *inter alia,* to promote the betterment of public health and security, to secure the widest public acceptance of the principles of voluntary nonprofit prepayment of health services, to protect the Blue Cross and Blue Shield names and symbols, and to develop and maintain membership standards for the corporation. (Plaintiff's Ex. 5).

Bernard R. Tresnowski is President and Chief Executive Officer of the Association. (Trial Transcript ("Tr.") Tr. 77).

The Association is not a health underwriter and does not sell health insurance products or services. Rather, the Association provides a variety of support programs and services to Member Plans which, in turn, sell prepaid health care financing insurance services. (Tr. 83, 85).

The support programs and services provided by the Association include lobbying and the operation of the Inter-Plan Services Benefit Bank. [1] Pursuant to the provider contract, the host Plan submits a claim to the Inter-Plan Bank, which operates as a clearing house; the home Plan is ultimately responsible for reimbursing the host Plan through the Bank. (Tr. 113).

[4]** The Association has eighty-six Regular, Associate, and Affiliate Members. Each member is a not-for-profit hospital and/or medical surgical benefits plan that offers health care financing and related services to the public. There are seventy-four Regular Members of the Association located in the U.S. and Puerto Rico. Two Associate Members are located in Canada and Jamaica. Three Affiliated Members are located in Australia, Canada and the United Kingdom. (Plaintiff's Ex. 7).

The Blue Cross and Blue Shield word and design marks are federally registered in the Association's name with the United States Patent and Trademark Office. (Stipulation No. 4, Tr. 90-91).

Defendant Group Hospitalization and Medical Services, Inc. ("D.C. Plan") is a not-for-profit corporation established by an act of Congress, with its principal place of business in the District of Columbia. The D.C. Plan was formed in

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[1] The Inter-Plan Bank allows a subscriber of one Plan to travel anywhere in the U.S. and receive covered services from another plan. The Association, through the Inter-Plan Bank, facilitates payment between the two plans. (Tr. 84).

1985 through the merger of Group Hospitalization, Inc. and Medical Services of the District of Columbia. (Uncontested Facts para. 2; Defendant's Ex. 1410).

The D.C. Plan is a Member Plan of the Association. (Uncontested Facts para. 3).

Joseph P. Gamble is the President and Chief Executive Officer **[**5]** of the D.C. Plan. (Tr. 663).

The parties have been involved in previous litigation. There was a lawsuit in this court styled *Group Hospitalization and Medical Services, Inc. v. Blue Cross and Blue Shield of Virginia,* CA No. 85-1123-A (E.D. Va. April 8, 1986). Proceedings here before Judge Bryan resulted in an Order which defined the geographic scope of the D.C. Plan's license to use the Blue Cross and Blue Shield Marks.

A. *Origin and History of the Blue Cross and Blue Shield Marks*

The first prepaid hospital plan, which eventually developed into a Blue Cross Plan, began at Baylor University in 1929.

[*704] The American Hospital Association ("AHA") sponsored this Plan and other subsequent Plans, operating as a clearing-house and trade association for the Plans. (Plaintiff's Ex. 3; Tresnowski, p. 92).

The "Blue Cross" was adopted in 1939 as the official emblem of those Plans that conformed to the AHA's approval standards. (Plaintiff's Ex. 3).

On March 1, 1954, the AHA and approved individual Plans entered into an Agreement for use of the Blue Cross name and design ("the Mark"). Pursuant to this Agreement, the Plans assigned their rights in the Blue Cross Mark to the AHA. The stated **[**6]** purpose of this Agreement was to create a single owner of all rights in the Blue Cross Mark for the benefit and protection of all the Plans. The Agreement provided as follows:

> [AHA] and the Plans recognize that there should be a sole, exclusive ownership and control of all rights, as hereinafter set forth, to the words Blue Cross and the design of a blue cross, in order that the words Blue Cross and/or the design of the blue cross may not be used in such a manner as to deceive the public, but to maintain and protect, on behalf of all parties hereto, the good will symbolized by the words Blue Cross and the design of a blue cross."
>
> The Plans further provided:
>
> "The words Blue Cross and the design of a Blue Cross are known and recognized in the United States and in foreign countries as designating plans for prepayment of hospital care and related services, sponsored and approved by [AHA] under an approval program."
>
> The Agreement also provided:
>
> "All right, title and interest in and to the words Blue Cross and the design of a blue cross, as service marks, for a prepayment plan for hospital care and related services, and the words Blue Cross in and as a part of the trade name **[**7]** and/or corporate title of said Plans . . . ."

The Agreement further provided that the rights assigned to AHA included the right to hold the registered trade name and service mark.

The Member Plans acknowledged that the Agreement applied to all ownership rights when they agreed that:

> [AHS] shall hold and exercise any and all rights of ownership in and to the words Blue Cross and/or a design of a blue cross, as service marks, whether or not derived from this agreement . . . ."

The Agreement provided that the transfer of the Blue Cross name was in trust to AHA. (Plaintiff's Ex. 3).

On June 30, 1972, pursuant to the Blue Cross Ownership Agreement, the AHA assigned all of its rights in the Blue Cross Mark to the Blue Cross Association ("BCA"). The Agreement confirms that, as between the contracting parties, Blue Cross Association owns all the rights in the Mark. In this Agreement, the Member Plans explicitly affirmed the assignment of rights made in the March 1, 1954 Agreement. (Plaintiff's Ex. 4, para. 1). The AHA, with the express consent of the Plans, then assigned all of these rights, without geographic limitation, to the Blue Cross Association. (Plaintiff's Ex. 4, para. 2).

Also on **[**8]** June 30, 1972, each Member Plan entered into a License Agreement with the BCA, which granted exclusive rights to each Member Plan to operate within its own defined geographical area. The rights of the BCA in the Blue Cross Mark were transferred to the Association upon the merger of Blue Cross Association and Blue Shield Association in 1982. (Defendant's Ex. 946).

The origin and history of the "Blue Shield" name and mark parallel that of the "Blue Cross." On December 1, 1952, pursuant to the Agreement Relating To The Collective Service Mark "Blue Shield," all of the Blue Shield Plans, including the predecessor to what is now the D.C. Plan, transferred their rights in the Blue Shield name and mark to the Blue Shield Medical Care Plans, a predecessor to the Association. (Plaintiff's Ex. 2). The ownership rights in the Blue Shield name and Mark passed to Blue Shield Association ("BSA") in 1977 and then to the Association upon **[*705]** the merger of Blue Cross and Blue Shield in 1982.

The Association owns twenty-three United States registrations for the Blue Cross and Blue Shield names and symbols ("the Marks"). The D.C. Plan has admitted that the Association owns these U.S. registrations for the **[**9]** Marks. (Plaintiff's Ex. 8; Answer).

B. *History and Current Status of the Association's Foreign Registration Efforts*

After the assignment of rights to the American Hospital Association pursuant to the 1954 Agreement, the AHA filed applications to register the Marks in foreign countries. (Plaintiff's Ex. 728, 869).

In the 1950's, 1960's and early 1970's, AHA registered the Blue Cross Mark throughout Latin America, the Caribbean and Europe. By June 30, 1972, AHA held thirty-two registrations in twenty-five countries. (Plaintiff's Ex. 10A).

Pursuant to the 1972 Ownership Agreement, the AHA, with the approval of the Member Plans, assigned these foreign registrations to BCA. The BCA continued to register the Blue Cross Mark abroad. Following the merger of BCA and BSA, the Association has continued these foreign registration efforts. (Plaintiff's Ex. 1104, 1108).

As of January 19, 1990, the Association held 192 registrations in fifty-one foreign countries. [2] (Plaintiff's Ex. 10B). In addition, as of January 19, 1990, the Association has 241 applications pending in another 48 foreign countries. (Plaintiff's Ex. 10).

[10]** The Association's foreign registration and application efforts have been known and, with the exception of the D.C. Plan, supported by the Member Plans. (Plaintiff's Ex. 13, 14).

From the mid-fifties to the present, the Association and its predecessors have protected the Mark against third-party infringers operating in foreign countries. For example, the Association obtained preliminary injunctive relief against a clinic, located in India, from operating under the name Blue Cross and using the Blue Cross symbol. (Plaintiff's Ex. 565). The Association has also pursued infringements in Australia, Guatemala, and Hong Kong. (Plaintiff's Ex. 182, 187, 190).

C. *The Association's Direct Involvement with the D.C. Plan: The Federal Employee Program*

Since 1960, the Association has operated a government-wide service benefit plan for federal employees (the "FEP") pursuant to a contract with the United States Civil Service Commission. Since the creation of the FEP, the

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[2] These include Algeria, Argentina, Australia, the Bahamas, Belgium, Bermuda, Bolivia, Brazil, Burundi, Chile, Columbia, Costa Rica, Cuba, the Dominican Republic, El Salvador, Ethiopia, France, Guam, Guatemala, Guinea, Honduras, Hong Kong, Italy, Jamaica, Japan, Jordan, Kenya, South Korea, Liberia, Liechtenstein, Luxembourg, Malawi, Mexico, Morocco, the Netherlands, the Netherlands Antilles, Norway, Cameroon, Panama, Paraguay, Peru, the Philippines, Poland, Portugal, Puerto Rico, Rwanda, the Seychelles, South Africa, Southwest Africa (Namibia), Switzerland, Transkei, Tunisia, Turkey, Uruguay, U.S.S.R., Zaire, and Zimbabwe. (Plaintiff's Ex. 10B).

Association has subcontracted (through a Plan Participation Agreement) with the D.C. Plan to underwrite and service the FEP for federal employees working in the District of Columbia and abroad. (Plaintiff's Ex. 17).

The Association **[**11]** and the D.C. Plan have also entered into an Operations Center Agreement which requires the D.C. Plan to act as a processing facility for the Plans that participate in the FEP. The Operation Center Agreement provides that

> All responsibility and authority for establishing and changing policies, practices and procedures for the administration of the Program other than practices and procedures relating to the internal operations of GHI [the D.C. Plan] reside in the Associations or their delegate, the Board.

(Plaintiff's Ex. 18).

The Association distributes a variety of materials overseas to promote the FEP. These materials display the Blue Cross and **[*706]** Blue Shield Marks, with the explicit legend "Registered Marks Blue Cross and Blue Shield Association." (Plaintiff's Ex. 204-31).

The Association also publishes newsletters providing information regarding the FEP. The newsletters have been sent to FEP subscribers living abroad since 1981. The newsletters bear the Blue Cross and Blue Shield Marks with either the name "Blue Cross and Blue Shield Association," or "Reg. Marks of the Blue Cross and Blue Shield Association." (Plaintiff's Ex. 235, 303, 532). In addition, since 1982 the Association **[**12]** has sent a package of materials to all new FEP subscribers which includes a "welcome letter," brochure and pamphlet. The materials bear the Marks and name "Blue Cross and Blue Shield Association." (Plaintiff's Ex. 232, 233, 236).

The D.C. Plan also distributes materials bearing the Marks to FEP subscribers in foreign countries, including:

(i) Identification cards bearing the Blue Cross and Blue Shield names and symbols and the Association's name to all new federal employees. (Plaintiff's Ex. 242-46);

(ii) FEP Overseas Claims Forms and checks in payment of FEP overseas claims, both bearing the Blue Cross and Blue Shield Marks. (Plaintiff's Ex. 237-40, 241);

(iii) A brochure entitled "A Guide to Your Explanation of Benefits." This brochure displays the Blue Cross and Blue Shield names and symbols and the legend "Registered Marks Blue Cross and Blue Shield Assn." (Plaintiff's Ex. 234).

The D.C. Plan has admitted that these foreign uses of the Marks in connection with the FEP inure to the benefit of the Association. (Gamble Dep. at 189-90).

D. *Foreign Involvement of the Association and Foreign Recognition of the Marks*

The Association and its predecessors have used the Marks in a **[**13]** variety of ads appearing in foreign publications, such as *Business Insurance, The International Herald Tribune, Fortune Magazine,* and *Forbes* magazine. (Plaintiff's Ex. 128, 144, 136, 142).

The Association sponsored the 1988 U.S. Olympic Team and used the Blue Cross and Blue Shield Marks to advertise its sponsorship. (Plaintiff's Ex. 145-49).

A variety of publications have published articles that discuss the Association, such as *The International Herald Tribune, Financial Times, The Guardian, The Economist,* and *Facts on File.* (Plaintiff's Ex. 150-57).

The Association has, since August 1983, published a quarterly journal, *Inquiry,* which is distributed throughout the world. (Plaintiff's Ex. 106-10, 181).

The Association is a member of the International Federation of Voluntary Health Service Funds ("IFVHSF") which is comprised of 160 independent non-profit, prepaid health plans from around the world. (Plaintiff's Ex. 50, 1110). Representatives of the Association and its Member Plans have attended each of IFVHSF's biennial meetings. (Plaintiff's Ex. 54-65).

The IFVHSF has distributed several publications that contribute to the goodwill and international fame of the **[**14]** Marks of the Association. For example, in June 1976, IFVHSF began to distribute a publication called *"Bulletin"* which contained articles about the Association and its Member Plans. (Plaintiff's Ex. 96-99).

IFVHSF also publishes a regular newsletter which often contains articles describing recent activities of the Association. Within these articles are references to the Association's ownership and use of the Marks. (Plaintiff's Ex. 71-91).

IFVHSF members from around the world have traveled to the U.S. to attend the Association's training programs. (Plaintiff's Ex. 72).

E. *The D.C. Plan's Foreign Registration Strategy*

In 1985, the D.C. Plan decided to secretly register the Marks for its own benefit and use in foreign countries. On October 1, 1985, Richard Groppe ("Groppe") was employed by the defendant in its International **[*707]** Division. He assumed responsibility for secretly registering the Blue Cross and Blue Shield Marks in foreign countries. (Plaintiff's Ex. 271).

On October 15, 1985, the D.C. Plan filed its first application in Barbados and, on October 28, 1985, filed additional applications in Spain and the United Kingdom. (D.C. Plan's Answer to 3rd Set of Interrogatories **[**15]** # 1; Plaintiff's Ex. 30, 31).

By the end of 1985, the D.C. Plan had filed ten applications to register the Marks in ten countries, and, by the first half of 1986, the D.C. Plan had filed another fifteen applications to register the Marks. (Plaintiff's Ex. 30, 31).

On August 4, 1986, Groppe sent a memorandum to Gamble on the status of the D.C. Plan's secret registration strategy. The memo stated that the D.C. Plan would inform the Association of its foreign registration efforts after they had been completed. However, the memorandum also indicated Groppe's belief that the D.C. Plan's secret strategy would be discovered by the Association before the foreign registrations were achieved. On this point the memorandum stated, "Before GHMSI can secure all trademark registrations we want worldwide, BSBSA will discover our activity." (Plaintiff's Ex. 35).

On June 21, 1985, in a letter to all Member Plans and the Association describing his overseas plans, Gamble gave no indication that the D.C. Plan was planning to register the Marks in its own name in foreign countries. (Plaintiff's Ex. 309).

In the spring and summer of 1986, the D.C. Plan sent a series of letters to the other Member Plans, encouraging **[**16]** their participation in the D.C. Plan's international hospital network and claims center. In these letters, the D.C. Plan never suggested that it was registering the Marks in its own name in foreign countries. Quite to the contrary, the D.C. Plan enclosed materials with these letters which acknowledged the Association as the owner of the Marks. (Plaintiff's Ex. 310, 292, 291).

In the August 4, 1986 memo, Groppe discussed the possibility that the Association would form a task force to study the international protection of the Marks and suggested that the D.C. Plan employ a strategy to block the formation of such a task force or at least neutralize its impact. (Plaintiff's Ex. 35).

In response to a request from the Association for additional information on the nature of the D.C. Plan's foreign programs, Gamble sent a letter on October 7, 1986 to Tresnowski failing to disclose that the D.C. Plan had filed applications to register the Marks abroad. (Plaintiff's Ex. 315). Gamble enclosed brochures that the D.C. Plan used to promote its international activities. The brochures identify the Association as the owner of the Marks. (Plaintiff's Ex. 291-92). Each of these brochures explicitly bore **[**17]** the legend, "Reg. Marks of the Blue Cross and Blue Shield Association." This was obviously an attempt by the D.C. Plan to conceal its foreign registration efforts from the Association.

The Association was unaware in 1985 and in the first part of 1986 that the D.C. Plan had undertaken a program to register the Blue Cross Blue Shield Marks, on its own, outside the United States. (Tr. 210).

In late 1986, after unsuccessfully attempting to register the Marks in the United Kingdom, the Association learned that the reason for the rejected application was because the D.C. Plan had already filed an application for the Marks in the United Kingdom in its own name. (Plaintiff's Ex. 318).

The D.C. Plan ignored the Association's numerous requests to withdraw its United Kingdom application and assign it to the Association. (Plaintiff's Ex. 319-321, Gamble Dep. at 573-74).

Thereafter, the Association took prompt steps to oppose the D.C. Plan's unilateral foreign registration efforts whenever they came to light and formed an International Service Mark Task Force to develop a program to protect all the Plans. (Plaintiff's Ex. 330).

In October 1986, the Association discovered that the D.C. Plan had **[**18]** also filed applications to register the Marks in Spain. The D.C. Plan failed to provide any information **[*708]** in response to questions from the Association concerning the Spanish registration efforts. (Plaintiff's Ex. 330).

On November 9, 1987, Tresnowski wrote Gamble regarding the Association's applications in Europe, Latin America, and elsewhere, as well as the D.C. Plan's own registration efforts in Bolivia, Benelux, Chile, Colombia, Denmark, Haiti, Italy, Paraguay, Spain, the United Kingdom, Uruguay, and Venezuela. In the letter, Tresnowski advised Gamble that the D.C. Plan's attempt to register the Marks in its name was a violation of the Ownership and Licensing Agreement. (Plaintiff's Ex. 322). The D.C. Plan never responded to this letter.

In 1987, the Association learned of the use of the Marks by the D.C. Plan in connection with the offering of a health benefits plan in Latin America, pursuant to an arrangement with Universal Insurance Broker, Corp. (Plaintiff's Ex. 324, 380).

The D.C. Plan's arrangement with Universal Insurance Broker, Corp. ("Universal") was evidenced by a brochure which espoused the benefits of this health care program. One of the major advantages to this Program, **[**19]** according to the brochure, was access to the "Recognized Blue Cross and Blue Shield ID card." In this vein, the brochure continued by stating that "a Blue Cross and Blue Shield Card helps you gain access to over 7,000 hospitals in the U.S. and around the world that participate in the Blue Cross and Blue Shield system." The brochure, however, did not mention that the Association and the Member Plans opposed this entire arrangement. (Plaintiff's Ex. 324).

The Association objected to the D.C. Plan's use of the Marks in connection with the arrangement with Universal, In response, the D.C. Plan attempted to conceal its activities and sought to delay the Associations investigation. (Plaintiff's Ex. 323, 324, 325).

On July 10, 1987, the Association reiterated its position to Universal that the Association owns the Marks worldwide and that the D.C. Plan was not authorized to use the Marks outside the U.S. (Plaintiff's Ex. 326).

Universal forwarded the Association's July 10, 1987 letter to the D.C. Plan. In an internal memorandum from Kathleen Flynn (head of the D.C. Plan's Latin American efforts) to Groppe, Flynn relayed the suggested strategy of Jackie Saue, D.C. Plans legal counsel. The **[**20]** memorandum stated

> "She [Saue] would like [Universal] to send another 'innocent' letter requesting additional information regarding Treaty of Paris and the Nat'l Assn's trademark filings in *specific* countries in Latin America. She feels that it would (1) buy us some time and (2) perhaps help [the D.C. Plan] find out more about where Nat'l Ass'n has filed for trademark."

(Plaintiff's Ex. 327). (Emphasis in original).

In January 1988, Universal asked the D.C. Plan whether Universal could publicize its relationship with the D.C. Plan in the Miami, Florida area. (Plaintiff's Ex. 328). The D.C. Plan responded that it would not be acceptable to publicize within the U.S. because the Association was monitoring the D.C. Plan. The letter stated:

> As you are aware, the Blue Cross and Blue Shield National Association is monitoring our relationship with you. We do not want to create any situations which would allow them to take legal action against either Universal Insurance Broker (UIB) or BCBSNCA in the State of Florida or anywhere else in the continental United States.

(Plaintiff's Ex. 329).

In October 1988, the D.C. Plan considered opening up a subsidiary to operate as a direct insurance **[**21]** company in Barbados. The D.C. Plan wished to conceal the Barbados initiative from the Association because the Barbados subsidiary would be a for-profit company and would use the Marks. (Plaintiff's Ex. 521).

In March 1987, the D.C. Plan entered into an agreement with a Venezuelan insurance group, Grupo Consolidado. The Grupo Consolidado program provided for the distribution of identification cards bearing the Blue Cross and Blue Shield Marks to **[*709]** Venezuelan subscribers. Pursuant to a marketing survey seeking to determine Venezuelan familiarity with the Blue Cross and Blue Shield Marks, Grupo Consolidado found that Blue Cross and Blue Shield ". . . . is widely known from an advertising standpoint. Most of the group believe it is a large insurance company operating in the USA." (Plaintiff's Ex. 161).

In 1987, the D.C. Plan entered into an agreement with a Mexican company, Grupo Nacional Provencial ("GNP"), to offer health insurance in Mexico under the Blue Cross and Blue Shield Marks. This program included the use of Blue Cross and Blue Shield identification cards that could be brought to the U.S. to present to hospitals anywhere in the country. During negotiations with GNP, the D.C. Plan **[**22]** clearly represented itself as authorized by the Association to enter into such an agreement. For example, in a "pitch" letter from Groppe to GNP, it was stated that

> the Blue Cross and Blue Shield system is the largest provider of health care insurance in the United States. Nearly one half of the U.S. population receives its health care coverage through Blue Cross and Blue Shield. We believe these services offer unique advantages to our members and allow us to operate as a very successful insurance company in the American and international marketplace.

(Plaintiff's Ex. 444).

In May 1988, the D.C. Plan entered into an agreement with a French health care provider, Federation Nationale de la Mutualite Francaise ("FNMF"). In a press release issued in the U.S., both the D.C. Plan and FNMF indicated that the purpose of their agreement was to issue Blue Cross and Blue Shield identification cards to members of the FNMF in France, allowing French vacationers "to use America's Blue Cross and Blue Shield card to pay for hospital care when they need it." (Plaintiff's Ex. 426). FNMF stated in a press release, "Our subscribers will be able to access the Blue Cross and Blue Shield participating **[**23]** hospitals worldwide." (Plaintiff's Ex. 426).

In 1989, the D.C. Plan began two new programs in France through a French insurance company, GAN. The programs were called "Plan Sante" and "Remy Martin." Both plans included the issuance of Blue Cross and Blue Shield identification cards which could be used in the U.S. (Plaintiff's Ex. 344, 389). A brochure issued by these plans indicated that "Today, Blue Cross and Blue Shield is the most important private provider on a worldwide scale for health related risks: 34% of the American market, 110 million members world-wide." The brochure also indicated that the organization has the status of a mutual insurance company, operating as a federation of 76 Blue Cross and Blue Shield companies across the U.S. -- all of which may be accessed via a single common card. (Plaintiff's Ex. 395).

In September 1988, the D.C. Plan entered into a contract with a Japanese insurance company, Yasuda Fire and Marine Insurance Company ("Yasuda"). (Plaintiff's Ex. 365). Under the terms of the contract, the D.C. Plan would provide services for the Yasuda subscribers throughout the entire U.S. The contract also provided that an identification card bearing the Blue **[**24]** Cross and Blue Shield Marks would be issued to Yasuda subscribers for use in the United States. (Plaintiff's Ex. 365).

Yasuda thought it was dealing with the Blue Cross and Blue Shield Association, and not merely one of its Member Plans. For example, the President of Yasuda, in remarks made at a "signing ceremony," stated, "It is [with] great pleasure for me to see [that] our business tie-up with Blue Cross Blue Shield, the largest medical treatment supply organization in the U.S.A., has been realized. (Plaintiff's Ex. 440).

This belief of Yasuda was not unfounded -- indeed it was purposefully cultivated by the D.C. Plan. For example, after being asked numerous questions by Yasuda concerning the D.C. Plan's relationship with the Association, Gregory Kryza (the D.C. Plan's Regional Director for the Pacific Rim) ("Kryza") wrote in an internal memorandum:

> Rather than become involved in this kind of quizzing, I decided to finesse them and **[*710]** gave them a 10 minute briefing on Blue Cross and Blue Shield with particular emphasis on the high technology that is used in claims adjudication, the state of the art techniques that are used for cost containment and the hospital network both inside **[**25]** and outside the United States. (Plaintiff's Ex. 435).

The D.C. Plan also wished to conceal from other Member Plans and the Association its deal with Yasuda. For example, a November 1988 memorandum to Kryza from Sudhir Vasudeva of the D.C. Plan discussed whether to inform other Member Plans and the Association of the D.C. Plan's agreement with Yasuda. Vasudeva advised against such notification, citing the need to maintain low advertising levels. (Plaintiff's Ex. 334).

On October 20, 1989, the Association wrote Yasuda indicating that the D.C. Plan was illegally operating in Japan and elsewhere. (Plaintiff's Ex. 500).

In February of 1989, the D.C. Plan entered into a program with a British company, Western Provident Association ("WPA"). A brochure touting this venture declared that subscribers would have access to "over 90% of all hospitals in the U.S. and Canada, and hospitals and clinics in cities and towns in over 40 other countries." (Plaintiff's Ex. 446).

Following the consummation of the WPA-D.C. Plan joint venture, a February 25, 1989 article in the *London Times* stated that the WPA "has teamed up with the U.S. Blue Cross and Blue Shield schemes to cover 90 percent of U.S. **[**26]** and Canadian hospitals." (Plaintiff's Ex. 448).

On March 15, 1989 the Association, through British counsel, wrote to WPA indicating its opposition to this "unauthorized" initiative and requesting that it be ceased within seven days of the date of the letter. This letter was also sent to Gamble at the D.C. Plan. No response was ever received by the Association from either party. (Plaintiff's Ex. 496).

Effective January 8, 1988, the D.C. Plan entered into a contract with the Kupat Holim Health Insurance Institution of Israel ("Kupat Holim"). (Defendant's Ex. 728; Gamble at 725). Under the terms of the Agreement, the Kupat Holim hospitals would become members of the D.C. Plan's International Hospital Network.

On February 18, 1988, a Chicago newspaper contained an article announcing an agreement between Blue Cross/Blue Shield and two Israeli hospitals. No mention was made of the D.C. Plan in the article. (Plaintiff's Ex. 423).

On August 2, 1989, the Association, through local counsel in Tel Aviv, Israel, wrote to Kupat Holim requesting that they cease the unauthorized use of the Marks. (Plaintiff's Ex. 449). No response was received by the Association to this letter.

F. *Efforts By* ***[**27]*** *The Association To Protect The Marks Abroad*

The Association has filed 103 oppositions or cancellations in twenty-two countries to combat the D.C. Plan's secret registration program. The Association has obtained favorable rulings in four countries. (Plaintiff's Ex. 330).

The Association formed the International Service Mark Task Force ("Task Force") in April of 1987 to develop a comprehensive program to facilitate the use of the Marks abroad as well as to protect the Marks for all Plans. In June 1987, Tresnowsky sent a letter to all Plan CEO's regarding the development of a procedure which will provide protection of "our names and Marks if and when they are used in foreign countries." (Plaintiff's Ex. 20; Tr. 226-27).

The Task Force sent Gamble three direct invitations, including a request to fill out a Plan Survey, soliciting his input as to foreign registration efforts. (Plaintiff's Ex. 22, 24, 26.) Gamble did not participate in or respond to these inquiries. (Tr. 234-36).

To provide prompt protection, the Task Force began implementing a program involving the issuance of interim foreign licenses. This would provide non-exclusive foreign licenses to interested Plans for a set period **[**28]** of time, pending the issuance of permanent licenses. (Tr. 236-37).

[*711] On December 9, 1988, Roger G. Wilson, General Counsel of the Association ("Wilson"), sent a letter to Gamble soliciting his views on the proposed interim licensing program. (Plaintiff's Ex. 560).

On December 28, 1989, Wilson sent an application to all Plan CEO's for an interim foreign license. The letter accompanying the application provided:

> If your Plan is using the service marks to operate in any way in foreign countries and if it has developed plans or proposals to commence operations overseas using the service marks, the attached application for an interim license should be completed and returned by February 1, 1989.

(Plaintiff's Ex. 28).

The D.C. Plan never applied for any interim foreign licenses. Indeed, the D.C. Plan not only continued to file -- in its own name -- registrations for ownership of the Marks abroad, it also continued to oppose any foreign registration efforts by the Association. (Tr. 239).

Several of the Plans applied for interim foreign licenses. For example, as of December 28, 1988, the Delaware, South Carolina and Arizona Plans filed applications for interim foreign license agreements. **[**29]** (Plaintiff's Ex. 27, 337, 563, 341). The three Plans applied for, and were granted, licenses in eighty-one countries. (Plaintiff's Exh. 29, 338, 564).

G. *Attempts At Reconciliation*

On January 20, 1989, Tresnowsky and Gamble discussed the issue of foreign registrations, and Gamble requested the opportunity to appear before the Board of Directors of the Association ("the Board"). (Tr. at 250; Gamble at 1201-02).

On March 30, 1989, Gamble presented to the Board his position as to ownership of the Marks abroad. The Board did not agree with Gamble's position. In fact, the Board conditioned the D.C. Plan's continued status as a Member Plan on submitting foreign ownership disputes to mediation. Ultimately, mediation was invoked, but it proved unsuccessful. (Tr. 250-53; Plaintiff's Ex. 477).

II. *Jurisdiction*

The D.C. Plan has challenged this court's jurisdiction to decide this case. Plaintiff's (the Association's) Complaint has sought declaratory relief pursuant to Count I and injunctive relief under Count II, pursuant to the Lanham Act. In Count I, the Association has claimed that the D.C. Plan has breached its agreements concerning the Blue Cross and Blue Shield Marks. The D.C. **[**30]** Plan, in entering the licensing and ownership agreements, acknowledged that the Association is the owner of the Marks and that use of the Marks inures to the Association's benefit. Also pursuant to these agreements, the D.C. Plan recognized that it has the right to use the Marks only in the Metropolitan D.C. area.

The first question for the court concerns the interpretation of the licensing and ownership agreements. Specifically, the crucial question is the scope of these agreements. The D.C. Plan argues that the agreements only create U.S. rights for the Association and are silent as to foreign use. Thus, the D.C. Plan contends it has the right to use the Marks overseas and will be granted such rights on a country by country basis. Based on the alleged non-extraterritorial scope of the agreements, the D.C. Plan argues that this court lacks jurisdiction to enjoin it from using the Marks overseas.

U.S. courts have interpreted and enforced contracts between American citizens which involve property and actions in foreign countries. The Supreme Court has stated:

> ***HN1***[] Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real **[**31]** or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary . . . . which he could do voluntarily, to give full effect to the decree against him.

Phelps v. McDonald, 99 U.S. 298, 308, 25 L. Ed. 473 (1879); *see also,* *Nordson Corp. v. Plasschaert, 674 F.2d 1371, 1377 (11th Cir. 1982)*.

[*712] Further, a U.S. court has the ability to order an individual over whom it has personal jurisdiction to do an act, or refrain from doing an act, abroad; and such an order does not involve a *per se* invasion of the sovereignty of the foreign country. For example, in *United States v. Ross, 302 F.2d 831 (2nd Cir. 1962)*, the Court affirmed the district court's order requiring a U.S. citizen to turn over stock certificates. The defendant was to comply with the court's order regardless of whether the property was located within or without the limits of the court's territorial jurisdiction. The Court further held, "The action of the district court awarding appellant over whom it has jurisdiction to do an act in a foreign country does not *per se* involve any invasion of the sovereignty of that country." *Ross, 302 F.2d at 834*; **[**32]** *see also,* *Columbia Nastri & Carte Carbone, S/P/A v. Columbia Ribbon & Carbon Mfg. Co., 147 U.S.P.Q. (BNA) 204 (S.D.N.Y. 1965)*, *aff'd,* *367 F.2d 308 (2d Cir. 1966)*.

In *Velsicol Chemical Corp. v. Hooker Chemical Corp., 230 F. Supp. 998 (N.D. Ill. 1964)*, the court confronted the question of whether declaratory relief was appropriate in resolving a dispute between a patent licensor and a licensee alleged to have violated a patent licensing agreement through unauthorized foreign activities. The court stated:

> Defendant apparently considers that plaintiff is seeking a determination by this court that defendant has infringed certain of plaintiff's foreign patents. The question, however, is not one of infringement, but rather is whether or not defendant retained a license to sell under [plaintiff's] foreign . . . . patents by virtue of [a provision] of the contract. This question, it seems to me, is precisely the kind of issue that the Declaratory Judgment Act was designed to resolve.

Vellsicol, 230 F. Supp. at 1016-17. Thus the court in *Velsicol* found that it had jurisdiction to decide the dispute -- despite the fact that the exercise of the court's jurisdiction would **[**33]** have an extraterritorial effect.
Therefore, as to Count I of plaintiff's complaint seeking declaratory relief, the court finds that it has jurisdiction to decide whether defendant D.C. Plan has breached the licensing agreement. [3]

The jurisdictional inquiry now turns to whether the court has jurisdiction to decide whether defendant D.C. Plan has violated the Lanham Trademark Act, *15 U.S.C. § 1114(1)*. In the seminal case of *Steele v. Bulova Watch Co., 344 U.S. 280, 97 L. Ed. 319, 73 S. Ct. 252 (1952)*, the Supreme Court stated that ***HN2***[] the Lanham Act "confers broad jurisdictional powers upon courts of the United States . . . . The district courts of the United States are granted jurisdiction over all actions 'arising under' the Act, § 39, *15 U.S.C. § 1121*, *15 U.S.C.A. § 1121*, and can award relief which may include injunctions, 'according to the principles of equity,' to prevent **[**34]** the violation of any registrant's rights." *Steele, 344 U.S. at 283-284*. (statutory citations omitted).

HN3[] Generally, in determining whether extraterritorial jurisdiction should be exercised, a multi-step analysis has been devised. In the case of *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979)*, the Court enunciated the factors to be considered:

> 1. Degree of conflict with foreign law or policy;
> 2. Nationality of the parties;
> 3. Relative importance of the alleged violation of conduct here compared to that abroad;
> 4. Availability of a remedy abroad and the pendency of litigation there;
> 5. Existence of intent to harm or affect American commerce and its foreseeability;
> 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief.
>
> 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting **[*713]** requirements by both countries;
> 8. Whether the court can make its order effective;
> 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and
>
> 10. Whether a treaty with the **[**35]** affected nations has addressed the issue.

Mannington Mills, 595 F.2d at 1297, 1298.
Turning to the first factor -- conflict with foreign law or policy -- the D.C. Plan has not demonstrated that the exercise of extraterritorial jurisdiction will conflict with foreign law. Indeed, the D.C. Plan's own expert witness in the field of foreign trademark law, Jeremiah McAuliffe, testified at trial that he "assumed that there would not be" any conflict with foreign law if the court exercises extraterritorial jurisdiction in this case. (Tr. 966-67).
As to the nationality of the parties, both the Association and the D.C. Plan are U.S. corporations with their principal places of business in Chicago, Illinois and Washington, D.C. respectively.

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[3] It is interesting to note that defendant D.C. Plan, in its counterclaim, also seeks declaratory relief and that such relief, if granted, would have an extraterritorial effect.

Regarding the extent to which enforcement can achieve compliance, the D.C. Plan and its employees are American citizens and thus subject to personal jurisdiction.

As to the relative importance of the alleged violation of conduct here compared to that abroad, declaratory and injunctive relief would prevent confusion over the Marks abroad as well as in the U.S.

Concerning the D.C. Plan's intent to affect U.S. commerce, the D.C. Plan has admitted that it **[**36]** intends to provide foreign subscribers visiting the U.S. with the ability to present Blue Cross and Blue Shield identification cards to hospitals with which the D.C. Plan has no contact.

No treaty between the U.S. and the affected nations addresses these issues.

Finally, the D.C. Plan's expert, Mr. McAuliff, testified that a U.S. court would have jurisdiction to prevent an unfair trade practice by a U.S. company in foreign commerce which causes confusion in the U.S. -- even if some of the acts were done outside the U.S. (Tr. 964).

Accordingly, the court concludes that it has jurisdiction to decide the issues raised in the Complaint.

III. *Ownership of the Marks* [4]

[37]** The agreements confer ownership of the Marks on the Association.

In 1952, the Association's predecessor acquired all the rights in the Blue Shield Marks pursuant to the Blue Shield Agreement to which the D.C. Plan was a party. (Plaintiff's Ex. 2).

In 1954, all of the Blue Cross Plans -- including the D.C. Plan -- assigned all of their rights in the Blue Cross Marks to the American Hospital Association. (Plaintiff's Ex. 3).

The Blue Cross Plans vested exclusive ownership and control of the Blue Cross Marks in the American Hospital Association. The 1954 Agreement provided, in pertinent part:

> American [Hospital Association] shall hold and exercise *any and all rights of ownership* in and to the words Blue Cross and/or a design of a blue cross, as service marks, whether or not derived from this agreement, exclusively for prepayment plans for hospitals care and related services . . . .

(Plaintiff's Ex. 3) (emphasis added).

Further, the 1954 Agreement provided that

> Any and all applications for the registration of the words Blue Cross and/or a **[*714]** design of a blue cross, as service marks and trade-marks, and any registrations granted *or to be granted hereafter* for said service marks **[**38]** and trade-marks, shall be solely in the name of American [Hospital Association] for the life of this agreement.

(Id.) (emphasis added).

The 1954 Agreement established that "the words Blue Cross and the design of a Blue Cross are known and recognized . . . . in foreign countries." *(Id.)*

The foregoing language substantiates that the American Hospital Association was vested with world-wide ownership in the Blue Cross Marks.

On June 30, 1972, the American Hospital Association transferred ownership of the Blue Cross Marks to the Blue Cross Association. The Member Plans consented to and entered into agreements regarding ownership of the Marks. In the 1972 Blue Cross Ownership Agreement (Plaintiff's Ex. 4), the American Hospital Association assigned to the Blue Cross Association all of its rights, both foreign and domestic, in the Marks. In the

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[4] Pursuant to Virginia choice of law rules, the validity, interpretation and construction of agreements are governed by the laws of the state where the contracts were made. [Crosson v. Conlee, 745 F.2d 896, 902 (4th Cir. 1984)](), *cert. denied,* ***470 U.S. 1054, 84 L. Ed. 2d 822, 105 S. Ct. 1759 (1985)***. A contract is "made" where the final act necessary to make the contract binding is done. *See* *Chesapeake Supply & Equipment Co. v. J. I. Case Co., 700 F. Supp. 1415, 1417 (E.D. Va. 1988)*. All of the agreements in this case ultimately became effective by vote of the Association's Board of Directors in Illinois. Thus, because the agreements were made in Illinois, Virginia choice of law rules require that Illinois law governs the validity, interpretation and construction of the agreements.

Ownership Agreement, the Member Plans -- including the D.C. Plans' predecessor -- consented to the assignment. (Plaintiff's Ex. 4).

The Plans also explicitly affirmed the assignment of rights made in the 1954 Blue Cross Agreement. *(Id.)*

The Blue Cross License Agreement, executed along with the 1972 Blue Cross Ownership Agreement, confirms **[**39]** that the Association is the owner of the term "Blue Cross" and the design of a blue cross as service marks for prepayment plans for hospital care and related services. (Plaintiff's Ex. 1).

In return for the grant of a license to use the Marks in the D.C. area, the D.C. Plan promised it would not "during the term of the License Agreement, attack the title of the Blue Cross Association in and to the License Marks or Licensed Name or attack the validity of this license." (Plaintiff's Ex. 1).

The D.C. Plan also agreed that "all use by it of the Licensed Marks and Licensed Name hereunder shall inure to the benefit of BCA [predecessor to the Association]." *(Id.).* The D.C. Plan further agreed that "rights in the Licensed Marks and Licensed Name other than those specifically granted herein are reserved by BCA for its own use." *(Id.)*

In addition to the language of the ownership and licensing agreements, for over thirty years the conduct of the D.C. Plan has indicated its recognition that the Association owns the Marks. For example, since 1960 the D.C. Plan has contracted with the Association to underwrite and administer the federal employees program to approximately 12,000 Americans **[**40]** living abroad. (Plaintiff's Ex. 17). In 1983, the D.C. Plan formed World Access, Inc. ("World Access"), a travel-assistance program which provides U.S. travelers abroad with access to English-speaking doctors and makes hospital arrangements. The D.C. Plan distributes identification cards in conjunction with World Access, but these cards do not carry the Blue Cross and Blue Shield Marks nor has World Access ever promoted itself or its products as being affiliated in any way with the Blue Cross and Blue Shield Association.

In 1985, as an adjunct to World Access, the D.C. Plan developed an international hospital network consisting of a group of foreign hospitals which agreed to treat subscribers of World Access, the Federal Employees Program, and U.S. Member Plans. Materials sent by the D.C. Plan to hospitals within this network expressly acknowledged that the Association owned the Marks via a legend on these materials indicating the Association as owner of the Marks. (Plaintiff's Ex. 609).

There have also been instances where unauthorized use of the Marks by the D.C. Plan has been discovered by the Association and quickly rectified by the D.C. Plan. For example, in 1985 a D.C. Plan **[**41]** subsidiary, Access America, complied with the Association's request to cease using the Marks in connection with its foreign travel services. (Plaintiff's Ex. 282; Defendant's Ex. 1259).

[*715] All other Member Plans have interpreted the Association's ownership rights under the agreements as extending to foreign countries. *See* *American National Bank & Trust Co. v. Lembessis, 116 Ill. App. 2d 5, 253 N.E.2d 126, 130 (1st Dist. Ill. 1969)* ***HN4***[] ("where all parties adopt and act on a certain construction of a contract, there is no better extrinsic evidence of their intention"). Further, no other Member Plan has challenged the Association's ownership of the Marks -- in the United States or abroad.

In preparing to challenge the Association's foreign ownership of the Marks, the D.C. Plan devised a strategy for initiating foreign registration. This was a clandestine strategy, planned and executed without the knowledge of the Association or any of the Member Plans. Particularly egregious is the memorandum from Groppe to Gamble of August 4, 1986 (Plaintiff's Ex. 35) wherein Groppe discusses foreign registrations and how to approach the Association. Groppe's plan provided that:

> 1. Before GHMSI can secure all the trademark **[**42]** registrations we want worldwide, BCBSA will discovery our activity.
> 2. This discovery is likely to come through the Kilmer [law] firm when it starts to do title searches and discovers our activities.
> 3. We expect this discovery to take place in the next 3 to 9 months . . . .

> The best case scenario is that we are able to negotiate an arrangement with BCBSA directly to use the name and mark exclusively in those countries in which we want to do business. The worst case scenario is that BCBSA moves to try to limit, restrict or remove our ability to do business and use the name and trademark internationally. It is clear in its worst case scenario that BCBSA has enough clout to make life difficult for us on the domestic side even if we were to successfully defend against their restricting our use of trademark overseas.

(Plaintiff's Ex. 35).

Obviously, the D.C. Plan was attempting a surreptitious end-run around the Agreements. The D.C. Plan was attempting to gain leverage on the Association by registering the Marks in foreign countries before the Association discovered its activities. These activities were a clear violation of the Agreements.

Accordingly, the court concludes that the D.C. **[**43]** Plan has breached its License Agreement by registering the Marks in foreign countries in its own name for its exclusive benefit. *See* *B.V.D. Licensing Corp. v. Maro Hosiery Corp., 688 F. Supp. 961, 962-64 (S.D.N.Y. 1988)*.

IV. *The Lanham Act*

> The Lanham Act, *15 U.S.C. § 1114(1)*, provides, in pertinent part, that
>
> ***HN5***[] Any person who shall, without consent of the registrant --
> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . . shall be liable in a civil action by the registrant . . . .

The Fourth Circuit in *Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984)*, set forth ***HN6***[] a number of factors to be considered in determining the likelihood of confusion:

1. the strength or distinctiveness of the marks;
2. the similarity of the marks;
3. the similarity of the goods/services the marks identify;
4. the similarity of the facilities the two parties use in their business;
5. the similarity of the advertising used by the **[**44]** parties;
6. the defendant's intent; and
7. actual confusion.

It is without peradventure that the Blue Cross and Blue Shield Marks are distinctive. The Blue Cross and Blue Shield Marks are strong Marks within the U.S. *See* *Central Benefits Mutual Ins. Co. v. Blue Cross and Blue Shield Association, 711 F. Supp. 1423, 1433 (S.D. Ohio 1989)*; *Blue Cross and Blue Shield Association **[*716]** v. Blue Cross Mutual Clinic, Inc., 612 F. Supp. 41, 44 (S.D. Fla. 1985)*; *National Association of Blue Shield Plans v. Lovelace, 435 F. Supp. 115, 117 (N.D. Cal. 1977)*.

The Marks are used abroad in targeted countries where the Blue Cross and Blue Shield name and symbols have immediate recognition among major foreign insurance companies.

The Marks used by the D.C. Plan are identical to those used by the Association. The manner of the D.C. Plan's use of the Marks in foreign promotional materials demonstrates its intention to mislead its foreign joint venture partners into believing that they are receiving the benefits of the Blue Cross and Blue Shield Marks in the United States. For example, the D.C. Plan distributed brochures in Latin America which indicated that the Blue Cross and Blue Shield cards **[**45]** help foreign subscribers gain access to several thousand U.S. hospitals when traveling to the United States -- although such access was never authorized by the Association or any of the Member Plans. (Plaintiff's Ex. 380). In addition, the D.C. Plan attempted to hide from Yasuda, its Japanese joint venture partner, the fact that Yasuda was dealing with the D.C. Plan and not the Association. (Plaintiff's Ex. 435). This effort at deception was apparently successful, for Yasuda was clearly confused, believing that it was dealing with the Blue Cross and Blue Shield Association and not merely one of its Plans. (Plaintiff's Ex. 436). It is beyond cavil that there has been actual confusion and such confusion was intentional. *See Frisch's Restaurants, Inc. v. Elby's Big Boy, 670 F.2d 642, 648 (6th Cir. 1982)*.

In addition, the sales and advertising methods used by the D.C. Plan in its foreign business efforts are similar to those used by the Association and other Plans.

Accordingly, the court finds that the D.C. Plan has violated the Lanham Act.

V. *Affirmative Defenses and Counterclaims*

The D.C. Plan has raised an affirmative defense of laches and has brought a counterclaim alleging **[**46]** tortious interference with contractual and prospective business relations, as well as alleging a violation of the federal antitrust laws.

A. Laches

HN7[] The determination as to whether a claim is barred by laches is committed to the sound discretion of the trial court. *Murphy v. Holland, 237 Va. 212, 377 S.E.2d 363, 365 (1989)*. [5] In order for laches to bar an action, there must be a delay accompanied by facts indicating an intention to abandon the claim, and the delay must be unreasonable and injurious to the party asserting the laches defense. *Murphy, 377 S.E.2d at 365*.

As to the Association's claim for declaratory relief, the court finds that any delay **[**47]** by the Association in bringing this action was not made with the intention to abandon any of its rights in the Marks. When first learning of the D.C. Plan's foreign initiatives, the Association was under the belief that these efforts were being done on behalf of the Association and all the Member Plans -- not solely a unilateral move on the part of the D.C. Plan. Later, upon discovering that the D.C. Plan sought to gain foreign rights only for itself, the Association sought, through the establishment of the International Trade Mark Task Force, a means by which Member Plans could acquire licenses to establish business abroad. The D.C. Plan, however, declined to participate in this program. Finally, the Association invoked mediation proceedings to attempt to solve the impasse with the D.C. Plan. Clearly, any delay on the part of the Association was not done with the intention to abandon its rights in the Marks. Further, the D.C. Plan prompted some of the delay by devising its clandestine strategy to register the Marks abroad. (Plaintiff's Ex. 35). Based on these circumstances, **[*717]** it cannot be said that any delay by the Association was unreasonable or injurious to the D.C. Plan.

In addition, **[**48]** the Association's claim for declaratory relief is not barred by the relevant statute of limitations. As previously indicated, the contract at issue in this case provides that Illinois law governs. The applicable Illinois statute provides a five year limitations period. *Virginia Code Section 8.01-247* provides that:

> **HN8**[] No action shall be maintained on any contract which is governed by the law of another state or country if the right of action thereon is barred either by the laws of such state or country or of this commonwealth.

See Virginia Code Section 8.01-230; *Goodell v. Rehrig Int'l, Inc., 683 F. Supp. 1051, 1056 (E.D. Va. 1988)*, *aff'd 865 F.2d 1257 (4th Cir. 1989)*.

Plaintiff's action was filed on July 7, 1989, and as indicated in the court's Findings of Fact, the Association was not aware of the D.C. Plan's foreign registration program in 1986. (Tr. 2101). The court finds Mr. Tresnowsky's testimony on this point to be believable. Further, Mr. Gamble testified that he told Marvin C. Reiter (Vice President and Deputy General Counsel of the Association) about the D.C. Plan's foreign registration efforts in

[5] Federal courts hearing a state law claim must apply the procedural rules of the forum state, including its choice of law rules. *Zukowski v. Dunton, 650 F.2d 30, 34, n. 3 (4th Cir. 1981)*. Under Virginia law, questions regarding the timeliness of an action are determined by reference to forum law. *Hospelhorn v. Corbin, 179 Va. 348, 19 S.E.2d 72 (1942)*.

November 1985. (Tr. 749-750). However, Reiter testified that **[**49]** he and Gamble only had a general discussion in which Gamble said the D.C. Plan was looking at overseas initiatives. As to this dispute of fact, the court credits Reiter's testimony. (Dep. of Reiter, p.24). The court believes that Gamble mentioned overseas initiatives with Reiter but did not discuss specifics regarding registering the Marks overseas.
Therefore, as to plaintiff's action for declaratory relief as to the ownership of the Marks, the court finds this Count to have been timely brought.

HN9[] A defense of laches to a claim for injunctive relief under the Lanham Act requires "plaintiff's knowledge of defendant's use of the mark; plaintiff's inexcusable delay in taking action; and the prejudice that will accrue if plaintiff is allowed to assert its right at this time." *Perini Corp. v. Perini Construction, Inc., 715 F. Supp. 719, 723 (D. Md. 1989)*. As indicated above, the true nature of the D.C. Plan's foreign registration strategy -- that all foreign rights to the Marks would inure only to the D.C. Plan -- was hidden from the Association. Also, once known, the Association initially believed that the D.C. Plan's foreign efforts were taken on behalf of the Association and all the **[**50]** Member Plans. Once the Association became aware of the reality of the situation, it sought to protect its rights in the Marks -- first through the interim licensing mechanism, then through arbitration, and ultimately through the bringing of this action.

The Association has not inexcusably delayed in asserting its rights. As to any prejudice that will accrue to the D.C. Plan if the Association is allowed to assert its rights to the Marks at this time, "It is only . . . . where the delay is so prolonged and inexcusable that it amounts to a virtual abandonment of the right by the plaintiff for a long period of time that the balance of equities would favor the knowing infringer." *Perini, 715 F. Supp. at 725* *quoting* *Tisch Hotels, Inc. v. Americana Inn, Inc., 350 F.2d 609, 614-15 (7th Cir. 1965)*. In light of the fact that a portion of any delay was precipitated by the D.C. Plan's own covert strategy, the court does not find any prejudice to the D.C. Plan caused by the Association now asserting its rights in the Marks.

Also, because the D.C. Plan's conduct is continuing, the statute of limitations does not bar the Lanham Act claim. *See* *Valmor Products Co. v. Standard Products, 464 F.2d 200, 204 **[**51]** (4th Cir. 1972)*; *Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513, 526 (10th Cir. 1987)*; *James Burrough, Ltd. v. Sign of the Beefeater, Inc., 572 F.2d 574, 578 (7th Cir. 1978)*. [6]

[*718] Accordingly, plaintiff's complaint is not barred by laches or any statutes of limitations.
B. Intentional Interference with Contractual Relations and Prospective Business Rights

Counts 2 and 3 of the D.C. Plan's Counterclaim seeks damages for intentional interference of contractual relationships, particularly those it has established with the WPA, Federal National De la Mutulite Francaise, (FNMF), Israel's **[**52]** Kupat Holim and with the Yasuda Fire and Marine Insurance Co. in Japan. The D.C. Plan contends that under the contracts with each of these parties extensive business dealings were contemplated for the future.

HN10[] A federal court sitting in diversity is bound to apply the conflict of laws of the forum state. *See* *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. Pursuant to Virginia's conflict of laws rules, the rule of *lex loci delecti* is to be applied. In other words, the place of the wrong determines the right to recover. *See* *McMillian v. McMillian, 219 Va. 1127, 253 S.E.2d 662 (1979)*. Here, the place of the alleged wrong is the District of Columbia, the D.C. Plan's principal place of business. Thus, as to the state law aspects of the counterclaim, D.C. law applies. ***HN11***[] Under D.C. law, the elements for intentional interference with third-party contracts are as follows: (1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of its breach by the defendant; and (4) damages resulting from the breach. *Tuxedo Contractors, Inc. v. Swindell-Dressler, 198 U.S. App. D.C. 426, 613 F.2d 1159, 1162 (D.C. Cir.*

[6] The D.C. Plan's counterclaim also includes a claim for selective enforcement, although this claim was not argued during the course of the trial. In any event, the court finds that the D.C. Plan has failed to show selective enforcement. *See* *United States Jaycees v. Philadelphia Jaycees, 639 F.2d 134 (3d Cir. 1981)*. In addition, D.C. Plan has failed to establish that the Association has waived any of its rights.

1979). Further, "a party may lawfully engage in conduct **[**53]** which may interfere with a contract or contractual relations if it 'asserts in good faith a legally protected interest of his own or threatens in good faith to protect the interest . . . . if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.'" *In re Ashby Enterprises, Ltd.,* 47 Bankr. 394, 397 (D.D.C. 1985) *(quoting* Restatement (Second) of Torts § 773).

In regard to the alleged intentional interference with FNMF, Tresnowski's December 29, 1988 letter to Renee Teulade, chairman of FNMF, was rather straight-forward. The letter informed Teulade that the Association owned the Marks, that the D.C. Plan was a licensee, and that the Association had undertaken legal action to keep the D.C. Plan from registering the Marks in its own name. Furthermore, Tresnowski indicated in his letter that the Association did not object to FNMF entering into the relationship with the D.C. Plan as long as it did not involve any use of the Marks. (Plaintiff's Ex. 47). FNMF proceeded with its arrangement with the D.C. Plan without using the Blue Cross and Blue Shield Marks. (Plaintiff's Ex. 493).

In March of 1989, the Association **[**54]** sent a letter to WPA indicating the likelihood of confusion that has and will obtain if the WPA continues to be party to the use of the Marks. The letter only requested that WPA cease using the Marks in conjunction with its arrangement with the D.C. Plan. (Plaintiff's Ex. 496).

In regards to Kupat Holim, the Association became aware of the Blue Cross and Blue Shield Marks appearing without authorization on the letterhead of Kupat Holim. (Plaintiff's Exh. 499). On August 2, the attorney for the Association, Roger Wilson wrote Kupat Holim concerning unauthorized use of the Blue Cross and Blue Shield Marks. The letter clearly indicated that the Association only objected to the unauthorized use of the Marks and not to the hospital engaging in business with the D.C. Plan.

It is significant that Kupat Holim has not terminated its arrangement with the D.C. Plan, but has informed the Association that it intends to continue its arrangement with the D.C. Plan, save for use of the Marks. **[*719]** (Dep. of Gamble, p. 1150; Plaintiff's Ex. 1103).

By letter dated October 20, 1989, Roger Wilson, Association General Counsel of the Association, wrote to Yasuda regarding use of the Marks. His letter indicated **[**55]** that the D.C. Plan was not authorized to use the Marks in Japan. Wilson's letter made clear that the Association did not object to Yasuda entering into other business relationships with the D.C. Plan not involving the Marks. (Plaintiff's Ex. 500).

The letters sent by the Association have not procured the breach of any of the contracts the D.C. Plan has with any foreign entity. Indeed, these letters do not intimate any intentional interference but merely seek to protect rights the Association, in good faith, believes it has in the Marks.

HN12[] With regard to the D.C. Plan's claim for interference with prospective business relations, this action applies only to expectancies which have not yet been reduced to contract. *Carr v. Brown, 395 A.2d 79, 84 (D.C. App. 1978)*. In this case, the D.C. Plan alleges interference with existing contracts. Thus, the interference with prospective business relations claim is without merit.

Accordingly, the D.C. Plan's counterclaim for intentional interference affecting contractual rights and prospective business relationships, Counts II and III of the Counterclaim, have not been proven and must be dismissed.

VI. *Antitrust Claim*

In its Counterclaim, the **[**56]** D.C. Plan also alleges a violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, ***HN13***[] which provides, in pertinent part:

> Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal . . . .

To establish a violation of *Section 1* of the Sherman Act ("the Act"), the D.C. Plan must show: (1) the existence of a conspiracy or concerted action; (2) that the conspiracy resulted in adverse, anti-competitive effects within the relevant product and geographic market; (3) that the objects of and conduct pursuant to the conspiracy were illegal; and (4) that the party bringing the claim must have been injured as a result of the conspiracy.

Terry's Floor Fashions v. Burlington Industries, Inc., 763 F.2d 604, 610, n. 10 (4th Cir. 1985). "Concerted action is the essence of a *Section 1* claim." *Id.*

Applying these elements to the facts of this case, it is clear that the D.C. Plan's antitrust claim fails. First, the D.C. Plan has not established the penultimate requirement of a conspiracy or concerted action. Mr. Gamble's testimony failed to identify any alleged co-conspirators. **[**57]** *See Lombard's Inc. v. Prince Manufacturing, Inc., 753 F.2d 974, 975 (11th Cir. 1985), cert. denied, 474 U.S. 1082, 88 L. Ed. 2d 892, 106 S. Ct. 851 (1986)* (failure of complaint to identify co-conspirators provides grounds for granting motion to dismiss). ***HN14***[] Mere speculation as to the existence of a conspiracy, without more, is not sufficient to establish a violation of *Section 1* of the Act. *Terry's Floor Fashions, 763 F.2d at 611*. Further, it is well-settled that *Section 1* of the Act "does not proscribe independent action" but only concerted action. *Terry's Floor Fashions, 763 F.2d at 610*; *see also, Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

The Association ***HN15***[] has a right to protect its Marks and not face the charge of antitrust violations. Good faith efforts to enforce trademark rights do not violate the Sherman Act. Indeed, vigorous enforcement of trademark rights is exactly the "sort of aggressive competition and promotion that ***antitrust law*** seeks to protect." *Drop Dead Co. v. S.C. Johnson & Son, Inc., 326 F.2d 87, 96 (9th Cir. 1963), cert. denied 377 U.S. 907, 84 S. Ct. 1167, 12 L. Ed. 2d 177, 141 U.S.P.Q. (BNA) 949 (1964)*. Further, the *Noerr-Pennington Doctrine* confers absolute immunity on the Association **[**58]** for its actions.

The D.C. Plan has failed to show that the Association's actions unreasonably restrained trade. The D.C. Plan has also failed to show that the Association's efforts **[*720]** in protecting its Marks have restrained competition in the relevant product or geographic market. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; *Military Services Realty, Inc. v. Realty Consultants of Virginia, 823 F.2d 829, 832 (4th Cir. 1987)*. [7]

[59]** VII. *Conclusions of Law*

(1) The court concludes as a matter of law that it has jurisdiction;

(2) Under the license and ownership agreements, as between the Association and the D.C. Plan, the Association is the owner of any and all rights in the Marks;

(3) Any use of the Marks by the D.C. Plan, including use in foreign countries, has inured and continues to inure to the benefit of the Association;

(4) All rights, if any, that may have been created by the D.C. Plan's use of the Marks in foreign countries are the property of the Association and are held in trust by the D.C. Plan for the Association;

(5) That the defendant has breached the Licensing Agreement with plaintiff by attempting to register and own the Marks, in its own name, in foreign countries;

(6) That the defendant has violated the Lanham Act;

(7) That the defendant has failed to prove its claim of laches;

(8) That the defendant has failed to prove its claim for tortious interference with contractual rights and prospective business relations; and

(9) That the defendant has failed to prove its claim for violation of the Sherman Antitrust Act.

Accordingly, an appropriate Order shall issue.

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[7] The D.C. Plan relies heavily on *U.S. v. Sealy, 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)*. *Sealy* involved an antitrust action brought by the government against a licensor of mattresses and bedding products. The complained of conduct consisted of the licensor conspiring with its licensees to allocate mutually-exclusive territories among the licensees. The licensor essentially promised the licensees not to grant any additional licenses to others seeking to operate in the same geographic area as the licensees. The facts of *Sealy* are clearly distinguishable to those in this case. The anticompetitive conduct in *Sealy* affected those who sought to sell Sealy products in an area already granted to a designated licensee. The arrangement between Sealy and its licensees completely foreclosed others from selling Sealy products in a particular area. In this case, the Association, in seeking to protect its rights in the Marks, has not completely foreclosed the D.C. Plan from engaging in foreign business. The Association has indeed encouraged such business, provided that the Marks are not used without its consent and authorization.

ORDER

In accordance with the **[**60]** accompanying Memorandum Opinion, it is accordingly ORDERED:

(1) that Judgment be, and it hereby is, ENTERED in favor of the plaintiff and against the defendant upon plaintiff's Complaint, Count I, Breach of Contract and Count II, Violation of the Lanham Act;

(2) that Judgment be, and it hereby is, ENTERED in favor of the plaintiff/counter-defendant and against the defendant and counter-plaintiff on the Counterclaim brought by the defendant and counter-plaintiff. The Counterclaim is DISMISSED with prejudice;

(3) that the defendant and its officers, agents, and employees and those persons in active concert or participation with them who receive notice of this Order are hereby ENJOINED and RESTRAINED from:

a. breaching the Blue Cross and Blue Shield License and Ownership Agreements;

b. taking any further action to register the Marks in the name of the D.C. Plan in foreign countries or to cancel or depose any registration of the Marks by the Association in foreign countries;

c. claiming ownership of the Marks or challenging the Association's ownership of or title of the Marks in any foreign countries;

d. using the Marks in connection with the sales promotion of health care financing services **[**61]** or any other product service in foreign countries without license or authorization from the Association;

[*721] (3) that the defendant is ORDERED to assign to the plaintiff all registration, applications, petitions and any other rights defendant may have or claim of the Marks in foreign countries, and dismiss any opposition, petitions or cancellations, or any other actions currently pending against the Association in foreign countries, or challenging plaintiff's ownership of the Marks in those countries;

(4) that the defendant is ORDERED to notify its foreign joint venture partners, foreign subscribers and the foreign hospitals with which it has agreements, that as between the plaintiff and defendant, the plaintiff is the owner of the Marks and any registrations and applications therefore;

(5) that the defendant, its officers, agents, employees and those persons in active concert or participation with them will receive notice of this Order hereby enjoining and restraining from:

a. using the Marks on material distributed in foreign countries without the express authorization of the Association;

b. distributing material not authorized by the Association, which bears the Marks in foreign countries **[**62]** with the intent, instructions, advice or understanding that said material may be brought into the United States;

c. using the Marks in connection with the sale of health care financial products and services or other products, where such use is likely to create the impression that:

(1) the defendant is the plaintiff or the Blue Cross and Blue Shield System;

(2) the defendant or its foreign partners are authorized or approved by the plaintiff or the Blue Cross and Blue Shield System to sell Blue Cross and Blue Shield insurance in foreign countries; or

(3) the defendant can make available to foreign subscribers the benefits of the Blue Cross and Blue Shield System in the U.S., when such representations have not been authorized by the Association;

(6) that within fifteen (15) days of this Order, defendant shall provide a copy of the Order to each of defendant's officers, employees, brokers, and joint venture partners who are engaged in the sale or promotion of its products and services in foreign countries using the Marks. Accompanying the Order shall be a cover letter: (a) explaining that the defendant does not sell insurance in foreign countries that has been sponsored or approved by **[**63]** the Association or the Blue Cross and Blue Shield System; and (b) recalling all material which violates paragraph 5 above. Defendant shall collect all such material and shall deliver them to the U.S. Marshal for destruction. Copies of these letters shall be submitted to the court and counsel for the Association;

(7) that within thirty (30) days of this Order, the defendant shall mail a letter to each person who has purchased an insurance product from the defendant or its joint venture partners, which letter shall advise the recipients that the defendant does not sell insurance in foreign counties that has not been sponsored or approved by the Association or the Blue Cross and Blue Shield System and that cards with the Marks on them may not be presented to, or accepted by, accepted hospitals in the United States for prepaid services. Copies of these letters shall be submitted to the court and counsel for the Association;

(8) that within fifteen (15) days of this Order, the plaintiff shall FILE its brief in support of its Petition for Attorney's Fees, and within thirty (30) days of this Order, the defendant shall file an Opposition to plaintiff's request for attorney's fees. Should **[**64]** the court grant plaintiff's request for attorney's fees, the court will then place parties on a briefing schedule as to the reasonableness of fees requested;

(9) that the court retains jurisdiction of this action for the purpose of granting any further and necessary relief.

(10) that the Clerk shall forward copies of this Order to all counsel of record.

United States v. Rockford Memorial Corp.

United States Court of Appeals for the Seventh Circuit

December 4, 1989, Argued ; April 3, 1990, Decided

No. 89-1900

Reporter

898 F.2d 1278 *; 1990 U.S. App. LEXIS 4805 **; 1990-1 Trade Cas. (CCH) P68,978

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROCKFORD MEMORIAL CORPORATION and SWEDISHAMERICAN CORPORATION, Defendants-Appellants

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Western Division. No. 88 C 20186, Stanley J. Roszkowski, Judge.

Core Terms

merger, percent, Clayton Act, market share, firms, stock, acquisition, patients, prices, district judge, Sherman Act, defendants', nonprofit, suppliers, output, service area, antitrust, acquire, nonprofit corporation, customers, acute-care, violates, collude

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN1[] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act, 15 U.S.C.S. § 18, provides that no person shall acquire the whole or any part of the stock or other share capital and that no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person, where the effect may be substantially to lessen competition or to tend to create a monopoly.

Business & Corporate Compliance > ... > Business & Corporate Law > Nonprofit Corporations & Organizations > Formation

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN2[] **Nonprofit Corporations & Organizations, Formation**

Illinois law forbids a nonprofit corporation to have stock or share capital.

Banking Law > Regulators > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > US Civil Aeronautics Board

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Transportation Law > Interstate Commerce > Federal Powers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN3[] **Banking Law, Regulators**

Section 11 of the Clayton Act, *15 U.S.C.S. § 21*, vests authority to enforce the prohibitions of the statute in five agencies. These are the Interstate Commerce Commission, with respect to the common carriers regulated by that Commission, the Federal Communications Commission, with respect to the common carriers regulated by it, ditto for the Civil Aeronautics Board, now defunct, the Federal Reserve Board, for banks, and, for everyone else, the Federal Trade Commission.

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 21*.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Governments > Federal Government > Claims By & Against

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN5[] **Clayton Act, Jurisdiction**

The force of the assets-acquisition provision in § 7 of the Clayton Act is merely to exempt mergers in the regulated industries enumerated in § 11 of the Act. Those industries do not include the hospital industry. The Act evinces a purpose of limiting the Federal Trade Commission's jurisdiction vis-a'-vis that of other federal agencies charged with enforcing the Act in the industries that they regulate, but it evinces no purpose of exempting nonprofit firms in industries within the domain that the Act bestows on the Commission ("all other character of commerce").

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN6[] **Reviewability of Lower Court Decisions, Preservation for Review**

An appellate court can affirm a decision by a district court on an alternative ground that has not been waived.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

A transaction violates *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, if it restrains trade; it violates § 7 of the Clayton Act, *15 U.S.C.S. § 18*, if its effect may be substantially to lessen competition. But both statutory formulas require, and have received, judicial interpretation; and the interpretations have, after three quarters of a century, converged.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN8[] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, forbids mergers that are likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level. A merger with such effects would also violate *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > General Overview

HN9[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

The suggestion that horizontal mergers are unlawful without regard to competitive effects has been rejected.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] **Regulated Practices, Market Definition**

The market is the denominator of the fraction the numerator of which is the output of the defendants or some other select group of firms; the denominator is given by the output of the suppliers to which a group of customers can turn for their requirements of a particular product. Market share is the fraction of that output that is controlled by a particular supplier or particular suppliers whose market power the court wishes to assess. The higher the aggregate market share of a small number of suppliers, the easier it is for them to increase price above the competitive level without losing so much business to other suppliers as to make the price increase unprofitable; this is the power the court calls market power.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Insurance Law > Industry Practices > General Overview

HN11[] **Antitrust Actions, Facilities**

Regulatory limitations on entry into the hospital industry increase the propensity to collude by preventing (or at least delaying and increasing the cost of) entry by new competitors to take advantage of an increase in prices. And neither generally nor in this instance does the existence of regulation work an implied repeal of the antitrust laws. The excess capacity that is part of the motivation for the regulatory limitations is itself an incentive to collude, although excess capacity in the competitive fringe reduces the feasibility of collusion. The urgencies of medical care and the prevalence of third-party (insurance or governmental) payment no doubt dilute price sensitivity, but that this weakens - rather than strengthens - the importance of encouraging competition is far from obvious.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Evidence > Burdens of Proof > General Overview

HN12[] **Standards of Review, Substantial Evidence**

The principles of civil procedure do not require that the plaintiff make an airtight case, only that his case satisfy some minimum threshold of persuasiveness and be better than the defendant's case.

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Judges: Posner and Flaum, Circuit Judges, and Dumbauld, Senior District Judge. *

Opinion by: POSNER

Opinion

[*1280] POSNER, Circuit Judge.

The United States brought suit under section **[**2]** 7 of the Clayton Act and *section 1* of the Sherman Act (*15 U.S.C. §§ 18*, *1*) to enjoin a merger of the two largest hospitals -- both nonprofits -- in Rockford, Illinois, a city of 140,000 people. The district judge held that the merger violated section 7, and issued the injunction; he did not reach the *section 1* charge. *717 F. Supp. 1251*.

The defendants appeal, arguing first that section 7 does not apply to a merger between nonprofit enterprises. Surprisingly, this is an issue of first impression at the appellate level, with the exception of an unpublished opinion by the Fourth Circuit, of which more later. Section 7 provides that ***HN1***[] "[1] no person . . . shall acquire . . . the whole or any part of the *stock or other share capital* and [2] no person *subject to the jurisdiction of the Federal Trade Commission* shall acquire the whole or any part of the *assets* of another person," where the effect may be substantially to lessen competition, or to tend to create a monopoly. (Emphasis added.) **[**3]** ***HN2***[] Illinois law forbids a nonprofit corporation to have, and these hospitals do not have, stock or share capital. Ill.Rev.Stat. ch. 32, para. 106.05. So the clause we have labeled [1] would seem not to apply. And, the defendants argue, the FTC has no jurisdiction over a nonprofit corporation -- so that the merger is not covered by the clause referring to asset acquisitions, clause [2], either -- because section 4 of the Federal Trade Commission Act confines the Commission's jurisdiction under the Act to a "company . . . or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members." *15 U.S.C. § 44*.

The first argument, knocking out clause [1], is strong. The second argument, however, in assuming that the reference in section 7 to "person[s] subject to the jurisdiction of the Federal Trade Commission" is to the Federal Trade Commission Act, overlooks the possibility that the reference is actually to the provision in the Clayton Act itself concerning the jurisdiction of the FTC -- namely section 11, *15 U.S.C. § 21*. **[**4]** Section 11 ***HN3***[] vests authority to enforce the prohibitions of the Clayton Act in five agencies. These are the Interstate Commerce Commission, with respect to the common carriers regulated by that Commission; the Federal Communications Commission, with respect to the common carriers regulated by it; ditto for the Civil Aeronautics Board (now defunct); the Federal Reserve Board, for banks; and, for everyone else, the FTC: ***HN4***[] "Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in . . . the Federal Trade Commission where applicable to all other character of commerce." Section 11 goes on to prescribe the procedure to be followed by these commissions and boards that have been given jurisdiction to enforce the Act. The procedure is self-contained and does not depend on particular provisions in the agencies' organic statutes, so that when in 1950 Congress amended section 7 to broaden its reach, it amended section 11 as well. We believe that ***HN5***[] the force of the assets-acquisition provision in section 7 is, therefore, merely to exempt **[**5]** mergers in the regulated industries enumerated in section 11. Areeda & Turner, ***Antitrust Law*** para. 906, at p. 797 n. 2 (1989 Supp.). Those industries do not include the hospital industry. The Clayton Act evinces a purpose of limiting the Federal Trade Commission's jurisdiction vis-a'-vis that of other federal agencies charged with enforcing the Act in the industries that they regulate, but it evinces no purpose of exempting nonprofit firms in industries within **[*1281]** the domain that the Act bestows on the Commission ("all other character of commerce").

* Hon. Edward Dumbauld, of the Western District of Pennsylvania, sitting by designation.

The government amazingly has failed to make this argument (thus waiving it), substituting an unnecessarily venturesome argument that the acquisition of control of a nonprofit corporation is the acquisition of that corporation's stock or share capital within the meaning of section 7 (and hence comes within clause [1]), even though a nonprofit corporation does not have any stock or share capital and could not under relevant state law. The government points out that in *United States v. Philadelphia National Bank, 374 U.S. 321, 335-49, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*, the Supreme Court held that a bank **[**6]** merger was a stock acquisition for purposes of section 7, though in corporate law it is an asset acquisition. There was no indication, the Court pointed out, that Congress had by its references to the FTC in sections 7 and 11 intended to exempt mergers by regulated firms; and while the acquiring firm in a merger does not actually acquire the stock of the acquired firm -- it acquires the assets, in exchange either for stock of the acquiring firm or, in the case of a consolidation (the actual transaction in that case), for new stock -- the effect is the same. *Id. at 336-38*.

The approach to statutory interpretation that informs *Philadelphia National Bank* is controversial, but it is neither indefensible nor irrelevant to the interpretive question in the present case. The approach, premised on recognition that legislative draftsmanship is often a rushed and clumsy process, deficient in foresight, tries to carry out the purposes of the statute insofar as these can be inferred, even if the result is a wide departure from literal meaning. But whatever its merits, it is not an approach in vogue in the Supreme Court at the moment and we hesitate to push it further than **[**7]** it was pushed in *Philadelphia National Bank*. We would be pushing it further if we read the words "stock" and "share capital" in section 7 as if they were synonyms for "control" (which is what would be acquired by this merger), although there are passages in the *Philadelphia Bank* opinion that can be quoted in support of the extension. E.g., *id. at 338*.

We are especially reluctant to test the elasticity of our interpretive powers without good reason, the only reason here being that the government overlooked a solid argument, based on section 11 of the Clayton Act, which would eliminate the loophole that the government rather desperately asks us to fill by a far-out interpretation of section 7. We decline the invitation, and conclude that *as the parties have framed the issues* the merger is not subject to section 7. The qualification is important, for we believe (contrary to *United States v. Carilion Health System, 707 F. Supp. 840, 841 n. 1* (W.D.Va.), aff'd without opinion, *892 F.2d 1042 (4th Cir. 1989))* that the merger *is* subject to section 7, once the reference in that section to the jurisdiction of the FTC is understood, **[**8]** as we think it should be understood, to refer to section 11 of the Clayton Act rather than to section 4 of the FTC Act.

The government has a fallback position, however: the merger violates *section 1* of the Sherman Act, as charged alternatively in the complaint. Although the district judge did not find it necessary to reach the issue, we can do so, without impropriety, since the subordinate findings that the judge made demonstrate a *section 1* violation. ***HN6***[] We can affirm a decision by a district court on an alternative ground that has not been waived, *Martinez v. United Automobile Workers, 772 F.2d 348, 353 (7th Cir. 1985)*; *LaSalle National Bank v. General Mills Restaurant Group, Inc., 854 F.2d 1050, 1052 (7th Cir. 1988)*, and this ground has not been; it has been briefed and argued by both sides.

We doubt whether there is a substantive difference today between the standard for judging the lawfulness of a merger challenged under *section 1* of the Sherman Act and the standard for judging the same merger challenged under section 7 of the Clayton Act. It is true **[**9]** that the operative language of the two provisions is different **[*1282]** and that some of the old decisions (old by antitrust standards anyway) speak as if that should make a difference. E.g., *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 323, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965)*; *United States v. Penn-Olin Chemical Co., 378 U.S. 158, 170-71, 12 L. Ed. 2d 775, 84 S. Ct. 1710 (1964)*. ***HN7***[] A transaction violates *section 1* of the Sherman Act if it restrains trade; it violates the Clayton Act if its effect may be substantially to lessen competition. But both statutory formulas require, and have received, judicial interpretation; and the interpretations have, after three quarters of a century, converged. 2 Areeda & Turner, ***Antitrust Law***, para. 304 (1978); 4 *id.*, para. 906, at p. 22.

We must recall some history. The Clayton Act was passed in 1914 against a background of disappointment with the Supreme Court's interpretation of the Sherman Act. Although the Court had held railroad cartels and the oil and tobacco trusts illegal **[**10]** under that Act, language in the Court's opinions, particularly Chief Justice White's opinion in *Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*, aroused anxiety that it was too difficult to prove a violation. The response of the draftsmen of the Clayton Act was to identify particular anticompetitive practices and forbid them upon a showing not that they would, but merely that they might, lessen competition substantially. Among these practices was the acquisition of the stock of a competitor; such acquisitions, particularly when secret, were thought to be among the methods that trusts used to acquire market dominance and intimidate rivals. *Brown Shoe Co. v. United States, 370 U.S. 294, 314, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*.

Although the Clayton Act gave the Department of Justice jurisdiction concurrent with the Federal Trade Commission to enforce its provisions, *15 U.S.C. §§ 21*, *25*, only the FTC seemed interested in enforcing section 7 and its ability to do so against mergers as distinct from pure stock acquisitions was crippled by a series of decisions narrowly interpreting the Commission's **[**11]** powers under section 11. (The story is told in *United States v. Philadelphia National Bank, supra, 374 U.S. at 338-40*.) In addition, when the Department of Justice brought suit under *section 1* of the Sherman Act against a substantial asset acquisition in *United States v. Columbia Steel Corp., 334 U.S. 495, 92 L. Ed. 1533, 68 S. Ct. 1107 (1948)*, it was rebuffed in an opinion widely regarded as imposing -- once again -- an undue burden on the antitrust plaintiff.

It was against this background that Congress in 1950 amended section 7 to plug the asset-acquisition loophole and by doing so to bring mergers and other asset acquisitions under the less demanding standard of the Clayton Act. *United States v. Philadelphia National Bank, supra, 374 U.S. at 341-42*. But it was less demanding only in relation to the interpretation of *section 1* in *Columbia Steel*, and that interpretation was to change. In *United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665, 12 L. Ed. 2d 1, 84 S. Ct. 1033 (1964)*, the Supreme Court invalidated under *section 1* a merger which had joined two banks that between them had **[**12]** from 52 to 54 percent of the commercial banking business of their market and from 80 to 95 percent of the trust business. The ground was the elimination of competition between the merging firms, and implied -- since every merger eliminates competition between the parties to the merger -- that any very large horizontal merger violated the statute. There was still a gap between the statutory standards, for in the period in which *Lexington Bank* was decided the Supreme Court was holding mergers in single digits unlawful under section 7, a trend that culminated in *United States v. Von's Grocery Co., 384 U.S. 270, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966)*. In recent years, however, a more moderate interpretation of section 7 has prevailed. As we noted recently in another (and very similar) hospital-merger case, *Hospital Corporation of America v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986)*, the current understanding of section 7 is that ***HN8***[] it forbids mergers that are likely to "hurt consumers, as by making it easier for the **[*1283]** firms in the market to collude, **[**13]** expressly or tacitly, and thereby force price above or farther above the competitive level."

A merger with such effects would also violate *section 1*. The defendants' argument that section 7 prevents *probable* restraints and *section 1* *actual* ones is word play. Both statutes as currently understood prevent transactions likely to reduce competition substantially. Insofar as the *Lexington Bank* case implies that any large horizontal merger violates *section 1* whether or not it is likely to reduce competition, it has been superseded by more recent decisions construing *section 1*, such as *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 23, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*, and *Copperweld Corp. v. Independence Tube Co., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, which reject ***HN9***[] the suggestion that horizontal mergers are unlawful without regard to competitive effects. In noting as if it supported their position that there can be no finding under these decisions of a Sherman Act violation without proof of market power, *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins. Inc., 784 F.2d 1325, 1334-37 (7th Cir. 1986)*, **[**14]** the defendants fail to see that this requirement would be superfluous if the Act punished only actual restraints. It is *because* the transactions punished under the Sherman Act, like those punished under the Clayton Act, are ambiguous in their competitive consequences that the courts insist on proof of market power.

Even if we are wrong that the standards under *section 1* of the Sherman Act and section 7 of the Clayton Act have converged, and even if we are right that the teaching of *Lexington Bank* that a large horizontal merger (we mean of course large relative to its market) violates *section 1* has been superseded, and even if the consequence of all this is that the old *Columbia Steel* decision remains canonical for mergers challenged under *section 1*, the defendants are still in deep trouble. The Court in *Columbia Steel* thought that a merger which created a 24 percent firm was not anticompetitive in the unusual conditions of the industry, *334 U.S. at 529*; here we have a far larger merger and, as we shall see, such unusual conditions as may be present in the hospital industry reinforce rather than undermine the inference naturally to be drawn from the defendants' **[**15]** combined market share.

But all this is provided the district court's market definition is accepted. ***HN10***[] The "market" is the denominator of the fraction the numerator of which is the output of the defendants or some other select group of firms; the denominator is given by the output of the suppliers to which a group of customers can turn for their requirements of a particular product. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*. Market share is the fraction of that output that is controlled by a particular supplier or particular suppliers whose market power we wish to assess. The higher the aggregate market share of a small number of suppliers, the easier it is for them to increase price above the competitive level without losing so much business to other suppliers as to make the price increase unprofitable; this is the power we call market power.

The district judge estimated the combined market share of the parties to the merger (hospitals of roughly equal size -- the two largest in Rockford) at between 64 and 72 percent, **[**16]** depending on whether beds, admissions, or patient days are used as the measure of output. And he estimated the combined market share of the three largest hospitals in Rockford after the merger at 90 percent. Three firms having 90 percent of the market can raise prices with relatively little fear that the fringe of competitors will be able to defeat the attempt by expanding their own output to serve customers of the three large firms. An example will show why. To take away 10 percent of the customers of the three large firms in our hypothetical case, thus reducing those firms' aggregate market share from 90 percent to 81 percent, the fringe firms would have to increase their own output by 90 percent (from 10 to 19 percent of the market). This would take a while, surely, and would force up their costs, perhaps steeply -- the fact they are so **[*1284]** small suggests that they would incur sharply rising costs in trying almost to double their output, and that it is this prospect which keeps them small. So the three large firms could collude to raise price (within limits of course) above the competitive level without incurring the additional transaction costs and risk of exposure that **[**17]** would result from their trying to coordinate their actions with that of their small competitors.

This analysis, however, collapses if customers can turn to suppliers who (or products that) have been excluded from the market. The market defined by the district judge consists of the provision of inpatient services by acute-care hospitals in Rockford and its hinterland. The defendants point out correctly that a growing number of services provided by acute-care hospitals are also available from nonhospital providers. But the force of the point eludes us. If a firm has a monopoly of product X, the fact that it produces another product, Y, for which the firm faces competition is irrelevant to its monopoly unless the prices of X and Y are linked. For many services provided by acute-care hospitals, there is no competition from other sorts of provider. If you need a kidney transplant, or a mastectomy, or if you have a stroke or a heart attack or a gunshot wound, you will go (or be taken) to an acute-care hospital for inpatient treatment. The fact that for other services you have a choice between inpatient care at such a hospital and outpatient care elsewhere places no check on the prices **[**18]** of the services we have listed, for their prices are not linked to the prices of services that are not substitutes or complements. If you need your hip replaced, you can't decide to have chemotherapy instead because it's available on an outpatient basis at a lower price. Nor are the prices of hip replacement and chemotherapy linked. The defendants' counsel correctly noted that diet soft drinks sold to diabetics are not a relevant product market, but that is because the manufacturers cannot separate their diabetic customers from their other customers and charge the former a higher price. Hospitals can and do distinguish between the patient who wants a coronary bypass and the patient who wants a wart removed from his foot; these services are not in the same product market merely because they have a common provider. The defendants do not argue for the broader market on the basis of substitutability in supply -- that is, the ability of a provider of outpatient services to switch to inpatient services should the price of the latter rise as a result of collusive pricing, making such services more profitable.

The more difficult issue is the geographical market. The defendants offered evidence, **[**19]** which the judge accepted, that their service area is a ten-county area of northern Illinois and southern Wisconsin centered on Rockford. Medicare records the address of all hospital patients, so it was possible to determine the zip codes from which the defendants draw their patients. The district judge noticed that 87 percent of the defendants' patients come from an area surrounding Rockford and consisting of the rest of Winnebago County (the county in which

Rockford is located) and pieces of several other counties; the remaining patients are widely scattered. The defendants accept the area picked out by the district judge as a reasonable approximation of their service area (though not of the relevant market). There are four other acute-care hospitals in that area. Their output (as measured, we said, by beds, admissions, or patient days, all of which are highly correlated) plus that of the defendants is the market that the judge used to estimate the defendants' market share.

The defendants point out correctly that the hospitals in the defendants' service area may not exhaust the alternatives open to the residents of that area. Maybe a lot of people who live in Rockford, or if not **[**20]** in Rockford then at the edge of the Rockford hospitals' service area at the farthest possible distance from Rockford that is still within that area, use hospitals outside the area. Maybe -- but the record shows that the six hospitals in the defendants' service area, plus a hospital in Beloit just north of the service area, account for 83 percent of the hospitalizations of residents of the service area, and that 90 percent of Rockford residents who are hospitalized are hospitalized in Rockford itself. For highly exotic **[*1285]** or highly elective hospital treatment, patients will sometimes travel long distances, of course. But for the most part hospital services are local. People want to be hospitalized near their families and homes, in hospitals in which their own -- local -- doctors have hospital privileges. There are good hospitals in Rockford, and they succeed in attracting most of the hospital patients not only from Rockford itself but from the surrounding area delineated by the district judge. The exclusion of the Beloit hospital from the market was not adequately explained, but apparently does not affect the figures materially.

It is always possible to take pot shots at **[**21]** a market definition (we have just taken one), and the defendants do so with vigor and panache. Their own proposal, however, is ridiculous -- a ten-county area in which it is assumed (without any evidence and contrary to common sense) that Rockford residents, or third-party payors, will be searching out small, obscure hospitals in remote rural areas if the prices charged by the hospitals in Rockford rise above competitive levels. Forced to choose between two imperfect market definitions, the defendants' and the district judge's (the latter a considerable expansion of the government's tiny proposed market), and bound to review the judge's determination under the deferential "clearly erroneous" standard, we choose the less imperfect, the district judge's.

The defendants' immense shares in a reasonably defined market create a presumption of illegality. Of course many factors other than the number and size distribution of firms affect the propensity to collude, but here as in *Hospital Corporation of America*, a factually similar case, most of them strengthen rather than weaken the inference of market power from market shares. *807 F.2d at 1387-92*. ***HN11***[] Regulatory limitations **[**22]** on entry into the hospital industry increase the propensity to collude by preventing (or at least delaying and increasing the cost of) entry by new competitors to take advantage of an increase in prices. And neither generally nor in this instance does the existence of regulation work an implied repeal of the antitrust laws. *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 69 L. Ed. 2d 89, 101 S. Ct. 2415 (1980)*. The excess capacity that is part of the motivation for the regulatory limitations is itself an incentive to collude, although excess capacity in the competitive fringe reduces the feasibility of collusion -- but concerning *that* excess capacity there is no evidence in the record. The urgencies of medical care and the prevalence of third-party (insurance or governmental) payment no doubt dilute price sensitivity, but that this weakens -- rather than strengthens -- the importance of encouraging competition is far from obvious.

We would not repeat any more of what we said in *Hospital Corporation* but for the emphasis that the defendants place on their status as nonprofit corporations. This status, they argue, **[**23]** removes any ground for concern that they might seek to maximize profits through avoidance of price or service competition. If this is correct, the Supreme Court was wrong in *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100 n. 22, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*, to reject an implicit exemption of nonprofit enterprises from the antitrust laws. We are aware of no evidence -- and the defendants present none, only argument -- that nonprofit suppliers of goods or services are more likely to compete vigorously than profit-making suppliers. Most people do not like to compete, and will seek ways of avoiding competition by agreement tacit or explicit, depending of course on the costs of agreeing. The ideology of nonprofit enterprise is cooperative rather than competitive. If the managers of nonprofit enterprises are less likely to strain after that last penny of profit, they may be less prone to engage in profit-maximizing collusion but by the same token less prone to engage in profit-maximizing competition. *Hospital Corporation of America v. FTC, supra, 807 F.2d at 1390-91*.

The question cannot be resolved a priori, and **[**24]** once the government showed that the merger would create a firm having a market share approaching, perhaps exceeding, a common threshold of monopoly power -- two-thirds (*United States v. Aluminum Co. of America, 148 F.2d 416, 424, 65 U.S.P.Q. (BNA) 6 (2d **[*1286]** Cir. 1945)* (L. Hand, J.)) -- it behooved the defendants to present evidence that the normal inference to be drawn from such a market share would mislead.

It is regrettable that antitrust cases are decided on the basis of theoretical guesses as to what particular market-structure characteristics portend for competition, but to place on the government an insuperable burden of proof is not the answer. We would like to see more effort put into studying the actual effect of concentration on price in the hospital industry as in other industries. If the government is right in these cases, then, other things being equal, hospital prices should be higher in markets with fewer hospitals. This is a studiable hypothesis, by modern methods of multivariate statistical analysis, and some studies have been conducted correlating prices and concentration in the hospital industry. Kopit & McCann, *Toward a Definitive* **[**25]** *Antitrust Standard for Nonprofit Hospital Mergers*, 13 Journal of Health Politics, Policy & Law 635, 645-46 and n. 30 (1988) (discussing studies); Blackstone & Fuhr, *Hospital Mergers and Antitrust: An Economic Analysis*, 14 *id. at 383 (1989)*; Dranove, Shanley & Simon, *Is Health Care Competition Wasteful? No!* (U.Chi.Grad.Sch.Bus., March 1, 1990). Unfortunately, this literature is at an early and inconclusive stage, and the government is not required to await the maturation of the relevant scholarship in order to establish a prima facie case. Cf. *Allen v. Seidman, 881 F.2d 375, 378-80 (7th Cir. 1989)*. ***HN12***[] The principles of civil procedure do not require that the plaintiff make an airtight case, only that his case satisfy some minimum threshold of persuasiveness and be better than the defendant's case. The government showed large market shares in a plausibly defined market in an industry more prone than many to collusion. The defendants responded with conjectures about the motives of nonprofits, and other will o' the wisps, that the district judge was free to reject, **[**26]** and did. The judge's findings establish a violation of *section 1* under the standards of *Columbia Steel*, and the judgment must therefore be affirmed without our needing to decide whether the district judge was correct in holding that section 7 does reach mergers between nonprofit corporations.

The defendants press upon us a recent, not-to-be published (and therefore nonprecedential) opinion by the Fourth Circuit, *United States v. Carilion Health System, 892 F.2d 1042 (4th Cir. 1989)*, affirming a decision in favor of the defendants in a hospital-merger case much like this one. *707 F. Supp. 840 (W.D.Va. 1989)*. The discussion in the Fourth Circuit's opinion is brief, indeed perfunctory, consisting as it does very largely of a conclusion that the district court's findings were not clearly erroneous; in any event the court did not want its decision to have a precedential effect. As for the discussion by the district court in *Carilion*, we find it unpersuasive as well as inconsistent with our analysis in *Hospital Corporation of America* -- a case cited by neither the district court nor the court of appeals in *Carilion*.

AFFIRMED.

End of Document

United States v. Western Elec. Co.

United States Court of Appeals for the District of Columbia Circuit

December 6, 1989, Argued ; April 3, 1990, Decided

Nos. 87-5388, 87-5389, 87-5390, 87-5391, 87-5392, 87-5393, 87-5394, 87-5395, 87-5396, 87-5397, 88-5276, 88-5277, 88-5278, 88-5279, 88-5280, 88-5281, 88-5282, 88-5283, 88-5284

Reporter

900 F.2d 283 *; 1990 U.S. App. LEXIS 4888 **; 283 U.S. App. D.C. 299; 1990-1 Trade Cas. (CCH) P68,973; 67 Rad. Reg. 2d (P & F) 824

UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, et al. PACIFIC TELESIS GROUP, et al., APPELLANTS; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, NATIONAL CONSUMERS LEAGUE BLACK CITIZEN FOR A FAIR MEDIA, INTERVENORS; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, et al.; NYNEX CORPORATION, APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, et al.; US WEST, INC., APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, et al.; AMERICAN INFORMATION TECHNOLOGIES CORPORATION, APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, et al.; BELLSOUTH CORPORATION, APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, et al.; PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, et al.; PEOPLE OF THE STATE OF CALIFORNIA, et al., APPELLANTS; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, et al.; SOUTHWESTERN BELL CORPORATION, APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, et al.; BELL ATLANTIC, APPELLANT; UNITED STATES OF AMERICA, APPELLANT v. WESTERN ELECTRIC COMPANY, et al.; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, INC., et al.; BELL ATLANTIC, APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, INC., et al.; SOUTHWESTERN BELL CORPORATION, APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, INC., et al.; PACIFIC TELESIS GROUP, et al., APPELLANTS; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, INC., et al.; NYNEX CORPORATION, APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, INC., et al.; AMERICAN INFORMATION TECHNOLOGIES CORPORATION, APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, INC., et al.; PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLANT; UNITED STATES OF AMERICA, APPELLANT v. WESTERN ELECTRIC COMPANY, INC., et al.; UNITED STATES OF AMERICA, APPELLANT v. WESTERN ELECTRIC COMPANY, INC., et al.; US WEST, INC., APPELLANT; UNITED STATES OF AMERICA v. WESTERN ELECTRIC COMPANY, INC., et al.; BELLSOUTH CORPORATION, APPELLANT

Subsequent History: [1]** As Amended April 6, 1990.

Prior History: Appeals from the United States District Court for the District of Columbia, Civil Action No. 82-00192.

Core Terms

decree, district court, restrictions, information service, district judge, parties, removal, interexchange, impede, manufacturing, modification, public interest, cross-subsidization, regulations, markets, telecommunications, monopoly, switches, motions, monopoly power, petitioning, line of business, uncontested, lift, anticompetitive, intervenor, consent decree, transmission, competitors, proceedings

LexisNexis® Headnotes

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Entry of Judgments, Consent Decrees**

The construction of a consent decree is subject to de novo appellate review.

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Entry of Judgments, Consent Decrees**

While the meaning of a consent decree's terms must be discerned within its four corners, the court's inquiry is guided by conventional aids to construction, including the circumstances surrounding the formation of the consent order and any technical meaning words used may have had to the parties.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Civil Procedure > Appeals > Standards of Review > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

HN3[] **Standards of Review, Deference to Agency Statutory Interpretation**

Appellate courts do not normally defer to anyone else's non-contemporaneous interpretations of the Constitution, statutes, cases, or contracts -- whether or not the interpreter was also the drafter of the language at issue. When the court defers to agency interpretations of their own ambiguous statutes, it does so on the assumption that Congress delegated to departments or agencies the reconciliation of agency policies implicated in that function -- institutional concerns not present when reviewing district court opinions.

Administrative Law > Judicial Review > Standards of Review > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Appeals > Standards of Review > General Overview

HN4[] **Judicial Review, Standards of Review**

The Justice Department's interpretation of the law is not normally given deference in a civil or criminal case; in federal courts, departments' and agencies' legal views are deferred to only when they make a determination, either quasi-legislative or quasi-judicial, that has independent legal significance -- as opposed to when they act in a prosecutorial role.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Antitrust & Trade Law > ... > Settlements > Consent Judgments > Modification & Termination

Civil Procedure > Appeals > Standards of Review > General Overview

HN5[] **Settlements, Consent Judgments**

A less demanding standard of review applies to an uncontested motion to modify a consent decree than applies to a contested one. Unless the parties have expressly agreed otherwise, an antitrust defendant can prevail on a contested motion to reduce or eliminate its obligations only if it can make a clear showing of grievous wrong evoked by new and unforeseen conditions. But when all parties to a decree assent to a particular modification, the relevant inquiry for the court is whether the resulting array of rights and liabilities comports with the public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN6[] **Settlements, Consent Judgments**

An important general rule of decree construction is the presumption that the parties, absent any expressly stated intention to the contrary, intended to adopt the ordinary substantive standards that attend decree modification.

Civil Procedure > Appeals > Standards of Review > General Overview

HN7[] **Appeals, Standards of Review**

Resolving the disputed factual issues would be wholly inconsistent with the function of an appellate court.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Appeals > Standards of Review > General Overview

HN8[] **Settlements, Consent Judgments**

Considering the flexibility of the public interest inquiry, the court's function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN9[] Reviewability of Lower Court Decisions, Adverse Determinations

In order to have standing, a party must demonstrate an injury in fact fairly traceable to the conduct it is challenging and likely to be redressed by the relief it has requested. While the necessary injury is not susceptible to precise definition, it must be distinct and palpable, and not merely hypothetical, abstract, or conjectural.

Counsel: Stephen M. Shapiro, with whom R. Frost Branon, Jr. for BellSouth Corporation; Richard W. Odgers, Margaret deB. Brown and Stanley J. Moore for Pacific Telesis Group; James D. Ellis and James S. Golden for Southwestern Bell Corporation; Robert A. Levetown and John Thorne for Bell Atlantic Corporation; Raymond F. Burke and Gerald E. Murray for NYNEX Corporation; Jeffrey S. Bork for US West, Inc., C. Douglas Floyd and Frank Cicero, Jr., were on the joint brief, for the Regional Telephone Company Appellants. Abbott B. Lipsky, Jr. for Bell South Corporation; Liam S. Coonan and Paul G. Lane for Southwestern Bell Corporation; Mark J. Mathis, James R. Young, John M. Goodman and Michael D. Lowe for Bell Atlantic Corporation; Robert V. R. Dalenberg and Martin Silverman for NYNEX Corporation, also entered appearances for the Regional Telephone Companies.

Laurence H. Tribe, with whom R. Frost Branon, Jr. for BellSouth Corporation; Richard W. Odgers and Margaret deB. Brown for Pacific Telesis Group; James D. Ellis and James S. Golden for Southwestern **[**2]** Bell Corporation; Robert A. Levetown and JohnThorne for Bell Atlantic Corporation; Raymond F. Burke and Gerald E. Murray for NYNEX Corporation; Jeffrey S. Bork for US West, Inc., Stephen M. Shapiro, Floyd Abrams, Abbott B. Lipsky, Jr., C. Douglas Floyd and Frank Cicero, Jr., were on the joint brief for the Regional Telephone Company Appellants Regarding Information Services. Liam S. Coonan and Paul G. Lane for Southwestern Bell Corporation; Mark J. Mathis, James R. Young, John M. Goodman and Michael D. Lowe for Bell Atlantic Corporation; Robert V. R. Dalenberg and Martin Silverman for NYNEX Corporation, also entered appearances for the Regional Telephone Companies.

Alison Leigh Smith, Attorney, Department of Justice, for Appellants United States of America. James F. Rill, Assistant Attorney General, Catherine G. O'Sullivan, Barry Grossman, Nancy C. Garrison and Andrea Limmer, Attorneys, Department of Justice, were on the brief, for Appellants United States of America.

Gretchen T. Dumas for Appellants The People of the State of California and the Public Utilities Commission of the State of California. Janice E. Kerr and J. Calvin Simpson also entered appearances for The people of **[**3]** the State of California and the Public Utilities Commission of the State of California.

John E. Ingle, Deputy Associate General Counsel, Federal Communications Commission, with whom Diane S. Killory, General Counsel, Daniel M. Armstrong, Associate General Counsel, and Linda L. Oliver, Counsel, Federal Communications Commission, were on the brief for Amicus Curiae urging remand.

Howard C. Davenport, with whom Gilbert E. Hardy, Mary J. Sisak and Peter G. Wolfe were on the brief, for Appellant Public Service Commission of the District of Columbia. Charles A. Tievsky also entered an appearance for Public Service Commission of the District of Columbia.

Howard J. Trienens, with whom David W. Carpenter, Francine J. Berry and Mark C. Rosenblum were on the brief, for Appellee AT & T. Jonathan S. Hoak also entered an appearance for AT & T.

Thomas S. Martin, Chester T. Kamin, Michael H. Salsbury, Anthony C. Epstein, Carl S. Nadler and John R. Worthington for MCI Communications Corporation; Kenneth E. Hardman for Comcast Cellular Communications, Inc. (f/k/a American Cellular Network Corporation); Peter A. Rohrbach and Anthony S. Harrington for National Telecommunications Network; Leon **[**4]** M. Kestenbaum, Michael B. Fingerhut and Philip M. Walker for US Sprint Communications Company Limited Partnership; Katherine M. Holden, Richard E. Wiley and R. Michael Senkowski for McCaw Communications Companies, Inc.; W. Theodore Pierson, Jr., Richard M. Singer and James W. Smith for Competitive Telecommunications Association; Raymond G. Bender, Jr. and Laura H. Phillips for Cybertel Corporation, were on the joint brief, for the Non-AT & T Interexchange and Mobil Services.

Robert F. Aldrich, with whom Albert Kramer for North American Telecommunications Association; Herbert E. Marks and James L. Casserly for Independent Data Communications Manufacturers Association; John W. Pettit and

Thomas K. Crowe for Tandy Corporation; Sue D. Blumenfeld and John L. McGrew for Telecommunications Industry Association, were on the joint brief of the Manufacturing Appellees.

Gene Kimmelman, with whom James S. Blaszak and Charles C. Hunter for Ad Hoc Telecommunications Users Committee; Bruce J. Weston and Margaret Ann Samuels for Ohio Consumers' Counsel; Gary L. Lieber, E. Jay Finkel and John M. Glynn for Maryland People's Counsel; Ian D. Volner and Mark L. Pelesh for Direct Marketing Association, **[**5]** were on the joint brief of the Telephone Consumers.

E. Barrett Prettyman, Jr., with whom John G. Roberts, Jr., Richard E. Wiley, Michael Yourshaw, Katherine M. Holden, William B. Baker and W. Terry Maguire for American Newspaper Publishers Association; Werner K. Hartenberger and Laura H. Phillips for Cox Enterprises, Inc.; Frank W. Lloyd and Diane B. Burstein for Leghorn Telepublishing Company; Brenda L. Fox, H. Bartow Farr, III, Joel I. Klein and Robert H. Tiller for National Cable Television Association, Inc.; John W. Pettit and Thomas K. Crowe for Phone Programs, Inc.; Richard E. Wiley and Robert J. Butler for Information Industry Association; Randolph J. May for CompuServe, Inc.; Sue D.Blumenfeld and John L. McGrew for The Dun and Bradstreet Corporation; Henry L. Baumann and Robert E. Branson for National Association of Broadcasters, were on the joint brief for Electronic Publishing Participants.

Joseph P. Markoski for ADAPSO; Howard D. Polsky for Alarm Industry Communications Committee; Stephen R. Bell for Tymnet-McDonnell Douglas Network Systems Company; Simon Lazarus, III for the Computer and Business Equipment Manufacturers Association; Phillip M. Walker and Donald E. Ward **[**6]** for Telenet Communications Corporation, were on the joint brief Regarding Information Services. Ann J. LaFrance also entered an appearance for Tymnet McDonnell Douglas Network Systems Company.

Laurence H. Tribe, with whom R. Frost Branon, Jr. for BellSouth Corporation; Richard W. Odgers and Margaret deB. Brown for Pacific Telesis Group; James D. Ellis, Liam S. Coonan and Paul G. Lane for Southwestern Bell Corporation; Robert A. Levetown, John Thorne and Michael D. Lowe for Bell Atlantic Corporation; Raymond F. Burke, Gerald E. Murray and Mary McDermott for NYNEX Corporation; Jeffrey S. Bork for US West, Inc., Stephen M. Shapiro, Kenneth J. Chesebro, Abbott B. Lipsky, Jr. and C. Douglas Floyd, were on the brief, of the Regional Telephone Companies Supporting the Decisions on Information Transmission and Storage Services and Non-Telecommunications Businesses. Mark J. Mathis, James R. Young, John M. Goodman and Michael D. Lowe for Bell Atlantic Corporation; Robert V. R. Dalenberg and Martin Silverman for NYNEX Corporation, also entered appearances for the Regional Telephone Companies.

Martin T. McCue and Rodney L. Joyce were on the brief for Intervenor United States Telephone Association.

[7]** Samuel A. Simon for Black Citizens for a Fair Media, et al.; Phillip D. Mink for Citizens for a Sound Economy Foundation; Henry Geller and Donna Lampert for Henry Geller, et al., were on the joint brief for Intervenors and amici, urging reversal. Harry M. Shooshan, III also entered an appearance for Henry Geller, et al.

L. Andrew Tollin was on the brief for Intervenor The Media Institute.

Thomas S. Martin, with whom John R. Worthington, Chester T. Kamin, Michael H. Salsbury and Anthony C. Epstein for MCI Communications Corporation; Frank W. Lloyd and Diane B. Burstein for Leghorn Telepublishing Company; Ian D. Volner and Mark L. Pelesh for Direct Marketing Association; Bruce J. Weston and Margaret Ann Samuels for Ohio Consumers' Counsel; Howard D. Polsky for Alarm Industry Communications Committee; Randolph J. May for CompuServe, Inc.; R. Michael Senkowski and Katherine Holden for McCaw Cellular Communications, Inc.; Werner K. Hartenberger and Laura H. Phillips for Cox Enterprises, Inc.; Charles H. Helein and Laura H. Phillips for Enhanced Services Council; Peter A. Rohrbach for National Telecommunications Network; Brenda L. Fox and Joel I. Klein for National Cable Television **[**8]** Association, Inc.; Leon M. Kestenbaum and Michael B. Fingerhut for US Sprint Communications Company Limited Partnership; Herbert E. Marks and James L. Casserly for Independent Data Communications Manufacturers Association, Inc.; John W. Pettit and Thomas K. Crowe for Tandy Corporation; John M. Glynn, Gary L. Lieber and E. Jay Finkel for Maryland People's Counsel; Kenneth E. Hardman for Comcast Cellular Communications, Inc.; Raymond G. Bender, Jr. and Laura H. Phillips for Cybertel Corporation; James S. Blaszak and Charles C. Hunter for Ad Hoc Telecommunications Users Committee; Sue D. Blumenfeld and John L. McGrew for The Dun and Bradstreet Corporation and Telecommunications Industry Association; Paul

H. Vishny for Telecommunications Industry Association; Henry L. Baumann and Robert E. Branson for National Association of Broadcasters; Gene Kimmelman for Consumer Federation of America; Joseph P. Markoski for ADAPSO; Albert H. Kramer and Robert F. Aldrich for North American Telecommunications Association; W. Terry Maguire and Claudia M. James for American Newspaper Publishers Association; Richard E. Wiley, Michael Yourshaw, Katherine M. Holden and William B. Baker for American Newspaper **[**9]** Publishers Association; Ashton R. Hardy for Radiofone, Inc.; Stephen R. Bell for Tymnet-McDonnell Douglas Network Systems Company; W. Theodore Pierson, Jr. and James M. Smith for Competitive Telecommunications Association, were on the joint brief for Appellees and Intervenors supporting the line of business restrictions.

Alexander P. Humphrey and Frank W. Krogh entered appearances for Appellee General Electric Communications and Services; Joseph P. Markoski and Herbert E. Marks entered appearances for Appellee Association of Data Processing Service Organization, Richard E. Wiley, R. Michael Senkowski and Robert J. Butler also entered appearances for Appellees Telocator Network of America, Association of Telemessaging Services, Int'l, Martin Marietta Corporation, Digital Equipment Corporation, Trintex, Tele-Communications Association, and Information Industry Association.

John L. Bartlett and Robert J. Butler entered appearances for Appellee Aeronautical Radio, Inc.

Genevieve Morelli entered an appearance for Appellee ALC Communications Corporation.

Michael Yourshaw and Katherine M. Holden also entered appearances for Appellee Teleport Communications.

Henry D. Levine and Brant **[**10]** S. Karstetter entered appearances for Appellee California Bankers Clearing House, et al.

Arnold J. Barer entered an appearance for Appellees Phonequest, Inc., et al.

Alfred Winchell Whittaker entered an appearance for Appellee American Information Technologies Corporation.

Lawrence R. Fullerton and Simon Lazarus, III entered appearances for Appellee Hayes Microcomputer Products, Inc.

Norman P. Leventhal and Steven N. Muchnick entered appearances for Appellee Digital Directory Assistance, Inc.

Andrew G. Mulitz entered an appearance for Appellee Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO).

John H. Chapman entered an appearance for Appellee Computer and Communications Industry Association.

Andrew D. Lipman and Russell M. Blau entered appearances for Appellee David Systems, Inc.

Paul Rodgers, Charles D. Gray and Lisa M. Zaina entered appearances for Appellee National Association of Regulatory Utility Commission.

Milton J. Grossman, Richard Juhnke and Arthur Simms entered appearances for Appellee The Western Union Telegraph Company.

Charles D. Ferris and Howard J. Symons entered appearances for Appellee Telocator Network of **[**11]** America.

J. Richard Devlin, Carolyn C. Hill and James T. Roche entered appearances for Appellee United Telecommunications, Inc.

Gregory J. Krasovsky entered an appearance for Appellee Florida Public Service Commission.

Henry D. Levine also entered an appearance for Appellee Association of Data Communication User.

Norton Cutler entered an appearance for Appellee NCR Corporation.

Elisabeth H. Ross entered an appearance for Appellee Missouri Public Service Commission.

Earle K. Moore entered an appearance for Appellees National Council of Churches of Christ in the U.S.A., et al.

Samuel A. Simon also entered an appearance for Appellees World Institute on Disability, Inc., et al.

Jerry Berman and Kate Martin entered appearances for Appellee American Civil Liberties Union.

Richard E. Wiley also entered an appearance for Appellee Prodigy Services Company.

Robert M. Hill, Jr. entered an appearance for Appellee Alabama Public Service Commission.

Judges: Mikva, Edwards, and Silberman, Circuit Judges.

Opinion by: PER CURIAM

Opinion

[*289] Opinion for the Court filed PER CURIAM.

As part of the 1982 consent decree that severed the seven Regional Bell Operating Companies ("BOCs") **[**12]** from AT & T, the parties agreed that the BOCs, which inherited AT & T's local exchange monopoly, would be prohibited from providing interexchange (long distance) or information services, manufacturing telephone equipment, and participating in any non-telecommunications industry. The district judge retained jurisdiction over the case, and the Department of Justice ("DOJ") pledged to report to the court every three years as to the continuing need for these "line of business" restrictions. In the first such "Triennial Review," after considering the DOJ's report, as well as the comments of the other parties and dozens of other individuals and organizations, the district judge issued two opinions lifting the restriction against BOC participation in non-telecommunication businesses, modifying the restriction against their entering the information services market, and leaving intact the interexchange and manufacturing restrictions. *See United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987)*; *United States v. Western Elec. Co., 714 F. Supp. 1 (D.D.C. 1988)*. With the exception of the district judge's ruling dealing with information services -- **[**13]** which we reverse and remand -- we affirm.

I.

A. *The 1982 Consent Decree*

In 1974, the DOJ filed this antitrust suit against AT & T. After seven years of pretrial proceedings, the case was tried in district court for eleven months but did not culminate in a verdict. Instead, the parties submitted a proposed consent decree to the court for review according to the "public interest" standard prescribed by the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16(b)-(h)* ("Tunney Act"). After extensive Tunney Act proceedings, and after the parties agreed to certain modifications added by the district judge, the district court approved the decree.[1] **[**14]** *See United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982)*, *aff'd sub nom. Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983)*.[2]

Although the district court made no explicit findings of liability in the course of the Tunney Act proceedings, it did examine whether the evidence was sufficient to warrant antitrust relief. *See 552 F. Supp. at 161*. The evidence indicated that AT & T or the "Bell System" was, at the time of the trial, a massive, vertically-integrated enterprise which enjoyed a monopoly in local exchange services, provided long distance service, designed and developed telephone equipment (through Bell Laboratories), and manufactured that equipment at its wholly-owned subsidiary, Western Electric. AT & T used its local exchange monopoly -- the so-called "bottleneck" -- in a number of ways to promote its own affiliated operations in the long distance and equipment fields. In the interexchange field, other **[**15]** providers such as MCI were dependent on AT & T's local exchange facilities since there was no other

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[1] Although the district court never determined whether the Tunney Act was technically applicable to this case, the parties consented to have the Tunney Act procedures applied. *See AT & T*, 552 F. Supp. at 145.

[2] Justice Rehnquist, joined by two other justices, dissented from the Supreme Court's summary affirmance because they questioned whether the application of an undefined "public interest" standard falls within the judicial power under Article III. *See 460 U.S. at 1001-06*.

way to reach the ultimate consumer. AT & T therefore had a strong incentive to provide **[*290]** more expensive or inferior quality local exchange access to its long distance competitors than it provided to itself. According to the DOJ, despite vigilant FCC attempts to prevent it, AT & T was able to discriminate against its interexchange competitors and, in that way, to stave off significant interexchange competition. *See* 552 F. Supp. at 160-63.

In the equipment market, the BOCs purchased over eighty percent of the nation's central office switches and transmission equipment and nearly always purchased that equipment from AT & T's Western Electric affiliate, even when those products were more expensive or of lesser quality than equipment available from competing vendors. The BOCs and Bell Labs also preferred Western Electric over competitors by granting it early and otherwise advantageous access to technical data and other information about the BOCs' equipment requirements. Finally, there was evidence that AT & T cross-subsidized its equipment prices offered by its **[**16]** Western Electric affiliate using its monopoly revenues from local exchange services, thereby enabling Western Electric to undersell its competitors while telephone consumers were effectively overcharged for their local telephone service. Again, all of this was apparently carried out notwithstanding the FCC's best efforts to stop it. *See* 552 F. Supp. at 190-92.

Under the consent decree, AT & T retained its long distance and equipment manufacturing operations but agreed to divest itself of its local exchange monopoly, transferring those operations to the BOCs [3] which were to become totally separate from AT & T. In turn, the BOCs were to be limited to the provision of local exchange services and precluded from participating in the markets for interexchange (long distance) services, [4] **[**18]** equipment manufacturing, information services, [5] and all other non-telecommunications businesses. *See* 552 F. Supp. at 227-28. The BOCs were, however, permitted to provide -- but not manufacture -- customer premises equipment and also to produce, publish, and distribute "Yellow Pages" directories. *See* 552 F. Supp. at 231. These line of business restrictions **[**17]** were premised on the notion that, because the BOCs still controlled the local exchange bottlenecks, there was a risk that they would engage in the same sort of anticompetitive abuses that AT & T had. *See* 552 F. Supp. at 187-191.

Before approving the restrictions, the district judge scrutinized them carefully to ensure "that they will not actually limit competition by unnecessarily barring a competitor from a market." 552 F. Supp. at 186. He rejected as overly simplistic the DOJ's equation of the post-divestiture BOCs with the pre-divestiture Bell System based simply on the proposition that they both possessed a monopoly in local telecommunications. The separated BOCs, the district judge recognized, would be far more manageable monopolists for regulators to oversee than AT & T had been because they would **[**19]** be regional rather than national in scope, they would not be vertically integrated, and, if permitted to enter competitive **[*291]** markets, they would face "the most potent conceivable competitor: AT & T itself." 552 F. Supp. at 187. He therefore ruled that the Tunney Act's public interest standard would permit banning the BOCs from a market only if there was a substantial possibility that the BOCs would use monopoly power to

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[3] Under the reorganization plan submitted by AT & T and approved by the court, the 22 BOCs were consolidated into seven Regional Holding Companies. *See* United States v. Western Elec. Co., 282 U.S. App. D.C. 347, 569 F. Supp. 1057 (D.D.C.), *aff'd sub nom.* ***California v. United States, 464 U.S. 1013, 78 L. Ed. 2d 719, 104 S. Ct. 542 (1983)***. For simplicity, we continue to refer to these Regional Holding Companies as the "BOCs."

[4] According to section IV(K) of the decree, "'interexchange telecommunications' means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area." 552 F. Supp. at 229. "Exchange areas" are geographic areas of jurisdiction established by the BOCs according to criteria set out in the decree. *See id*.

[5] Section IV(J) of the decree defines "information services" as:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

552 F. Supp. at 229.

impede competition in that market. *552 F. Supp. at 187*. As part of that "public interest" analysis, the district judge undertook a two-part inquiry to determine for each market barred to the BOCs whether (1) the BOCs would actually have the incentive and opportunity to act anticompetitively and (2) whether the participation of the BOCs would contribute to the creation of a competitive market. *See* *552 F. Supp. at 187, 188-94*. In addition, the district judge examined the effect of the restrictions on "important public policies." *552 F. Supp. at 187*. The district judge ultimately determined that the proposed restrictions were indeed warranted.

The line of business restrictions were not meant necessarily **[**20]** to be permanent, however. The district judge retained jurisdiction [6] and insisted that a mechanism be inserted into the decree for removing them at a later date. Rejecting the DOJ's view that mere monopoly power in local exchange services warranted the restrictions, the district judge thought that removal of the restrictions should be governed by a standard that allows a petitioning BOC to prove that there is no substantial possibility that the BOC could use its monopoly power to impede competition in the relevant market. *See* *552 F. Supp. at 195*. The district judge therefore drafted, and the parties agreed to, section VIII(C) of the decree, which reads:

> The restrictions imposed upon the separated BOCs by virtue of section II(D) [the line of business restrictions] shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

552 F. Supp. at 231. This removal standard was intended to supplant the "test usually applied to a contested modification of a consent decree," set out in *United States v. Swift &* **[**21]** *Co.* that asks whether "'unforeseen conditions'" make modification appropriate. *See* *552 F. Supp. at 195 n. 266* (quoting *United States v. Swift & Co., 286 U.S. 106, 119, 76 L. Ed. 999, 52 S. Ct. 460 (1932))*. Whether section VIII(C) would also apply to *uncontested* modifications is a question upon which the district court was silent in 1982.

[22]** B. *The Triennial Review*

When the decree was entered, the DOJ pledged to report to the court on the third anniversary of divestiture and every three years thereafter on the continuing need for the line of business restrictions. Since divestiture was not actually accomplished until 1984, the first such Triennial Review was held in 1987. The DOJ hired an independent consultant, Peter Huber, to conduct in-depth research on the telecommunications industry as a whole as well as on each of the relevant sub-markets. The *Huber Report* provided the factual basis for the DOJ's preliminary submission, filed with the district court in February 1987, in which it recommended the complete removal of the manufacturing, non-telecommunications, and information restrictions as well as the modification of the interexchange restriction. Quite clearly, the DOJ's position -- which conceded the continued existence of the BOCs' local exchange monopoly -- represented a significant change from its position when the decree was entered that mere monopoly power in local exchange services necessitated the restrictions.

[*292] After studying the comments of the parties and intervenors on its **[**23]** recommendations, the DOJ formally moved the court -- apparently under section VIII(C) of the decree -- for the removal of all the line of business restrictions, with the exception of the interexchange restriction. The DOJ was evidently persuaded to alter its position on interexchange services, and it instead asked the court to leave the restriction intact but to grant waivers as soon as local regulation in a given area is lifted. The Department believes that the BOCs' bottleneck

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[6] Section VII of the decree is entitled "Retention of Jurisdiction" and reads:

> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

552 F. Supp. at 231.

monopolies persist primarily because of local regulation which, if removed, would allow potentially competitive access alternatives to be made available by new technology. The seven BOCs also filed motions under section VIII(C) of the decree asking for complete removal of all the line of business restrictions.

The district court held proceedings in which interested persons were invited to comment and respond to the report and the motions. With respect to the non-telecommunications and information services restrictions, all of the parties to the original decree -- AT & T, the BOCs, and the DOJ -- as well as the FCC agreed that the restrictions should be removed. [7] AT & T opposed any modification of the other **[**24]** restrictions, thus making those BOC motions undeniably "contested." Not surprisingly, numerous existing participants in the markets that the BOCs sought to enter intervened and vigorously opposed each of the proposed modifications. And, as noted above, the DOJ opposed the complete removal of the interexchange restriction.

After discussing the standard for removal of restrictions under section VIII(C) of the decree, the district judge determined that the BOCs still possessed a bottleneck monopoly over local exchange service. *See 673 F. Supp. at 536-40*. The court then analyzed each line of business restriction to decide whether the BOCs had nevertheless met their burden under section VIII(C) to warrant removal. In reviewing the restriction concerning nontelecommunications businesses, **[**25]** the court noted that it had routinely reviewed and granted requests to waive this restriction since the decree became operational in 1984. Despite losing the safeguards that the waiver process afforded by virtue of the conditions imposed whenever a waiver was granted, [8] the district court removed the restriction entirely because potential competitors did not actively oppose the removal and because cross-subsidization is more difficult in enterprises unrelated to telecommunications. *See 673 F. Supp. at 599*. In addition, the court asserted that lifting the restriction would eliminate a significant burden on BOCs' business planning and free the court from unnecessary and detailed oversight of BOC decisions. *See id.*

[26]** The district judge left largely intact the decree's so-called "core" restrictions -- those regarding interexchange services, manufacturing, and information services. The manufacturing and interexchange restrictions remained completely unchanged since the district court rejected arguments that circumstances had changed since the issuance of the decree so as to justify the BOCs' entrance into those markets under the standard imposed by section VIII(C). The district judge did grant partial relief to the BOCs on the information services provision but rejected the request of the DOJ and the BOCs to remove the restriction entirely for much the same reasons as he left the manufacturing and interexchange restrictions in place. The court asserted that information services are vulnerable even to slight manipulation and discrimination in access or transmission quality, **[*293]** thereby making it especially easy for the BOCs to use their bottleneck monopolies anticompetitively if they entered the market. *See 673 F. Supp. at 566*. Nevertheless, the information restriction was lifted insofar as it prevented the BOCs from providing transmission of information services generated **[**27]** by others. *See 673 F. Supp. at 587-97*. The district judge described the economic and social advantages of making information services more widely available and noted that the telephone system was perhaps the only means of accomplishing that goal, because it uniquely offers providers a means "to reach large, dispersed audiences over reasonably priced, interactive facilities." *673 F. Supp. at 564*. So long as the BOCs do not compete with the companies that *generate* the information services, the district judge reasoned, they would have an incentive to afford the widest, fastest, and highest quality access and transmission to all information providers, thereby maximizing their own revenues. This determination was further explained and substantially reaffirmed by the district judge following a separate proceeding held to work out the details of the information services restriction. *See 714 F. Supp. at 1*. All of these rulings have been appealed.

II.

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[7] AT & T stated that it did not oppose information services relief for the BOCs but argued that any modification of that restriction should be made pursuant to section VII of the decree, not under section VIII(C).

[8] The court normally required the BOCs to operate the competitive business through a separate subsidiary that would obtain its own debt financing. Furthermore, the total net revenues for all non-telecommunications activities engaged in by a single BOC were limited to ten percent of that company's total net revenues. These conditions were designed to minimize the risk of cross-subsidization and to guarantee that the BOCs would not neglect their primary responsibility of providing local telephone service. *See* ***673 F. Supp. at 598***.

A. *Standard of Review*

HN1[] We have repeatedly held that the construction of a consent decree **[**28]** (indeed of this particular consent decree) is subject to *de novo* appellate review. *See United States v. Western Elec. Co., 282 U.S. App. D.C. 347, 894 F.2d 1387, 1390 (D.C.Cir. 1990)*; *United States v. Western Elec. Co., 269 App. D.C. 436, 846 F.2d 1422, 1427* (D.C.Cir.), *cert. denied*, *488 U.S. 924, 109 S. Ct. 306, 102 L. Ed. 2d 325 (1988)*; *United States v. Western Elec. Co., 254 App. D.C. 415, 797 F.2d 1082, 1089 (D.C.Cir. 1986)*, *cert. denied*, *480 U.S. 922, 94 L. Ed. 2d 698, 107 S. Ct. 1384 (1987)*; *see also United States v. Armour & Co., 402 U.S. 673, 681-82, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)*. "We read the Decree essentially as we would a contract. *See United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975)*; *United States v. Western Elec. Co., 254 App. D.C. 415, 797 F.2d 1082, 1089 (D.C. Cir. 1986)* ("*Western Elec. II"), cert. denied*, *480 U.S. 922, 107 S. Ct. 1384, 94 L. Ed. 2d 698 (1987)*. **[**29]** Thus, ***HN2***[] while the meaning of the Decree's terms 'must be discerned within its four corners,' *United States v. Armour & Co., 402 U.S. 673, 682, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)*, our inquiry is guided by conventional 'aids to construction,' including 'the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties . . .' *ITT Continental Baking Co., 420 U.S. at 238*." *United States v. Western Elec. Co., 894 F.2d at 1390*.

Appellees nevertheless urge us to employ an "abuse of discretion" standard of review, arguing that what we are reviewing here is the district judge's decision not to modify the consent decree -- subject to review only for abuse of discretion, *see System Fed'n No. 91 v. Wright, 364 U.S. 642, 647-48, 5 L. Ed. 2d 349, 81 S. Ct. 368 (1961)* -- rather than his interpretation of the decree. We think that is an inaccurate description of this proceeding. At least insofar as the district court was faced with motions brought under section VIII(C), it was not asked by any appellant to modify the decree; it was asked to apply it. To the **[**30]** limited extent that that process might require the district judge to find facts (for instance, to determine whether the BOCs still possess monopoly power over local exchange services), we would review under a clearly erroneous standard. *Cf. City of Las Vegas v. Lujan, 282 U.S. App. D.C. 57, 891 F.2d 927, 931 (D.C.Cir. 1989)*. But the legal standard for lifting the line of business restrictions pursuant to a BOC motion is explicitly provided by section VIII(C) of the decree and therefore the district judge need not "balance [any] imponderables," *Wright, 364 U.S. at 648*, in deciding whether to remove them as he might in a case seeking modification. Indeed, the district court enjoys no equitable discretion at all in applying section VIII(C); if the petitioning BOC makes the required showing, the district court "shall" remove the restriction. Therefore, aside from fact-finding, **[*294]** we owe no deference to the district court's decisions under section VIII(C). And to the extent that we review the district court's conclusions about the scope of the applicability of section VIII(C) (as opposed to section VII) for modifications, that is clearly a **[**31]** pure question of law subject to plenary review. [9]

Further, we reject the suggestion -- apparently embraced by other circuits, *see, e.g., Keith v. Volpe, 784 F.2d 1457, 1461 (9th Cir. 1986)* -- that this particular district judge's interpretations should be afforded some "special" deference because he drafted the pivotal provision of the decree, section VIII(C), and because he has had enormous experience overseeing the case and the decree since its inception. In addition to our discomfort with the concept that the degree of deference we afford should depend even in part on the identity of a **[**32]** district judge hearing the case below, we also note that ***HN3***[] appellate courts do not normally defer to anyone else's non-contemporaneous interpretations of the Constitution, statutes, cases, or contracts -- whether or not the interpreter was also the drafter of the language at issue. When we defer to agency interpretations of their own ambiguous statutes, *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*, or of contracts, *National Fuel Gas Supply Corp. v. FERC, 258 App. D.C. 374, 811 F.2d 1563* (D.C.Cir.), *cert. denied*, *484 U.S. 869, 98 L. Ed. 2d 151, 108 S. Ct. 200 (1987)*, we do so on the assumption that Congress delegated to departments or

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[9] We need not decide here whether "abuse of discretion" is the proper standard for reviewing the district court's decisions concerning modification under section VII -- where the district judge is apparently called upon to apply a public interest standard. *But cf. Maryland v. United States, 460 U.S. 1001, 1001-06, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983)* (Rehnquist, J., dissenting).

agencies the reconciliation of agency policies implicated in that function -- institutional concerns not present when we review district court opinions. [10]

[33]** B. *Applicability of Section VIII(C)*

Except for some BOC petitions regarding information services, the BOCs and the DOJ brought, and the district court analyzed, all of the motions to lift the line of business restriction under the standard set out in section VIII(C) of the decree. It is unclear to us, however, that section VIII(C) applies at all to some of those motions. In the first place, section VIII(C) refers to "a showing by the *petitioning BOC*," and thus on its face contemplates only petitions brought by BOCs. The DOJ's hard-line position in favor of the restrictions in 1982 further indicates that when the parties agreed to the decree, none of them contemplated that the DOJ would seek to invoke section VIII(C). We do not see, therefore, how the DOJ can petition for removal of restrictions under section VIII(C). [11] That is not to suggest that if section VIII(C) is not available to the DOJ no avenue for requesting modification would be open to it. Section VII explicitly provides for modifications of the decree, and the district court would possess equitable power to modify the decree even if section VII were not included, *see* United States v. Swift & Co., 286 U.S. 106, 114-15, 76 L. Ed. 999, 52 S. Ct. 460 (1932). **[**34]** [12] **[*295]** Furthermore, as a party to the decree, the DOJ's position on any BOC petition would be considered by the district court in much the same way as is an intervenor's views -- whether it supports or opposes the petition. Strictly speaking, however, only the BOCs can be petitioners under section VIII(C).

[35]** We also believe that section VIII(C) does not apply to proposed modifications that are agreed to by all the parties to the decree, such as the motions for removal of the restrictions on BOC entry into the information services field. Section VIII(C) speaks of a "*showing* by the *petitioning* BOC," thereby indicating that it applies only to contested motions for removal -- and this reading comports with the intent of the parties as expressed to the district court in 1982. *See infra* Part III.C.1. As we explain more fully in Part III of this opinion, uncontested motions for modification -- those involving the information services and non-telecommunications businesses restrictions -- should be treated by the district judge under section VII of the decree, and should be approved so long as the modifications satisfy the "public interest" standard embodied in the Tunney Act. Thus, while both the district judge and the parties treated the removal of the line of business restrictions as though it were governed entirely by section VIII(C), that section was really the appropriate standard only for the BOC petitions for removal of the manufacturing and interexchange restrictions -- the **[**36]** former opposed by AT & T and the latter by both AT & T and the DOJ.

C. *The VIII(C) Standard*

The proper construction and application of section VIII(C) is nonetheless critical in reviewing the district court's decision not to remove the manufacturing and interexchange restrictions. There is no dispute, at least not on appeal, that the BOCs still possess their bottleneck monopolies in local exchange services. Despite certain technological innovations, only a minute percentage of telephone users can bypass the local exchange carriers for

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[10] In interpreting the decree, we do, however, take careful account of the explanatory opinion issued by the district judge at the time the decree was entered, *see* 552 F. Supp. at 131, although we are, of course, not bound by it, *see* United States v. Western Elec. Co., 846 F.2d at 1429.

[11] When pressed at oral argument about the applicability of section VIII(C) to DOJ motions, counsel for the Department stated, surprisingly, that the Government had "no position" on the matter, noting that the Court had "not asked [the Department] to argue" that issue.

[12] The Government *opposed* the modification sought in *Swift*, and therefore it is not at all clear to us that the stringent, so-called "unforeseen conditions" test of *Swift* would apply to motions brought by the *DOJ* under section VII. Since the DOJ is, as plaintiff, the "Prime Mover" of this case, it may well be that modifications it seeks should be evaluated under a standard somewhat more akin to the "public interest" test of the Tunney Act. Still, it is true that the line of business restrictions were part of what AT & T bargained for in the original decree, therefore suggesting that the modification requests that AT & T opposes should perhaps be viewed differently from those that all the parties agree to. We need not pass judgment on this issue here since the DOJ brought no motion under section VII.

any of their calls. *See 673 F. Supp. at 536-40*. The question under VIII(C), then, is whether any petitioning BOC has made a showing "that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." Given the enormous legal resources expended on the issue, it is hardly surprising that the parties hotly dispute the meaning of the quoted phrase and the proper scope of the district judge's inquiry in deciding whether the standard has been met. According to both the DOJ and the BOCs, the district court's analysis suffered from several flaws: (1) misconstruing **[**37]** the actual terms of section VIII(C) quoted above; (2) failing to accord deference to the recommendations and opinions of the DOJ and FCC; and (3) taking into account allegedly irrelevant factors while ignoring or discounting critical changes in the industry since the decree.

We begin with a close parsing of section VIII(C)'s terms. Section VIII(C) requires a BOC to show that there is no "*substantial* possibility that it could use its monopoly power to impede competition." According to the DOJ and the BOCs, the district court altered the decree by implicitly equating the phrase "substantial possibility" with a mere theoretical possibility. Since the BOCs concede that they could always theoretically use their local exchange monopolies to impede competition, they claim that this putative misreading was tantamount to a ruling that retention of the local exchange monopolies precludes relief from the interexchange and manufacturing restrictions under section VIII(C). They base this argument on the district court's statements to the effect that the local monopolies "continue to provide the same basis for anticompetitive activity as they did prior to the Bell System break-up." *673 F. Supp. at 543*. **[**38]** While we do not read the district court's opinion, as appellants do, to have amended the decree, *see, e.g.*, *673 F. Supp. at 536 n. 42* (explicitly rejecting the contention that "the restrictions are justified by the mere fact that a monopoly exists in an area"), the importance of the word "substantial" should not **[*296]** be minimized. The ultimate burden under section VIII(C) remains on the petitioning BOC, [13] but the requirement that the possibility of using its monopoly power to impede competition be "substantial" relieves the BOC of the essentially impossible task of proving that there is absolutely no way for it to use its monopoly power to impede competition. For example, the district judge's speculation that the BOCs could impede competition by way of illegal (and perhaps criminal) collusion to divide markets among them according to territory, *see 673 F. Supp. at 558*, would, in the absence of supporting evidence, seem to qualify only as a theoretical possibility.

[39]** The parties also differ markedly concerning what precisely is meant by section VIII(C)'s ambiguous phrase "*impede competition* in the market it seeks to enter." According to the DOJ, a BOC cannot impede competition in a given market unless it has market power -- the ability to restrict output and/or raise prices. AT & T argues that the district court's 1982 opinion equated impeding competition with "leveraging" monopoly power, something that AT & T claims a BOC can do so long as its local exchange monopoly is also an "essential facility" for the market it seeks to enter. Whatever it means to "leverage" one's monopoly power, the DOJ is surely correct that no damage to competition -- through "leverage" or otherwise -- can occur unless the BOCs can exercise market power. *Cf. General Leaseways, Inc. v. National Truck Leasing Ass'n., 744 F.2d 588, 596 (7th Cir. 1984)*. To be sure, it may be difficult to decide whether the BOCs would have such power if they were allowed to enter a market. Moreover, it may be necessary to refine the analysis to deal with markets in which self-dealing bias is a risk, such as the production of central office switches and transmission **[**40]** equipment. In those markets, a BOC might be able effectively to raise prices (disguised as costs in the local exchange market) or restrict output -- thereby impeding competition -- in the segment it controls or forecloses. *See infra* Part III.B. The district court, however, was apparently concerned with the possibility that BOC entry into new markets would disadvantage or destroy small and innovative firms in those markets. *See, e.g.*, *673 F. Supp. at 561* (castigating the DOJ for its indifference to the possible destruction of "many high-quality firms producing high-quality goods that have emerged since divestiture"). New entry or increased competition in any market typically hurts and sometimes even destroys existing competitors. A court's solicitude for those firms -- ostensibly in an effort to foster competition -- may well come at the expense of competition. *Cf. Cargill, Inc. v. Monfort, 479 U.S. 104, 115, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*.

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[13] We do not agree with the district judge, however, that the BOCs' burden is "particularly heavy" because of the litigants' and the public's interest in the finality of judgments or because would -- be competitors of the BOCs invested "billions of dollars" in reliance on the line of business restrictions. *See* ***673 F. Supp. at 533 n. 25***. Any enterprise that read the decree and the district court's 1982 opinion could not reasonably have relied on the perpetual enforcement of the line of business restrictions in light of the inclusion of section VIII(C) and the explicit pledge to review the continuing need for the restrictions every three years. And any interest that any party conceivably has in the "finality" of this judgment is necessarily tempered by the same factors.

Accordingly, unless the entering BOC will have the ability to raise prices or restrict output in the market it seeks to enter, there can be no substantial possibility that it could use its monopoly **[**41]** power to "impede competition."

And while there may be some complexities in defining precise boundaries of the relevant market, one thing that is clear from section VIII(C) is that it is the "market [the BOC] seeks to enter" that matters, and *not* the local exchange market. For the most part, then, the district court should decide motions under section VIII(C) without regard to the effect BOC entry into new markets will have on local service ratepayers. Concern for the ratepayers' welfare is primarily the responsibility of the FCC and state regulators, not the district court. Appellees make much of DOJ's prior position before the district **[*297]** court when the decree was entered when the Department urged the court to consider the interests of ratepayers in its evaluation and implementation of the decree. The DOJ concedes the shift, and the only explanation we are given is its statements in two footnotes of its brief that it now believes, contrary to its stance in 1982, that line of business restrictions should not be used -- indeed, cannot be used under section VIII(C) -- to protect ratepayers of local exchange services rather than solely to protect competition in unregulated **[**42]** markets. While this may have been the DOJ's contention at the time, we see no clear evidence that ratepayer protection was part of the "contemporaneous understandings of [the decree's] purposes," *846 F.2d at 1427*. And, in any event, we believe the text of the decree generally forecloses the goal of ratepayer protection by the use of the words "the market [the BOC] seeks to enter."

In that regard, to the extent that the district court's consideration of cross-subsidization focused on the danger that the BOCs would overcharge local ratepayers, it was misconceived. *See, e.g.*, *673 F. Supp. at 557, 572*. Cross-subsidization is relevant under VIII(C) insofar as it may be used to price below cost in the competitive market, and thereby unfairly to acquire power and impede competition in that market. Still, the impact on the local exchange market of allowing BOC entry into a new market might well be relevant under section VIII(C) if the BOC is likely to be its own primary customer in the entered market, as with production of central office switches and transmission equipment. In that case, cross-subsidization or cost misallocation that allowed a BOC to **[**43]** pass on its (inflated) equipment costs to the local ratepayers would likely be the primary manifestation of market power and might constitute an impeding of competition *in the entered market. Cf.* 3 P. AREEDA & D. TURNER, ***ANTITRUST LAW***, para. 726 (1978).

Appellants also fault the district court for failing to give deference to the views of the FCC and the Justice Department with respect to the BOC petitions under section VIII(C). ***HN4***[] The Justice Department's interpretation of the law is not normally given deference in a civil or criminal case; in federal courts, departments' and agencies' legal views are deferred to only when they make a determination (either quasi-legislative or quasi-judicial) that has independent legal significance -- as opposed to when they act in a prosecutorial role. *See Michigan Citizens for an Indep. Press v. Thornburgh, 276 App. D.C. 130, 868 F.2d 1285* (D.C.Cir.), *aff'd by an equally divided Court, 493 U.S. 38, 107 L. Ed. 2d 277, 110 S. Ct. 398 (1989)*. Still it must not be forgotten that the Justice Department has the "principal **[**44]** responsibility for enforcing the Sherman Act." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 14, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. Therefore, although we see no doctrinal basis for the district court to defer to the DOJ's interpretation of the decree or its views about ***antitrust law***, it is to be expected that the district court would seriously consider the Department's economic analysis and predictions of market behavior. Indeed, it would seem that that is precisely why the district judge required the Department to report to the court every three years concerning the continuing need for the restrictions imposed by the decree. *See* *552 F. Supp. at 195*.

Economic analysis and market predictions are not an exact science. Antitrust scholars and courts have changed their views somewhat over the last fifty years concerning the interrelationship of the antitrust laws and market behavior. *Compare, e.g., United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967) with Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)* **[**45]** (overruling *Schwinn* after determining that its *per se* rule against vertical nonprice restraints was not economically sound). *Also compare* Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust*?, 125 U.PA.L.REV. 1214 (1977) (arguing that economic efficiency is not the sole goal of the antitrust laws) *with* 1 P. AREEDA & D. TURNER, ***ANTITRUST LAW*** paras. 103-113 **[*298]** (1978) *and* R. BORK, THE ANTITRUST PARADOX 50-89 (1978) (agreeing that courts should treat antitrust laws as designed solely to advance consumer welfare and efficiency). Consequently, we recognize that the DOJ may change its views -- to incorporate different policy concerns -- over time. That is not to say that we do not have any sympathy for the district court's attitude toward the DOJ's position changes in this Triennial Review. As we noted above, the DOJ in 1982 wanted the line of business restrictions to remain in place unless and until the BOCs lost their local exchange monopolies. With little warning or explanation, the DOJ completely altered its stance and is now generally hostile toward the restrictions. In the absence of a complete **[**46]** explanation of how and why the DOJ's position had changed, the district judge was understandably uneasy about relying on the DOJ in this first Triennial Review since to do so would be to undo much of the decree after only three years' time.

The FCC's claim to deference is perhaps even more puzzling to analyze. The FCC argues that the district court acted improperly when it evaluated the effectiveness of the FCC's regulatory scheme since that is solely the function of a court of appeals pursuant to direct review as provided by the Communications Act. The problem with this argument is that a court of appeals reviews FCC regulations only if they are challenged and only to ensure that they are not arbitrary and capricious. The district court below, however, was *obliged* to determine ultimately whether the FCC's regulations would effectively prevent the BOCs from using their monopoly power to impede competition in the markets they sought to enter. *Cf.* 846 F.2d at 1433. The very premise of this case was that the FCC could not effectively control AT & T. We think it would therefore have been an abdication of judicial responsibility for the district court to assume that **[**47]** the FCC's regulations would be effective merely because they had not been found to be arbitrary and capricious.

On the other hand, we recognize the institutional anomaly presented by a district judge placed in the position of evaluating the effectiveness of a federal agency's regulatory program. The DOJ, which brought this action based on its view that the FCC was incapable of preventing AT & T's abuse of monopoly power, would appear to be in a better position, both institutionally and practically, to evaluate the FCC's regulatory effectiveness. And, therefore, we would expect the district court to consider the Department's comparative advantage in performing that task. However, two of the principal FCC regulations that bear on this appeal, the *Joint Cost* and the *Computer III* rules, had not been finally implemented at the time this case was submitted to the district court. Thus the DOJ's assessments of those regulations that are in the record of this appeal are necessarily speculative. *See, e.g., infra* notes 16, 17, 21. Rather than hazard our own, necessarily under-informed, appraisal of how these rules have performed in the three years since this case was presented to **[**48]** the district court, we think it is more prudent to await the DOJ's assessment in subsequent Triennial Reviews. [14]

Appellants further argue that the district court erred in its application of section VIII(C) by considering factors it should have ignored while ignoring some that it should have considered. Most importantly, appellants take issue with the minimal significance that the district court placed on the break-up of AT & T's local exchange monopoly into seven separate BOCs in deciding whether to lift the line of business restrictions. The decree was premised on the notion that the BOCs would have both the incentive and the ability to use their local exchange monopoly to impede competition in these markets, therefore necessitating **[**49]** the line of business restrictions. *See* 552 F. Supp. at 187. Under section VIII(C), therefore, the BOCs must establish that something is different now from the time **[*299]** when the decree was entered so that they can no longer use their monopoly power to impede competition. Obviously, if all conditions and assumptions remain the same now as when the decree was entered, no relief can be due under section VIII(C).

While we reject the BOCs overly loose reading of the restrictions under section VIII(C), we also reject the appellees' overly rigid interpretation of those restrictions. The appellees appear to insist that the standard under section VIII(C) requires a finding of some *unforeseen* changed circumstances as an ingredient of the petitioners' showing necessary to justify removal of a line-of-business restriction. This construction finds no support in the language of the decree. Rather, the decree provides that a petitioning BOC is entitled to relief under section VIII(C) so long as it can prove that its ability to impede competition is no longer present. It would make no difference whether the

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[14] Assuming after remand the BOCs are permitted entry into the information services market, we would also expect the DOJ's reports concerning BOC behavior in that market as well as the effectiveness of applicable FCC regulation to be critical in subsequent Triennial Reviews.

circumstances leading to that conclusion were entirely foreseen **[**50]** or even if they could not be discretely identified. Indeed, even if the economic assumptions or market predictions which governed the decree turned out to be in part wrong, the BOCs might thereby be entitled to relief under section VIII(C).

To be sure, as the district court noted, the mere existence of seven BOCs in place of the prior unified Bell System is not by itself a significant factor. Not only was it the very product of the decree, the seven continue to exercise monopoly power in the local exchange market. However, the other conditions in the various telecommunications markets wrought by divestiture and the behavior of the BOCs since divestiture are appropriately considered under section VIII(C), even if they were foreseen by the parties or incorporated into the fabric of the decree. These are not limited to obvious changes such as new competitors that did not exist or were not stable at the time of the decree. The court also may properly consider the manner in which the seven BOCs behave competitively against each other, AT & T, and other firms, as well as the way in which the various markets have evolved since the decree. It was feared, for instance, at the time the decree **[**51]** was entered that the BOCs would favor one another and AT & T over unrelated firms, a concern that now appears unfounded. Also appropriately considered in the section VIII(C) calculus is the asserted existence of "benchmarks" for comparing BOC performance. According to appellants and the FCC, these benchmarks would make it far easier to regulate the BOCs than the old Bell System if the BOCs were permitted to enter other markets. That the "possibility of the existence of benchmarks was necessarily included in the decree assumption which imposed the restrictions," *673 F. Supp. at 547*, makes them no less significant under section VIII(C). Indeed, the greater ease with which the FCC can regulate the BOCs merely because they have a monopoly in only one geographic portion of one of the markets controlled by AT & T prior to the decree -- although clearly contemplated (and therefore foreseen) at the time of the decree, *see [552 F. Supp. at 187](#)* -- is properly considered under section VIII(C). Of course, the district court still legitimately imposes on the petitioning BOCs the burden of making the requisite showing.

Finally, we consider appellants' claim that **[**52]** the district court strayed beyond the competitive analysis mandated by section VIII(C) when it considered the impact of removing the restrictions on various public policies, including the welfare of local ratepayers, innovation in the manufacturing market, the goal of universal telephone service, *[first amendment](#)* values, and the United States' position in international trade. The district court explained its discussion of these factors by noting that "the same standards may be applied in proceedings addressing continued viability of the restrictions as were used in determining whether the restrictions were to be imposed in the first place." *673 F. Supp. at 583*. We disagree. When the district court entered the decree in 1982, it decided -- as it was required to do under the Tunney Act -- whether the decree was in the public interest. Whatever the substance of the "public interest" standard, it is surely more far-ranging than the section VIII(C) standard. **[*300]** When a BOC petitions under section VIII(C) for the removal of a line of business restriction, section VIII(C) itself defines the limits of the district judge's inquiry. If a BOC makes the showing called for **[**53]** by section VIII(C), the district judge may not, for example, deny the motion because of the possible impact on the United States' balance of trade, or for any other reason not related to the antitrust laws. [15]

III.

We turn next to the district judge's rulings on the BOC motions to remove the interexchange and manufacturing restrictions. As we noted above, the BOC motions to remove these two restrictions were the only motions properly analyzed under section VIII(C) of the decree. We therefore need not separately consider the DOJ's motions, which were brought explicitly pursuant to section VIII(C), to the extent that those **[**54]** motions are different in substance from the BOC motions.

Despite our disagreements with the district judge concerning the matters described above, we agree that the BOCs did not satisfy their burden in this Triennial Review of showing that there was no substantial possibility that they could use their monopoly power to impede competition in these markets. On appeal, the DOJ and the BOCs focus their criticism on the district court's analysis and the standard it applied. As such, they ask us to remand for

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[15] The district judge explicitly stated that his considerations of some of the public policies mentioned above "d[id] not have an actual impact on the Court's decisions." ***673 F. Supp. at 580***. While that disclaimer makes it somewhat unusual that he would include the sections of his opinion expressly dealing with those public policies, we take the district judge at his word.

reconsideration under the "legally correct VIII(C) standard." Since we conclude that the district court reached the correct results on the motions properly considered under VIII(C), there obviously is no reason to remand those motions to the district court.

A. *Interexchange Services*

The BOCs, supported by the FCC but not the DOJ, argue that the interexchange restriction should be removed in spite of the conceded persistence of their local exchange monopoly -- upon which interexchange carriers rely for access to ultimate consumers -- because changed circumstances since the decree would prevent them from impeding competition if they were permitted to enter the market. The DOJ **[**55]** opposes the BOCs' petition.

The district court noted that the interexchange market is currently competitive. Even though AT & T still retains a lion's share of the market, there are hundreds of long-distance carriers in the United States, eight of them serving twenty-five or more states. *See 673 F. Supp. at 550*. This apparently undisputed fact leads the district court to the curious observation that "the entry of the [BOCs] into that market is not necessary to give it vitality." *Id.* Section VIII(C) does not put the BOCs in the "Catch-22" that the district judge seems to imply by that statement -- that the restriction will not be lifted if the market to be entered is not competitive because the BOC will grab and wield market power nor will it be lifted if the market to be entered is highly competitive because the BOCs' presence is not "necessary." If the market to be entered is sluggish or concentrated, that might be an argument in favor of allowing BOC entry, although it might also make it easier for a BOC to acquire market power. But if the BOC wants to enter a *competitive* market, that is a powerful reason to grant the section VIII(C) petition since there **[**56]** is less of a danger that the BOC will be able to seize and wield market power.

Nevertheless, we agree with the district court's conclusion regarding the changes in the interexchange market. The crux of the BOCs' argument is that equal access for all interexchange carriers has been achieved and cross-subsidization eliminated, thus closing off the primary way for the BOCs to acquire market power anticompetitively. This has allegedly come about primarily through FCC regulation that was made more effective by the fragmentation of the Bell System's local exchange monopoly into **[*301]** seven BOCs. As we indicated above, even though the mere existence of the seven BOCs is not a significant consideration under section VIII(C), the break-up is critically important insofar as the FCC has been able to adapt its regulations to the more manageable task of overseeing seven regional monopolies instead of one national, vertically-integrated one. *See* *552 F. Supp. at 187*. On this point, we think the DOJ's assessment of the FCC's regulations is entitled to significant weight. According to the DOJ, those regulations, combined with the BOCs' own equal access plans have "eliminated **[**57]** most of the anticompetitive advantages AT & T formerly enjoyed." At the time this case was before the district court, however, the DOJ asserted that "the FCC's equal access rules are based on the assumption that the BOCs will not provide interexchange services. Thus the FCC has not yet developed rules that would apply the nondiscrimination and cost separation principles of the *Computer III* [16] and *Joint Cost* [17] proceedings to BOC provision of interexchange services." And until those regulations are adjusted to take account of BOC entry into the interexchange market -- entry which would, of course, provide an incentive to deny equal access and to cross-subsidize if possible -- the DOJ represents that equal access and proper cost allocation cannot be assured.

[58]** The DOJ also points out that violations of the equal access policy are extremely difficult to detect and remedy, *see* *846 F.2d at 1424-25*, thereby underscoring the danger of allowing entry before the FCC's regulations are designed to deal with the problem. Finally, the DOJ warns that the BOCs will have an easier time acquiring market power in the interexchange market than in other markets because many of the firms that began providing interexchange services after the decree have not yet become stable in the highly capital-intensive field. Since the BOCs raise no serious opposition on appeal to any of these points made by the DOJ and since we have no other

[16] *104 F.C.C.2d 958 (1986)*, *on reconsideration*, *2 FCC Rcd 3035 (1987), 3 FCC Rcd 1135 (1988)*, *appeal docketed sub nom. California v. FCC*, No. 87-7320 (9th Cir. May 28, 1987).

[17] *2 FCC Rcd 1298*, *on reconsideration*, *2 FCC Rcd 6283 (1987)*, *on further reconsideration*, *3 FCC Rcd 6701 (1988)*, *petition for review denied sub nom.* *Southwestern Bell Corp. v. FCC, 283 U.S. App. D.C. 80, 896 F.2d 1378 (D.C.Cir. 1990)*.

reason to doubt the DOJ's assessments, we affirm the district judge's conclusion that the BOCs failed to show that there was no substantial possibility that they could use their monopoly power to impede competition in the interexchange market. [18]

[59]** B. *Manufacturing*

The "manufacturing restriction," imposed by section II(D)(2) of the decree and amended by section VIII(A) is really more properly conceived of as two restrictions. First, it forbids the BOCs from manufacturing (but permits them to provide) customer premises equipment ("CPE"), which "includes equipment employed on the premises of anyone other than a carrier that is utilized to originate, route, or terminate telecommunications." *673 F. Supp. at 552 n. 116*. Second, it prohibits the BOCs from manufacturing or providing telecommunications equipment, that is, equipment other than CPE used by a carrier to provide telecommunications services. *See id.* The BOCs petitioned, with DOJ support, for the complete removal of the manufacturing restriction, and the district court left the restriction intact.

1. *Telecommunications Equipment*

The BOCs and the DOJ argue that market changes since the decree and regulatory adaptations to the post-divestiture **[*302]** market warrant removal of the telecommunications equipment restriction. The Justice Department further divides the telecommunications equipment market into separate markets for central **[**60]** office switches and for transmission equipment (primarily metal cable). The DOJ makes the significant concession that any BOC that chooses to manufacture central office switches, either unilaterally or through a joint venture, will buy all (or nearly all) of its requirements from the affiliated producer -- thereby foreclosing a certain portion of the market, whether or not there are economies to be gained from such integration. [19] Nevertheless, the BOCs will not impede competition (although competitors will surely be hurt) in the switch market, it is argued, because large economies of scale would prevent any BOC from remaining in the market solely to sell to itself. Even the largest BOC buyer of switches in 1985 purchased only 1.4 million lines of new switching capacity, about 17 percent of the U.S. market. Only two other BOCs purchased over one million switches and two BOCs bought less than 500,000. *Huber Report* at 14.8. The *Huber Report* estimates that switch producers must sell upwards of 1.5 million switches per year to survive and many more to be profitable. *Huber Report* at 14.15-14.16. Of the three major U.S. switch producers, two (AT & T and Northern Telecom) sold **[**61]** over 4.5 million switches in the U.S. in 1985, and perhaps twice that many worldwide. The third (GTE) sold only about 1.5 million switches in 1985 and is losing money in its equipment businesses. *Huber Report*, 14.8, 14.14-14.15. Assuming that there are no joint ventures among BOCs (which the DOJ admits would alter its assessment), the DOJ argues that only a few BOCs would enter the switch market and those that did could not afford to produce idiosyncratic (or overpriced) switches since they would have to attract at least some significant number of nonaffiliated buyers who, of course, can choose among many producers.

The DOJ further concedes, **[**62]** however, that the image they convey of the efficient BOC producer of switches is somewhat clouded by the danger of anticompetitive interconnection discrimination and of cross-subsidization. The risk of interconnection discrimination, by which a BOC would design its switches in a way that would favor the BOC's self-produced equipment over rival manufacturers, has allegedly been "substantially decreased" by more effective regulatory control -- especially the availability of benchmark comparisons among the BOCs. [20] Cross-

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[18] The BOCs pressed the argument below that the interexchange restriction should be removed because the Justice Department agreed to, and the district court accepted, a consent decree in an antitrust action against GTE that did not include line of business restrictions. *See* *United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984)*. This claim was not raised on appeal and so we do not discuss it. We also have no occasion to discuss the suggestion made by the DOJ below, but dropped on appeal, that the restriction should be lifted with respect to cellular radio, paging, and other mobile interexchange services.

[19] This latter admission moots any suggestion that the district court should have balanced the asserted economies of vertical integration against the anticompetitive danger of BOC entry into the market. We express no opinion as to whether such a balance would be the proper subject of litigation in future Triennial Reviews. *Cf.* ***673 F. Supp. at 560***.

subsidization is a "plausible concern" in the switch market, the DOJ tells us, because of the need to attract a large market share, the extensive shared costs with local exchange services (especially research and development) ("R & D"), and traditional difficulty encountered by regulators in discovering cost misallocations. Indeed, according to the DOJ, a BOC "might not have to produce efficiently to attract its own operating companies as buyers if regulators did not prevent recovery of excessive switch costs." And while the risk of cross-subsidization cannot be eliminated completely, FCC regulation -- especially the availability of benchmarks to enforce effective accounting **[**63]** rules -- would "significantly mitigate" it. [21] Finally, the **[*303]** DOJ maintains that a small amount of cross-subsidization would not impede competition in the entered market; rather its primary effect would be to raise the price of local exchange service, a problem that the DOJ suggests is to be handled by regulators and is irrelevant to this proceeding.

[64]** The DOJ's assessment of the transmission equipment market is substantially similar to that for central office switches. In the transmission equipment market, as was true of central office switches, any BOC would purchase all or most of its own equipment from its own manufacturing affiliate; not all BOCs would manufacture every type of transmission equipment. There is some danger of discrimination and of cross-subsidization, but, due in large part to the availability of benchmark comparisons, that risk is substantially less than it was prior to divestiture. Among the salient differences is that the market has supported competition even though the BOCs have already been allowed to provide transmission equipment in the form of CPE, and therefore already possesses an incentive to discriminate in interconnection. In addition, cross-subsidization is allegedly less probable than in the switch market because R & D costs, normally the prime source of cross-subsidization, are so low. [22]

[65]** Even if we did accept the DOJ's market forecasts and regulatory assessments wholesale, it would not suffice to compel removal of the telecommunications equipment restriction under the section VIII(C) standard. As we discussed above in Part II(C), the possibility of self-dealing bias in the telecommunications equipment market poses dangers to competition that do not exist in the other markets the BOCs seek to enter. The DOJ's submissions provide little solace against those dangers. As we noted above, the DOJ "assumes that any BOC that manufactures equipment would purchase substantially all of its requirement from its affiliate," presumably regardless of price or quality. While the BOCs and the DOJ contend that not all BOCs will produce each type of equipment and therefore dispute the district judge's conclusion that the BOCs would foreclose 70% of the telecommunications equipment market, there seems to be no dispute that some substantial portion (5-15%) of the equipment market will be foreclosed.

Such foreclosure, if combined with cross-subsidization, would appear to allow the BOCs, in effect, to raise prices (and therefore exercise a form of market power) in the foreclosed sectors **[**66]** of the equipment market by

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[20] The DOJ also noted that the so-called "Open Architecture" or ONA requirements, an integral part of the FCC's *Computer III* rules, might provide another obstacle to a BOC's ability to discriminate. When the case was presented to the district court, however, the DOJ represented that "it is unclear just what the impact of ONA on the potential for discrimination will be and how those effects will vary from market to market." For that reason, we do not understand how a court could be expected to rely at all in this Triennial Review on the asserted efficacy of the FCC's *Computer III* rules.

[21] The DOJ also pointed to the FCC's *Joint Cost* proceeding which, it argues, will give the BOCs the incentive to develop accounting rules that are acceptable to the FCC in order to escape from the separate subsidiary requirements for BOC provision of enhanced (information) services and CPE. Whatever merit there might be in this argument -- and we note that the district judge thought there was very little -- we need not even consider it in this Triennial Review since the *Joint Cost* rules had not been implemented at the time this case was brought. *See* ***673 F. Supp. at 572***. Furthermore, we note with some discomfort that at least some of the BOCs were petitioning this court to strike down as arbitrary and capricious one of the central aspects of the *Joint Cost* rules designed to deal with the cross-subsidization problem while simultaneously pointing to the *Joint Cost* rules in this appeal as effectively ending the cross-subsidization danger. *See* *Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C.Cir. 1990)*.

[22] Conversely, R & D costs are quite high in the fiber-optics sector of the transmission equipment market. Still, the DOJ submits that cross-subsidization is not a primary concern since the BOCs' competitors in that sector could respond in kind to cross-subsidization without suffering any competitive disadvantage.

disguising inflated equipment prices as costs in the local exchange market. *See supra* Part II.C. To be sure, the DOJ advised the district court that FCC regulation would substantially reduce the risk of cross-subsidization. In its own reports on the two principal telecommunications equipment submarkets, the DOJ nevertheless concedes that the BOCs would possess both the incentive *and the ability* to cross-subsidize, at least somewhat. The DOJ and the BOCs nowhere explain, however, why any significant amount of cross-subsidization that, in practical terms, enables the BOCs to charge higher prices for the equipment it produces would not be akin to an exercise of market power that would impede competition in the telecommunications equipment market. At least in this first Triennial Review, it is not enough for the BOCs (independently or through the DOJ) to show that a significant number of stable competitors will be able to survive BOC entry. We think that the BOCs cannot meet their burden under section VIII(C) **[*304]** without also explaining why foreclosure combined with cross-subsidization does not *itself* pose a "substantial possibility that the **[**67]** BOC could use its monopoly power" in the telecommunications equipment market.

2. *Customer Premises Equipment*

The DOJ subdivides the CPE market into the private branch exchange ("PBX") market and the terminal equipment market. While it analyzed those submarkets separately, the DOJ believes -- for reasons similar to those offered for the telecommunications equipment market -- that BOC entry into both would not threaten competition. The PBX market is described as "moderately concentrated" -- with three major and many minor producers -- but nevertheless competitive. The DOJ points out that the BOCs have been permitted to *provide* PBXs (as well as all other forms of CPE) since the decree, and that they therefore have always had the incentive to provide discriminatory interconnection. If allowed to produce PBXs, that discrimination could manifest itself through BOC manipulation of its local network or through discriminatory dissemination of network information. We are assured, however, that the BOCs' *ability* to discriminate will be blocked, as it has been until now, by numerous obstacles, especially FCC regulation. [23] Similarly, any danger of cross-subsidization in the PBX **[**68]** market is dismissed by the DOJ as negligible.

The DOJ's argument with respect to the terminal equipment market is based again on the premise that no BOC could successfully discriminate against its rivals, either by way of interconnection or by failing to provide critical network information. Their ability to discriminate is asserted to be undercut somewhat by the advent of PBX use, as well as cellular and paging systems for which the BOCs do not even provide the interconnection with the terminal equipment and which all contribute to the prevalent use of standards in interconnection. Residual risk of discrimination, as well as the risk of cross-subsidization, are adequately prevented by FCC regulation.

While we certainly have some reservations concerning the DOJ's assessment of the CPE market, [24] we are inclined **[**69]** to think that the question is much closer than it was for telecommunications equipment. Since the BOCs purchase only a minute percentage of the nation's CPE output, there is no risk of the combined cross-subsidization and foreclosure that is so crucial to our decision on telecommunications equipment. Indeed, on appeal, the BOCs and the DOJ complain primarily that when the district judge discussed foreclosure, he did not differentiate between CPE and the various types of telecommunications equipment that the BOCs do purchase themselves in great quantity. While we agree that different competitive concerns should motivate decisions regarding CPE than those regarding telecommunications equipment, we do not perceive that as a reason to upset the district court's decision as it applies to CPE manufacturing. The burden under section VIII(C) is not on the district judge; it is on the petitioning BOCs to show that they can enter certain markets without raising a substantial possibility that they could use their monopoly power to impede competition in those markets. In this Triennial Review, the BOCs petitioned for *complete* removal of the manufacturing restriction, and the DOJ explicitly **[**70]**

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[23] Among the regulations relied upon, however, were the new *Computer III* and *Joint Cost* rules which were not fully implemented at the time this case was submitted to the district court.

[24] For instance, we question the DOJ's reliance on not-yet-final regulations as well as its apparent equation of FCC success in regulating CPE *provision* by the BOCs with its ability to regulate their CPE manufacturing. It would seem that manufacturing offers far greater opportunities for discrimination in interconnection.

urged the district judge *not* to distinguish between the two types of equipment in making his decision, because line-drawing between them is so difficult. Given the risks to competition we identified in the telecommunications equipment market, the district court understandably did not allow the entire manufacturing restriction to be removed **[*305]** in this first Triennial Review, and the motions were properly denied.

C. *Information Services*

The BOCs and the DOJ also appeal from the district court's decision not to lift the restriction on "information services" under section II(D)(1), as that restriction is applied to the *generation* of information. [25] The district **[**71]** court found that there had "been no significant, relevant change in" market conditions justifying removal of this restraint under section VIII(C). *673 F. Supp. at 564*. Noting that neither the DOJ nor AT & T opposed lifting the information services ban, the BOCs contend that the district court should have reviewed this question under a more flexible "public interest" standard pursuant to section VII. *See supra* note 6. We agree, and hold that the district court erred in applying section VIII(C) to the uncontested motion to remove the line-of-business restriction on information services. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we are constrained to remand the case for further consideration of the BOCs' motion to remove the information services ban in its entirety.

[72]** 1. *The Applicability of Section VII to Uncontested Motions to Modify a Line-of-Business Restriction Under the Decree*

It is well established that ***HN5***[] a less demanding standard of review applies to an uncontested motion to modify a consent decree than applies to a contested one. *See generally* Note, *Modifications of Antitrust Consent Decrees: Over a Double Barrel*, *84 MICH.L.REV. 134, 135 (1985)*. As we have explained, unless the parties have expressly agreed otherwise, an antitrust defendant can prevail on a contested motion to reduce or eliminate its obligations only if it can make "a clear showing of grievous wrong evoked by new and unforeseen conditions." *United States v. Swift & Co., 286 U.S. 106, 119, 76 L. Ed. 999, 52 S. Ct. 460 (1932)*. But when all parties to a decree assent to a particular modification, the relevant inquiry for the court is whether the resulting array of rights and liabilities comports with the "public interest." *See, e.g., United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983)*, *cert. denied* **[**73]** , *465 U.S. 1101, 80 L. Ed. 2d 127, 104 S. Ct. 1596 (1984)*; *United States v. National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) para. 66,856, at 64,248 (E.D.Mich. 1985).

Through section VIII(C), the parties expressly altered this "common law" approach to decree modification. The question is *how much* they altered it. According to the BOCs, Section VIII(C) was intended merely to supplant Swift's "grievous wrong" standard for *contested* modifications of the decree's line-of-business restrictions; *uncontested* motions to lift these restrictions, the BOCs argue, remain subject to the ordinary public interest standard as incorporated in section VII's general provision for modification of the decree. [26] Because neither AT & T nor the DOJ opposed the BOCs' motion to remove section II(D)(1)'s information service restriction, [27] the BOCs

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[25] Under the Decree,

> "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications service.

Decree § IV(J), *reprinted in* *552 F. Supp. at 229*.

[26] The DOJ, in contrast, premises its challenge to the district court's information-services ruling solely on the ground that the court misapplied *section VIII(C)*.

[27] Although the appellees suggest that AT & T did not *consent* to removal of the Decree's information-services restriction, it is clear from the record that AT & T did not *object* to such a modification of the Decree. *See* Joint Appendix 2695-96; *see also* *id. 1402*. The district court did not suggest otherwise. *See* ***673 F. Supp. 534*** & n. 33 (characterizing AT & T's position as

conclude that the district **[*306]** court should have reviewed their motion under a public interest test rather than under section VIII(C)'s "no-substantial-possibility" test. The appellees reply that section VIII(C) furnishes the exclusive mechanism for modifying the decree's line-of-business restrictions. **[**74]**

Whether section VII or section VIII(C) governs an uncontested motion to modify section II(D) is not a mere academic question. By focusing on whether a particular uncontested modification is in **[**75]** the public interest, section VII allows the district court to approve an uncontested modification even without a showing of a "change" of any kind so long as the resulting array of rights and obligations is "'within the reaches of the public interest'" today. *United States v. Bechtel Corp., 648 F.2d 660, 666* (9th Cir.) (quoting *United States v. Gillette Co., 406 F. Supp. 713, 716 (D.Mass. 1975))*, *cert. denied*, *454 U.S. 1083, 70 L. Ed. 2d 617, 102 S. Ct. 638 (1981)*.

To determine whether the parties intended section VII or section VIII(C) to apply to uncontested motions to modify the decree's line-of-business restrictions, we must look first to the text of the decree, and then, if the question remains subject to doubt, to "'contemporaneous statements of [the decree's] objectives.'" *United States v. Western Elec. Co., 282 U.S. App. D.C. 271, 894 F.2d 1387, 1390-91 (D.C.Cir. 1990)* (quoting *United States v. Western Elec. Co., 269 App. D.C. 436, 846 F.2d 1422, 1427* (D.C.Cir.), *cert. denied*, *488 U.S. 924, 109 S. Ct. 306, 102 L. Ed. 2d 325 (1988))*. This inquiry convinces us that **[**76]** uncontested motions to modify line-of-business restrictions should be resolved pursuant to a public interest standard under section VII.

Contrary to the contentions of the appellees, the applicability of section VIII(C) is not dictated by the plain meaning of its terms. Section VIII(C) does not purport to be the *exclusive* standard for reviewing motions to modify restrictions imposed by section II(D). Indeed, as we have noted above, insofar as section VIII(C) makes removal of a restriction contingent "upon a *showing* by the *petitioning* BOC," *552 F. Supp. at 231* (emphasis added), this provision appears to contemplate adversarial testing of the relevant issues. At best, section VIII(C) must be deemed to be silent on the question of what standard applies to uncontested motions to remove the decree's line-of-business restrictions.

The circumstances surrounding the formation of the decree, however, leave little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII. When the parties initially submitted the decree to the district court, the only provision for modification was section VII. In explaining **[**77]** their understanding of that section, both parties stated that "in the event that the parties agree to an amendment of the modification to remove [a line-of-business] restriction, the standard for such removal would be whether it is in the public interest." Brief of the United States in Response to the Court's Memorandum of May 25, 1982 at 32, *reprinted in* J.A. 882; *see* AT & T Brief in Response to the Court's Memorandum of May 25, 1982 at 17-18, *reprinted in* J.A. 849-50 (stating same view).

The addition of section VIII(C) cannot be viewed as altering this understanding. The district court conditioned approval of the decree on adoption of section VIII(C) in order to alter the parties' stated intention that *contested* motions to remove a line-of-business restriction be granted merely upon a finding "that 'the rationale for [the restriction] is outmoded by technical developments.'" *552 F. Supp. at 195* (quoting Brief of the United States in Response to the Court's Memorandum of May 25, 1982 at 32-33, *reprinted in* J.A. 882-83); *see also* AT & T Brief in Response to the Court's Memorandum of May 25, 1982 at 18, *reprinted in* J.A. 850 (expressing **[**78]** same standard). The trial court expressly noted that the standard in section VIII(C) would supplant "the test usually applied to a *contested* modification . . . [as] set forth in *United States v. Swift & Co.*" *552 F. Supp. at 195 n. 266* (emphasis added) (citation omitted). Nothing in the court's opinion suggests that section VIII(C) was designed in addition to displace the parties' agreement that a public interest standard would **[*307]** apply to *uncontested* motions to modify section II(D).

This reading of the decree is further supported by ***HN6***[] an important general rule of decree construction, namely, the presumption that the parties, "absen[t] any expressly stated intention to the contrary," intended to adopt "the ordinary substantive . . . standards that attend decree modification." *United States v. Western Elec. Co., 282*

"suggest[ions]" as to alternative "routes with respect to the information services restriction"). For purposes of identifying the proper standard of review, the critical point is that neither AT & T nor the DOJ *opposed* the BOCs' motion.

U.S. App. D.C. 271, 894 F.2d 430, 436 (D.C.Cir. 1990). As we have explained, the only *express* intention relating to section VIII(C) was that it would displace the *Swift* test for reviewing contested modifications. **[**79]**

2. *Application of the Public Interest Test to the Motion to Remove the Restriction on Information Services*

Having determined that section VII's public interest test governs uncontested proposals to modify the decree's line-of-business restrictions, we must next examine whether the district court's erroneous reliance on section VIII(C) affected the court's decision to deny the BOCs' unopposed motion to remove the decree's restriction on information services. We conclude that it did, and, consequently, we reverse.

As we have indicated, section VII and section VIII(C) involve different inquiries. Section VII's public interest test directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today. Cf.* Bechtel Corp., 648 F.2d at 666. Section VIII(C) requires the district court to determine whether the petitioning BOC has shown that it could not impede competition in the relevant market as it was believed it could *when the decree was approved*; applying this standard, Judge Greene denied the BOCs' motion to remove the information-services **[**80]** restriction because he found that "there has been no change whatever in" the information services market. *673 F. Supp. at 565*.

Under only two circumstances could we discount the possibility that the district court would have reached a different result had it applied section VII rather than section VIII(C). The first would be if the inclusion of the information services restriction was mandatory, not merely permissible, at the time that the decree was adopted. If market conditions or assumptions in 1982 so constrained the range of permissible settlements that *only* a decree incorporating this restriction could have been approved as consistent with the public interest *then*, it would follow that the parties would need to show that those conditions had abated before the court could approve removal of the restriction *today*.

We cannot say, on the record before us at least, that this condition is met. The Government's case in the *AT & T* antitrust litigation centered exclusively on AT & T's activities in the interexchange-service and equipment-manufacturing markets. *See, e.g.*, COMPETITIVE IMPACT STATEMENT IN CONNECTION WITH PROPOSED MODIFICATION OF FINAL **[**81]** JUDGMENT, 47 Fed.Reg. 7172 (1982). Indeed, because the 1956 consent decree enjoined AT & T "from engaging . . . in any business other than the furnishing of common carrier communications services," *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) para. 68,246, at 71,138 (D.N.J. 1956), and because relatively few information services were provided to the public before the DOJ moved to reopen that decree in 1974, there really was no record to speak of concerning AT & T's activities in the information services market. The parties agreed to the information services restriction as a precautionary measure in light of uncertainty about how divestiture of AT & T would affect the development of this embryonic market. Under these circumstances, it would not have been legal error for the district court to approve the decree had the parties *not* agreed on their own to include the restriction on information services. Consequently, the district court's bare finding that the BOCs failed to show a *change* in market conditions does not suffice to show that the decree, absent the information services restriction, would no longer be "'within the reaches of **[**82]** the public interest.'" Bechtel Corp., 648 F.2d at 666 **[*308]** (quoting Gillette Co., 406 F. Supp. at 716).

The second condition under which we could disregard the district court's reliance on section VIII(C) would be if the record conclusively showed that, regardless of whether the parties were *obliged* to include the information services restriction in 1982, removing it would be against the public interest now. Because the "public interest" test must take its meaning from the nation's antitrust laws, *see* American Cyanamid Co., 719 F.2d at 565, the appropriate question under section VII is whether the proposed modification would be certain to lessen competition in the relevant market. *See generally* 2 P. AREEDA & D. TURNER, ***ANTITRUST LAW*** para. 330, at 141-42 (1978) ("To remain consistent with antitrust policy, the court should revise the decree that is shown to lessen competition substantially in present circumstances."). Purporting to find that the BOCs would have both the incentive and the ability to cross-subsidize the information-service operations of unregulated affiliates and to discriminate against information-service **[**83]** competitors, the district court concluded that removal of section II(D)(1)'s restriction on information services would be *anticompetitive* under current market conditions. *673 F. Supp. at 565-67*.

But because we cannot be certain that these findings were not infected by the court's legal error concerning the proper standard of review, we may not rely on them to support the district court's denial of the BOCs' motion. *See* Pullman-Standard v. Swint, 456 U.S. 273, 292, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982). The district court's analysis of the contemporary risk of anticompetitive behavior repeatedly incorporates the failure of the BOCs to show a change in market conditions from those existing when the decree became effective:

> There still has been no *significant, relevant change* in the situation.

673 F. Supp. at 564 (emphasis added).

> It is necessary next to determine whether, with respect to the provision of information services, the incentive and ability of the Regional Companies to engage in anticompetitive conduct *remains the same* as it was when the decree was entered. The answer is plain. **[**84]** *There has been no change whatever* in this respect since 1984. . . .

Id. at 565 (emphasis added).

> In short, the reasons cited by the Court in 1982 and in 1984 *are as valid today as they were then*.

$ *Id. at 567* (emphasis added). Consequently, we cannot be sure whether the district court's findings of anticompetitive risk stemmed from its *de novo* assessment of the evidence.

Nor can we say that "the record permits only one resolution of the factual issue[s]" pertinent to determining whether lifting the information-services prohibition would be pro- or anticompetitive. Pullman-Standard, 456 U.S. at 292. To be sure, the district court had before it evidence to support its findings on the risk of discrimination and cross-subsidization. But the record also contains considerable evidence cutting the other way. The *Huber Report*, in particular, discounts the prospect of anticompetitive behavior, citing the ability of competing information-service providers to bypass the BOCs' local-exchange networks, *see Huber Report* at 6.8, 6.17-6.21, the existence of nontelecommunications substitutes for **[**85]** information services, *see id.* at 6.21-6.23, and the lack of common costs between local-exchange services and *the generation of information, see id.* at 6.35. [28] Because ***HN7***[] resolving these disputed factual issues "would be wholly inconsistent with the function of an appellate court," Southern Pacific Communications Co. v. American Tel. & Tel. Co., 238 App. D.C. 309, 740 F.2d 980, 984 (D.C Cir. 1984), *cert. denied*, **[*309]** *470 U.S. 1005, 84 L. Ed. 2d 380, 105 S. Ct. 1359 (1985)*, we are constrained to remand the case for further factfinding, pursuant to the proper legal standard. *See* Pullman-Standard, 456 U.S. at 292.

[86]** In sum, we find that the district court erred in applying section VIII(C) rather than section VII's public interest standard to the BOCs' unopposed motion to lift the decree's information-services restriction in its entirety. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we reverse the court's decision and remand the case for further proceedings. In reconsidering the BOCs' motion, the district court should determine whether removal of the information-services restriction as applied to the generation of information would be anticompetitive under *present* market conditions. [29] The court should also

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[28] As Dr. Huber notes:

> The preparation of the information content itself is one activity that [the BOCs] would have notably little opportunity to cross-subsidize. Running a local telephone exchange does not require reporters, copy editors, joke writers, financial analysts, astrologists, or other information-content providers.

Id. at 6.35 (footnote omitted).

[29] We are also concerned with the practical difficulty of enforcing a merely *partial* repeal of the information-services ban; as the trial court recognized, significant disputes can be expected to arise concerning whether the BOCs are using their right to transmit

bear in mind ***HN8***[] the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is the one that will *best* serve society," but only to confirm that the resulting "settlement is 'within the *reaches* of the public interest.'" *Bechtel Corp., 648 F.2d at 666* (quoting *Gillette Co., 406 F. Supp. at 716*) (emphasis added).

[87]** IV.

The Public Service Commission of the District of Columbia ("DC-PSC") is the only party that appeals the district court's decision to allow the BOCs to participate in non-telecommunications markets and limited information transmission and storage activities.

The BOCs assert that in the absence of some actual or threatened injury to DC-PSC or some congressional enactment conferring standing, DC-PSC has no right to appeal the district court's decision. DC-PSC responds that it was granted the status of a limited intervenor in the district court proceedings and that it has the right to appeal the district court's judgment. DC-PSC bases this claim on an unclear combination of the following reasons: the district court granted the right to appeal its decision to all limited intervenors; the district court's decision to lift the restrictions at issue will cause DC-PSC to suffer specific injury as consumer and regulator; the law of standing applies only to plaintiffs and not to intervenors; an agency may intervene in an appeal from proceedings that may affect its ability to carry out its statutory functions; and DC-PSC may represent the interests of District of Columbia residents on **[**88]** appeal in a *parens patriae* capacity.

As a preliminary matter, despite the BOCs' assertions to the contrary, DC-PSC was a limited intervenor in both district court decisions under review. By its order dated March 9, 1987, the district court granted DC-PSC's motion for leave to intervene. On October 14, 1988, the district court ordered that all those parties that had been granted limited intervenor status on February 26, 1987 in the proceedings that culminated in the issuance of the September 10, 1987 decision were to be considered limited intervenors for purposes of the decision issued on March 7, 1988. Because DC-PSC's motion to intervene was filed out of time and was granted on March 9 instead of on February 26, the BOCs assert that DC-PSC is not a limited intervenor with respect to the March 7 decision. Although the BOCs may be technically correct, it would be unduly formalistic for this court to convert an obvious oversight of the district court into an independent basis for barring appeal.

DC-PSC's status as an intervenor does not, however, guarantee that it has standing **[*310]** to appeal the district court's decisions. DC-PSC seems to be under the impression that the **[**89]** district court, by conferring the status of limited intervenor in the proceedings below, can confer standing on DC-PSC in this court to appeal the district court's decisions. The Supreme Court has stated, however, that

> although intervenors are considered parties entitled, among other things, to seek review by this Court, *Mine Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 338, 89 L. Ed. 1649, 65 S. Ct. 1166 (1945)*, an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.

Diamond v. Charles, 476 U.S. 54, 68, 90 L. Ed. 2d 48, 106 S. Ct. 1697 (1986). Thus, because DC-PSC alone challenges the district court's decision to lift the restrictions at issue, this court must determine whether DC-PSC independently satisfies the article III requisites for standing to appeal.

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the information of others as a cover for generating their own. *See* ***673 F. Supp. at 596***. Because it is clearly in the public interest to minimize the district court's oversight responsibilities under the decree, *see* ***id. at 599***, the district court on remand should also consider whether the residual anticompetitive risks associated with lifting the restriction on generation of information are sufficiently great to outweigh the administrative burdens on the court of policing this limited prohibition.

The Supreme Court has held that ***HN9***[] in order to have standing, a party must demonstrate an injury in fact fairly traceable **[**90]** to the conduct it is challenging and likely to be redressed by the relief it has requested. *Allen v. Wright, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984)*. While the necessary "injury" is not susceptible to precise definition, it must be "distinct and palpable," *Warth v. Seldin, 422 U.S. 490, 501, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)*, and not merely hypothetical, abstract, or conjectural. *Los Angeles v. Lyons, 461 U.S. 95, 101-02, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983)*. As noted above, DC-PSC claims to be constitutionally "injured" both as consumer and regulator. We disagree.

DC-PSC's argument that it has standing as a consumer, if accepted, would mean that any consumer of telecommunications service in the country would have standing to challenge the consent decree. This is far too broad; it approaches the kind of diffuse and unparticularized "taxpayer" standing that the Supreme Court consistently has rejected. *See* *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 476-82, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982)*.

DC-PSC's claim that **[**91]** it has standing because its regulatory function could be impaired by the removal of the restrictions at issue is equally unpersuasive. It is hard to see exactly how DC-PSC's ability to regulate could be harmed by the district court's judgment. Even though DC-PSC has no power to regulate Bell Atlantic, it does regulate Bell Atlantic's subsidiary, Chesapeake and Potomac Telephone Company ("C & P"). The fact that Bell Atlantic might inappropriately cross-subsidize other businesses by drawing funds from C & P -- and thereby reduce the quality or increase the cost of service to C & P's customers--does not impede DC-PSC's power to require C & P to provide reasonably safe and adequate service at just and reasonable rates to its customers. DC-PSC may claim injury as a regulator only if it can demonstrate that cross-subsidization would prevent it from *regulating* C & P; it has not done so.

Finally, we reject DC-PSC's contentions that it can bring this appeal in a *parens patriae* capacity. *Section 15c of Title 15 of the United States Code* provides that any attorney general of a state may bring a civil action in a *parens patriae* capacity to secure relief from antitrust violations. **[**92]** "State attorney general" is defined as

> the chief legal officer of a State, or any other person authorized by State law to bring actions under *section 15c* of this title, and includes the Corporation Counsel of the District of Columbia. . . .

15 U.S.C. § 15g(1). The BOCs argue that this language means that only the Corporation Counsel is authorized to bring such actions. DC-PSC argues that the grant is not exclusive, because DC-PSC's General Counsel is implicitly authorized to bring *§ 15c* actions by D.C.Code § 43-405, which authorizes the General Counsel "to commence and prosecute all actions and proceedings directed or authorized by the Commission." On balance, we conclude that the general grant of power in § 43-405 is insufficient to authorize *§ 15c* suits by DC-PSC's General Counsel in the **[*311]** absence of some more explicit authorization by Congress or the District of Columbia Council.

V.

With the exception of the district judge's ruling dealing with information services -- which we reverse and remand -- we affirm.

So ordered.

End of Document

Rural Tel. Service Co. v. Feist Publications, Inc.

United States District Court for the District of Kansas

April 5, 1990, Decided ; April 5, 1990, Filed

Case No. 83-4086-R

Reporter

737 F. Supp. 610 *; 1990 U.S. Dist. LEXIS 3795 **; 1990-1 Trade Cas. (CCH) P69,022

RURAL TELEPHONE SERVICE COMPANY, INC., Plaintiff, v. FEIST PUBLICATIONS, INC., Defendant

Subsequent History: [1]** As Corrected May 4, 1990.

Core Terms

listings, directory, pages, advertising, service area, license, telephone company, telephone directory, yellow pages, monopoly power, monopolize, subscribers, telephone, damages, publisher, relevant market, competitors, northwest, market share, monopolist, antitrust, cases, geographic, annual, duplicate, distributed, estimate, parties, percent, calculations

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN1[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN2[] **Monopolies & Monopolization, Actual Monopolization**

To prove monopolization, plaintiff must show: (1) that defendant has possession of monopoly power in the relevant market; and (2) that defendant willfully engaged in conduct designed to acquire, maintain or enhance its monopoly power. To establish a claim of attempted monopolization, plaintiff must show: (1) a specific intent by defendant to monopolize a relevant market; (2) predatory or anticompetitive conduct by defendant; and (3) a dangerous probability of success. In addition, the fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown. An attempted monopolization claim requires evidence of a specific intent to monopolize. Specific intent may be established by direct proof, or it may be inferred from predatory conduct, i.e., conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN3[] **Regulated Practices, Market Definition**

Monopoly power is the power to dominate or control a market. If monopoly power exists, it must be found to exist within an economically meaningful market, or what is called a relevant market. There are two aspects to be considered in defining the relevant market: the relevant product market and the relevant geographic market. The determination of relevant market is essentially a question of fact. The burden of establishing the relevant product and geographic market falls upon plaintiff.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN4[] **Regulated Practices, Market Definition**

The relevant product market consists of those products which are reasonable substitutes from a buyer's point of view.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN5[] **Regulated Practices, Market Definition**

The relevant geographic market is the area in which defendant faces competition from suppliers of competing products that are in the relevant product market, and to which a buyer can practically turn for the product. The commercial realities of the industry are the major factors in determining the relevant geographic market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN6[] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power is the power to control prices and to exclude competition in the relevant market. Monopoly power may be shown through market share, i.e., percentage of the relevant market.. The existence of monopoly power will ordinarily be inferred when a defendant has a predominant share of the market. Market share alone, however, does not establish monopoly power. Other factors should also be considered, including the number and strength of the defendant's competitors, the difficulty or ease of entry into the market by new competitors, and consumer sensitivity to change in prices.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN7[] **Actual Monopolization, Claims**

The existence of monopoly power in the relevant market does not by itself prove the offenses of actual monopolization or attempted monopolization. A monopolist's behavior is not unlawful unless the monopolist has engaged in the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Torts > Transportation Torts > Rail Transportation > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

Ordinarily, a business has no legal obligation to deal with its competitors. There are situations, however, in which the federal courts find a duty under *section 2* of the Sherman Act, *15 U.S.C.S. § 2*, for a monopolist to trade with all on nondiscriminatory terms. One of these instances is where the monopolist controls an "essential facility." The "essential facilities" doctrine imposes on the owner of a facility that cannot be reasonably duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis. There are four elements necessary to establish liability under the doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

A monopolist's facility is essential to rivals only where vital to their competitive viability. The defendant's resource is not vital if an equivalent is available from other sources. The question of equivalence can cover a wide range since everything that is legal and possible is available at some price. A facility is not essential unless the plaintiff shows his inability practically or reasonably to duplicate it. An inquiry into the practicality of duplicating the facility should include economic, regulatory and other concerns. It is insufficient for plaintiff to show that access to the facility is merely more economical than other alternatives.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN10[] **Monopolies & Monopolization, Actual Monopolization**

In addition to the cases finding liability for a refusal to deal when an essential service is involved, there are cases which find liability when a monopolist's refusal to deal with a competitor is shown to be evidence of an illegal intent to destroy competition. These cases focus on the intent and competitive effect of the refusal to deal; not on whether the facility itself is "essential." The theoretical distinction between the intent theory and the essential facilities doctrine is that the former focuses on the monopolist's state of mind while the latter examines the detrimental effect on competitors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN11[] **Monopolies & Monopolization, Actual Monopolization**

Ordinarily, a company may deal or refuse to deal with whomever it pleases, as long as it acts independently. Even a company with monopoly power in a relevant market has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such refusal. It is unlawful, however, for a monopolist to engage in conduct, including refusals to deal, that unnecessarily excludes or handicaps competitors in order to maintain its monopoly into another relevant market. Exclusionary conduct is conduct that does not benefit consumers by making better products or services available, by increasing efficiency, or in other ways, but instead has the effect of impairing competition.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN12[] **Private Actions, Remedies**

Injury is an essential element that a plaintiff must prove to recover under the antitrust laws. Plaintiff must prove antitrust injury reflecting the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. Proving causation does not require plaintiff to prove the value of its injury. It requires only that plaintiff prove that it was in fact injured by defendant's alleged antitrust violation. If plaintiff was in fact injured, then the court must consider the amount of plaintiff's damages.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN13[] **Private Actions, Remedies**

The trier of fact in an antitrust action can determine the amount of damages from a just and reasonable estimate of the damage based on relevant data. The damage award, however, may not be based on speculation or conjecture.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN14[] **Remedies, Damages**

Injunctive relief under § 16 of the Clayton Act, *15 U.S.C.S. § 26*, is granted for the purpose of preventing threatened loss or damage by reason of a violation of the federal antitrust laws. In the framing of equitable decrees, the district courts are clothed with broad discretion to model their judgments to fit the exigencies of the particular case.

Judges: Richard D. Rogers, United States District Judge.

Opinion by: ROGERS

Opinion

[*611] MEMORANDUM AND ORDER

RICHARD D. ROGERS, UNITED STATES DISTRICT JUDGE.

This is an antitrust action brought by way of a counterclaim. Feist Publications, **[*612]** Inc.(FP) contends that Rural Telephone Service Company, Inc.'s (RTSC) refusal to license white page telephone listings to it is an antitrust violation under the "essential facility" theory and/or "intent to monopolize" theory of *section 2* of the Sherman Antitrust Act, *15 U.S.C. § 2*. A trial to the court has been concluded. The court is now prepared to issue findings of fact and conclusions of law.

FINDINGS OF FACT

1. RTSC is a cooperative telephone company providing service to various communities in northwest Kansas. All of the telephone subscribers in the RTSC service area are member owners. RTSC is a nonprofit business with all revenues exceeding the cost of doing business returned to members under a refund plan called capital credits. RTSC is a certified public utility and, as such, is regulated by the Kansas Corporation Commission (KCC) The service area of RTSC consists of the area colored in yellow on the map attached to this memorandum and order as Attachment No. 1. RTSC has approximately 4,700 telephone **[**2]** subscribers.

2. In the course of its business, RTSC compiles, publishes and distributes telephone directories covering the geographical area in which it provides telephone service. The KCC requires all telephone companies operating in Kansas to issue at least annually a dated telephone directory. The telephone directories published by RTSC contain white pages and yellow pages. The white pages list in alphabetical order the names, addresses and telephone numbers of RTSC's telephone subscribers. The yellow pages list RTSC's business subscribers alphabetically under the appropriate business classifications and contain classified advertisements of various sizes purchased by RTSC's business subscribers.

3. On August 1, 1974, RTSC entered into a "Telephone Directory Publishing Contract" with Leland Mast Directory Company to publish its annual telephone directory until December 31, 1985. Pursuant to the contract, RTSC granted Leland Mast Directory Company the exclusive rights to compile, print and sell advertising in RTSC's annual telephone directory during that period of time. On July 29, 1985, RTSC entered into an agreement with the Gronseth Directory Service Corporation to publish its **[**3]** annual telephone directory until October 31, 1990.

4. FP is a Kansas corporation that publishes and distributes telephone directories in Kansas and other states. FP publishes and distributes regional telephone directories. These directories are designed to cover certain trade areas

and to allow telephone subscribers to have access to telephone numbers in nearby communities. FP first produced a directory for southwest Kansas in 1977. FP produced a directory for northwest Kansas in 1978. The northwest directory covered fifteen counties. The directories produced by FP contained the same white pages and yellow pages similar to the RTSC directory. The advertising contained in the directories, especially the advertising contained in the yellow pages, provides the revenue for FP.

5. The inclusion of white pages listings is necessary for the production of a successful independent telephone directory. Independent directories containing only yellow pages have not been successful. In order to obtain the white pages listings for its directory, FP contacted the telephone companies providing service in the areas of its regional directory. FP sought to obtain the white pages listings by paying the **[**4]** telephone companies for the listings. Some of the companies refused to license their white pages listings initially, but ultimately most have agreed to license the listings. All of the telephone companies in northwest Kansas agreed to provide the listings except RTSC. Each agreement also provides that the telephone company will provide FP with updated listings. The cost for the listings ranged from $.01 to $.49 for each listing.

6. Tom Feist of FP contacted Henry Austerman, the manager for RTSC, in 1978 about obtaining the white pages listings. Austerman invited Feist to appear at the next board meeting and make a presentation to the RTSC board of directors. Feist agreed and made a presentation at the **[*613]** April 28, 1978 meeting of the RTSC board of directors. Feist offered to pay $.10 for each of RTSC's listings. The issue was left unresolved at that meeting. The minutes from the meeting reflect the following:

> Representative from area-wide telephone directory was admitted to the meeting at this time, a Mr. Tom Feist from Spearville, Kansas. His main objective was to purchase from us our directory listings so as to establish a wide area directory for western Kansas. After much discussion **[**5]** on this request the board, upon a motion duly made, seconded, and unanimously approved, voted to table the request indefinitely.

7. Feist eventually learned that it was unlikely that FP would receive the listings from RTSC. RTSC refused to provide the white pages listings to FP in order to extend its monopoly in telephone service into yellow pages advertising. The refusal to deal was not motivated by a legitimate business reason, but by an intent to exclude competition in the yellow pages advertising market in the RTSC service area. Feist made no further direct efforts to obtain the listings from the RTSC, but he did make several indirect attempts through other individuals. These efforts were unsuccessful.

8. RTSC later licensed its white pages listings to other telephone companies for inclusion in their directories. RTSC provided its listings from Olmitz, Kansas to H & B Communications, Inc. and the Wilson Telephone Company for its 1986-1987 and 1987-1988 telephone directories. These telephone companies did not sell yellow pages advertising in the RTSC service area. RTSC was paid $.50 per listing for the Olmitz listings.

9. The directory produced by RTSC in 1977-1978 contained only **[**6]** white pages listings for the communities within its service area. In the following year, RTSC expanded its directory to include listings for towns outside its service area. In order to include white pages listings from communities outside its service area, RTSC licensed these listings from the local telephone companies. RTSC paid from $.01 to $.49 for these listings. RTSC also sold yellow pages advertising in areas outside of its service area. RTSC, however, did not distribute its directory outside of its service area. RTSC continued these practices in subsequent years.

10. The 1978 northwest Kansas directory produced by FP did include the RTSC white pages listings. FP obtained a copy of the RTSC directory and used the listings without RTSC's knowledge. FP hired verifiers to confirm as many names and telephone numbers as possible. FP did not include any RTSC subscriber in its directory that was not independently verified. This policy meant that many of the RTSC subscribers would not be included in the FP directory because of the problems of verification. FP continued the practice of using the RTSC directory through 1983 for each of its annual northwest Kansas directories. Feist **[**7]** believed that it was necessary to include the communities in the RTSC service area because such an omission would have created "enormous holes" in the FP northwest directory. Feist thought that a lack of complete coverage would have rendered the FP directory

ineffective. During the period from 1978 to 1983, FP continued to pay for listings from the other telephone companies in the northwest Kansas area.

11. In 1983, RTSC filed the instant action for copyright infringement after finding fictitious listings in FP's directory. RTSC alleged that FP had infringed the copyright on RTSC's 1982-1983 telephone directory. FP responded with the instant counterclaims. FP alleged that its yellow pages advertising had declined because it had incomplete RTSC white pages listings due to RTSC's refusal to enter into a license agreement with FP.

12. On January 5, 1987, the court granted summary judgment to RTSC in its copyright infringement claim. *663 F. Supp. 214*. The court subsequently awarded damages to RTSC in the amount of $ 6,000. The court also awarded attorney's fees to RTSC. These decisions were affirmed by the Tenth Circuit Court of Appeals on March 9, 1990.

[*614] 13. Each telephone company publishes its directory **[**8]** at a different time of the year. RTSC has generally published its directory in October of each year. FP has generally published its northwest directory in January of each year.

14. The white pages listings in a telephone directory change substantially each year. Feist estimated that the listings change 30 to 35 percent every year.

15. Due to RTSC's failure to license its white pages listings, the FP northwest directory over the years was only 70 percent complete in the RTSC service area. The FP northwest directory, however, also had listings that were not in the RTSC directory. This was apparently due to FP's later publication date and to FP's verification process.

16. FP was unable to identify anyone who had refused to purchase yellow pages advertising in its directory because the FP northwest directory did not contain complete listings from the RTSC service area. FP was also unable to identify anyone who had complained that the FP northwest directory was incomplete.

17. The financial success of any telephone directory is dependent upon advertisers and potential advertisers perceiving that the directory is used by the consumers to whom it is distributed. Customer usage depends on **[**9]** the accuracy, completeness and timeliness of the information contained in the directory. However, information in any telephone directory becomes increasingly inaccurate with the passage of time. This is the reason that the directories are published on an annual basis.

18. In 1987, the advertising revenues and respective market shares for the competitors in the RTSC service area were as follows:

Directory	**Advertising revenues (]**	**Market Share (%)**
Rural Telephone	56,010.60	75.8
Feist Publications	14,705.50	19.9
Phillipsburg	954.00	1.3
Wakeeney	735.60	1.0
Russell	414.00	0.6
Sunflower-Brewster Regional	300.60	0.4
Hays	279.00	0.4
Colby	270.00	0.4
Gorham	138.00	0.2
Plainville	45.00	0.1
Total	$ 73,851.80	

[10]** 19. In 1987, the advertising revenues for FP, RTSC and other local telephone companies were as follows:

Service Area	Feist's Revenues	Local Telco's Revenues	Other Dir's. Revenues	Total Adv. Revenues
Rural Tel.	14,705.00	56,010.60	3,136.20	73,851.80
Wakeeney (United Tel)	52,785.00	115,946.10	11,877.00	180,608.10
Phillipsburg (SWB)	11,888.00	22,506.00	10,036.80	44,430.80
Norton (SWB)	35,871.00	50,661.00	15,953.00	102,485.00
Atwood (SWB)	12,712.00	12,414.00	166.80	25,292.80
Colby (SWB)	92,602.00	114,327.00	23,325.60	230,254.60
Goodland (SWB)	41,050.00	67,434.00	14,932.20	123,416.20
Plainville (SWB)	14,487.00	29,889.00	7,071.00	51,447.00
Hays (SWB)	149,545.00	304,617.00	51,294.75	505,456.75
Sunflower-Brewster Reg.	22,222.00	101,492.40	2,563.80	126,278.20
Ness City (Continental)	14,041.00	27,252.60	4,757.20	46,050.80
Elkhart Tel.	18,320.00	42,724.50	846.00	61,890.50
Jetmore Tel.	3,168.00	7,666.60	1,206.00	12,040.60
Ashland (United Assoc.)	55,461.00	85,264.25	4,729.40	145,454.65
LaCrosse (SWB)	3,677.00	8,004.00	3,039.00	14,720.00
Russell (United Tel.)	14,788.00	104,005.20	27,626.20	146,419.40
Ellinwood (United Tel.)	12,771.00	28,380.60	9,742.20	50,893.80
Hoisington (Cont. Tel.)	12,111.00	41,313.60	10,459.20	63,883.80
Little River(Mutual Tel)	3,335.00	2,416.50	510.00	6,261.50
Great Bend (SWB)	142,226.00	346,239.00	45,107.25	533,572.25
Total for 19 Service Areas Where Local Companies License White Page Listings	713,060.00	1,512,553.35	245,243.40	2,470,856.75
Gorham Tel.	349.00	1,984.80	2,988.60	5,322.40
Galva (Home Tel.)	4,419.00	4,092.60	834.60	9,346.20
Wilson & H&B Tel. Cos.	7,433.00	32,793.60	8,121.75	48,348.35
Total for 3 Service Areas Where Local Companies Do Not License	12,201.00	38,871.00	11,944.95	63,016.95
Total for All Areas Except Rural Service Area	725,261.00	1,551,424.35	257,188.35	2,533,873.70

	Feist's Market	Feist's Revenues As % of Local Telco's	Local Telco's Market

Service Area	Share (%)	Revenue	Share
Rural Tel.	19.9	26.3	75.8
Wakeeney (United Tel)	29.2	45.5	64.2
Phillipsburg (SWB)	26.8	52.8	50.7
Norton (SWB)	35.0	70.8	49.4
Atwood (SWB)	50.3	102.4	49.1
Colby (SWB)	40.2	81.0	49.7
Goodland (SWB)	33.3	60.9	54.6
Plainville (SWB)	28.2	48.5	58.1
Hays (SWB)	29.6	49.1	60.3
Sunflower-Brewster Reg.	17.6	21.9	80.4
Ness City (Continental)	30.5	51.5	59.2
Elkhart Tel.	29.6	42.9	69.0
Jetmore Tel.	26.3	41.3	63.7
Ashland (United Assoc.)	38.1	65.0	58.6
LaCrosse (SWB)	25.0	45.9	54.4
Russell (United Tel.)	10.1	14.2	71.0
Ellinwood (United Tel.)	25.1	45.0	55.8
Hoisington (Cont. Tel.)	19.0	29.3	64.7
Little River(Mutual Tel)	53.3	138.0	38.6
Great Bend (SWB)	26.7	41.1	64.9
Total for 19 Service Areas Where Local Companies License White Page Listings	28.9	47.1	61.2
Gorham Tel.	6.6	17.6	373.0
Galva (Home Tel.)	47.3	108.0	43.8
Wilson & H&B Tel. Cos.	15.4	22.7	67.8
Total for 3 Service Areas Where Local Companies Do Not License	19.4	31.4	61.7
Total for All Areas Except Rural Service Area	28.6	46.7	61.2

[11]** **[*615]** 20. For the period from 1977 to 1987, RTSC has had an annual rate increase of 11.9 percent. During the period from 1979 to 1987, FP has had an annual rate increase of 6.2 percent. The average rate of increase for all directories in Kansas from 1977 to 1987 was 8.3 percent. The average rate of increase for telephone companies that refused to license white pages listings, including RTSC, was 14.2 percent. The average rate of increase for all directories in the United States between 1977 and 1987 was 6.6 percent. The average rate in the United States in 1987 for a quarter column advertisement in directories falling into the distribution size category of the RTSC directory (10,000-24,000) was $ 283.64 while the RTSC rate was $ 333.60. The average rate in the United States in 1987 for a quarter column advertisement in directories falling into the distribution size of the FP northwest directory (50,000-99,000) was $ 386.97 while the FP rate was $ 324.00.

CONCLUSIONS OF LAW

Monopolization and Attempted Monopolization

FP alleges that the RTSC has violated *§ 2* of the Sherman Act by attempting to monopolize and monopolizing the yellow pages advertising market by refusing to **[**12]** license the white pages listings. ***HN1***[] *Section 2* of the Sherman Act provides that:

> every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states . . . guilty of a misdemeanor.

15 U.S.C. § 2.

HN2[] To prove monopolization, FP must show: (1) that RTSC has possession of monopoly power in the relevant market; and (2) that RTSC willfully engaged in conduct designed to acquire, maintain or enhance its monopoly power. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. To establish a claim of attempted monopolization, FP must show: (1) a specific intent by RTSC to monopolize a relevant market; (2) predatory or anticompetitive conduct by RTSC; and (3) a dangerous probability of success. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc., 783 F.2d 159, 161 (10th Cir. 1986)*. In addition, the fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown for FP to prevail on its claims. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1519 n. 12 (10th Cir. 1984)*, *aff'd on other grounds*, *472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. An attempted monopolization claim **[**13]** requires evidence of a specific intent to monopolize. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1984)*. The mere intention to exclude competition and to expand one's own business is not sufficient to prove a specific intent to monopolize. *See Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790, 795 (10th Cir. 1977)*, *cert. denied*, *434 U.S. 879, 54 L. Ed. 2d 160, 98 S. Ct. 234 (1977)*. Specific intent may be established by direct proof, or it may be inferred from predatory conduct, i.e., conduct that is in itself an independent violation of the antitrust laws or that has no legitimate business justification other than to destroy or damage competition. *Great Escape, Inc. v. Union City Body* ***[*616]*** *Co., Inc., 791 F.2d 532, 541 (7th Cir. 1986)*. Evidence of intent in a monopolization claim is merely relevant to the question whether the challenged conduct is fairly characterized as exclusionary or anticompetitive. *Aspen Skiing Co., 472 U.S. at 602*.

Relevant Market

HN3[] Monopoly power is the power to dominate or control a market. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. If monopoly power exists, it must be found to exist within **[**14]** an economically meaningful market, or what is called a relevant market. There are two aspects to be considered in defining the relevant market: the relevant product market and the relevant geographic market. *Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1392 (9th Cir. 1984)*, *cert. denied*, *469 U.S. 990, 83 L. Ed. 2d 331, 105 S. Ct. 397 (1984)*. The determination of relevant market is essentially a question of fact. *Aspen Highlands Skiing Corp., 738 F.2d at 1514 n. 4*. The burden of establishing the relevant product and geographic market falls upon FP. *See Gough v. Rossmoor Corp., 585 F.2d 381, 389 (9th Cir. 1978)*.

Product Market

HN4[] The relevant product market consists of those products which are reasonable substitutes from a buyer's point of view. *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. In this case, FP claims that the relevant product market is yellow pages advertising. RTSC does not disagree on this contention. The evidence further supports this stipulation since yellow pages advertising is a unique form of advertising which has no substitute.

Geographic Market

HN5[] The relevant geographic market is the area in which RTSC faces competition **[**15]** from suppliers of competing products that are in the relevant product market, and to which a buyer can practically turn for the product. *See* *Otter Tail Power Co. v. United States, 410 U.S. 366, 369 n. 1, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*; *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-28, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*. The commercial realities of the industry are the major factors in determining the relevant geographic market. *Ralph C. Wilson Industries v. Chronicle Broadcasting Co., 794 F.2d 1359, 1383 (9th Cir. 1986)*. FP contends that the relevant geographic market in this case is the RTSC service area, and their evidence is designed to show monopoly power in that particular area. This area is identified as the yellow area on Attachment No. 1. RTSC contends that the relevant geographic market in this case extends beyond the expanse of its service area and includes, *inter alia*, the trade centers of Colby, Hays and Phillipsburg, and that there was no evidence that RTSC exercised monopoly powers in this broadened geographic market. This area consists of the yellow, light blue, red, purple, green, blue, dark brown and brown (only that area between the light blue and yellow) on Attachment No. 1.

The court **[**16]** finds that the evidence establishes that the RTSC service area is the relevant geographic area in this case. This is the area where RTSC and FP effectively compete. It is in this area that the consumer has two choices for purchasing yellow pages advertising that reaches the local community and the regional communities. The area suggested by RTSC is not the area of effective competition. It is true that RTSC and FP do compete in those areas. The RTSC directory, however, is not a legitimate substitute for the FP directory in areas outside the RTSC service area because the RTSC directory is not distributed in those areas. Thus, an advertiser in the areas outside the RTSC service area does not view the RTSC directory and FP directory as substitutes for each other because the RTSC directory is not useful in that advertiser's local community. This advertiser has three choices: the FP directory, the RTSC directory, and his local telephone company directory, which may or may not be a regional directory. For purposes of advertising his business locally and to other areas, the advertiser is restricted **[*617]** to advertising in the FP directory and his local telephone company directory, if it is also **[**17]** a regional directory. The RTSC directory is not a valid substitute for either of these directories because the advertising will not be seen by the local community since the directory is not distributed there. Accordingly, the only area of effective competition here is the RTSC service area. This is the area where advertisers have choices of two similar products.

Monopoly Power

Having identified and defined the relevant market, we turn to the question of whether RTSC has monopoly power in that market. **HN6**[] Monopoly power is the power to control prices *and* to exclude competition in the relevant market. *Shoppin' Bag, Inc., 783 F.2d at 164*. Monopoly power may be shown through market share, i.e., percentage of the relevant market. *Id. at 161*. The existence of monopoly power will ordinarily be inferred when a defendant has a predominant share of the market. *United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. Market share alone, however, does not establish monopoly power. *Bright v. Moss Ambulance Service, Inc., 824 F.2d 819, 824 (10th Cir. 1987)*. Other factors should also be considered, including the number and strength of the defendant's competitors, the difficulty **[**18]** or ease of entry into the market by new competitors, and consumer sensitivity to change in prices. *Shoppin' Bag, Inc., 783 F.2d at 162*.

The court finds sufficient evidence of monopoly power here. RTSC had a market share of 75.8% in 1987. A strong inference of monopoly power is raised by this fact alone. Moreover, other factors suggest that RTSC has monopoly power. The evidence before the court shows that RTSC has been able to raise prices over the years without suffering any loss in market share. From 1977 to 1987, RTSC had a higher average annual rate of increase than other telephone companies in Kansas; yet, in 1987, RTSC maintained a higher market share than the average market share of the other telephone companies in Kansas. In addition, RTSC has been able to charge a higher advertising rate than other telephone directories of its size on a national basis. Finally, we note that entry into the relevant market would be difficult for any competitor to RTSC because of time and money factors. In sum, RTSC had monopoly power in the relevant market.

Willful Maintenance of Monopoly Power: Refusal to Deal

HN7[] The existence of monopoly power in the relevant market, however, does not **[**19]** by itself prove the offenses of actual monopolization or attempted monopolization. A monopolist's behavior is not unlawful unless the monopolist has engaged in the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell, 384 U.S. at 570-71*. FP contends that RTSC's refusal to license the white pages listings amounts to an illegal refusal to deal in violation of *§ 2* of the Sherman Act. There are two distinct lines of cases which have imposed a duty to deal upon a monopolist -- the "essential facilities" doctrine, or "bottleneck" theory, and the "intent" test. *Aspen Highlands Skiing Corp., 738 F.2d at 1519*. In *Aspen Highlands Skiing Corp*., the Tenth Circuit made the following comments about these two theories:

> We recognize that the cases do not fit neatly into these two categories. There is a significant amount of overlap between them. Nevertheless the dichotomy, though in part illusory, is a useful analytical tool. (Footnotes omitted.)

Id. at 1519-20.

Essential Facilities (or bottleneck)

FP has alleged as part of its monopolization claim **[**20]** that RTSC refused to deal with FP and thereby denied FP access to a facility essential to competition in the marketplace. FP alleges that RTSC denied it access to the white pages listings without a valid business reason.

HN8[] Ordinarily, a business has no legal obligation to deal with its competitors. *Aspen Skiing Co., 472 U.S. at 600*. There are situations, however, in **[*618]** which the federal courts have found a duty under *§ 2* of the Sherman Act for a monopolist to trade with all on nondiscriminatory terms. One of these instances is where the monopolist controls an "essential facility." The "essential facilities" doctrine imposes on the owner of a facility that cannot be reasonably duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis. *McKenzie v. Mercy Hospital of Independence, Kansas, 854 F.2d 365 (10th Cir. 1988)*. The doctrine was established in § 1 cases. *See* *United States v. Terminal Railroad Association, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912)* (consortium of railroads owning a terminal facility that was only feasible facility when coming to city from east must make facility available to other railroads); **[**21]** *Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945)* (Associated Press enjoined from continuing its practice of refusing to furnish its service to its members' competitors). In *Otter Tail*, the Supreme Court employed the essential facilities doctrine, although not referring to it by name, to conclude in a *§ 2* case that a regulated electric utility had used its monopoly power unlawfully to eliminate competition in the retail sale of electric power. In recent times, the federal courts of appeals, including the Tenth Circuit, have adopted standards to determine whether a monopolist's refusal to deal constitutes a violation of the essential facility doctrine under *§ 2*. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 738 F.2d 1509 (10th Cir. 1984)*, *aff'd on other grounds*, *472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*, the Tenth Circuit, relying on *MCI Communications Corp. v. American Telephone and Telegraph Co., 708 F.2d 1081 (7th Cir. 1983)*, *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*, determined that four elements were necessary to establish liability under the doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial **[**22]** of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *738 F.2d at 1520*.

Three of the elements of the doctrine are not in dispute here. There is no question that RTSC has control over the white pages listings; that RTSC denied FP use of the listings; and that RTSC could easily provide the listings to FP. The only issue in dispute is the essentiality of the white pages listings, i.e., FP's ability to duplicate them.

HN9[] A monopolist's facility is essential to rivals only where vital to their competitive viability. Areeda & Hovenkamp, *1989 Supplement to* ***Antitrust Law*** 723 (1989). The defendant's resource is not vital if an equivalent is available from other sources. *See* *McKenzie v. Mercy Hospital of Independence, Kansas, supra* (hospital emergency room and obstetrical care unit not essential facility for plaintiff who performed same services in his own private office); *Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976 (9th Cir. 1988)* (minidome was not essential facility because plaintiff failed to offer sufficient evidence that monopolist's competitor could not construct another equally adequate facility in the area); *Flip* **[**23]** *Side Productions v. Jam Productions, 843 F.2d 1024 (7th Cir. 1988)*, *cert. denied*, *488 U.S. 909, 109 S. Ct. 261, 102 L. Ed. 2d 249 (1988)* rock concert arena not essential facility where several alternatives available); *Florida Fuels, Inc. v. Belcher Oil Co., 717 F. Supp. 1528 (S.D.Fla. 1989)* (competitor's fuel storage tanks at port were not essential facility which could not be duplicated for providing bunkers to cruise ships where plaintiff fuel oil company made no showing why other sites were unsuitable); *Driscoll v. City of New York, 650 F. Supp. 1522 (S.D.N.Y. 1987)* (municipal pier was not essential facility where there were privately owned alternatives); *Robinson v. Magovern, 521 F. Supp. 842 (W.D.Pa. 1981)*, *aff'd*, *688 F.2d 824 (3d Cir. 1982)* (hospital was not an essential facility for physician with staff privileges at other hospitals in area). The question of equivalence can cover a wide range since everything that is legal and possible is available at some price. A facility **[*619]** is not essential unless the plaintiff shows his "inability practically or reasonably to duplicate" it. *MCI Communications, 708 F.2d at 1132*. "An inquiry into the practicality of duplicating the facility should include **[**24]** economic, regulatory and other concerns." *Florida Fuels, 717 F. Supp. at 1533*. It is insufficient for plaintiff to show that access to the facility is merely "more economical" than other alternatives. *Florida Cities v. Florida Power & Light, 525 F. Supp. 1000, 1007 (S.D.Fla. 1981)*.

Circumstances similar to those in this case have arisen in other cases. In *Bellsouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc., 719 F. Supp. 1151 (S.D.Fla. 1988)*, plaintiff, an independent telephone directory publisher, filed an antitrust action against the telephone company alleging that the telephone company had maintained monopoly power by not providing it with information such as business classifications and updates. The court held that the plaintiff could apply the essential facility doctrine to this information to prove intent to monopolize. 719 F.2d at 1566. The court, however, determined that factual disputes were present as to the essentiality of the information and the availability of the information from alternative sources. *Id*.

In *Directory Sales Management Corp. v. Ohio Bell Telephone Co., 833 F.2d 606 (6th Cir. 1987)*, the Sixth Circuit held, **[**25]** based on uncontroverted evidence, that the service of providing business classifications was not an essential facility because such information was unreliable and thus had to be duplicated in any event by a competitor. *Id. at 613*. The Sixth Circuit further held that the telephone company did not control essential facilities in the form of simultaneous delivery of its white pages and the yellow pages published by a sister subsidiary and the billing of yellow pages listings and advertisements in telephone bills. *Id*. The evidence had shown that the competing producers of yellow pages could provide simultaneous delivery and that the telephone company charged its sister subsidiary a fee far in excess of its costs for the dual billing. *Id*.

In *White Directory of Rochester, Inc. v. Rochester Telephone Corp., 714 F. Supp. 65 (W.D.N.Y. 1989)*, the court held, based on the evidence presented, that the telephone company need not share its white pages listings with a rival independent telephone directory publisher. *Id. at 70*. Judge Michael A. Telesca determined that the listing information was not an essential facility. *Id*.

FP has taken the position that the duplication of **[**26]** the white pages listings would be difficult and economically impractical. RTSC has contended that the information contained in the white pages listings could be reproduced either through a house-to-house survey or through a telephone survey using digit sheets. RTSC has also pointed out that the courts in the copyright field have recognized that this information could be obtained through independent means.

The evidence concerning the essentiality of the white pages listings was not extensive. Tom Feist, the owner of FP, testified that it would not be economically feasible to reproduce the white pages listings through other means. He stated that he had no idea what it would cost to produce the white pages listings by a house-to-house survey. He further indicated that a telephone survey using digit sheets would be possible, but not practical. Fred Smykla, the executive director of the National Yellow Pages Service Association, testified that the white pages listings could not be economically generated from scratch. Dave Grandell, who has been involved in the business of producing independent telephone directories for over ten years, testified that he had attempted to compile white pages **[**27]** listings from scratch using digit sheets from 1978 through 1982 or 1983. He noted that he had problems finding someone to make the phone calls and getting it completed in a timely manner. He concluded that it was not economically feasible to obtain the white pages listings without access to the telephone company's listings. This constituted the sum of the evidence on the subject of the essentiality of the white pages listings.

[*620] The cases noted by RTSC from copyright law are helpful in considering this issue. In considering whether independent telephone directory publishers could use a copyrighted telephone directory produced by the telephone company, courts have indicated that the independent publisher can make fair use of the telephone company's directory if he first makes an honest, independent canvass and then merely compares and checks his own directory with that of the copyrighted publication and publishes the result after verifying the additional items derived from the copyrighted publication. *United Telephone Co. of Missouri v. Johnson Publishing Co., 671 F. Supp.1514, 1522 (W.D.Mo. 1987)*, aff'd, *855 F.2d 604 (8th Cir. 1988)*; *Central Telephone Co. of Virginia v. Johnson* ***[**28]*** *Publishing Co., 526 F. Supp.838, 843 (D.Colo. 1981)*; *Northwestern Bell Telephone Co. v. Bedco of Minnesota, Inc., 501 F. Supp. 299, 302 (D.Minn. 1980)*; *Southwestern Bell Telephone Co. v. Nationwide Independent Directory Service, Inc., 371 F. Supp. 900, 906 (W.D.Ark. 1974)*. These courts have all recognized that the independent telephone directory publisher can obtain the information contained in the white pages listings through independent research.

The court is not convinced, based on the present record, that the white pages listings are an "essential facility." The information contained in the white pages listings can be independently obtained from other sources. FP was unable to point to any regulatory restrictions in obtaining the information. In addition, FP did not persuade the court that acquiring this information was either impossible or economically impractical. The evidence did demonstrate that it would require some effort and some cost. However, the evidence fell far short of that adduced in other essential facility cases. *See, e.g., Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1984)*; *Hecht v. Pro-Football Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992 (D.C.Cir. 1977)*, **[**29]** *cert. denied*, *436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978)*. The evidence did show that one other independent telephone directory publisher had made use of digit sheets when the local telephone company refused access to the white pages listings. We further note that the copyright laws do not totally preclude the independent telephone directory publisher from using the local telephone company directory. The copyright laws require only that the independent publisher make an honest, good faith effort at obtaining the information contained in the telephone company directory prior to using that directory. This requirement, as the court views it, does not mean that the independent publisher must contact every telephone subscriber prior to using the telephone company directory. The independent publisher need only make an honest effort. The court cannot establish in this opinion what constitutes such an effort, but we can say that the requirement is not nearly as constrictive as FP would suggest. Once the independent publisher has made an honest effort at procuring this information, then he can use the telephone company directory. With the use of the telephone company directory, the independent publisher has access **[**30]** to the desired facility. Accordingly, we do not find that FP has sustained its burden of proof on this theory of its refusal of deal claim.

Intent

A second and independent basis for imposing *§ 2* antitrust liability upon RTSC for its refusal to deal would be a determination that RTSC's actions constituted sufficient evidence of an intent to monopolize. "In ***HN10***[] addition to the cases finding liability for a refusal to deal when an essential service is involved, there are cases which find liability when a monopolist's refusal to deal with a competitor is shown to be evidence of an illegal intent to destroy competition. These cases focus on the intent and competitive effect of the refusal to deal; not on whether the facility itself is 'essential.'" *MCI Communications Corp., 708 F.2d at 1148* (citations omitted). The theoretical distinction between the intent theory and the essential facilities doctrine is that the former focuses on the monopolist's state of mind while the latter examines the detrimental effect on competitors. *Byars v. Bluff City News Co., 609 F.2d 843, 856* ***[*621]*** *(6th Cir. 1979)*. However, as recognized by the Tenth Circuit in *Aspen Highlands Skiing Corp*., there are **[**31]** many overlapping considerations in practice.

HN11[] Once again, ordinarily, a company may deal or refuse to deal with whomever it pleases, as long as it acts independently. Aspen Skiing Co., 472 U.S. at 600. Even a company with monopoly power in a relevant market has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such refusal. Id. at 604. It is unlawful, however, for a monopolist to engage in conduct, including refusals to deal, that unnecessarily excludes or handicaps competitors in order to maintain its monopoly into another relevant market. Exclusionary conduct is conduct that does not benefit consumers by making better products or services available, by increasing efficiency, or in other ways, but instead has the effect of impairing competition. Id. at 605.

Having carefully reviewed the sum of the evidence, we find an intent by RTSC to exclude FP in order to extend its monopoly into another relevant market. In reaching this conclusion, the court has carefully weighed the evidence presented to the court. We believe that the intent of RTSC was honestly reflected during discovery in this case. FP propounded **[**32]** an interrogatory to RTSC asking for the reason for RTSC's refusal to license the white pages listings to FP. RTSC responded as follows: "Compilation of white page listings is an ongoing year 'round effort of [RTSC] to be provided to its subscribers. Costs are recovered from the subscribers and revenues derived from Yellow Page ads. Any profits realized from the directory are used to keep rates down. Furnishing these listings to anyone would be defeating one of the purposes of the co-op." In addition, the following occurred during a deposition of Merlin Dennis, a member of the board of directors of RTSC, after the interrogatory had been answered:

Q: You don't recall why you refused to license listings to [FP]?

A: No, not absolutely. I know it was the motion of the board to do that and I don't recall any particular discussion, no.

Q: Do you still refuse to license listings to [FP]?

A: Speaking for the board, that's their feeling. You are asking me as a spokesman for the board. Is that correct?

Q: Either that or as president of the corporation.

A: At this point we have not changed our decision.

* * * *

Q: You have answered the interrogatory, the corporation has, stating the reason **[**33]** you refused to license listings to [FP] is because it would defeat your purpose. You state that your costs of compilation are recovered from subscribers and revenues derived from Yellow Page ads. What I am asking is what's the recovery of cost from the Yellow Page ads have to do with your purpose?

A: Any income that comes to the organization will affect the rates that the subscribers pay.

Q: What does that have to do with licensing the listings to [FP]?

A: Anything that will affect the operation of our Yellow Pages.

* * * *

Q: Okay, that's the total extent of your answer, is that it is a business decision. No matter how much I ask you, you are never going to say anything about reasons, is that right?

A: Never is a long time.

Q: Would you like to have [FP] out of the area?

A: I am not going to answer that.

Q: Why don't you answer that?

A: I think the reason, the answer is obvious why I do not answer.

The aforementioned responses suggest quite clearly that RTSC did not want any competition in the yellow pages advertising market. Although the testimony at trial differed from the record established during discovery, we were not persuaded by it. **[*622]** Merlin Dennis testified at trial, and his **[**34]** memory was much clearer. He testified that he had refreshed his recollection and he now clearly remembered that RTSC had refused to license the white pages listings to FP because the RTSC board believed that its subscribers were suspicious of a new independent telephone directory and was concerned that the licensing of the white pages listing might violate the contract that RTSC had with its directory publisher. The court did not find Mr. Dennis' trial testimony credible in light of the evidence adduced during discovery. The discovery materials strongly suggest that RTSC's intent was to destroy competition. The conduct of RTSC impaired the opportunities of FP and did not further competition on the merits. RTSC's refusal to deal was exclusionary conduct, not competitive conduct. The suggestion that the RTSC board was unwilling to license the white pages listings because subscribers were leery of an independent telephone directory was unsupported. In addition, the contention that the licensing of the white page listings to FP might have violated the contract with RTSC's directory publisher also lacks credence. A quick review of the contract would have settled this concern. The overriding **[**35]** interest of the RTSC board was the damage that the FP directory would do to RTSC.

This finding is further supported by the evidence indicating that RTSC was willing to license its white pages listings to noncompetitors. RTSC had no problem in licensing its listings to telephone companies that did not sell advertising in the RTSC service area. This sort of discriminatory refusal to deal is unlawful. *See Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951)*

Accordingly, although RTSC generally may be free to deal with whomever it pleases, we find based on a review of the evidence that its real purpose was to extend its monopoly in telephone service to a monopoly in yellow pages advertising unlawfully, and conclude that its behavior constitutes an illegal refusal to deal under *§ 2* of the Sherman Act.

Injury

The court shall next **[**36]** turn to the issue of injury and damages. RTSC argues that, even assuming it abused its monopoly power, FP cannot recover because it has failed to establish that RTSC's unlawful conduct caused FP injury and damages to its business.

HN12[] Injury is an essential element that a plaintiff must prove to recover under the antitrust laws. *Aspen Highlands Skiing Corp., 738 F.2d at 1523*. FP must prove antitrust injury "reflecting the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Proving causation does not require plaintiff to prove the value of its injury. It requires only that plaintiff prove that it was in fact injured by defendant's alleged antitrust violation. If plaintiff was in fact injured, then we must consider the amount of plaintiff's damages. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*; *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*.

The court is satisfied that FP offered evidence which established as a matter of fact and with a fair degree of certainty that RTSC's illegal conduct **[**37]** was a material cause of FP's injury. FP demonstrated that RTSC's refusal to license the white pages listings had an impact on its market share and its advertising rate. The evidence revealed that FP's directory was incomplete and inaccurate because of RTSC's refusal to license its white pages listings. The evidence further revealed that FP's market share in areas where the local telephone company licensed its white pages listings was significantly higher than its market share in the RTSC service area. In sum, the requirement of proof of injury as an element of plaintiff's case was met.

Damages

The standards involved in proving damages in antitrust cases were set forth **[*623]** in *Aspen Highlands Skiing Corp*. as follows:

> The Supreme Court has recognized that an antitrust plaintiff is rarely able to prove its damages with mathematical precision. *See e.g., J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 101 S. Ct. 1923, 1929, 68 L. Ed. 2d 442 (1981)* ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation."); *Zenith Corp. v. Hazeltine, 395 U.S. 100, 123,* ***[**38]*** *89 S. Ct. 1562, 1576, 23 L. Ed. 2d 129 (1969)* ("damages issue in [cases where plaintiff was partially or totally excluded from a market] are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts"); *see also King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1158 (10th Cir. 1981)*, *cert. denied*, *454 U.S. 1164, 102 S. Ct. 1038, 71 L. Ed. 2d 320 (1982)*; *Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242, 246 (10th Cir. 1976)*, *cert. denied*, *429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572 (1977)*. The Court has emphasized that ***HN13***[] the trier of fact can determine the amount of damages from "a just and reasonable estimate of the damage based on relevant data." *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 66 S. Ct. 574, 580, 90 L. Ed. 652 (1946)*. The damage award, however, may not be based on "speculation or conjecture." *Id*.

738 F.2d at 1525-26.

FP presented the testimony of Charles P. Goldfarb, an economist with an extensive background in antitrust matters. Mr. Goldfarb determined that the range of damages suffered by FP over the ten-year period between 1978 to 1988 was $ 33,000 to $ 58,000. Mr. Goldfarb **[**39]** arrived at this figure using several assumptions and several calculations. Mr. Goldfarb's calculations were performed only for the year 1987. He first assumed that FP would have gained as much of the market in the RTSC service area as it had in other areas where it had been able to license the white pages listings. This meant that FP's market share would have increased 9%. This 9% increase would have boosted earnings by $ 6,600. Mr. Goldfarb called this calculation a "conservative estimate." This was deemed a conservative estimate because Mr. Goldfarb assumed that the total sales in the RTSC service area would not have increased even if FP had been able to license the white pages listings. Mr. Goldfarb noted that advertisers in the RTSC service area might have purchased more advertising if they believed that the FP was producing a better product. He noted further that it assumes that FP was not harmed outside the RTSC service area as a result of the incomplete listings in the RTSC service area. He believed that the incomplete listings in the RTSC service area might have had an impact on FP's ability to sell outside the RTSC service area. He also performed a less conservative estimate **[**40]** which showed a gain of revenues of $ 11,600. This calculation reflected an increase in FP's percentage of RTSC's revenues to the percentage that FP had achieved in comparison to other local telephone companies. Mr. Goldfarb then divided these figures in half and multiplied them by five. He divided them in half and only multiplied them by five rather than ten in order to be "very conservative" in his damages estimate. He did not figure the cost of licensing the white pages listings because he noted that the cost of verification is the same or higher than the cost of the listings.

The court has carefully considered all of the testimony offered at trial as it related to the issue of damages. Having carefully reviewed that testimony, the court concludes that FP suffered damages in the amount of $ 33,000. We believe that this amount is a conservative one, but an appropriate one. The court found no merit to RTSC's efforts to attack Mr. Goldfarb's testimony as insufficient, incomplete or inaccurate. In reaching this conclusion, we note that once a plaintiff has proved the fact of injury, it is allowed considerable latitude in proving the amount of damages resulting from that injury. No mechanical **[**41]** test or formula requires that damage proof **[*624]** conform to a particular theory or model. An antitrust plaintiff has a lesser burden of proof as to damages than do plaintiffs in other types of civil actions. *See Zenith Radio Corp., 395 U.S. at 123*. RTSC sought to point out that Mr. Goldfarb used only the figures from 1987 in arriving at his damages figure. RTSC contended that FP should have produced figures for each of the ten years for which it sought damages. The court was convinced that the year 1987 was a representative year and could be used to estimate the total amount of FP's damages. Mr. Goldfarb's subsequent calculations suggested that a very conservative methodology. Thus, we are unable to conclude that his final figures were based on speculation or conjecture. We note that RTSC could have made the necessary calculations if it believed that the numbers used by Mr. Goldfarb were inaccurate or not representative. RTSC also pointed out that it was a co-op company and that the market shares it obtained may have been due to loyalty by its telephone subscribers and/or the economic interests of its telephone subscribers. Mr. Goldfarb discounted this contention, and we agree with his **[**42]** analysis. In sum, we are convinced that the figure of $ 33,000 is the proper amount of FP's damages. This amount shall be trebled for a total award of $ 99,000.

Injunctive Relief

The court shall also grant the injunctive relief sought by FP. ***HN14***[] Injunctive relief under § 16 of the Clayton Act, *15 U.S.C. § 26*, is granted for the purpose of preventing threatened loss or damage by reason of a violation of the federal antitrust laws. *Helfenbein v. International Industries Inc., 438 F.2d 1068, 1071 (8th Cir. 1971)*, *cert. denied*, *404 U.S. 872, 92 S. Ct. 63, 30 L. Ed. 2d 115 (1971)*. In the framing of equitable decrees, the district courts are clothed with broad discretion to model their judgments to fit the exigencies of the particular case. *See Allis-Chalmers Manufacturing Co. v. White Consolidated Industries Inc., 414 F.2d 506, 525 n. 32 (3d Cir. 1969)*, *cert. denied*, *396 U.S. 1009, 90 S. Ct. 567, 24 L. Ed. 2d 501 (1970)*. The court shall enjoin RTSC from refusing to license its white pages listings at a reasonable rate. The court shall provide the parties the opportunity to reach an agreement on this rate. This agreement should be reached within thirty days of the date of this order. This matter shall be resubmitted to the court if **[**43]** the parties fail to reach an agreement.

Attorney's Fees

Finally, the court shall also award attorney's fees to FP. *15 U.S.C. §§ 15* and *26*. The parties should make some effort to resolve this aspect of the case pursuant to the guidelines established in Local Rule 220. The issue of the amount of attorney's fees should be submitted to the court if no agreement is reached by the parties.

IT IS THEREFORE ORDERED that judgment hereby be entered in favor of Feist Publications, Inc. in the amount of $ 99,000.00.

IT IS FURTHER ORDERED that Rural Telephone Service Company, Inc. be hereby enjoined from refusing to license the white pages listings to Feist Publications, Inc. at a reasonable rate. The parties shall attempt to resolve the amount of this rate within thirty days of the date of this order. If no agreement is reached, the court shall determine the appropriate rate.

IT IS FURTHER ORDERED that Feist Publications, Inc. be hereby awarded its attorney's fees in litigating this action. The parties should make some effort to resolve this issue in accordance with Local Rule 220. The issue should be submitted to the court if no agreement is reached by the parties.

IT IS SO ORDERED.

[44]** **[*625]** [SEE EXHIBIT K-1 IN ORIGINAL]

Dated this 5th day of April, 1990 at Topeka, Kansas.

Twin Laboratories, Inc. v. Weider Health & Fitness

United States Court of Appeals for the Second Circuit

March 7, 1990, Argued ; April 9, 1990, Decided

Docket No. 89-7972

Reporter

900 F.2d 566 *; 1990 U.S. App. LEXIS 5466 **; 1990-1 Trade Cas. (CCH) P68,991; 1990 WL 42302

TWIN LABORATORIES, INC., Appellant, v. WEIDER HEALTH & FITNESS, a corporation, I, BRUTE ENTERPRISES, INC., Appellees

Prior History: [1]** Appeal from a summary judgment denying appellant's antitrust and pendent state claims entered on August 30, 1989, in the Southern District of New York, Michael B. Mukasey, District Judge.

Disposition: Affirmed.

Core Terms

facilities, magazines, monopolization, advertising, prima facie tort, nutritional, supplements, competitor, antitrust, Muscular, summary judgment motion, summary judgment, bodybuilding, counts

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Summary Judgment, Opposing Materials**

On an appeal from a summary judgment, a court reviews the record de novo to determine whether there are genuine issues of material fact. *Fed. R. Civ. P. 56(c)*. The court assesses the record in the light most favorable to the non-movant and draw all reasonable inferences in its favor. A non-movant who bears the ultimate burden of proof, however, must demonstrate in opposing a summary judgment motion that there is some evidence which would create a genuine issue of material fact. Conclusory allegations will not suffice to create such a genuine issue. There must be more than a scintilla of evidence, and more than some metaphysical doubt as to the material facts.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Burdens of Proof > General Overview

HN2[] **Monopolies & Monopolization, Actual Monopolization**

To establish that a defendant denied an essential facility, a plaintiff must demonstrate that duplication of the facility would be economically infeasible and that denial of its use inflicts a severe handicap on potential or current market entrants. The four-part test for finding essential facilities liability is (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Burdens of Proof > General Overview

HN3[] **Monopolies & Monopolization, Actual Monopolization**

A successful "essential facilities" plaintiff must prove that denial of access has caused it "severe handicap." As the word "essential" indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Evidence > Burdens of Proof > General Overview

HN4[] **Monopolies & Monopolization, Attempts to Monopolize**

To succeed on a claim of attempted monopolization, a plaintiff is required to demonstrate that defendant (1) intended to monopolize the pertinent market; (2) engaged in conduct designed to carry out that intent; and (3) had a "dangerous probability" of success.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN5[] **Monopolies & Monopolization, Attempts to Monopolize**

A threshold showing for a successful attempted monopolization claim is sufficient market share by the defendant.

Civil Procedure > Remedies > Damages > Special Damages

Torts > Intentional Torts > Prima Facie Tort > Elements

Torts > Intentional Torts > Prima Facie Tort > General Overview

HN6[] **Damages, Special Damages**

The elements for prima facie tort under New York law are (1) intentional infliction of harm; (2) resulting in special damages; (3) without excuse or justification; (4) by an act that would otherwise be lawful. The touchstone is "disinterested malevolence," meaning that the plaintiff cannot recover unless the defendant's conduct was not only harmful, but done with the sole intent to harm. Motives other than disinterested malevolence, such as profit, self-interest, or business advantage will not suffice under the doctrine of prima facie tort.

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Alan R. Malasky, Washington, District of Columbia (Salvatore A. Romano, Joyce L. Bartoo, Lewis Rose, Jennifer A. Albert, and Arent, Fox, Kintner, Plotkin & Kahn, Washington, District of Columbia; Anthony L. Tersigni, and Meyers, Tersigni, Lurie, Feldman & Gray, New York, New York, on the brief), for Appellees Weider Health & Fitness and I, Brute Enterprises, Inc.

Judges: Timbers, Meskill, and Altimari, Circuit Judge.

Opinion by: TIMBERS

Opinion

[*567] TIMBERS, Circuit Judge:

Appellant Twin Laboratories, Inc. ("Twinlab") appeals from a summary judgment entered August 30, 1989 in the Southern District of New York, Michael B. Mukasey, District Judge, in favor of appellees Weider Health & Fitness ("Weider") and I., Brute Enterprises, Inc. ("Brute").

The final judgment entered August 30, 1989 was **[**2]** based on two prior orders. The first, dated July 21, 1989, granted appellees' motion for summary judgment on all of Twinlab's antitrust claims. The second, dated August 25, 1989, *720 F. Supp. 31 (S.D.N.Y. 1989)*, denied Twinlab's motion for reconsideration of the "essential facilities" antitrust count and granted appellees' motion for summary judgment on Twinlab's pendent claim of prima facie tort under New York law.

On appeal, Twinlab presses claims of error on two antitrust counts -- essential facilities and attempted monopolization -- and on the prima facie tort count. It asserts that the court misconstrued the applicable law and, in violation of its duty at the summary judgment stage, failed to draw proper factual inferences in its favor.

For the reasons which follow, we affirm the judgment of the district court.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal. Since we are reviewing a summary judgment in favor of appellees, we view the evidence in the light most favorable to Twinlab.

Twinlab and Weider produce competing nutritional supplements for bodybuilders. According to the **[**3]** testimony of Twinlab's expert witness, Dr. Thomas Overstreet, Weider's supplements comprised 10-25% of the market, depending on the market definition, and Twinlab's share of the same market was 5-12%.

Weider, through its wholly-owned subsidiary, Brute, publishes what are universally acknowledged to be the two leading magazines in the bodybuilding field: *Muscle & Fitness* and *Flex*. Twinlab owns *Muscular Development*, a competing magazine, but Twinlab's magazine has a far smaller circulation -- less than 10% of the combined circulation of Weider's magazines. For several years, Twinlab used *Muscle & Fitness* and *Flex* as the primary advertising vehicles for its nutritional supplements. In late 1988, however, Weider gave Twinlab notice that it would accept no more advertising for Twinlab's products. From the January 1989 issues through the present, no Twinlab advertising has appeared in either magazine.

Based on Weider's refusal to accept its ads, Twinlab commenced the instant action **[*568]** in February 1989 by filing a five-count complaint. Three counts were based on *§ 2* of the Sherman Act, *15 U.S.C. § 2 (1988)*. They were: (1) monopolization; **[**4]** (2) denial of essential facilities; and (3) attempted monopolization. The complaint also alleged two counts of actionable conduct under New York State law -- intentional interference with business relations and prospective economic advantage; and prima facie tort. By its opinion and order dated July 21, 1989, the court granted Weider's motion for summary judgment on all counts except the prima facie tort count. Weider renewed its summary judgment motion on the latter count, and Twinlab cross-moved for reconsideration of the essential facilities count. By its opinion and order dated August 25, 1989, the court granted Weider's motion and denied Twinlab's cross-motion. The judgment dismissing Twinlab's complaint in its entirety was entered August 30.

There followed this appeal during which Twinlab has dropped the counts alleging monopolization and intentional interference with business relations and prospective economic advantage.

II.

HN1[] On an appeal from a summary judgment, we review the record de novo to determine whether there are genuine issues of material fact. *Fed.R.Civ.P. 56(c)*. We assess **[**5]** the record in the light most favorable to the non-movant and draw all reasonable inferences in its favor. *Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465* (2 Cir. 1989). A non-movant who bears the ultimate burden of proof, however, must demonstrate in opposing a summary judgment motion that there is some evidence which would create a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Conclusory allegations will not suffice to create such a genuine issue. There must be more than a "scintilla of evidence", *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*, and more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

III.

Turning first to Twinlab's essential facilities count, it asserts that *§ 2* of the Sherman Act imposes a duty on Weider to make available advertising space in *Muscle & Fitness* and *Flex*. This is so, it claims, because the magazines are facilities essential **[**6]** to competition in the nutritional supplement business; that is, one cannot effectively compete without advertising in these magazines. The policy behind prohibiting denial of an essential facility to a competitor, at least in part, is to prevent a monopolist in a given market (here, bodybuilding magazines) from using its power to inhibit competition in another market (here, nutritional supplements for bodybuilders). *E.g., Flip Side Productions, Inc. v. Jam Productions, Ltd., 843 F.2d 1024, 1033* (7 Cir.), *cert. denied*, *488 U.S. 909, 109 S. Ct. 261, 102 L. Ed. 2d 249 (1988)*; Areeda & Hovenkamp, ***Antitrust Law*** para. 736.1, at 655 (1988 supp.).

Antitrust law, however, does not require one competitor to give another a break just because failing to do so offends notions of fair play. *Cf. Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 375-76* (7 Cir. 1986), *cert. denied*, *480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574 (1987)*. "A particular plaintiff's plight is relevant only as it bears on market effects." Areeda & Hovenkamp, *supra*, P. 736.2, at 676. The existence of a facility, even **[**7]** if essential in a technical sense, does not constitute an antitrust violation if the plaintiff cannot allege harm to competition. *E.g., McKenzie v. Mercy Hospital, 854 F.2d 365, 370* (10 Cir. 1988); *Colonial Penn Group, Inc. v. American Ass'n of Retired Persons, 698 F. Supp. 69, 73 (E.D.Pa. 1988)*.

At the very least, ***HN2***[] a plaintiff must demonstrate that "duplication of the facility would be economically infeasible" and that "denial of its use inflicts a *severe handicap* on potential [or current] market entrants." *Hecht v.*

Pro-Football, Inc., 187 App. D.C. 73, 570 F.2d 982, 992 (D.C.Cir. 1977) (emphasis added), *cert. denied*, *436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978)*; *see also* *MCI Communications Corp. v. American Tel. &* **[*569]** *Tel. Co., 708 F.2d 1081, 1132-33* (7 Cir.) (four-part test for finding essential facilities liability: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial **[**8]** of the use of the facility to a competitor; and (4) the feasibility of providing the facility."), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*.

A leading antitrust commentator would limit the analysis to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately." Areeda & Hovenkamp, *supra*, P. 736.2, at 680-81. Most of the successful essential facility claims fall within the categories stated by this commentator. *E.g.,* *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)* (electric power lines); *Fishman v. Estate of Wirtz, 807 F.2d 520* (7 Cir. 1987) (basketball arena); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509* (10 Cir. 1984) (mountain), *aff'd on other grounds*, *472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*; *Hecht, supra, 570 F.2d 982* (football stadium). In cases finding liability in other categories, however, the facility in question was more than dominant; **[**9]** it was effectively the only one in town. *E.g.,* *Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951)* (ads in monopolist newspaper); *Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274* (1 Cir. 1982) (newspaper's classified listings), *cert. denied*, *460 U.S. 1028, 75 L. Ed. 2d 500, 103 S. Ct. 1279 (1983)*.

Twinlab asserts that sales of Weider's magazines account for 66% of all bodybuilding magazine sales. The district court assumed without deciding that Weider had monopoly power in the magazine market. We also accept that assumption. We nevertheless conclude that Weider's conduct did not constitute an antitrust violation.

We reach that conclusion despite our acceptance of Twinlab's assertion that the district court failed to draw certain factual inferences in its favor. Specifically, the court held that *Muscle & Fitness* and *Flex* could not be essential facilities primarily because Twinlab had the means to turn *Muscular Development* into a strong competitor and had promised to do so in its promotional literature designed to attract advertisers. The court practically transformed **[**10]** those promotional phrases into judicial admissions, and relied on them despite substantial evidence that *Muscular Development* would not compete effectively with Weider's magazines any time in the foreseeable future. Weider itself regards *Muscular Development* as being non-competitive with its magazines. *Muscular Development* apparently has lost money and has not met its circulation goals. If resolution of the essential facilities claim turned solely on whether Twinlab's magazine could compete with Weider's in the foreseeable future, the proper result here would be to remand for trial.

While the question of *Muscular Development's* competitiveness may genuinely be in dispute, its resolution is not material. ***HN3***[] A successful "essential facilities" plaintiff must prove that denial of access has caused it "severe handicap." *Hecht, supra, 570 F.2d at 992*; *Driscoll v. City of New York, 650 F. Supp. 1522, 1529 (S.D.N.Y. 1987)*. At the summary judgment stage, of course, Twinlab need only show that there is a triable question of severe handicap. *Liberty Lobby, supra, 477 U.S. at 251*. **[**11]**

We hold that Twinlab has failed to make such a showing. Its own expert, Dr. Overstreet, stated that, six months after Weider's advertising ban, Twinlab's nutritional supplements were not only continuing to grow more profitable but were continuing to increase their market share relative to Weider's products. While Dr. Overstreet stated that in his opinion Twinlab's growth would have been even more rapid but for the advertising ban, this hardly constitutes a showing of severe handicap.

The testimony of several other witnesses supports our conclusion. Twinlab's president indicated that he expected 1989 to be even better for the company than 1988, which was, in his words, a "banner year". The anticipated expansion was so great

[*570] that Twinlab expected to increase its production facilities.

Moreover, an executive of General Nutrition Corp., the largest retailer in the market, predicted that in 1989 Twinlab's sales would overtake Weider's sales in his stores for the first time. He did not indicate that Weider's refusal to accept advertising from Twinlab affected that trend in the first half of 1989.

Our conclusion also is bolstered by an exhibit introduced by Twinlab which **[**12]** shows that only five of the top ten sellers of nutritional supplements advertise in *Muscle & Fitness* and *Flex*. Of the five that do, only Weider itself relies on the magazines for over 50% of its advertising. Twinlab now attempts to discredit that evidence by stating that the survey covered only one month; it fails to state specific facts that demonstrate why the one-month sample is inaccurate.

As the word "essential" indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible. *E.g., McKenzie, supra, 854 F.2d at 370*; *Driscoll, supra, 650 F. Supp. at 1530*; Areeda & Hovenkamp, *supra*, P. 736.2, at 678-80.

Since Twinlab has failed to make such a showing, we hold that its essential facilities claim fails.

IV.

We turn next to Twinlab's claim of attempted monopolization. ***HN4***[] To succeed on this claim, Twinlab was required to demonstrate that there were triable issues of fact as to whether Weider: (1) intended to monopolize the nutrition supplement market; (2) **[**13]** engaged in conduct designed to carry out that intent; and (3) had a "dangerous probability" of success. *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; *Lorain Journal, supra, 342 U.S. at 153-55*; *Kelco Disposal, Inc. v. Browning-Ferris Indus., Inc., 845 F.2d 404, 407* (2 Cir. 1988), *aff'd*, *492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)*. We need address only the third factor.

HN5[] A threshold showing for a successful attempted monopolization claim is sufficient market share by the defendant. Twinlab's most favorable evidence established that Weider at best had 25% of the relevant market and probably much closer to 10%. We have held that a 33% market share does not even approach the level required for dangerous probability of success. *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 841* (2 Cir. 1980). The probability of success is reduced even further where, as here, the remainder of the market is divided among dozens of competitors.

[14]** Market share is the primary indicator of the existence of a dangerous probability of success, but not the sole one. *E.g., International Distrib. Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 792* (2 Cir.), *cert. denied*, *482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987)*; *Broadway Delivery Corp. v. United Parcel Service of Am., Inc., 651 F.2d 122, 128* (2 Cir.), *cert. denied*, *454 U.S. 968, 70 L. Ed. 2d 384, 102 S. Ct. 512 (1981)*. Twinlab points to *Muscle & Fitness* and *Flex* as the requisite special factors. According to Twinlab, these demonstrate that Weider is dangerously likely to succeed in its attempt to monopolize the supplements market by leveraging its position with the magazines. To raise the point here, however, is merely to rehash the essential facilities argument referred to above. The magazines may give Weider a leg up in the nutritional supplements competition, but they do not create a dangerous probability that Weider will gain a monopoly.

Twinlab's reliance on *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263* (2 Cir. 1979), *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*, **[**15]** is misplaced. As Twinlab points out, we did state in *Berkey Photo* that "it is improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete effectively in the second market." *Id. at 284*. Aside from the fact that this statement was dictum (since the plaintiff in *Berkey Photo* failed to allege an applicable violation) and that *Berkey Photo* involved a "tying" claim rather than **[*571]** one alleging denial of essential facilities, our discussion above precludes application of the cited principle. We found that Twinlab has remained an effective competitor with Weider despite the latter's refusal to accept Twinlab's ads. The quoted passage from *Berkey Photo* requires tangible harm to competition.

We hold that Twinlab's claim of attempted monopolization is without merit.

V.

This brings us to Twinlab's claim of prima facie tort. It alleges that Weider's refusal to accept its ads rendered Weider liable for prima facie tort under New York law. **[**16]** ***HN6***[] The elements for such a tort are: (1) intentional infliction of harm; (2) resulting in special damages; (3) without excuse or justification; (4) by an act that would otherwise be lawful. *E.g., Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332, 451 N.E.2d 459, 467, 464 N.Y.S.2d 712, 720 (1983)*. The touchstone is "disinterested malevolence", meaning that the plaintiff cannot recover unless the defendant's conduct was not only harmful, but done with the sole intent to harm. *Id. at 333, 451 N.E.2d at 467-68, 464 N.Y.S.2d at 721*. We have held that motives other than disinterested malevolence, "such as profit, self-interest, or business advantage" will not suffice under the doctrine of prima facie tort. *Marcella v. ARP Films, Inc., 778 F.2d 112, 119* (2 Cir. 1985) (citing *Squire Records, Inc. v. Vanguard Recording Society, Inc., 25 A.D.2d 190, 191-92, 268 N.Y.S.2d 251, 253-54* (1st Dep't 1966), *aff'd*, *19 N.Y.2d 797, 226 N.E.2d 542, 279 N.Y.S.2d 737 (1967))*.

We emphasize this principle because there is some dispute over Weider's true motive for rejecting the ads. A Weider executive **[**17]** stated in a deposition that Twinlab's ads were rejected because they were misleading. Twinlab countered that there was substantial evidence indicating that the proffered justification was mere pretext. We agree. Twinlab, however, does not, and could not, suggest that Weider's primary motive was not based on self-interest.

We hold that Twinlab's contention that Weider is liable for prima facie tort is without merit.

VI.

To summarize:

We hold that Twinlab's antitrust claims, which alleged denial of essential facilities and attempted monopolization, were properly disposed of by summary judgment in favor of appellees. We further hold that Twinlab's claim of prima facie tort under New York law is without merit. Twinlab is not a 90-pound weakling in whose face Weider has kicked sand. Rather, Twinlab is a muscular competitor who is complaining about the competitive process. We affirm the summary judgment in favor of appellees.

Affirmed.

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LexisNexis®

Now Plastics, Inc. v. HPT Plastics, Inc.

United States District Court for the Southern District of New York

April 10, 1990, Decided and Filed

No. 89 Civ. 6938 (PNL)

Reporter

1990 U.S. Dist. LEXIS 3942 *; 1990 WL 301521

NOW PLASTICS, INC., Plaintiff, v. HPT PLASTICS, INC., HENRY P. TROUNSTINE, GREGG FOUS, DONALD LIPKA and LIPKA PRODUCTS, Defendants

Core Terms

venue, reside, defendants', contacts, Products

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > Individuals

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Domicile

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN1[] **Venue, Corporations**

In a civil action where jurisdiction is not founded solely on diversity, venue will generally be proper only in the judicial district where all defendants reside or in which the claim arose. *28 U.S.C.S. § 1391(b)*. Residence of individual defendants is determined by their place of domicile. Corporate defendants are deemed to reside in any judicial district in which they are subject to personal jurisdiction at the time the action is commenced. *28 U.S.C.S. § 1391(c)*.

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN2[] Venue, Individual Defendants

As for the "claim arose" prong of 28 U.S.C.S. § 1391(b), there is a "weight of the contacts" test, whereby the court weighs the connections between the claim and particular districts proposed as proper venue sites, and determines in which district the events having operative significance for plaintiff's claim arose, or, in other words, in which district the defendant's contacts have been most significant. In making this calculation, the court must consider the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not of the plaintiff). The court must bear in mind that the venue statute is designed primarily to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial, and that the "claim arose" language is inserted in § 1391(b) not to provide plaintiffs with an unfettered choice among a host of different districts, but simply to ensure that plaintiffs would be able to sue somewhere if defendants reside in different districts. Where defendants all do reside in the same district, the "claim arose" language should not even be considered.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN3[] In Personam Actions, Doing Business

While a defendant's contacts with the forum state might be relevant in a personal jurisdiction inquiry, they are not relevant to the "weight of contacts" analysis applied to determine proper venue. The contacts to be weighed are those between the claim and the jurisdiction, not those generally between a defendant and the jurisdiction.

Civil Procedure > Preliminary Considerations > Venue > Agents

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN4[] Venue, Agents

The Racketeer Influenced and Corrupt Organization Act (RICO) provides that, as to any given defendant, any civil action or proceeding under the chapter may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs. 18 U.S.C.S. § 1965(a). A corporate defendant is "found" in a district for the purposes of RICO if its officers or agents regularly carry on the business of the corporation there. The "transacts affairs" prong of the RICO statute has been interpreted to require the regular conduct of business of a substantial and continuous character within the district. Occasional acts such as telephoning or mailing letters into the district, or attending trade fairs there at which goods may be sold, have been held to be insufficient to meet this test.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN5[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

As for individual defendants in an action brought under the Racketeer Influenced and Corrupt Organizations Act, the "transacts affairs" prong for venue requires evidence of personal affairs of the defendant within the state, not simply affairs he may have transacted on behalf of his employer.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN6[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

There are seven factors to determine venue for a corporation in an action brought under the Racketeer Influenced and Corrupt Organizations Act. They include whether the corporation has within the district a place to do business, people to carry on the business, or tangible property; whether the corporation is subject to regulation in the district; and whether it has business operations there, manifestations of doing business, or good will activities.

Opinion by: [*1] LEVAL

Opinion

MEMORANDUM AND ORDER

PIERRE N. LEVAL, UNITED STATES DISTRICT JUDGE

Defendants HPT Plastics, Henry Trounstine, Gregg Fous, Donald Lipka and Lipka Products move to dismiss for improper venue or, alternatively, to transfer the action to the United States District Court for the Southern District of Ohio.

Background

Plaintiff, a corporation based in Massachusetts and incorporated under Massachusetts law, is engaged in the business of purchasing plastic packaging materials and reselling them to wholesalers and manufacturers. Defendants HPT Plastics and Lipka Products, Inc. are Ohio corporations which have their principal and sole place of business in Cincinnati. Defendants Trounstine and Fous, both citizens and residents of Ohio, are respectively president and "a principal" of HPT. Defendant Lipka, also an Ohio citizen and resident, is the president of Lipka Products. The complaint alleges that defendants conspired to solicit plaintiff's customers and sources of supply, in violation of a 1987 agreement between the Now Plastics and HPT, [1] and that this solicitation has induced some of plaintiff's customers to breach their contracts with plaintiff. Defendants contend that **[*2]** the contract between Now and HPT was based in large part on plaintiff's false representations that it had an exclusive relationship with three of the suppliers, and that defendants were justified in contacting plaintiff's customers when the representations proved to have been false. Federal jurisdiction is based both on diversity of citizenship and on federal questions arising out of a RICO claim. Plaintiff also alleges breach of contract, fraud, appropriation of trade secrets, and intentional interference with a business relationship.

[*3] In response to defendants' motion, plaintiff defends the venue under both *28 U.S.C. § 1391*, the general venue statute for civil cases, and *18 U.S.C. § 1965(a)*, the special venue provision of RICO.

Discussion

A. *Venue Under § 1391*

HN1[] In a civil action where jurisdiction is not founded solely on diversity, venue will generally be proper "only in the judicial district where all defendants reside or in which the claim arose." *28 U.S.C. § 1391(b)*. Residence of individual defendants is determined by their place of domicile. Corporate defendants are deemed to reside "in any judicial district in which [they are] subject to personal jurisdiction at the time the action is commenced." *28 U.S.C. § 1391(c)*.

HN2[] As for the "claim arose" prong of *§ 1391(b)*, there has been longstanding debate about the method by which courts should determine the district in which a given claim arose, even after the Supreme Court's attempt to clarify this issue in *Leroy v. Great Western United Corp., 443 U.S. 173 (1979)*. In this Circuit, *Leroy* has been interpreted as calling for a "weight of the contacts" test, whereby the court weighs the connections between the claim and particular districts proposed **[*4]** as proper venue sites, and determines in which district the "events having operative significance" for plaintiff's claim arose, *see Kupcho v. Steele, 651 F. Supp. 797 (S.D.N.Y. 1980)*, or in other words, in which district the defendant's contacts "have been most significant." *See Catsimadis v. Innovative Travel Group, 650 F. Supp. 748, 752 (S.D.N.Y. 1986)*; *Andrew H. by Irene H. v. Ambach, 579 F. Supp. 85, 88 (S.D.N.Y. 1984)*; *Canaday v. Koch, 598 F. Supp. 1139, 1147 (E.D.N.Y. 1984)*; *Cheeseman v. Carey, 485 F. Supp. 203, 213 (S.D.N.Y. 1980)*, *rev'd on other grounds*, *623 F.2d 1387 (2d. Cir. 1980)*. [2] In making this calculation, the court must consider the "availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not of the plaintiff)." *Leroy, 443 U.S. at 185*. *Leroy* directs the court to bear in mind that the venue statute is designed primarily to protect the *"defendant* against the risk that a plaintiff will select an unfair or

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[1] According to the complaint, the December 11, 1987, agreement provided that HPT would act as a commission agent for NOW Plastics in the marketing of polyester film and other film products for two years. Now Plastics also made HPT its exclusive sales representative for all polyester film sold to the film coating and metallizing industry, and HPT agreed not to offer any competing polyester film to the industry which was not supplied by NOW Plastics. The Agreement also provided that for two years after the termination of the Agreement, but in any event until November 1, 1991, HPT would not market, directly or indirectly, any products from plaintiff's suppliers, Kolon Industries, Sam Young, and Unitika, nor contact any of the suppliers, without plaintiff's prior written consent. Plaintiffs allege that HPT terminated the Agreement in January 1989, and notified plaintiff of the termination in April 1989.

Defendant Lipka is alleged to have acted as a commission agent for HPT, and to have conspired with HPT and its principals, through Lipka Products, to solicit and deal with plaintiff's customers in breach of the agreement between plaintiff and HPT.

[2] For venue to be proper in cases involving multiple claims, each of the claims joined must have individually arisen in that district. It is not sufficient that one or several of the claims arose there. *See* C. Wright & A. Miller, *Fed. Practice & Procedure*, § 3808 at 81.

inconvenient place of trial," *id. at 185* (emphasis in original), and that the "claim arose" language was inserted in *§ 1391(b)* "not to provide plaintiffs with an "unfettered **[*5]** choice among a host of different districts," *id. at 184*, but simply to ensure that plaintiffs would be able to sue *somewhere* if defendants reside in different districts. Where defendants all do reside in the same district, there is support for the proposition that the "claim arose" language should not even be considered. *See* *Canaday v. Koch, 598 F. Supp. 1139, 1148 (E.D.N.Y. 1984)*, tranf. *608 F. Supp. 1460 (S.D.N.Y. 1985)*, aff'd *768 F.2d 501 (2d Cir. 1985)*.

In this case, it is clear that venue in the Southern District of New York cannot be based on the "all defendants reside" clause of *§ 1391(b)*. Whether or not the corporate defendants might be subject to personal jurisdiction in this district, the three individual defendants are clearly domiciled in Ohio, not in New York. As for the "claim arose" prong, I agree with the court in *Canaday* that this test is inappropriate where, as here, defendants **[*6]** all reside in a single district. This seems more consistent with the Supreme Court's insistence in *Leroy* that the venue statute is designed to protect the defendants' convenience, not to enlarge the plaintiff's range of choices. According to the Supreme Court's reasoning, the function of the "claim arose" language is to close a "gap" previously created by the venue statute, offering plaintiff a possible forum to join all defendants in cases where defendants did not all reside in one state -- not to give plaintiffs an automatic venue alternative where suit could be brought in the district in which all defendants reside. *See* *Sunray Enterprises v. Bouza, 606 F. Supp. 116, 118 (S.D.N.Y. 1984)*; *Seabrook Foods Inc. v. Seabrook Bros., 495 F. Supp. 792 (S.D.N.Y. 1980)*.

However, I need not rely on this restrictive statutory interpretation. Even if the "claim arose" standard were to be applied, there is little basis for finding that the "weight of the contacts" lies in the Southern District of New York. The contract at the heart of this dispute was offered by letter from Massachusetts and accepted in Ohio. [3] **[*8]** The parties all reside in either Massachusetts or Ohio. As for the defendants' **[*7]** actions which are asserted as breaches of plaintiff's rights, all were done by defendants in Ohio, and only a very limited number involved any connection with New York. The complaint does allege that defendant Lipka arranged a single shipment of Kolon polyester film to the Brewster, New York plant of the Camvac Corporation, one of plaintiff's customers. Camvac is headquartered in Connecticut; the goods were shipped to its New York plant at the buyer's request. The affidavits of the parties subsequent to the complaint establish that HPT had limited other dealings with Camvac at its Brewster plant, relating to Azotherm PVC film, which the defendants argue was neither covered by the contract nor alleged as a breach in the plaintiff's complaint. Finally, the affidavits indicate that HPT solicited a single order for a trial roll of Kolon film from Stanpat Products, then based in Port Washington, New York (which is in the Eastern District of New York), but the product in that case was shipped to a New Jersey plant, and according to defendants resulted in no further orders. [4]

I find that these sporadic contacts with New York are not sufficient to make this district the locus of the claim under *§ 1391(b)*, particularly as defendants' conduct at issue occurred in Ohio and as the vast majority of other transactions at the heart of the action had no connection with New York. [5] *See* *Sunray Enterprises v. David C.*

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[3] Plaintiffs contend that the contract was negotiated in part during a meeting in New York in February of 1987 between representatives of plaintiff and HPT, and that the parties held a second meeting in New York in 1988 to discuss problems arising out of their contractual relationship. It does not appear, however, that New York was chosen as the site of these meetings for any substantive reason. The February 1987 meeting apparently occurred during a trade show attended by the parties, and the 1988 meeting occurred at a New York airport, at the request of plaintiff's principal, who was passing through New York en route to another destination. That meeting, in any event, was in the Eastern, not the Southern, District of New York.

[4] Plaintiff attempts to portray defendants' contacts with New York as more substantial by referring to other business dealings of defendants with New York companies long before the contract between these parties was signed or the breach arguably occurred. Thus, it claims that defendant HPT was doing business with a company in Newburgh, New York from 1983-1985. ***HN3***[] While these contacts with New York might be relevant in a personal jurisdiction inquiry, they are not relevant to the "weight of contacts" analysis conducted here. The contacts to be weighed are those between *the claim* and the jurisdiction, not those generally between a defendant and the jurisdiction.

Bouza & Assoc., 606 F. Supp. 116, 118 (S.D.N.Y. 1984) (holding that "mere impact or occasional solicitation" of sales orders in New York are not sufficient to establish venue) ; *Seabrook* **[*9]** *Foods Inc. v. Seabrook Bros., 495 F. Supp. 792, 793-94 (S.D.N.Y. 1980)* (noting that the "claim arose" language in *§ 1391(b)* was not meant to permit suit in "every district in which defendant sells its products").

[*10] B. *Venue Under RICO*

If venue in the Southern District is improper under the general provisions of *§ 1391(b)*, it is all the more improper under the special venue provisions of RICO. ***HN4***[] The RICO statute provides that, as to any given defendant, [6] **[*12]** "any civil action or proceeding under this chapter . . . may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." *18 U.S.C. § 1965(a)*. A corporate defendant is "found" in a district for the purposes of this statute if its officers or agents regularly carry on the business of the corporation there. *See* *Van Shaick v. Church of Scientology, 535 F. Supp. 1125 (D.C. Mass. 1982)*. The "transacts affairs" prong of the RICO statute has been interpreted to require the regular conduct of business of a substantial and continuous character within the district. *See* *Soltron, Inc. v. McAngus, No. 86-486, 1987 U.S. Dist. LEXIS 4905 (S.D.N.Y. 1987)*; *Abeloff v. Barth, 119 F.R.D. 315*. 326 (D. Mass. 1988); *Dody v. Brown, 659 F. Supp. 541, 544-45 (W.D. Mo. 1987)*; *Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1288 (E.D. Wis. 1985)*; *Hodgdon* ***[*11]*** *v. Needham-Skyles Oil Co., 556 F. Supp. 75, 78 (D.D.C. 1982)*. [7] Occasional acts such as telephoning or mailing letters into the district, or attending trade fairs there at which goods may be sold, have been held to be insufficient to meet this test. *See, e.g.,* *Dody, 659 F. Supp. at 545-46* (phone and mail communications insufficient to establish venue, as is shipment of sample product to jurisdiction); *Sunray Enterprises v. Bouza, 606 F. Supp. 116, 119 (S.D.N.Y. 1984)* (attending trade shows in jurisdiction is insufficient). *Cf.* *Rolls-Royce Motors v. Charles Schmitt & Co., 657 F. Supp. 1040, 1058 (S.D.N.Y. 1987)* (monthly business visits to jurisdiction coupled with frequent transactions there *is* sufficient). [8]

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[5] Plaintiff lists fourteen companies with which defendants allegedly had dealings, and whose representatives therefore are likely to be called as witnesses at trial. Only two of these companies, Camvac and Stanpat, have any relation to New York. The other fourteen are located in New Jersey, Connecticut and Pennsylvania. *See* Plaintiff's Affidavit in Opposition, Exhibit L. Plaintiff contends that New York is still a far more convenient forum than Ohio in terms of securing the presence of these third-party witnesses. However, plaintiff has made no showing that the third-party witnesses whom they wish to call will decline to testify in Ohio. Moreover, defendants have listed sixteen companies whose representatives they intend to call as witnesses, and for these witnesses Ohio appears to be the most convenient forum. *See* Affidavit of Defendants in Reply, Exhibit P. *See* *Georgia Boot Div. v. Georgia Footwear Corp., 579 F. Supp. 1037, 1038-39 (S.D.N.Y. 1984)* (finding venue in district which is more convenient for defendants' witnesses, where plaintiff has made no assertion that third-party witnesses would decline to testify there).

[6] If the venue provisions are satisfied as to some but not all of the defendants, plaintiffs of course have the option of maintaining their action here as to those defendants, and commencing a separate action in another district as to the remaining defendants. However, splitting the action in this way creates inefficiencies and multiplies the burdens on witnesses. It might well justify transfer for the purpose of consolidation under *28 U.S.C. § 1404(a)*.

[7] ***HN5***[] As for individual defendants, the "transacts affairs" prong has been held to require evidence of personal affairs of the defendant within the state, not simply affairs he may have transacted on behalf of his employer. *See* *Bulk Oil v. Sun Oil Trading Co., 584 F. Supp. 36, 39-40 (S.D.N.Y. 1983)*. Of course, in situations in which the employer is essentially a vehicle for the activities of the individual, such as a "one man firm," it may be possible to "pierce the corporate veil" and attribute the individual's activity on behalf of his company to him personally. In this case, I need not determine whether such piercing is justified for HPT or Lipka Products, because I find that neither transacted sufficiently substantial and continuous affairs here as to justify venue for *either* the corporation or its principals.

[8] *Cf.* *Agra Chem. Dist. Co. v Marion Laboratories, Inc., 523 F. Supp. 699, 702 (W.D.N.Y. 1981)* (listing seven factors to be considered in determining whether a corporation is "transacting business" under the analogous venue provisions of federal ***antitrust law***). ***HN6***[] These factors include whether the corporation has within the district a place to do business, people to carry on the business, or tangible property; whether the corporation is subject to regulation in the district; and whether it has business operations there, manifestations of doing business, or good will activities. None of these seven factors is clearly met in the case of defendants HPT, Lipka Products, or their principals.

[*13] Defendants have neither office, agents, bank accounts nor property in New York; their only recurring business contacts with New York have been a few phone or mail communications and a limited number of shipments of goods here at the request of companies headquartered elsewhere. I cannot find that the requirement of regular, substantial and continuous activity has been met. By contrast, defendants' contacts with the Southern District of Ohio have been substantial and continuous, and the bulk of defendants' documentary evidence and their witnesses are located there.

Conclusion

For the reasons stated above, I find that venue in the Southern District of New York is not proper. Pursuant to *18 U.S.C. § 1406(a)*, this action is therefore transferred to the Southern District of Ohio. The Clerk of the Court shall transmit the file.

Dated: New York, N.Y.

April 10, 1990

SO ORDERED

Juster Assoc. v. Rutland

United States Court of Appeals for the Second Circuit

January 2, 1990, Argued ; April 12, 1990, Decided

No. 89-7747

Reporter

901 F.2d 266 *; 1990 U.S. App. LEXIS 5927 **; 1990-1 Trade Cas. (CCH) P68,999

JUSTER ASSOCIATES and JUSTER DEVELOPMENT COMPANY, Plaintiffs-Appellants, v. CITY OF RUTLAND, VERMONT, WILLIAM FINARD, DAMIAN ZAMIAS, STEVEN MOSITES, THE ZAMIAS GROUP, INC., RUTLAND ASSOCIATES, FINARD-RUTLAND REALTY LIMITED PARTNERSHIP, RUTLAND-ZAMIAS LIMITED PARTNERSHIP, FINARD-ZAMIAS ASSOCIATES, and FINARD-ZAMIAS RUTLAND DEVELOPMENT COMPANY, Defendants-Appellees

Prior History: [1]** Appeal from a decision of the United States District Court for the District of Vermont (Franklin S. Billings, Jr., Chief Judge) granting defendants' motions to dismiss. We hold that the complaint fails to allege antitrust injuries and that the City of Rutland and the other defendants are immune from antitrust liability under the Noerr-Pennington doctrine.

Disposition: Affirmed.

Core Terms

Developers, antitrust, immune, mall, shopping center, competitors, anti trust law, proceedings, anticompetitive, municipal, regional, consumers

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] **Motions to Dismiss, Failure to State Claim**

For purposes of *Fed. R. Civ. P. 12(b)(6)*, a court views all facts and allegations in the complaint in the light most favorable to the non-movant. The movant is entitled to judgment on the pleadings only if it has established that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Private Actions, Remedies

To prevail on claims under §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, a plaintiff must assert injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN3[] Private Actions, Remedies

The mere fact of increased competition and reduced profits resulting from an agreement between other parties does not constitute an antitrust injury to a plaintiff. To hold otherwise would be to divorce antitrust recovery from the purposes of the antitrust laws, which were enacted for the protection of competition, not competitors.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Employees & Officials

HN4[] Exemptions & Immunities, Parker State Action Doctrine

See 15 U.S.C.S. §§ 34-36.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Sherman Antitrust Act, 15 U.S.C.S. §§ 1, 2, does not apply to lobbying to seek action on laws in the hope that the lobbying parties may bring about an advantage to themselves and a disadvantage to their competitors, regardless of any anticompetitive purpose it may have had. This immunity is extended to attempts to influence administrative processes, again regardless of intent or purpose.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Torts > Public Entity Liability > Immunities > Judicial Immunity

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN6[] Exemptions & Immunities, Noerr-Pennington Doctrine

To be immune from antitrust suit under the Noerr-Pennington doctrine, participation in administrative or judicial processes must be for the purpose of asserting colorable claims within the jurisdiction of the particular tribunal.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN7[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The distinction between anticompetitive political activity and anticompetitive commercial activity depends on the context and nature of the activity.

Counsel: Alan B. George, Rutland, Vermont (Timothy Martin, Carroll, George & Pratt, Rutland, Vermont, of Counsel), for Plaintiffs-Appellants.

John H. Shenefield, Washington, District of Columbia, (Peter E. Halle, Michael F. Clayton, Melinda R. Hatton, Morgan, Lewis & Bockius, Washington, District of Columbia; Gary H. Barnes, Robert A. Miller, Jr., Downs, Rachlin & Martin, Burlington, Vermont; Barry Waxman, Finard & Company, Burlington, Massachusetts, of Counsel), for Defendants-Appellees.

David L. Cleary, Rutland, Vermont (Miller, Cleary & Faignant, Rutland, Vermont, of Counsel), for Defendant-Appellee City of Rutland.

Judges: Kearse and Winter, Circuit Judges, and Charles S. Haight, Jr. [*] District Judge. **[**2]**

Opinion by: WINTER

Opinion

[*268] WINTER, Circuit Judge:

This antitrust action pits developers who are seeking permits necessary to begin construction of a new shopping mall against the owners of an existing mall who possess permits allowing them to double its size. The novel aspect of this not-unusual scenario is that the existing mall is accusing its as-yet non-existent competitor of monopolistic practices.

Two New York partnerships that wish to expand their shopping mall in Rutland, Vermont have sued the City of Rutland and several prospective developers of a new shopping center in the Rutland area, claiming that the City and the developers have conspired to restrain trade and to monopolize the market of leasing space in violation of federal antitrust laws, *see* *15 U.S.C. §§ 1*, *2*, *15*, *26 (1988)*; that they have tortiously interfered with the plaintiffs' business relationships; and that they have deprived plaintiffs of property interests without due process in violation of *42 U.S.C. § 1983 (1982)* ("*Section 1983*"). Chief Judge Billings granted judgment on the pleadings and dismissed the complaint. Because the complaint fails to allege **[**3]** antitrust injuries and because the defendants are immune from antitrust liability under the *Noerr-Pennington* doctrine, we affirm.

BACKGROUND

Plaintiff Juster Associates, a New York limited partnership, owns the Rutland Mall in the Town of Rutland, Vermont ("Town of Rutland" or "the Town"). Plaintiff Juster Development Company ("JDC"), a New York general partnership, proposes to develop an extension of the Rutland Mall with Juster Associates on JDC's adjoining land. Juster

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[*] The Honorable Charles S. Haight, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Associates and JDC (collectively "Juster") possess the licenses and permits necessary to expand the mall to double its current size.

Defendant City of Rutland ("City of Rutland" or "the City") is a municipal corporation. Defendant Finard-Zamias Associates ("FZA") is a developer that has applied for a land-use permit under Vermont law, *Vt. Stat. Ann. tit. 10, §§ 6001-6092* (1984) ("Act 250"), regarding its proposed development of a regional shopping center in the Town of Rutland adjacent to the City of Rutland. Defendants William Finard, Damian Zamias, and Steven Mosites are partners in FZA (collectively "the Developers").

Act 250 requires, inter alia, that shopping center developers obtain approval for **[**4]** their projects from the state-appointed District Environmental Commission ("Commission"). *Vt. Stat. Ann. tit. 10, § 6086* (1984 & Supp. 1989). That the Commission takes into account the views of major municipalities in granting or denying approval to projects is not seriously disputed by the parties. There is also no question that the City of Rutland has played an active role with regard to the Juster and FZA developments in an effort to protect what it perceives as its interests. In fact, the City of Rutland was granted party status before the Commission in proceedings concerning both Juster's and FZA's applications.

On September 27, 1988, the City of Rutland and the Developers, acting through their Vermont corporation Finard-Zamias Rutland Development Company ("FZR"), entered into an agreement regarding the Developers' proposed new regional shopping center. The agreement noted the Developers' need for the cooperation and assistance of the City to satisfy various permit requirements of Act 250 and provided for the payment of direct and indirect impact fees by FZR to the City. In particular, FZR agreed to offset any adverse impact on the City's municipal services or tax base through **[**5]** one of three means: (1) payment of impact fees, (2) investment of at least $ 10 million in non-residential real estate in the City, or (3) adoption, with legislative approval, of a gross-receipts user fee. FZR also agreed to provide other long-term support to the Rutland community, **[*269]** including housing assistance, public transportation, regional promotional activities, and cultural and social activities. In return, FZR gained access to the City's water supply and sewage facilities at most-favored customer rates, obtained assurances that the City would improve transportation routes and traffic control around the development, and won the active support of the City in FZA's Act 250 permit proceedings. Finally, FZR agreed to refrain either from actively recruiting tenants for the regional shopping center from the City's central business district or from actively promoting relocation of existing businesses from within the City limits.

Meanwhile, the City had unsuccessfully opposed Juster in Act 250 proceedings regarding Juster's proposed expansion of the Rutland Mall. Juster, which is thus now armed with the necessary permits to expand its mall, filed this complaint on January 23, 1989. On **[**6]** April 17, 1989, the City filed a motion for judgment on the pleadings under *Fed.R.Civ. P. 12(c)*, and the other defendants filed a motion for dismissal under *Fed.R.Civ.P. 12(b)(6)*. The district court granted both motions. Juster appeals.

DISCUSSION

We affirm the judgment for two reasons. First, with regard to the claims under *Sections 1* and *2* of the Sherman Act, the complaint's allegations that Juster has suffered damage because the City of Rutland has subsidized or otherwise aided the Developers in their attempt to build their shopping center do not constitute an antitrust injury. Second, assuming *arguendo* that the agreement between the City and the Developers restricts competition, they are immune from liability under the antitrust laws.

HN1[] We apply the usual standard of review that, for purposes of *Rule 12(b)(6)*, we view all facts and allegations in the complaint in the light most favorable to Juster. *See* *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*. The standard for *Rule 12(c)* is essentially the same for purposes of the present complaint: **[**7]** the City is entitled to judgment on the pleadings only if it has established "that no material issue of fact remains to be resolved and that [it] is entitled to judgment as a matter of law." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1368, at 690 (1969); *see also* *MacDonald v. Du Maurier, 144 F.2d 696, 700-01 (2d Cir. 1944)* (stating that plaintiff's allegations must be accepted despite the answer's denial of their veracity).

We turn first to Juster's claims under ***HN2***[] *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2 (1988)*. To prevail on such claims, Juster must assert "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Juster has not alleged such an injury.

As we stated in *R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 109* (2d Cir.), *cert. denied*, *493 U.S. 815, 110 S. Ct. 64, 107 L. Ed. 2d 31 (1989)*, **[**8]** ***HN3***[] the mere fact of increased competition and reduced profits resulting from an agreement between other parties does not constitute an antitrust injury to a plaintiff. *See also* *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 116, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*. Juster may thus well be "in a worse position than [it] would have been" had the challenged agreement not been executed, *Brunswick, 429 U.S. at 486*, but that fact does not by itself establish an antitrust injury. To hold otherwise would be to "divorce[] antitrust recovery from the purposes of the antitrust laws," *id. at 487*, which were "enacted for 'the protection of *competition*, not *competitors*,'" *id. at 488* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* (emphasis in original)).

We have applied these principles to a claim similar to Juster's and have found no antitrust injury. In *Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985)*, **[**9]** *cert. denied*, *484 U.S. 918,* ***[*270]*** *98 L. Ed. 2d 226, 108 S. Ct. 269 (1987)*, we upheld against an antitrust challenge an agreement between New York City and a private consortium of banks that denied the plaintiff construction company access to low-cost mortgage lending. Stating that the plaintiff had failed even to allege, much less to show, any anticompetitive effects on consumers from its exclusion from the lending market by contract between New York and the consortium, we affirmed the district court's grant of summary judgment to the defendants. *See id. at 251*.

The agreement in this case presents even less of an arguable antitrust injury than did the agreement in *Eastway*. Here, the agreement between the City and the Developers provided for payment of impact fees by the Developers to the City and support by the Developers for various public projects in the City. This portion of the agreement raises the Developers' costs and in no way injures competition. In fact, it doesn't even injure Juster. In exchange, the Developers gained access, at most-favored customer rates, to the water and sewage facilities of the City, as well as a promise **[**10]** of improvements in transportation routes to the regional shopping center. Although access to these municipal facilities and the promise of improvements no doubt aid the Developers, they do so by making their project more attractive to consumers than it would otherwise be. This is not an injury to competition, no matter how injurious it may be to Juster as a competitor.

Finally, the City pledged its support for the Developers in the Act 250 permit proceedings. This support is no more than part of a not-unusual bargain struck between a municipality and a developer for the purpose of controlled growth of commercial real estate. The Developers have no market share whatsoever at present, and the alternative to negotiating with the City is to attempt to obtain a permit without the City's support. Without that support, of course, they might fail, a result beneficial to Juster as a competitor but hardly in the interests of consumers. The agreement attacked by Juster is thus a vehicle by which competitors can challenge existing firms. Were courts to strike down such agreements, potential new entrants to a market would find entry more difficult, and consumers would suffer. Juster's claim is **[**11]** thus designed to enhance barriers to entry of new competitors, a result that would stand ***antitrust law*** on its head.

Even if one reads the complaint to allege that Juster is at a disadvantage because the City of Rutland is subsidizing the new mall, still no antitrust harm has been alleged. Such a disadvantage would derive solely from the fact that subsidization reduces the costs and increases the attractiveness of the new mall, therefore allowing it to compete more effectively with Juster. Although Juster's concern is understandable, we perceive no harm to consumers in the decision of the City's taxpayers to subsidize more attractive shopping conditions or lower prices to shoppers at the Developers' mall in order to ameliorate the taxpayers' concerns about the impact of new development on their municipality.

Having held that the City of Rutland's support for the Developers' proposed regional shopping center does not create any antitrust injury, we also address the City's and Developers' claim that they are immune from liability under the antitrust laws. We reach the issue of immunity because the district court based its rulings partially on the fact that the Developers have not **[**12]** yet entered the market and expressly left open the possibility that Juster may bring another antitrust suit once the Developers enter the market and gain some market power. The Developers are apprehensive that further litigation concerning their agreement with the City will occur when they enter the market. To foreclose a further challenge to that agreement, we address the Developers' claim of immunity. [1]

[13]** **[*271]** In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, ***HN5***[] the Supreme Court held that the Sherman Act did not apply to lobbying "to seek action on laws in the hope that [the lobbying parties] may bring about an advantage to themselves and a disadvantage to their competitors," *id. at 139*, regardless of "any anticompetitive purpose it may have had," *id. at 140*. In doing so, the Court recognized that attempts to influence legislation were an inherent part of the political process protected by the *First Amendment*. *Id. at 137-38, 145*. Four years later, in *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, the Court extended this immunity to attempts to influence administrative processes, again "regardless of intent or purpose," *id. at 670*. The Court in *Pennington* thus held that "efforts to influence public officials do not violate the antitrust laws even though **[**14]** intended to eliminate competition." *Id.* Of course, ***HN6***[] to be immune, participation in administrative or judicial processes must be for the purpose of asserting colorable claims within the jurisdiction of the particular tribunal. Where administrative or judicial processes are invoked for the purpose of causing collateral effects such as delaying entry by competitors, *see California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*, or where those processes are invoked by means that violate ethical standards applicable to adjudicative tribunals, *see Landmarks Holding Corp. v. Bermant, 664 F.2d 891 (2d Cir. 1981)*, the *Noerr-Pennington* immunity is not available.

Central to the agreement between the Developers and the City was the Developers' desire for the City's support in the Act 250 proceedings regarding their application. The City's views were important to the Commission, and it was formally a party to the FZA Act 250 proceedings. Whether gaining support from the City was essential or merely helpful, seeking **[**15]** it was within the realm of conduct protected by the *First Amendment* and thus immunized by the *Noerr-Pennington* doctrine. We believe, therefore, that the activities of the Developers and the City in negotiating their agreement are immunized from antitrust liability.

The Supreme Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*, in which it distinguished "anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact," *id. at 507-08 n. 10*, does not preclude application of the *Noerr-Pennington* doctrine in the instant matter. In *Allied Tube*, members of the steel industry packed an annual meeting of the National Fire Protection Association with new members solely to vote against a new type of electrical conduit that posed an economic threat to steel conduit. *See id. at 495-97*. The Supreme Court, in holding that this action was not immune under *Noerr-Pennington*, stated that "this is itself a case close to the line" **[**16]** ***HN7***[] between anticompetitive political activity and anticompetitive commercial activity, and it cautioned that its decision "depends on the context and nature of the activity." *See id. at 508 n.10*. If the activity in *Allied Tube*, which involved influencing a private organization's position on a potentially public issue, was close to the line, then the activities of the Developers and the City in this case, which involved the City's direct support as a party to the Act 250 proceedings, falls on the side of the line protected by *Noerr-Pennington* immunity.

The Supreme Court's recent decision in *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*, also does not alter this conclusion. In *Superior Court*, the Court held that a boycott by **[*272]** trial lawyers in private practice who acted as court-appointed counsel for indigent defendants was not immune from antitrust liability. In doing so, the Court reviewed its decisions in *Noerr* and *Allied*

[1] The City is immune from antitrust liability for damages under the Local Government Antitrust Act, *15 U.S.C. §§ 34-36 (1988)* ("LGAA"). The LGAA provides that ***HN4***[] "no damages, interest on damages, costs, or attorney's fees may be recovered under [the antitrust laws] from any local government, or official or employee thereof acting in an official capacity." *15 U.S.C. § 35(a)*. Because "local government" includes "a city," *15 U.S.C. § 34(1)(A)*, Rutland is obviously immune from suit for damages.

Tube, distinguishing the former from *Superior Court* on the grounds that the **[**17]** restraint of trade effected by the boycott in *Superior Court* "was the *means* by which respondents sought to obtain favorable legislation." *Superior Court, 110 S. Ct. at 776* (emphasis in original). By contrast, the Court noted, the restraint of trade in *Noerr* "was the intended *consequence* of public action." *Id.* (emphasis in original). The activity at issue in this case is within the ambit of the protection afforded by *Noerr* because, like *Noerr*, the claimed restraint of trade is the consequence of the governmental action.

Juster's remaining arguments are wholly without merit. The *Section 1983* claim was properly dismissed because it failed to state any deprivation of a constitutionally protected property interest. As Chief Judge Billings held, Juster has failed to identify contractually established business relationships that will be disrupted as a result of defendants' conduct. Juster's interests in possible future relationships with tenants at the Rutland Mall do not constitute property interests of the sort protected by the Constitution, for Juster cannot claim to have "a legitimate claim of entitlement" to these benefits. *Board of Regents v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)*. **[**18]**

Finally, Juster's state-law claim of tortious interference with business relationships was properly dismissed because Juster failed to allege more than the possibility that it may face legitimate competition. *See* *Giroux v. Lussier, 126 Vt. 555, 561, 238 A.2d 63, 67 (1967)*. The actions it complains of in this claim are virtually identical to the conduct made the basis of its antitrust claims, discussed *supra*. There is nothing tortious about competition.

Affirmed.

Primo Constr., Inc. v. Swig Weiler & Arnow Management Co.

Supreme Court of New York, Appellate Division, First Department

April 12, 1990

No. 39236

Reporter

160 A.D.2d 379 *; 553 N.Y.S.2d 425 **; 1990 N.Y. App. Div. LEXIS 4014 ***

Primo Construction, Inc., Respondent, v. Swig Weiler & Arnow Management Co., Inc., Appellant

Prior History: **[***1]** Supreme Court, New York County (David H. Edwards, Jr., J.), July 5, 1989.

Disposition: Order entered, which denied defendant's motion to dismiss the complaint, pursuant to *CPLR Rule 3211*, is unanimously reversed, on the law, and, on the facts, motion granted, and, complaint dismissed, with costs.

Core Terms

contractors, cause of action, premises, business relationship, contractual right, approve, tenants, leases, tortious interference, defense motion, Donnelly Act, landlord, deleted

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Public Enforcement, State Civil Actions**

A plaintiff has not set forth a cause of action under the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, which is the New York ***Antitrust Law***, when the plaintiff, inter alia, has failed to identify a relevant product market, describe the nature and effects of an alleged conspiracy, and indicate how a defendant's exercise of a conceded contractual right has had an anticompetitive impact on the market.

Counsel: G.T. King, for Plaintiff-Respondent.

L.J. Wachtler, for Defendant-Appellant.

Judges: Concur -- Kupferman, J. P., Ross, Kassal and Rubin, JJ.

Opinion

[*379] **[**425]** Order, Supreme Court, New York County (David H. Edwards, Jr., J.), entered July 5, 1989, which denied defendant's motion to dismiss the complaint, pursuant to *CPLR 3211*, is unanimously reversed, on the law and on the facts, motion granted, and complaint dismissed, with costs.

Swig Weiler & Arnow Management Co. (Swig) is the owner and managing agent of various commercial buildings (premises) which are located in New York City. Pursuant to the terms of the tenants' leases, the landlord must give its written approval before a tenant can employ a contractor to perform alterations. In accordance with that lease term, Swig maintained a list of contractors which it had preapproved to perform work for the tenants.

During **[***2]** the summer of 1987, Swig became aware that Primo Construction, Inc. (Primo) had participated with a former employee of Swig and others in a bribery and fraud scheme which resulted in the embezzlement of over $ 1,000,000 from Swig. Further, as part of that criminal scheme, Primo submitted invoices to Swig and the tenants of the premises, which billed them in excess of the reasonable value of goods delivered and services rendered. Based upon Primo's alleged misconduct and the landlord's contractual right to approve contractors, Swig deleted Primo's name from the list of approved contractors and denied Primo access to the premises.

Thereafter, on or about December 28, 1988, Primo commenced an action against Swig (defendant) for damages in the Supreme Court, New York County. The complaint alleges defendant is guilty of tortious interference with plaintiff's business relations (causes of action Nos. one to six) and of violation of *General Business Law § 340* ([Donnelly Act] cause of action No. seven).

[*380] [426]** Prior to the joinder of issue, defendant moved to dismiss the complaint pursuant to *CPLR 3211*. Plaintiff opposed. Trial Term denied that motion. Defendant **[***3]** appeals.

After our review of the record, we find that plaintiff has failed to allege facts which are sufficient to establish that defendant's actions, in deleting plaintiff's name from the contractors' list and denying same access to the premises, set forth a cause of action for tortious interference with plaintiff's business relations *(Alexander & Alexander v Fritzen, 68 NY2d 968* [1986]; *Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183* [1980]; *Felsen v Sol Cafe Mfg. Corp., 24 NY2d 682* [1969]; *Stratford Materials Corp. v Jones, 118 AD2d 559* [1986], *lv denied 70 NY2d 608* [1987]). We base our finding upon the fact that plaintiff concedes that defendant had an absolute right, pursuant to the terms of the leases, to approve contractors, and plaintiff does not allege that defendant, outside of exercising that contractual right, ever attempted to interfere with any other business relations of plaintiff.

Further, based on our examination of the record, we find that ***HN1***[] plaintiff has not set forth a cause of action under the Donnelly Act, which is the New York ***Antitrust Law***, since plaintiff, *inter alia*, has failed to identify the relevant product **[***4]** market, describe the nature and effects of the alleged conspiracy, and indicate how defendant's exercise of its conceded contractual right to approve contractors has had an anticompetitive impact on the market *(Creative Trading Co. v Larkin-Pluznick-Larkin, Inc., 136 AD2d 461* [1st Dept 1988]).

Based upon our analysis *supra*, we find that Trial Term erred in denying defendant's motion to dismiss the complaint.

Accordingly, we reverse, grant the motion, and dismiss the complaint.

End of Document

Turnbull & Turnbull v. ARA Transportation, Inc.

Court of Appeal of California, Third Appellate District

April 17, 1990

No. C002975

Reporter

219 Cal. App. 3d 811 *; 268 Cal. Rptr. 856 **; 1990 Cal. App. LEXIS 361 ***; 1990-1 Trade Cas. (CCH) P69,073

TURNBULL & TURNBULL, Plaintiff and Respondent, v. ARA TRANSPORTATION, INC., Defendant and Appellant

Notice: [*1]** Opinion certified for partial publication - Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts III through VIII and IX-B and IX-C.

Subsequent History: A petition for a rehearing was denied May 16, 1990, and the opinion was modified to read as printed above. The petition of appellant and respondent for review by the Supreme Court was denied July 11, 1990.

Prior History: Superior Court of San Joaquin County, No. 164610, James P. Darrah, Judge.

Disposition: The judgment is reversed and the matter is remanded to the trial court for a new trial limited to a determination of the amount of damages in accordance with part VIII of this opinion. Each party shall bear its own costs on appeal.

Core Terms

bid, costs, allocated, transportation, Practices, variable, cost method, competitors, Unfair, prices, total cost, treble damages, federal law, contracts, punitive damages, calculate, documents, widgets, compensatory and punitive damages, per mile, predatory, overhead, Sherman Act, multiproduct, preempted, contends, election, allocation of costs, fixed cost, incremental

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Public Enforcement, State Civil Actions**

See *Cal. Bus. & Prof. Code § 17043*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

See *Cal. Bus. & Prof. Code § 17082*.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

HN3[] **Case or Controversy, Constitutionality of Legislation**

In addressing a due process argument a court may question the wisdom of a statute, but the Due Process Clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Actual Monopolization, Anticompetitive & Predatory Practices**

As sections *Cal. Bus. & Prof. Code §§ 17026* and *17029* define cost to include all variable and fixed costs, it appears the Unfair Practices Act, *Cal. Bus. & Prof. Code § 17000 et seq.* employs a fully allocated cost or fully distributed cost standard to determine whether a sale has violated *Cal. Bus. & Prof. Code § 17043*. Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output. The concept of fully allocated cost has been equated with average total cost, which reflects that portion of the firm's total costs -- both fixed and variable -- attributable on an average basis to each unit of output.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Public Enforcement, State Civil Actions**

See *Cal. Bus. & Prof. Code § 17026*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Public Enforcement, State Civil Actions**

See *Cal. Bus. & Prof. Code § 17029*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN7[] **Public Enforcement, State Civil Actions**

Any difficulty in computing costs pursuant to the California Unfair Practices Act, *Cal. Bus. & Prof. Code § 17000 et seq.*, is a factual one, and statutes are not to be declared invalid because in their application factual difficulties may arise.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN8[] **Public Enforcement, State Civil Actions**

The use of the fully allocated cost method, when viewed in conjunction with the injurious intent requirement of *Cal. Bus. & Prof. Code § 17043*, is rationally related to the valid legislative purpose enunciated in *Cal. Bus. & Prof. Code § 17001* as it assists in preventing the creation or perpetuation of monopolies.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business. Moreover, a defendant is free to demonstrate to the trier of fact that its fully allocated cost, using another reasonable allocation method other than that used by the plaintiff, is actually lower than the plaintiff alleges and lower than defendant's sales or bid price.

Constitutional Law > Congressional Duties & Powers > General Overview

Governments > Federal Government > US Congress

Constitutional Law > Supremacy Clause > General Overview

HN10[] **Constitutional Law, Congressional Duties & Powers**

It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. Absent exclusive pre-emptive language, Congress' intent to supersede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Supremacy Clause > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN11[ ] Antitrust & Trade Law, Sherman Act

The history of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, makes it clear that the Congress did not intend that the federal legislation preempt parallel state efforts to control unfair competitive practices.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN12[ ] Actual Monopolization, Anticompetitive & Predatory Practices

Absent a determination by the United States Supreme Court regarding what formula or cost method should be used in determining whether pricing is predatory, there is no clear federal standard with which the Unfair Practices Act, *Cal. Bus. & Prof. Code § 17000 et seq.*, may be said to conflict.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Constitutional Law > Supremacy Clause > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[ ] Sherman Act, Scope

The mere fact that the Unfair Practices Act, *Cal. Bus. & Prof. Code § 17000 et seq.*, proscribes conduct that might, according to some federal courts, be permitted under federal law is insufficient to demonstrate that the Unfair Practices Act is preempted by the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*.

Governments > Legislation > Interpretation

Torts > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Governments > Legislation > Statutory Remedies & Rights

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Statutory Requirements

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

HN14[ ] Legislation, Interpretation

Where a statutory penalty is imposed for a wrongful act, it does not preclude recovery of punitive damages in a tort action where the necessary malice or oppression is shown. If the purpose of the penalty is the same as that of punitive damages, however, the plaintiff cannot obtain a double recovery and must elect to have judgment entered in an amount which reflects either the statutory trebling or the compensatory and punitive damages. When a statute recognizes a cause of action for a violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears. But when a new right, not existing at common law, is created by statute and a statutory remedy for the infringement thereof is provided, such remedy is exclusive of all others unless the statutory remedy is inadequate.

Headnotes/Summary

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

In a bus company's action against a competing bus company, alleging the competitor sold its bus transportation services to a county below its costs in violation of *Bus. & Prof. Code, § 17043* (sale below cost for purpose of injuring competitor), the trial court permitted plaintiff to make a postverdict election between the remedies of punitive damages and the treble damages provided in *Bus. & Prof. Code, § 17082* (recovery of treble damages for violation of Unfair Practice Act (*Bus. & Prof. Code, § 17000 et seq.*)). Without being apprised of plaintiff's entitlement to treble damages, the jury returned a verdict in favor of plaintiff for $ 259,568 in compensatory damages and $ 1 million in punitive damages, and plaintiff elected to receive the jury's award instead of treble damages. (Superior Court of San Joaquin County, No. 164610, James P. Darrah, Judge.)

The Court of Appeal affirmed in part and reversed in part, and remanded for a new trial on the amount of damages. It held that *Bus. & Prof. Code, § 17043*, was not unconstitutional, since its use of the fully allocated cost method to determine whether a service is sold below cost was rationally related to the valid legislative purpose of preventing the creation or perpetuation of monopolies as enunciated in *Bus. & Prof. Code, § 17001*. It held that *§ 17043* did not conflict with, and was therefore not preempted by, the federal Sherman Antitrust Act (*15 U.S.C. § 1 et seq.*). It also held that plaintiff was limited to the treble damages remedy of *Bus. & Prof. Code, § 17082*, which was mandatory. (Opinion by Marler, J., with Sims, Acting P. J., and DeCristoforo, J., concurring.)

Headnotes

CA(1a)[] **(1a)** ***CA(1b)***[] **(1b)** ***CA(1c)***[] **(1c)** ***CA(1d)***[] **(1d)**

Unfair Competition § 3—Unfair Practices Act—Validity—Prohibition Against Selling Below Cost to Injure Competitor.

--*Bus. & Prof. Code, §§ 17026*, *17029*, define costs to include all variable and fixed costs, and thus the Unfair Practices Act (*Bus. & Prof. Code, § 17000 et seq.*) employs a fully allocated cost or fully distributed cost standard to determine whether a sale has violated *Bus. & Prof. Code, § 17043* (sales below cost to injure competitor). When viewed in conjunction with the injurious intent requirement of *§ 17043*, the use of the fully allocated cost method to determine whether services are sold below cost, although not perfect, is rationally related to the valid legislative purpose of safeguarding the public against the creation of monopolies (*Bus. & Prof. Code, § 17001*). Thus, *§ 17043* does not violate the due process clauses of the California and United States Constitutions.

CA(2)[] **(2)**

Constitutional Law § 17—Judicial Power to Declare Legislation Void—Challenge Based on Due Process.

--In addressing a party's due process challenge to a statute, a court may question the wisdom of the statute, but the due process clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation.

CA(3)[] **(3)**

Words, Phrases, and Maxims—Variable Costs—Fixed Costs.

--Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output.

CA(4)[] **(4)**

Statutes § 7—Validity—Factual Difficulties in Applying Statute.

--Statutes are not to be declared invalid because in their application factual difficulties may arise.

CA(5a)[] **(5a)** *CA(5b)*[] **(5b)** *CA(5c)*[] **(5c)**

Unfair Competition § 3—Unfair Practices Act—Federal Preemption.

--*Bus. & Prof. Code, § 17043* (prohibition against sales below cost for purposes of injuring competitors), does not conflict with federal law, and thus is not preempted by the federal Sherman Antitrust Act (*15 U.S.C. § 1 et seq.*). Although *§ 17043* employs a method of determining costs that has been rejected by some federal courts of appeal, absent a determination by the United States Supreme Court regarding what formula or cost method must be used in determining whether pricing is predatory, there is no clear federal standard upon which the Unfair Practices Act (*Bus. & Prof. Code, § 17000 et seq.*), may be said to conflict. Also, the mere fact that the Unfair Practices Act proscribes conduct that might, according to some federal courts, be permitted under federal law is insufficient to show the Unfair Practices Act is preempted by the Sherman Act.

CA(6a)[] **(6a)** *CA(6b)*[] **(6b)**

Conflict of Laws § 4—Relationship Between Federal and State Law—Federal Preemption.

--Within constitutional limits, Congress may preempt state authority by so stating in express terms. Absent exclusive preemptive language, Congress's intent to supersede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it. Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. An inference of preemption is not appropriate where the basic purposes of the state and federal statutes are similar.

CA(7)[] **(7)**

Monopolies and Restraints of Trade § 4—Sherman Act—Federal Preemption.

--The history of the Sherman Antitrust Act (*15 U.S.C. § 1 et seq.*), makes it clear that the Congress did not intend that the federal legislation preempt parallel state efforts to control unfair competitive practices.

CA(8)[] **(8)**

Courts § 40—Doctrine of Stare Decisis—Conflicting Federal Circuit Rules.

--A California court need not resolve or harmonize conflicts among the federal circuits, as California courts are not bound by their decisions.

CA(9a)[] **(9a)** ***CA(9b)***[] **(9b)**

Unfair Competition § 10—Punitive Damages—Action for Sale Below Cost.

--In an action for violation of *Bus. & Prof. Code, § 17043* (sales below cost for purpose of injuring competitors), the trial court erred in allowing plaintiff to elect remedies between punitive damages and the treble damages provided in *Bus. & Prof. Code, § 17082* (recovery of treble damages for violation of Unfair Practice Act (*Bus. & Prof. Code, § 17000 et seq.*)). The treble damages provision of *§ 17082* is punitive in nature and similar in purpose to *Civ. Code, § 3294* (punitive damages); and the treble damages provision is mandatory. Also, plaintiff was pursuing a purely statutory cause of action, and did not pursue any alternate theory of liability founded on a common law tort action that existed before the enactment of the Unfair Practice Act. Thus, plaintiff was limited to the statutory remedy of treble damages.

CA(10)[] **(10)**

Damages § 22.2—Exemplary or Punitive Damages—Availability—Extant Statutory Penalty.

--Where a statutory penalty is imposed for a wrongful act, it does not preclude recovery of punitive damages in a tort action where the necessary malice or oppression is shown. If the purpose of the penalty is the same as that of punitive damages, however, the plaintiff cannot obtain a double recovery and must elect to have judgment entered in an amount which reflects either the statutory trebling or the compensatory and punitive damages. When a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears. But when a new right, not existing at common law, is created by statute and a statutory remedy for the infringement thereof is provided, such remedy is exclusive of all others unless the statutory remedy is inadequate.

Counsel: Alan D. Croll, Eve Triffo, Wyman, Bautzer, Kuchel & Silbert, James T. Freeman, Charity Kenyon, Diepenbrock, Wulff, Plant & Hannegan for Defendant and Appellant.

William A. Schuckman for Plaintiff and Respondent.

Judges: Opinion by Marler, J., with Sims, Acting P. J., and DeCristoforo, J., concurring.

Opinion by: MARLER

Opinion

[*814] [857]** Defendant ARA Transportation, Inc. (ARA), appeals from a judgment entered after a jury found ARA had sold its bus transportation services at below its cost of providing the **[***2]** services with the purpose of injuring competitors or destroying competition in violation of *Business and Professions Code section 17043* (hereafter all undesignated section references are to this code). The jury awarded plaintiff Turnbull & Turnbull, doing business as Sullivan & Co. (Sullivan), $ 259,568 in compensatory damages and $ 1 million in punitive damages.

[*815] On appeal, ARA contends the judgment should be reversed because California's below cost sales statute is unconstitutional and preempted by federal law and because there is no substantial evidence that ARA sold its services below cost. ARA also contends there is no substantial evidence it had the requisite intent to injure competitors and that it was prejudiced by instructional error and by the erroneous admission of certain evidence. In addition, it alleges juror misconduct prevented ARA from having a fair trial. Finally, ARA raises various challenges to the compensatory and punitive damages awards. We shall reverse the judgment and remand the matter for a new trial limited to the issue of damages.

Factual and Procedural Background

Sullivan and ARA were providers of bus transportation services and had been **[***3]** competitors for several San Joaquin County Office of Education contracts for the transportation of handicapped school children. Every year the San Joaquin County Superintendent of Schools provided bid specifications which indicated the estimated number of children that were to be transported and their addresses. From this information bus contractors interested in bidding on the contract could calculate the mileage and costs involved in transporting the students and submit their bids accordingly. During the 1978-1979, 1979-1980, 1980-1981, and 1981-1982 school years, ARA was awarded the contracts.

On July 13, 1982, Sullivan filed its first amended complaint against ARA alleging ARA sold its bus transportation services **[**858]** below cost in violation of *section 17043*. [2] **[***4]** Sullivan alleged it was injured in that it was deprived of being awarded the transportation contracts as a proximate result of ARA's conduct. Sullivan sought compensatory and punitive damages and treble damages pursuant to *section 17082*. [3]

The court ruled Sullivan's claim based on the 1978-1979 contract was barred by the statute of limitations. Relying on *G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 277-279 [195 Cal.Rptr. 211, 41 A.L.R.4th 653]*, it also ruled a one-year statute of limitation applied to the award of treble damages, **[*816]** precluding such an award except for the 1981-1982 contract year. In addition, the court determined Sullivan was not entitled to both treble damages and punitive damages and would therefore be permitted to make a post verdict election of remedies. It was also decided the jury would not be apprised of Sullivan's entitlement to treble damages and **[***5]** that the trebling would be performed by the court if Sullivan opted not to receive punitive damages.

At trial, John Bahnsen, the deputy superintendent of schools of San Joaquin County, testified that ARA and Sullivan provided services of equivalent quality, but ARA was awarded the contracts in question because it was the lowest bidder.

George Grundig, an economist specializing in transportation economics and transportation analysis, testified that in his opinion ARA had submitted bids that were lower than its cost of providing the contract services. Grundig used four different methods in calculating whether ARA's bid was below its costs. The first method involved comparing the revenue per mile received by ARA on the San Joaquin County contract with the revenue per mile it received on other bus transportation contracts in other counties, after having made adjustments for cost differentials between the counties. The second method compared the revenue per mile ARA received on the San Joaquin County contract with the revenue per mile it received on its Delta College contract in San Joaquin County. In the third method, Grundig calculated ARA's costs based on two national cost surveys **[***6]** regarding operating costs of private passenger vans. Grundig's fourth method entailed an analysis of ARA's operating statements and an

[2] *Section 17043* provides: ***HN1***[] "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

Section 17024 provides: "'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."

[3] *Section 17082* provides in pertinent part: ***HN2***[] "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, . . ."

allocation of ARA's operating expenses per mile traveled. ARA's total operating costs for the year were divided by the total miles traveled to yield an average cost per mile. This figure was then multiplied by the contract mileage to determine the contract cost. In each year in question, ARA's bid was below its costs of providing the contract services. Katherine Porter, who had a degree in mathematics and worked primarily as an investment adviser and financial planner, assisted Grundig in calculating both ARA's costs and Sullivan's damages.

Based on the limited information provided to Sullivan by ARA, Grundig was unable to calculate more accurately ARA's costs of providing the contract services. In response to interrogatories from Sullivan requesting the amount of overhead and administrative expenses and the amount of net profit or loss on each contract, ARA stated it did not maintain records which allocated overhead expenses and profits on a per contract basis. Some ARA witnesses verified that ARA did not have any documents allocating its costs **[***7]** per contract. However, according to Robert Griffiths, who had **[*817]** been ARA's area controller, initially documents were kept which would enable ARA to determine the cost of each contract, but once the level one operating **[**859]** statements were prepared at the end of each year, these documents were routinely destroyed. Griffiths testified it was not possible to recreate this documentation, although it could have been generated several years ago when the contracts were in effect. Griffiths stated he was unaware that on March 16, 1982, prior to the expiration of the 1981-1982 contract, Sullivan's counsel had written Merle Jewett, ARA's director of marketing, advising Jewett that litigation would ensue if documentation was not voluntarily provided demonstrating that ARA's bid on the 1981-1982 contract was above its costs. When ARA refused to supply the requested information, Sullivan advised ARA's general counsel in April 1982 that it would pursue litigation and Sullivan subsequently served ARA with its first amended complaint on July 20, 1982.

Augustine Zemba, who had been ARA's executive vice-president of the transportation group until mid-1977, testified concerning ARA's policy of **[***8]** bidding below cost. Zemba oversaw operations, assisted in the bidding process and worked at the policy-setting level with ARA. His office was located at the group headquarters in Encino. Apparently the transportation group was comprised of approximately five regions or areas and each area had several divisions. ARA's Stockton operation was part of a division that belonged to the central area. All of the Stockton operation's bids were approved by the Encino office prior to being submitted to the parties seeking transportation service bids.

According to Zemba, ARA's overall policy was to penetrate the market and where there was existing competition, it would bid at any cost, even below cost, a process known as "low-balling." Other ARA personnel involved in this policy were Mel Sherman, who was the president of the transportation group, Bill Seegel, who was president of ARA's food services and executive vice-president of ARA Services, Inc., and Livingston Kosborg, who was senior vice-president of ARA Services, Inc. Zemba became aware of ARA's below cost bidding policy approximately one year after he joined the corporation in 1972. At a transportation group meeting, attended by **[***9]** Sherman, Kosborg, and Zemba, Kosborg announced his objective was for ARA to become the largest transportation company and show tremendous growth in specific areas including Northern California. Kosborg stated ARA would bid below cost, secure contracts and eliminate the competition. After that meeting, below cost bids were submitted to various school districts by ARA.

Zemba explained the process that was used in bidding below cost. He stated that true cost figures, submitted by the bidding division to the group **[*818]** transportation office for approval would simply be reduced so that it appeared the bid was above cost. The loss would be reallocated to some other profit-making division of ARA. This also served to reduce the amount of profit ARA appeared to make on other school district contracts to which the costs had been reallocated. After showing the school district altered documents reflecting its small profit, ARA would be able to justify an increase in its bids when it came time to renew these contracts. Lower level management was unaware that these changes and reallocations were being made as they did not receive complete financial reports. Zemba used to have many **[***10]** documents reflecting these alterations, but he returned them to ARA after he left the corporation in 1977.

Zemba testified he left ARA because he was concerned that Kosborg would conveniently forget he had endorsed the below cost bidding policy and Zemba would be held responsible. He was also embarrassed by being repeatedly put in the awkward position of approaching the school district and asking for more money, using the excuse that a mistake had been made in preparing the bid. He had been asked to do this several times and had been successful in obtaining the necessary increases.

Based upon information Zemba received after his departure from ARA and upon his 30 years of experience as an executive at the policy-making level of large private corporations and government organizations, he believed ARA's "low-balling" was continuing as a matter of practice as corporate **[**860]** policy is slow to change. In May 1978, Zemba met with Marvin Heaps and Frank Pfizenmayer, the president and general counsel of ARA Services, Inc., and discussed, among other things, ARA's low-ball bidding practices. Zemba stated one purpose of the meeting was to ask him to be quiet as there was other litigation going **[***11]** on throughout the country and publicity throughout the news media. According to Zemba, Heaps asked him to "lay off" and stated he knew there was low-ball bidding going on. Zemba remembered that after the meeting, Heaps sent him a letter thanking him and stating something to the effect that Heaps knew he had "a lot of mud to clean up."

Heaps and Pfizenmayer admitted that the meeting took place, but denied that Heaps made any statements concerning ARA's bidding practices. A portion of the letter Heaps sent to Zemba was introduced and it stated: "I appreciate your sharing your views on so many subjects. Please be assured I take this matter seriously and continue to be desirous that ARA and all of its components operates [*sic*] in a completely ethical way." There was nothing specifically about cleaning up mud.

Charles Gross, ARA's chief financial officer between 1975 and 1979, testified that ARA was concerned with making a profit on each contract **[*819]** and would not bid under cost. Jack Gottsman, the president of ARA's transportation group, testified ARA's overall policy was to bid "a profitable business so that we could grow competitively. . . ." ARA was concerned that each **[***12]** contract make a profit and bids were reviewed to make sure ARA was going into a contract on a profitable basis.

Robert Griffiths, the area controller who was in charge of the bidding process between 1979 and 1982, testified concerning ARA's method of allocating costs. It appears that variable costs were allocated per bus, per day. Fixed or overhead costs were allocated on the basis of bus days and revenue generated by each contract. The overhead would first be allocated among the various divisions based on the number of bus days generated by each division. Then each division would allocate the overhead per contract in proportion to the percentage of revenue generated by each contract. According to Griffiths, the San Joaquin County bids covered ARA's costs and generated a profit. ARA provided no testimony or documentation concerning the *amount* of either its actual or projected costs of providing the San Joaquin County contract services.

The jury awarded Sullivan compensatory and punitive damages for the contract years 1979-1980 and 1981-1982 and nothing for 1980-1981. Sullivan elected to receive the compensatory and punitive damages award instead of treble damages. After **[***13]** ARA unsuccessfully moved for a new trial or a judgment notwithstanding the verdict, it timely filed a notice of appeal.

Discussion

I

CA(1a)[] **(1a)** ARA contends the Unfair Practices Act (*§ 17000 et seq.*) violates the due process clauses of the California and United States Constitutions because the method for determining whether a service is sold below cost is arbitrary and irrational. ***CA(2)***[] **(2)** ***HN3***[] In addressing ARA's due process argument a court may question the wisdom of a statute, but "the Due Process Clause does not empower the judiciary 'to sit as a "superlegislature to weigh the wisdom of legislation" . . . .' [Citation.]" (*Exxon Corp. v. Governor of Maryland (1978) 437 U.S. 117, 124 [57 L.Ed.2d 91, 99, 98 S.Ct. 2207]*.)

CA(1b)[] **(1b)** *HN4*[] As *sections 17026* [4] **[***15]** and *17029* [5] define cost to include all variable and fixed costs, **[**861]** it appears the Unfair Practices Act employs a fully allocated **[*820]** cost or fully distributed cost standard to determine whether a sale has violated *section 17043*. (*G.H.I.I. v. MTS, Inc., supra, 147 Cal.App.3d at p. 275*; *William Inglis, etc. v. ITT Continental Baking Co. (9th Cir. 1981) 668 F.2d 1014, 1048*.) **[***14]** *CA(3)*[] **(3)** Variable costs are costs that vary with changes in output, while fixed costs are those that do not vary with changes in output. (Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act* (1975) 88 Harv.L.Rev. 697, 700.) *CA(1c)*[] **(1c)** The concept of fully allocated cost has been equated with average total cost, which "reflects that portion of the firm's total costs -- both fixed and variable -- attributable on an average basis to each unit of output." (*William Inglis, supra, 668 F.2d at p. 1035, fn. 30, 1048*; but see *MCI Communications v. American Tel. & Tel. Co. (7th Cir. 1983) 708 F.2d 1081, 1122*.)

The Legislature has declared the purpose of the Unfair Practices Act "is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented." (*§ 17001*.) Although the California Supreme Court has determined the purpose and policy of the Legislature in enacting the Unfair Practices Act and the means employed to subserve the legislative purpose by prohibiting sales below costs made with intent to injure competitors or competition is a valid exercise **[***16]** of the police power (*Wholesale T. Dealers v. National etc. Co. (1938) 11 Cal.2d 634 [82 P.2d 3, 118 A.L.R. 486]*), it has not directly addressed the issue of whether the act's method of cost allocation is constitutional. (*Id., at p. 662*; *People v. Pay Less Drug Store (1944) 25 Cal.2d 108, 118 [153 P.2d 9]*.) *CA(4)*[] **(4)** The court did note, however, that *HN7*[] any difficulty in computing costs is a factual one, and statutes are not to be declared invalid because in their application factual difficulties may arise. (*Pay Less Drug Store, supra, at p. 118*.)

CA(1d)[] **(1d)** ARA points out that some authorities question the use of the fully allocated cost method or average total cost method in determining the costs below which a business may not sell its goods or services for federal ***antitrust law*** purposes and instead propose the use of the average variable cost or long-run incremental cost method. (*MCI Communications v. American [*821] Tel. & Tel. Co., supra, 708 F.2d at pp. 1119-1122* and cases cited therein; *Areeda & Turner, op. cit.* **[***17]** *supra*, 88 Harv.L.Rev. at pp. 716-718, 732-733.) Average variable cost is the sum of all variable costs divided by output. (*Areeda and Turner, op. cit. supra*, at p. 700.) Long-run incremental cost measures all of the fixed and variable costs of adding a new product or service but, unlike fully allocated cost, only measures such costs which are causally related to the service or product in question. (*MCI, supra, 708 F.2d at pp. 1115, 1122*.)

The Seventh Circuit has stated that the fully distributed cost (FDC) method, which is one method of calculating average total cost, "is a quite arbitrary allocation of costs among different classes of service. There are countless FDC methods, each allocating costs by a different mathematical formula. Despite trenchant criticism on economic grounds, FDC continues to be widely used for regulatory purposes, *inter alia*, because of its ease of application in dividing an authorized total revenue requirement among individual products or services -- much as a pie is divided into slices. But FDC cannot purport to identify those costs which are *caused* by a product or service, and this is fundamental to economic cost determination." **[***18]** (*MCI Communications v. American Tel. & Tel. Co., [**862] supra, 708 F.2d at p. 1116*, fns. omitted, italics original.) The court also noted various FDC methods would normally

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[4] *Section 17026* provides in pertinent part: *HN5*[] "'Cost' as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer. [para.] 'Cost' as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business. [para.] 'Cost' as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency."

[5] *Section 17029* provides: *HN6*[] "'Cost of doing business' or 'overhead expense' means all costs of doing business incurred in the conduct of the business and shall include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising."

produce quite different calculations of the cost of a product or service and set forth a simple example to highlight what it termed the arbitrariness of FDC methodology. It stated: "Imagine a railroad line that simultaneously transports three different products: gold, lead and feathers. If the railroad attempted to calculate, on a fully distributed cost basis, the cost of shipping each of these products, it would reach radically different results depending on whether it allocated joint and common costs on the basis of the value, weight, or bulk of the respective commodities shipped." (*Id., at p. 1116, fn. 48*.)

The Sixth and Ninth Circuits have not adopted any particular cost method, but have instead held that whatever method is used only affects the burden of proof. If the plaintiff establishes the defendant sold its product below its average total cost but above its average variable cost, then the plaintiff has the burden of proving defendant did so with a predatory intent. **[***19]** If the plaintiff establishes the defendant sold its product below its average variable cost, then the defendant has the burden of negating that it had a predatory intent. (*William Inglis, etc. v. ITT Continental Baking Co., supra, 668 F.2d at pp. 1035-1036*; accord *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co. (6th Cir. 1984) 729 F.2d 1050, 1056*.) The Ninth Circuit has stated the opinion that prices exceeding average total cost may be considered predatory where the plaintiff provides clear and convincing evidence of the defendant's predatory intent. (*Transamerica Computer Co., Inc. v. IBM **[*822]** Corp. (9th Cir. 1983) 698 F.2d 1377, 1387-1388*.) These cases demonstrate there has been no consensus in the federal courts regarding which measure of cost should be used in determining whether a business has engaged in predatory below-cost-pricing in a federal antitrust context. (*Cargill, Inc. v. Monfort of Colorado, Inc. (1986) 479 U.S. 104, 117, fn. 12 [93 L.Ed.2d 427, 440, 107 S.Ct. 484]*.)

We find ***HN8***[] the use of the fully allocated cost method, when viewed in conjunction **[***20]** with the injurious intent requirement of *section 17043*, is rationally related to the valid legislative purpose enunciated in *section 17001* as it assists in preventing the creation or perpetuation of monopolies. For example, assume that a large multiproduct company that uses the average variable cost method is in competition with a small single-product company which manufactures widgets (a product familiar to all lawyers and law students). The multiproduct company could allocate major indirect or fixed costs disproportionately to its nonwidget products and allocate little or nothing except variable costs to its widgets. In contrast, the single-product competitor's total fixed and variable costs must of necessity be allocated among its widgets. Accordingly, the multiproduct competitor could claim its cost of manufacturing widgets was far below that of the single-product competitor and set its prices at a level that would technically be above its costs and profitable, yet be damaging to competition. Because the single-product competitor could not meet the multiproduct competitor's artificially low prices, it might be driven from the marketplace, leaving the multiproduct competitor **[***21]** with a monopoly on the sale of widgets. The multiproduct competitor could then dramatically increase widget prices, disproportionately allocate its fixed costs to widgets, and by using the same variable cost method attack some other competitor's product line or market with unrealistically low prices. The fully allocated cost method, although not perfect, prevents this method of monopolization by requiring that a pro rata portion of the multi product competitor's overhead and fixed costs be included in its widget cost figures.

ARA claims the fully allocated cost method is arbitrary because there are many ways of allocating costs (for example, in the present case per mile, per bus or per student) each of which may result in significantly different cost profiles. While we agree there are many ways of fully allocating costs, the possibilities are not without limitation. ***HN9***[] To be legally acceptable, the **[**863]** allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business. (*William Inglis & Sons Bak. Co. v. ITT Con. Bak. Co., Inc. (N.D.Cal. 1975) 389 F.Supp. 1334, 1344*, **[***22]** reversed on other grounds in *Wm. Inglis & Sons Baking v. ITT Cont. Baking Co. (9th Cir. 1975) 526 F.2d 86, 88*.) Moreover, a defendant is free to demonstrate **[*823]** to the trier of fact that its fully allocated cost, using another reasonable allocation method other than that used by the plaintiff, is actually lower than the plaintiff alleges and lower than defendant's sales or bid price. (See McCarthy, *Whatever Happened to the Small Businessman? The California Unfair Practices Act* (1968) 2 U.S.F. L.Rev. 165, 179-180.) ARA did not do so. It merely presented witnesses who testified ARA always bid above cost or always sought to make a profit. In fact, ARA did not even demonstrate it sold its services above its average variable cost or long-run incremental cost, the methods it espouses. As such, defendant failed to demonstrate that the use of the fully allocated cost method was arbitrary or irrational as applied to the facts of this case.

ARA's attack on the use of the fully allocated cost method is, in effect, nothing more than a challenge to the economic wisdom of the statute, a matter more properly addressed to the Legislature. Since **[***23]** we have concluded the use of the fully allocated cost method is rationally related to a valid legislative purpose, we must reject ARA's due process claim. (*Exxon Corp. v. Governor of Maryland, supra, 437 U.S., at pp. 124-125 [57 L.Ed.2d at p. 99*]; *Eye Dog Foundation v. State Board of Guide Dogs for the Blind (1967) 67 Cal.2d 536, 547 [63 Cal.Rptr. 21, 432 P.2d 717]*.)

II

CA(5a)[] **(5a)** ARA contends California's use of the fully allocated cost method in *section 17043* may be interpreted as economic regulation intended to protect smaller or less efficient competitors from competition. (See *MCI Communications v. American Tel. & Tel. Co., supra, 708 F.2d at p. 1117*.) As such it is preempted by the Sherman Antitrust Act (*15 U.S.C. § 1 et seq.*) because it prohibits procompetitive conduct that is not injurious to competition. [6]

[*24]** ***CA(6a)***[] **(6a)** ***HN10***[] "It is well established that within contitutional limits Congress may pre-empt state authority by so stating in express terms. [Citation.] Absent exclusive pre-emptive language, Congress' intent to supersede state law altogether may be found from a '"scheme of federal regulation . . . so **[*824]** pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," . . .' [Citations.] Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation], or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citation.]" (*Pacific Gas & Elec. v. Energy Resources Comm'n. (1983) 461 U.S. 190, 203-204 [75 L.Ed.2d 752, 765, 103 S.Ct. 1713]*.)

CA(7)[] **(7)** ***HN11***[] "'The history of the Sherman Antitrust Act makes it clear that the Congress did not intend that the federal legislation preempt parallel state efforts to control **[**864]** unfair competitive **[***25]** practices.' . . . [Citations.]" (*Amarel v. Connell (1988) 202 Cal.App.3d 137, 147 [248 Cal.Rptr. 276]*.) ***CA(5b)***[] **(5b)** Therefore we need only decide whether the Unfair Practices Act actually conflicts with federal law.

ARA argues the Unfair Practices Act conflicts with the Sherman Act because it could be interpreted as anticompetitive, as the fully allocated cost method protects smaller or less efficient competitors from competition. Furthermore, it conflicts with federal law because it makes rational, profitable and nonpredatory pricing above long-run incremental cost presumptively unlawful.

A similar argument was raised by the defendant in *William Inglis, etc. v. ITT Continental Baking Co., supra, 668 F.2d 1014*. Continental contended that California's fully allocated cost standard conflicted with the Ninth Circuit's interpretation of federal antitrust laws, which permitted pricing, under appropriate circumstances, at or above

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[6] The Sherman Antitrust Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." (*15 U.S.C. § 1*.)

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . ." (*15 U.S.C. § 2*.)

Generally, the Sherman Act bans all arrangements that are adopted to reduce competition or which have a significant tendency to reduce competition. (*Northrop Corp. v. McDonnell Douglas Corp. (9th Cir. 1983) 705 F.2d 1030, 1050*.)

marginal or average variable cost. It argued that the California law proscribed conduct which federal law permitted and thereby frustrated the fundamental policies of the Sherman Act. (*Id., at pp. 1048-1049*.) **[***26]**

The Ninth Circuit held that the possibility of proscription by California of conduct that federal law might permit was not sufficient to warrant preemption. (*668 F.2d at p. 1049*.) The fact that federal law had established an evidentiary standard, which did not make all pricing below average total cost indicative of anticompetitive intent, did not create a federal right to set such prices. (*Id., at p. 1049*.) The court noted the cost method used by California's statute essentially proscribed pricing below average total cost. (*Id., at p. 1048*.) The statute did not make all sales below average total cost illegal per se, but only such sales that had been made for the purpose of injuring competitors or destroying competition. The court found the only real difference between the California statute and federal law was in the **[*825]** allocation of evidentiary burdens, as follows: "Assuming proof of injury to a competitor has been made, California law allows plaintiffs to establish a prima facie case with proof of prices below average total cost. The defendant then has the burden of negating the inference of illegal intent or establishing **[***27]** an affirmative defense. Under federal law, the plaintiff who relies on prices below average total cost, but above average variable cost, has not created a presumption of illegal intent. To establish such a presumption he must show that no legitimate business reason for the below-cost price exists. It follows, therefore, that a price below average total cost but above average variable cost does not always violate California law, nor is such a price a guarantee of immunity under federal law. The difference between the two laws does not warrant the inference of preemption." (*668 F.2d at pp. 1049-1050*.)

ARA disagrees with the statement in *William Inglis* that the Unfair Practices Act essentially proscribes pricing below average total cost and relies on the Seventh Circuit decision in *MCI Communications, supra, 708 F.2d 1081* to support its position. The *MCI Communications* court noted that average total cost should not be equated with fully distributed cost and that it is best measured by average long-run incremental cost. (*MCI Communications, supra, at p. 1122*.) It also noted that some federal circuits had rejected the **[***28]** use of the fully allocated cost method and endorsed a marginal cost method. (*Id., at pp. 1120-1122*.) ***CA(8)***[] **(8)** We need not resolve or harmonize this apparent conflict among the federal circuits, however, as we are not bound by their decisions. (*Rohr Aircraft Corp. v. County of San Diego (1959) 51 Cal.2d 759, 764-765 [336 P.2d 521]*, revd. without comment on this point, *362 U.S. 628 [4 L.Ed.2d 1002, 80 S.Ct. 1050]*; accord *Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 830 [171 Cal.Rptr. 604, 623 P.2d 165]*.) ***CA(5c)***[] **(5c)** ***HN12***[] Absent a determination by the United States Supreme Court regarding what formula or cost method should be used in determining whether pricing is predatory, there is no clear federal standard with which the Unfair Practices Act may be said to conflict.

[865]** In any event, even if, as ARA contends, the Unfair Practices Act may hypothetically have an anticompetitive effect, this does not warrant an inference of preemption. "For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage **[***29]** in economic regulation would be effectively destroyed." (*Exxon Corp. v. Governor of Maryland, supra, 437 U.S. at p. 133 [57 L.Ed.2d at p. 105]*.) ***HN13***[] The mere fact that the Unfair Practices Act proscribes conduct that might, according to some federal courts, be permitted under federal law is insufficient to demonstrate that the Unfair Practices Act is preempted by the Sherman Act. (*Id., at p. 130-131 [57 L.Ed.2d at p. 103]*.)

[*826] As previously discussed, the use of the fully allocated cost method is rationally related to the Unfair Practices Act's legitimate purpose of safeguarding the public against the creation or perpetuation of monopolies and of fostering and encouraging competition. This purpose is basically the same as that of the Sherman Act. (See fn. 6, *ante; William Inglis, etc. v. ITT Continental Baking Co., supra, 668 F.2d at p. 1050, fn. 62*.) ***CA(6b)***[] **(6b)** An inference of preemption is not appropriate where the basic purposes of the state and federal statutes are similar. (*Exxon Corp., supra, 437 U.S. at pp. 132-133 [57 L.Ed.2d at p. 104]*.) **[***30]**

On the facts of this case, ARA has not shown there is any conflict between the Sherman Act and the Unfair Practices Act. Under the circumstances, we find no preemption. (See also *People v. Gordon (1951) 105 Cal.App.2d 711, 718-719 [234 P.2d 287]*.)

III-VIII *

. . .

IX

A.

CA(9a)[] **(9a)** ARA also challenges the award of punitive damages arguing Sullivan was not entitled to an election of remedies as it was limited to the treble damages provided for in *section 17082*. We agree.

CA(10)[] **(10)** *HN14*[] Where a statutory penalty is imposed for a wrongful act, it does not preclude recovery of punitive damages in a tort action where the necessary malice or oppression is shown. (*Greenberg v. Western Turf Assn. (1903) 140 Cal. 357, 363 [73 P. 1050]*; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1334, p. 792.) If the purpose of the penalty is the same as that of punitive damages, however, the plaintiff cannot obtain a double recovery and must elect **[***31]** to have judgment entered in an amount which reflects either the statutory trebling or the compensatory and punitive damages. (*Marshall v. Brown (1983) 141 Cal.App.3d 408, 419 [190 Cal.Rptr. 392]*.) When a statute recognizes a cause of action for a violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears. (*Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal.3d 211, 215 [185 Cal.Rptr. 270, 649 P.2d 912]*.) But when a new right, not existing at **[*827]** common law, is created by statute and a statutory remedy for the infringement thereof is provided, such remedy is exclusive of all others unless the statutory remedy is inadequate. (*Orloff v. Los Angeles Turf Club (1947) 30 Cal.2d 110, 112-113 [180 P.2d 321, 171 A.L.R. 913]*; *Strauss v. A. L. Randall Co. (1983) 144 Cal.App.3d 514, 518-519 [194 Cal.Rptr. 520]*.)

CA(9b)[] **(9b)** Here it is not disputed that the treble damages provision of *section 17082* is punitive **[***32]** and similar in purpose to *Civil Code section 3294* and hence plaintiff is not entitled to both remedies. Nor is it disputed that the treble damages provision is mandatory. (See *Uneedus v. California Shoppers, Inc. (1978) 86 Cal.App.3d 932, 942 [150 Cal.Rptr. 596]*.)

Relying on *Marshall v. Brown, supra, 141 Cal.App.3d 408*, Sullivan contends it was entitled to an election of remedies. In *Marshall*, the plaintiff sued her previous employer based on statements the employer made to the plaintiff's prospective employer. She alleged both a cause of action for slander seeking compensatory **[**866]** and punitive damages and a civil action authorized by *Labor Code sections 1050* and *1054* which provided that an employer who had discharged an employee or paid off an employee voluntarily leaving such service and by any misrepresentation prevented or attempted to prevent the former employee from obtaining employment was liable to the former employee for treble damages. (*Id., at pp. 411-412*.) The jury found the employer had made a misrepresentation that prevented plaintiff from obtaining employment **[***33]** and found each defendant slandered plaintiff. (*Id., at p. 413*.) The court found the Labor Code provision for treble damages was mandatory and punitive. (*Id., at p. 419*.) Since the purpose of the treble damages provision was the same as that of punitive damages, the plaintiff was not entitled to both and had to elect between a judgment entered in an amount which reflected either the statutory trebling or the compensatory and punitive damages. (*Ibid.*)

Marshall does not support Sullivan's position, as in that case the plaintiff was pursuing two causes of action, each with different remedies though relying on the same facts. Here, Sullivan is relying solely on a statutory violation. It has not alleged, identified or pursued any alternate theory of liability nor has it pursued any common law tort cause of action that existed prior to the enactment of the Unfair Practices Act. As such, Sullivan is limited to a recovery of treble damages.

B., C. *

* See footnote 1, *ante*, page 811.

* See footnote 1, *ante*, page 811.

[*34]** . . .

[*828] The judgment is reversed and the matter is remanded to the trial court for a new trial limited to a determination of the amount of damages in accordance with part VIII of this opinion. * Each party shall bear its own costs on appeal.

End of Document

* Reporter's Note: Part VIII is contained in the nonpublished portion of the opinion. See footnote 1, *ante*, page 811.

Transnor (Bermuda), Ltd. v. BP North America Petroleum

United States District Court for the Southern District of New York

April 18, 1990, Decided ; April 18, 1990, Filed

No. 86 Civ. 1493 (WCC)

Reporter

738 F. Supp. 1472 *; 1990 U.S. Dist. LEXIS 4423 **; 1990-1 Trade Cas. (CCH) P68,998; Comm. Fut. L. Rep. (CCH) P24,829

TRANSNOR (BERMUDA) LIMITED, Plaintiff, v. BP NORTH AMERICA PETROLEUM, CONOCO INC., SHELL OIL COMPANY, BP OIL INTERNATIONAL LTD., CONOCO (U.K.) LTD., SHELL U.K. LTD., SHELL INTERNATIONAL TRADING CO., and EXXON CORPORATION, Defendants

Core Terms

prices, oil, trading, transactions, contracts, delivery, defendants', spinning, commodity, crude oil, parties, commerce, offset, trader, conspiracy, antitrust, speculative, non-defendants', cargoes, sales, summary judgment, market price, markets, manipulative, artificial, purposes, tax-spin, per barrel, notebook, taxes

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

HN1[] **Private Actions, Standing**

While U.S. antitrust laws give the court jurisdiction over antitrust claims that arise from actions directly affecting U.S. commerce, only persons or corporations injured while trading in U.S. foreign or domestic commerce have the standing necessary to bring such claims.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

HN2[] **Private Actions, Standing**

The first prerequisite to a determination that a plaintiff was injured in the relevant market is a finding that the market is part of American foreign or domestic commerce.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

International Trade Law > General Overview

HN3[] Private Actions, Standing

Where the contracts at issue were made is equally unimportant if the market itself is considered a U.S. market or directly impacts U.S. commerce. A plaintiff should not be penalized for the utilization of a foreign branch of a market instead of an equally accessible American branch.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4[] Private Actions, Standing

Where the market in question has even slight direct ties to U.S. commerce, that market is not an exclusively foreign market and is therefore deemed a U.S. market.

Governments > Courts > Judicial Comity

International Law > Dispute Resolution > Comity Doctrine > General Overview

HN5[] Courts, Judicial Comity

In evaluating the interests of a foreign government prior to determining whether to assert jurisdiction over a transaction occurring outside the United States, the courts have generally applied a jurisdictional rule of reason, which seeks to balance the competing interests asserted.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN6[] Summary Judgment, Burdens of Proof

A party seeking summary judgment must demonstrate that there is no genuine issue as to any material fact. *Fed. R. Civ. P. 56(c)*. When the moving party has carried its burden under *rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. It must establish that there is a genuine issue for trial. In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

Antitrust law limits the range of permissible inferences from ambiguous evidence in a case under *15 U.S.C.S. § 1* of the Sherman Act. Specifically, conduct as consistent with permissible conduct as with an illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. There must be direct or circumstantial evidence that tends to exclude the possibility that the defendants were acting independently. Moreover, in antitrust cases, if the factual context renders plaintiff's claim implausible, if the claim is one that simply makes no economic sense, plaintiff must come forward with more persuasive evidence to support its claim than would otherwise be necessary.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN8[] **Antitrust & Trade Law, Sherman Act**

While some assessment of the evidence is necessary to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN9[] **Summary Judgment, Opposing Materials**

A higher burden is imposed on the party opposing summary judgment when the scheme alleged is economically irrational.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Sherman Act, Claims**

To establish a violation of *15 U.S.C.S. § 1* of the Sherman Act, a plaintiff must establish only two elements: 1) a conspiracy 2) that unreasonably restrains trade or affects interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

A plaintiff must be able to prove that defendants had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement in order to prove a conspiracy under 15 U.S.C.S. § 1of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Antitrust & Trade Law, Sherman Act

In determining whether circumstantial evidence of a conspiracy exists, a court must keep in mind the distinction between independent but parallel business actions and a conscious commitment to a common scheme designed to achieve an unlawful objective which excludes the possibility of independent action. Only the latter is prohibited by the antitrust laws. Conduct equally consistent with permissible business activity as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Taxation Issues

HN14[] Antitrust & Trade Law, Sherman Act

A plaintiff must show the existence of additional circumstances, often referred to as "plus" factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy. These plus factors should not be considered in isolation; the important determination is whether the evidence viewed as a whole supports a reasonable inference of conspiracy.

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN15[] Discovery, Misconduct During Discovery

The nonproduction of material evidence in the control of a party raises an inference that evidence is unfavorable to that party.

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN16[] Discovery, Misconduct During Discovery

An inference that the missing evidence is harmful can be rebutted by an adequate explanation of the reason for nonproduction.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Sherman Act > Claims

HN17[] Clayton Act, Claims

A plaintiff must prove that its business injury was caused by defendants' violation of the antitrust laws in order to recover damages under 15 U.S.C.S. § 4 of the Clayton Act.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN18[] Summary Judgment, Entitlement as Matter of Law

Mere conjecture or speculation by the party resisting summary judgment does not provide a basis upon which to deny a summary judgment motion.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Securities Law > Commodities Futures Trading > Future Delivery

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Governments > Agriculture & Food > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading > Cash Forward Contracts

Securities Law > Commodities Futures Trading > Futures Contracts

HN19[] Types of Contracts, Futures

While 7 U.S.C.S. § 2(a)(1) of the Commodity Exchange Act provides the Commodity Futures Trading Commission with regulatory jurisdiction over contracts of sale of a commodity for future delivery, it further provides that the term future delivery shall not include any sale of a cash commodity for deferred shipment or delivery.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

HN20[] Agriculture & Food, Commodity Exchange Act

See 7 U.S.C.S. § 2.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading > Future Delivery

HN21[] Agriculture & Food, Commodity Exchange Act

Commodity is broadly defined to include, among others, all other goods and articles, and all services, rights, and interests in which contracts for future delivery presently or in the future dealt in.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

Securities Law > Commodities Futures Trading > Cash Forward Contracts

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading > Future Delivery

Securities Law > Commodities Futures Trading > Futures Contracts

HN22[] Types of Contracts, Futures

Cash commodity contracts for deferred shipment or delivery are commonly known as cash forward contracts, whereas contracts of sale of a commodity for future delivery are called futures contracts.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

Securities Law > Commodities Futures Trading > Definitions

Business & Corporate Compliance > ... > Negotiable Instruments > Types of Parties > Accommodated & Accommodation Parties

Contracts Law > ... > Negotiable Instruments > Indorsements > Accommodation Indorsements

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading > Futures Contracts

HN23[] Types of Contracts, Futures

Sales of cash commodities for deferred shipment or delivery generally have been recognized to be transactions in physical commodities in which delivery in fact occurs but is delayed or deferred for purposes of convenience or necessity. Forward contracts have thus been defined as transactions in which the commercial parties intend and can accommodate physical transfer of the actual commodity. By contrast, futures contracts are undertaken primarily to assume or shift price risk without transferring the underlying commodity. As a result, futures contracts providing for delivery may be satisfied either by delivery or offset.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Contracts Law > ... > Negotiable Instruments > Negotiations > Deliveries

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

HN24[] **Agriculture & Food, Commodity Exchange Act**

The Commodity Futures Trading Commission has recognized that commodity transactions between commercial participants in certain markets have evolved from privately negotiated contracts for deferred delivery of a physical commodity under which delivery generally occurs to transactions that have highly standardized terms and are frequently satisfied by payments based upon intervening market price changes.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

HN25[] **Agriculture & Food, Commodity Exchange Act**

The forward contract exclusion is unavailable to contracts for sale for commodities which are sold merely for speculative purposes and which are not predicated upon the expectation that delivery of the actual commodity by the seller to the original contracting buyer will occur in the future.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

Securities Law > Blue Sky Laws > Exemptions & Exclusions > Exempt Issuers Transactions

Governments > Agriculture & Food > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading > Cash Forward Contracts

Securities Law > Commodities Futures Trading > Future Delivery

HN26[] **Types of Contracts, Futures**

In determining whether a particular transaction is exempt from jurisdiction of the Commodity Exchange Act as a forward contract, the courts and the Commodity Futures Trading Commission have required that the contract's terms and the parties' practice under the contract make certain that both parties to the contract deal in and contemplate future delivery of the commodity.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

HN27[] **Agriculture & Food, Commodity Exchange Act**

Even where there is no right of offset, the opportunity to offset and a tacit expectation and common practice of offsetting suffices to deem the transaction a futures contract.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Governments > Agriculture & Food > General Overview

HN28[] **Agriculture & Food, Commodity Exchange Act**

The anti-manipulation provisions of *15 U.S.C.S. §§ 9(b)*, *4(c)* of the Commodity Exchange Act require proof of each of the following four elements: (1) manipulative conduct; (2) a specific intent to create an artificial price which is not determined by the forces of supply and demand; (3) a causal relationship between the manipulative conduct and a change in market prices; and (4) an artificial price.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

Securities Law > Commodities Futures Trading > Definitions

Governments > Agriculture & Food > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > ... > Express Liabilities > Price Manipulation > Matched Orders & Washed Sales

Tax Law > State & Local Taxes > Sales Taxes > General Overview

Tax Law > State & Local Taxes > Sales Taxes > Sales Tax Definitions

HN29[] **Types of Contracts, Futures**

Wash trading, not defined in 15 U.S.C.S. § 4c(a) of the Commodity Exchange Act (CEA) itself, is the practice of entering into or purporting to enter into transactions for the purpose of giving the appearance that trades are being or have been made but without having actually taken a market position. The existence of a wash result, the purchase and sale of the same futures contract at a similar price, is an insufficient showing to establish a wash sale in violation of § 4c(a) of the CEA. Prohibited wash sales are proved only if it is demonstrated that the trader knowingly participated in transactions initiated with intent to avoid a bona fide market position. Whether a transaction constitutes a wash sale inevitably turns on the particular facts and circumstances of individual cases and not on any absolute formula.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > ... > Express Liabilities > Price Manipulation > Matched Orders & Washed Sales

Governments > Agriculture & Food > General Overview

HN30[] **Agriculture & Food, Commodity Exchange Act**

15 U.S.C.S. § 4c(a)(A) of the Commodity Exchange Act's broad prohibition of any transaction of the character of, or commonly known to the trade as, a "wash sale," suggests that negating market risk sufficiently eliminates any significant risk to fall within the prohibition.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > ... > Express Liabilities > Price Manipulation > Matched Orders & Washed Sales

HN31[] **Agriculture & Food, Commodity Exchange Act**

While prearrangement is not a necessary element for finding a wash sale violation, it is one method used to avoid a bona fide market position.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Criminal Law & Procedure > ... > Fraud > Securities Fraud > Elements

HN32[] **Agriculture & Food, Commodity Exchange Act**

Where a trader acts with a legitimate investment or commercial purpose, no manipulative intent can be found.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

HN33[] **Agriculture & Food, Commodity Exchange Act**

Where multiple causes of an artificial price can be sorted out, and defendants are a proximate cause of the artificial price, a charge of manipulation can be sustained.

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Davis, Markel & Edwards, Esqs., Gregory A. Markel, David Dunn, Ann Alexander, of counsel, Attorneys for Defendants Conoco, Inc. and Conoco (U.K.) Ltd., New York, New York.

Sullivan & Cromwell, Esqs., William E. Willis, James H. Carter, Gandolfo V. DiBlosi, Michael Straus, William J. Snipes, of counsel, Attorneys for Defendant, Exxon Corporation, New York, New York.

Judges: William C. Conner, United States District Judge.

Opinion by: CONNER

Opinion

[*1474] OPINION AND ORDER

WILLIAM C. CONNER, UNITED STATES DISTRICT JUDGE

This action under the antitrust and commodity laws is before the Court on defendants' motion for summary judgment.

BACKGROUND

Plaintiff Transnor (Bermuda) Ltd. ("Transnor") is a corporation established under the laws of Bermuda and with its principal place of business there. Transnor's suit arises out of its purchase of two cargoes of North Sea Crude Oil in December 1985 at an average price of $ 24.50 per barrel for delivery in Scotland in March 1986. Transnor refused to take delivery of these cargoes because their market value had declined after Transnor entered into the contracts. [1]

[1] SITCO, a party to one of the contracts, obtained a judgment against Transnor for its default. Transnor settled with Nissho Iwai, a party to the second contract.

[*1475] Transnor claims that remaining defendants Conoco Inc., Conoco (U.K.) Ltd. (collectively "Conoco") **[**2]** and Exxon Corporation "Exxon"), conspired with the settling defendants [2] to cause a decline in crude oil prices by jointly selling cargoes of Brent blend crude oil ("Brent Oil") at below-market prices. Brent Oil is a blend of oils produced in various fields in the North Sea and delivered through pipelines for loading onto cargo ships at Sullem Voe in the Shetland Islands. By the end of March 1986, the price of a barrel of Brent Oil had dropped substantially to $ 13.80 per barrel, from $ 29.05 per barrel in November 1985. Transnor asserts claims against defendants for violations of the Sherman Act, *15 U.S.C. § 1 (1982)*, and *sections 4(c)*, *6(b)*, and *13(b)* of the Commodity Exchange Act ("CEA"), *7 U.S.C. §§ 6(c)*, *9(b)* and *13(b) (1980 & 1989 Supp.)*.

Defendants have moved for **[**3]** summary judgment pursuant to *Rule 56, Fed. R. Civ. P.* on the grounds that (1) Transnor lacks standing to sue under the antitrust laws and the CEA or, alternatively, that the Court should decline to exercise jurisdiction under principles of comity and international law; (2) there is no evidence that defendants conspired to drive down the price of oil in violation of the antitrust laws; (3) Transnor's injury is not cognizable under *Section 4* of the Clayton Act, *15 U.S.C. § 15 (1973 & 1990 Supp.)* because there is no evidence that defendants' behavior caused oil prices to fall; and (4) defendants' conduct was neither governed by nor in violation of the CEA. For the following reasons, the motion is denied.

ANTITRUST AND COMMODITY LAW STANDING

Defendants first move for summary judgment on the ground that Transnor lacks standing under both the Sherman Act, *15 U.S.C. §§ 1 et seq.* and the Commodity Exchange Act, *7 U.S.C. §§ 1 et seq.* In an opinion and order dated August 5, 1987 ("Order"), this Court denied defendants' motion to dismiss pursuant to *Rule 12, Fed. R. Civ. P. Transnor (Bermuda) Ltd. v. BP North America Petroleum, 666 F. Supp. 581 (S.D.N.Y. 1987)*. One of the grounds **[**4]** advanced by defendants for dismissal was that Transnor lacked standing under the antitrust and commodity laws. Accepting the facts alleged by Transnor as true, as a court must on a motion to dismiss, I found that the Brent Oil Market, in which Transnor allegedly suffered its injury, is "primarily a U.S. market," or at least a "part of U.S. commerce." *Id. at 583*. The Court accordingly held that Transnor had standing under U.S. antitrust and commodity laws.

Defendants then moved the Court to certify for immediate appeal the question of "whether Transnor, a foreign corporation which engaged in no business in this country, has standing to sue for injuries allegedly suffered in wholly foreign trading on an international market merely because it is alleged that there are U.S. participants trading in that market as well." The Court denied the motion because the question for certification had misstated the underlying basis for the Court's initial ruling, in which the Court specifically accepted as true Transnor's unrefuted allegation that the Brent Market is a U.S. market and not merely an international market. *Transnor (Bermuda) Ltd. v. BP North America Petroleum, 677 F. Supp. 777 (S.D.N.Y.* ***[**5]*** *1988)*. The Court thereafter stated that,

> if, after conducting pre-trial discovery, defendants uncover evidence indicating that the Brent Market is indeed an international market with no direct impact on **[*1476]** U.S. commerce, then it may be appropriate for them to move for summary judgment on the ground that plaintiff lacks standing under the antitrust laws.

Id. at 778. Defendants now move accordingly for summary judgment, insisting that the undisputed facts demonstrate that the Brent Market is an international market and that Transnor, therefore, lacks standing under U.S. antitrust and commodity laws.

HN1[] While U.S. antitrust laws give this Court jurisdiction over antitrust claims that arise from actions directly affecting U.S. commerce, only persons or corporations injured while trading in U.S. foreign or domestic commerce have the standing necessary to bring such claims. [3] In *de* *Atucha v. Commodity Exchange, Inc., 608 F. Supp. 510*

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[2] Transnor settled and dismissed with prejudice its claims against Shell International Trading Company ("SITCO") and Shell U.K. Limited ("SUKO"), as well as against BP North American Petroleum and BP Oil International Ltd. (collectively "BP"). Transnor also dismissed with prejudice its claims against the Royal Dutch Petroleum Company, the "Shell" Transport and Trading Company, p.l.c., and the Shell Oil Company.

(S.D.N.Y. 1985), the district court held that foreigners who trade "exclusively" on a foreign exchange do not have standing under either U.S. antitrust or commodity laws. The court noted that "**HN2**[] the first prerequisite to a determination that a plaintiff **[**6]** was injured in 'the relevant market' is a finding that the market is part of American foreign or domestic commerce." *Id. at 518*. Because Transnor's claims rest on injury from anticompetitive activity in the Brent Market, the issue presented here is whether the Brent Market is a part of American foreign or domestic commerce or is an exclusively foreign market.

According to Judge Lasker in *de Atucha*, "Congress did not contemplate recovery under the antitrust laws by an individual who traded, and was injured entirely outside of United States commerce." *Id. at 518*. The court further held that "such transactions were not intended to be and are not regulated under the [CEA]." *Id. at 523*. Judge Lasker then found that the plaintiff, having traded on an exclusively foreign market, lacked standing. This case, however, presents a wholly different situation wherein the plaintiff claims that the market on which it traded was a U.S. market or had a direct **[**7]** impact on U.S. commerce, a nexus with the United States sufficient to invoke standing.

Because 95% of the trades in the Brent Market are made for speculative or hedging purposes not calling for actual delivery of the oil, the appropriate inquiry involves a consideration of the location of the trading market. The location of the production area and the delivery point are manifestly much less relevant. *See* *Transnor (Bermuda) Ltd. v. BP North America Petroleum, 666 F. Supp. 581, 583 (S.D.N.Y. 1987)*. **HN3**[] Where the contracts at issue were made is equally unimportant if the market itself is considered a U.S. market or directly impacts U.S. commerce. *See id*. A plaintiff should not be penalized for the utilization of a foreign branch of a market instead of an equally accessible American branch. As this Court has previously stated, Transnor's choice to purchase the contracts through the London branch, rather than in New York or Houston, "does not lessen Transnor's ability to vindicate Congress's clearly expressed desire that foreigners have standing to sue under the U.S. antitrust laws if the alleged course of anti-competitive conduct has the requisite impact on U.S. commerce." *Transnor, **[**8]** 666 F. Supp. at 584*.

The unrefuted evidence establishes that of the 109 traders and brokers Transnor knew to be active in the Brent Market, 88 had offices located in the United States and at least 6 traded exclusively in the United States. It is further uncontested that two of the three principal trading centers of the Brent Market are located in the United States, specifically, New York and Boston.

HN4[] Where the market in question has even slight direct ties to U.S. commerce, that market is not an exclusively foreign market and is therefore deemed a U.S. market. While the Brent Market may be a substantially foreign market, Transnor has presented sufficient proof that the Brent Market is not an exclusively foreign market, and thus a U.S. market.

[*1477] Moreover, Brent Oil is imported into the United States and it may be delivered to fulfill Light Sweet crude oil contracts traded on the New York Mercantile Exchange. These indirect ties to U.S. commerce further support the determination that Transnor has standing to assert claims arising from trades executed on the Brent Market. Accordingly, the Court concludes that Transnor has standing under U.S. antitrust and commodity laws.

COMITY AND INTERNATIONAL **[**9]** LAW

Defendants next move this Court to stay its hand under principles of comity and international law, claiming that an assertion of jurisdiction by this Court would "affront legitimate and powerful British interests." **HN5**[] In evaluating the interests of a foreign government prior to determining whether to assert jurisdiction over a transaction occurring outside the United States, the courts have generally applied a "jurisdictional rule of reason," which seeks to balance the competing interests asserted. The parties agree that the applicable principles of comity among nations is set forth in *Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 749 F.2d 1378 (9th Cir. 1984)*, *cert. denied*, *472 U.S. 1032, 87 L. Ed. 2d 643, 105 S. Ct. 3514 (1985)*. They disagree, however, on the application of the

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[3] This Court carefully attempts to distinguish those cases dealing with standing from those interpreting subject matter jurisdiction. Defendants clearly contest plaintiff's standing to assert its antitrust and commodity claims.

seven principles espoused by *Timberlane* to the facts at hand. For the following reasons, the Court finds that comity principles do not compel the Court to decline to exercise jurisdiction.

The Court must first determine whether the extraterritorial enforcement of United States antitrust and commodity laws create an actual or potential conflict with the laws and policies of other nations. Defendants assert **[**10]** that the Securities and Investments Board ("SIB") -- the British government agency with jurisdiction over United Kingdom ("U.K.") financial markets -- has adopted a *Consultive Document on the Future Regulation of the Oil Markets* and an *Oil Market Code of Conduct* in February and March 1988, which presents guidelines for the forward trading of Brent Oil, and that SIB intends to promulgate regulations thereon. Transnor contends that defendants' speculation on the future action of SIB does not create a conflict with foreign law or policy. Transnor also states that no binding regulation of Brent Market trading presently exists in the U.K. The Court agrees with Transnor that application of U.S. antitrust and commodity laws does not create either an actual or potential conflict with existing British government regulation of Brent Market transactions. That a conflict may arise in the future should the British government act is too uncertain to weigh against the exercise of jurisdiction.

Next to be weighed are the headquarters and other office locations of the party corporations, as well as citizenship of persons involved in the alleged illegal conduct. In this case, of the three remaining **[**11]** defendants, Conoco Inc. and Exxon are U.S. corporations, headquartered in the U.S., and Conoco (U.K.) Limited is a subsidiary of Conoco Inc., controlled and directed by its parent. Transnor, a Bermuda corporation, transacted business internationally. Although the relevant transactions were effected through the London branch of the Brent Market, the parties' ties to the United States are stronger than those to the United Kingdom.

Also considered is the extent to which enforcement by either state can be expected to achieve compliance. In this case, compliance with the applicable statutes can be achieved only in the United States because there is no comparable regulation of the Brent Market in the U.K. and defendants offer no evidence that U.S. interests under the pertinent statutes can be vindicated abroad. Therefore, compliance with American law can only be assured in the United States.

The Court next turns to the relative significance of the effects of the alleged illegal conduct on the domestic and foreign commerce of the United States and on commerce elsewhere. Transnor maintains and defendants admit that defendants' trading of Brent Market contracts took place mainly in the United **[**12]** States. It is defendants' alleged conduct in the United States which **[*1478]** gave rise to this action. Because two of the three branches of the Brent Market are in the United States, as mentioned earlier, defendants' alleged conduct has clearly impacted U.S. commerce. This Court recognizes, of course, the equally significant impact on U.K. and international commerce. Consequently, this factor neither favors nor disfavors the exercise of jurisdiction.

The Court must also consider whether defendants' actions were intended to harm or affect American commerce or the foreseeability of such effect. Transnor's complaint alleges that defendants engaged in conduct intended to depress market prices. In its submissions in opposition to the motion for summary judgment, Transnor has sufficiently demonstrated that, at the least, there are issues of fact as to whether defendants intended to affect U.S. commerce or should reasonably have foreseen such an impact. These fact issues preclude summary denial of jurisdiction on the ground of lack of the necessary scienter.

Finally, a court should weigh the location of the alleged illegal conduct in order to assess the appropriateness of the exercise of extraterritorial **[**13]** jurisdiction. Transnor claims that the United States was the center of the illegal conduct charged. While defendants refute the substance of the charges in the complaint, they do not specifically deny that this conduct is alleged to have taken place in the United States. Clearly then, the U.S. is an important locus, if not the hub, of defendants' alleged manipulation.

With all factors considered, both a quantitative and a qualitative tally favor the exercise of jurisdiction by this Court -- a result which should not affront British interests.

ANTITRUST CLAIM

Standard for Summary Judgment

HN6[] A party seeking summary judgment must demonstrate that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, *480 U.S. 932, 94 L. Ed. 2d 762, 107 S. Ct. 1570 (1987)*; *see* Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). It must establish that there is a "genuine issue for **[**14]** trial." Id. at 587. "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." Knight, 804 F.2d at 11.

However, "HN7[] ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." Matsushita, 475 U.S. at 588. [4] Specifically, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.;* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984). There must **[*1479]** be direct or circumstantial evidence that "tends to exclude the possibility that the [defendants] were acting independently." Monsanto, 465 U.S. at 764. Moreover, in antitrust cases, "if the factual context renders [plaintiff's] claim implausible -- if the claim is one that simply makes no economic sense -- [plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." Matsushita, 475 U.S. at 587; Apex Oil, 822 F.2d at 253 ("implausibility **[**15]** of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence").

[16]** *Description of Tax Spinning*

Transnor claims that defendants carried out their conspiracy through "tax spinning" -- the arm's-length sale by an integrated oil producer to a third party and a substantially simultaneous purchase of a similar quantity of oil at substantially the same price for use in that producer's refineries -- which, depending on the relation between the average market price and the price at which the trades were made, created the possibility of substantial tax savings under U.K. tax law. The crux of Transnor's claim is that from approximately November 1985 through mid-March 1986, defendants conspired to tax spin Brent Oil at below-market prices in order to reduce the U.K. taxes paid by defendants. Transnor also claims that the artificially reduced price of the spin sales drove down the market price of Brent Oil, a benchmark crude oil, as well as that of other crude oils such as West Texas Intermediate ("WTI"), an oil traded on the New York Mercantile Exchange, with which Brent Oil is virtually interchangeable.

Under the U.K. Oil Taxation Act of 1975 ("Taxation Act"), the applicable petroleum revenue tax rate between April 2, 1985 and March 31, 1986 was 87%. Under **[**17]** the then-applicable provisions of the Taxation Act, the taxed price on sales of oil differed depending on whether the sale was at arm's length on the open market or the oil was transferred directly to an integrated producer's affiliated entity. Transfers to affiliated companies were taxed at an assessed market value, known as the tax reference price ("TRP"), which, beginning in 1984, was determined by the

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[4] Some courts and commentators state that the Supreme Court's decisions in *Matsushita, Celotex*, and Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) represent a "new era" more favorable to summary judgment motions. *See e.g.*, Childress, *A New Era for Summary Judgments:* Recent Shifts at the Supreme Court, 116 F.R.D. 183 (1987). For example, the *Matsushita* court stated that plaintiffs "must show that the inference of conspiracy is reasonable in light of the competing inferences [of lawful behavior]." Matsushita, 475 U.S. at 588. This language suggests that courts must more critically weigh the inferences which the parties urge. However, the Second Circuit Court recently emphasized in the context of an antitrust summary judgment motion that, "HN8[] while some assessment of the evidence is necessary to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial." Apex Oil Co. v. Dimauro, 822 F.2d 246, 253 (2d Cir.), *cert. denied*, ***484 U.S. 977, 98 L. Ed. 2d 487, 108 S. Ct. 489 (1987)***.

Inland Revenue's Oil Taxation Office ("OTO") based on an average of prices established retrospectively for a period of time prior to the interaffiliate transfer. Defendants argue that because of declining oil prices from other causes, primarily the excess supply in the world oil market caused by OPEC, the TRP was higher than the current market price and thus led to payment of taxes on sales to affiliated entities based on an artificially high rate. Rather than pay taxes based on such an inflated price, defendants entered into matched buy/sell transactions in the open market instead of transferring oil directly to their refineries. Defendants claim that tax spinning thus resulted in payment of taxes based on a more accurate market rate, not, as Transnor claims, at below-market rates. **[**18]** This would furnish a logical explanation of tax spinning if it was done only in a declining market, in which the tax-spin transactions were at an actual market price lower than the TRP -- i.e. lower than the average market prices over the past month. Whether the tax spinning was done only in such circumstances is unclear from the present record.

Both parties spend considerable energy debating whether these transfers violate U.K. tax law. In brief, Transnor contends that while it was legal for an integrated oil company to sell its oil in the open market and to buy oil for its own needs, it was not legal to enter into a large number of matched buy/sell contracts at the same price in order to establish a "portfolio" of contracts for delivery months in the future. Defendants held these contracts open until the delivery month and then selected from their "portfolio" the lowest-priced sale and assigned to it oil they produced that month, known as "equity production." Producers were also able to choose among their affiliated businesses in assigning the sale, which was then reported to the tax authorities as the arms-length price at which they sold their equity production. In order to balance **[**19]** its portfolio for the month, other **[*1480]** buy/sells for that month would be disposed of by "booking out" [5] or by entering into an offsetting transaction.

Defendants offer a lengthy explanation for the legality of their behavior and note that after reviewing data concerning all of their Brent transactions during the relevant period, the OTO subsequently approved the portions of Conoco's and Exxon's tax returns that Transnor now challenges. Defendants state that Conoco informed the OTO that when multiple sales and purchases were made in a given delivery month, it reported the lowest-priced transaction as the arms-length sale. [6]

Economic Incentive to Lower Prices

Defendants argue that they had no financial motive to encourage low, **[**20]** rather than high, crude oil prices and thus Transnor cannot meet its increased burden to defeat summary judgment. [7] **[**21]** Transnor claims that defendants had the following financial incentives to encourage lower crude oil prices. First, defendants are companies, or affiliates of companies, which not only produce and refine crude oil, but also market crude oil and petroleum products made from crude oil. Lower crude prices would allow defendants to obtain higher profit margins in their sales of "downstream" refinery products, more than offsetting losses from sales of lower-priced crude oil. [8]

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[5] "Bookout" contracts are separate contracts entered into by the parties to the original contracts whereby they settle their respective obligations under the original contracts by paying each other the difference between the contract price and an agreed reference price.

[6] In 1987, the U.K. government changed the tax law to limit a producer's ability to select lower-priced sales from a large portfolio, thus reducing the frequency of tax spinning.

[7] In *Matsushita*, the Supreme Court imposed ***HN9***[] a higher burden on the party opposing summary judgment when the scheme alleged is economically irrational. The *Matsushita* Court found that the predatory pricing scheme alleged -- pricing sufficiently below the market level to drive out competitors in order to gain monopoly power and then recoup any resulting losses through monopoly profits -- was economically irrational because it led to definite short-term loss and uncertain long-term gain. The instant case involves possible short-term gain and, defendants contend, almost certain long-term loss.

[8] Earnings from upstream operations, which include the exploration and production of crude oil, rise and fall directly with crude oil prices. Earnings from downstream operations, which include the refining and marketing of refined products, derive from the difference between the cost of purchasing and refining the crude oil and the market price of the refined products.

Transnor further claims that because defendants were huge net buyers of crude oil, [9] they stood to gain from lower prices. [10]

Second, defendants would reap significant financial benefits from shifting profits from Brent crude oil production, which was taxed by the United Kingdom at a rate of 87%, to refining and marketing petroleum **[**22]** products, which were taxed at a significantly lower rate of approximately 40%. Under the U.K. tax scheme, a dollar reduction in the price of crude oil led to an after-tax 13-cent loss to defendants on the sale of the oil, whereas defendants' refining affiliates could buy Brent Oil for a dollar per barrel cheaper and, assuming no decline in the price of refined products, increase its after-tax profit by 60 cents per barrel. [11]

[23]** **[*1481]** As further evidence that defendants had incentives to tax spin to drive down market prices, Transnor points to an Exxon document which calculated "spinning incentive, $/B". Another Exxon document stated that tax spinning "directionally effects downward pressure on market (especially forward months)." Finally, Dr. Edwin Spuller, a Transnor witness, testified that "the majors had, at [the relevant] time, an interest to make their refineries profitable, so they had an interest to damage the crude oil price." Spuller Dep. at 270.

The economic plausibility of the alleged scheme is enhanced by defendants' admission that a decrease in crude oil prices temporarily widens the refining profit margin because of the time lag between the change in crude oil prices and the adjustment in the related refined product markets. An article in Weekly Petroleum Argus states that in the first quarter of 1986, Exxon and Conoco made in the downstream thirty-four and thirteen times more profit, respectively, per barrel of oil than they had made in the previous year. Defendants respond that Exxon and Shell experienced combined upstream and downstream net earnings declines during that same quarter. [12] In addition, **[**24]** they argue that BP's and Conoco's temporary gains were wiped out by the end of the second quarter of 1986, as the depressed price levels of crude oil and narrowed refinery margins resulted in decreased earnings. However, in the 4th quarter of 1985 and the 1st quarter of 1986, the period during which the conspiracy allegedly operated, Exxon and Conoco earned more than they did in the next three quarters combined, when Transnor alleges that tax spinning subsided and crude oil prices recovered.

The parties agree that prices of refined products eventually fall when crude oil prices decline. [13] Defendants claim that they would not act to achieve short-term **[**25]** increases in earnings since any such gain would disappear

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[9] Conoco claims that when its crude production and refinery runs are compared, it was a net seller of crude oil between January and June of 1986.

[10] Defendants contend that Colin Robinson, Transnor's expert witness, wrongly assumed that defendant companies bought lower-priced North Sea crude oil for their refineries in the open market during 1986. Exxon claims that from late 1985 through early 1986, the use of North Sea Crude Oil in Exxon refineries dramatically decreased, and the use of Saudi Arabian oil purchased on a netback basis increased. Moreover, Conoco did not use Brent Oil in its U.K. refinery.

[11] Transnor's expert Colin Robinson, Professor of Economics at the University of Surrey, England, opined that defendants' overall after-tax profits would be increased by a drop in crude-oil prices, based on his analysis of the effect of declining oil prices on a "typical" and "sophisticated" integrated producer/refiner of North Sea crude oil, employing data gathered from the trade journal Petroleum Intelligence Weekly. Robinson acknowledges, however, that his data do not reflect "the crude prices paid, the refinery netbacks achieved [nor] . . . the tax position of any one company." Robinson Decl. paras. 49-50. Defendants object to Robinson's results as imprecise and lacking probative value because he did not examine data produced in discovery relating to defendants' actual experiences.

[12] Transnor argues that Exxon's and Conoco's figures are misleading because they refer to "earnings" or "after tax operating income" rather than "profits." However, these terms are interchangeable, each referring to the excess, if any, of revenues over expenses. Transnor further faults Exxon's figures because they combine natural gas and petroleum earnings; Exxon attempts to justify this by asserting that the bulk of its natural gas production is dissolved in crude oil and it is unable to separate out the two for reporting purposes.

[13] Richard J. Kruizenga, Vice President-Corporate Planning for Exxon states that "competitive pressures are strong in the downstream and as a result product prices adjust to reflect changes in the price of crude oil." Kruizenga Aff. para. 5. A Conoco document prepared in connection with Conoco's 1986 proposed plan stated "the effect of lower crude oil prices is dependent

shortly as product prices adjusted to the lower prices of crude oil, ultimately leading to substantially lower overall earnings. Defendants further argue that even if they were net buyers of crude oil, they had no incentive to drive down the price of crude oil because earnings from upstream operations are the overriding determinant of overall earnings. [14] Defendants therefore maintain that they have a strong incentive to obtain higher prices on their sales of crude oil.

[26]** Transnor responds that huge profits stood to be made as long as product prices fell at a slower rate than crude oil prices. Transnor claims that defendants possessed sufficient market power to make product prices "sticky" during a period of price declines. [15] Therefore, defendants had the **[*1482]** economic incentive to lower the prices of crude oil in order to increase their profits in the refined market and their overall earnings.

[27]** In its surreply, Transnor argues that information and arguments relating to defendants' incentive to drive world oil prices down are irrelevant because defendants had an incentive to tax spin only on the Brent market and only between late 1985 and early 1986. However, the effect of low Brent prices on other oil prices is pertinent to an examination of defendants' economic incentives to engage in such a scheme. Transnor has acknowledged that "the Brent Market is one of the principal benchmarks of the world price of oil." Transnor's own expert stated that "integrated companies would not have embarked on a tax spinning strategy -- which they would have expected to reduce crude prices both in the Brent market and elsewhere -- had they not believed that, on balance, they would gain worldwide from that strategy." [16] Robinson Decl. para. 70.

Defendants' internal documents during the time period of the **[**28]** alleged conspiracy show no such expectation. For example, on October 31, 1985, Exxon's Corporate Planning Department informed Exxon's Management Committee that a $ 3 per barrel drop in crude oil prices during 1986-1988 would cause after-tax earnings from operations to decrease between $ 650 and $ 700 million per year. [17] Similarly, on February 25, 1986, Exxon's Management Committee was presented with a bar graph charting its outlook for 1986 which illustrated that net income would dramatically decrease if Brent prices continued to fall. On February 10, 1986, Colin Lee, Conoco's then President of Petroleum Operations predicted that "the impact of a 20% drop in crude prices to $ 20/BBL would reduce our After Tax Operating Income by $ 99 million or 21% from our 1986 Profit Objective." Lee Aff. para. 11. These documents directly contrast Transnor's claim that defendants desired lower crude prices.

However, defendants' arguments that they had no incentive to drive down the **[**29]** market price of Brent Oil, while superficially attractive, miss the real point. Plaintiff does not have to prove that defendants intended to drive

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upon how quickly product margins reach a new equilibrium and whether the crude oil price decline precedes that of products or vice versa."

[14] Exxon states that between 1976 and 1988, its upstream earnings averaged $ 3.4 billion and downstream earnings averaged $ 1.1 billion. During that period, whenever lower crude oil prices depressed upstream earnings, increases in downstream earnings were never sufficient to compensate for the upstream decreases. In further support of their claims of implausibility, defendants point to their large reserves of oil and natural gas and argue that they could not benefit from a decline in its price.

[15] Transnor claims that a high degree of market power enabled integrated companies to keep refinery netbacks high while crude prices were falling. Robinson identifies eight firms, including four other than defendants and their alleged co-conspirator Mobil, as constituting an oligopoly in Western Europe because they accounted for 65% of total product sales in Western Europe in 1984 and 82% of refinery capacity in the British market in 1986. When defendants applied the Herfindahl-Hirshman Index ("HHI"), a measure of market concentration, to firms with Western European refineries, an index of 1028 resulted. Since an HHI range between 1000-1800 represents a moderately concentrated market, *see* U.S. Department of Justice Merger Guidelines at § 3.1, 4Trade Reg. Rep. (CCH) P13,103 at 20, 560 (1984), it is unlikely, although possible, that Western European refineries operated as an oligopoly. Robinson concedes that defendants lacked "enough market power to be able to keep refinery netbacks constant whilst crude [oil] prices were being cut." Robinson Decl. para. 44.

[16] Robinson also concedes that such gains could be recognized only if these companies could delay the decline of product prices in the other markets as well. Transnor has provided no evidence that defendants possessed sufficient market power to delay the decline of product prices worldwide.

[17] Although the document does not state whether this $ 3.00 per barrel decrease refers to oil prices generally or only Brent prices, it appears from subsequent documents that this figure refers to Brent prices.

down the market price of Brent Oil. It only has to establish that defendants conspired to rig prices in certain transactions for the purpose of understating their income and evading taxes, that this activity had the foreseeable effect of causing prices in general to decline, and that this decline caused economic injury to plaintiff. There was clearly an incentive to tax spin, and defendants do not dispute that there was. There is at least an issue of fact whether plaintiff was in the fall-out area of such activity. The Court therefore concludes that the scheme alleged is sufficiently plausible to avoid placing a higher burden on Transnor under *Matsushita*.

Antitrust Conspiracy

HN10[] Section 1 of the Sherman Act proscribes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . ." 15 U.S.C. § 1. **HN11**[] A plaintiff must establish only two elements: 1) a conspiracy 2) that unreasonably restrains trade or affects interstate commerce. **[**30]** Belfiore v. New York Times Co., 826 F.2d 177 (2d Cir. 1987), *cert.* **[*1483]** *denied*, *484 U.S. 1067, 98 L. Ed. 2d 994, 108 S. Ct. 1030 (1988)*.

HN12[] Transnor must be able to prove that defendants had a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." International Distrib. Centers Inc. v. Walsh Trucking Co., 812 F.2d 786, 793 (2d Cir.), *cert. denied*, *482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987)* (quoting American Tobacco v. United States, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)). Transnor has submitted no direct evidence of a conspiracy, but proof of such an agreement may be established by circumstantial evidence which permits a rational inference that defendants conspired to rig prices in Brent Oil transactions. *See* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 83 L. Ed. 610, 59 S. Ct. 467 (1939); *cf.* In re Plywood Antitrust Litigation, 655 F.2d 627, 633 (5th Cir. 1981), *cert. dismissed*, *462 U.S. 1125, 103 S. Ct. 3100, 77 L. Ed. 2d 1358 (1983)* ("solemnized covenants to conspire are difficult to come by . . .").

As previously discussed, **HN13**[] in determining whether such circumstantial evidence exists, a court must keep in mind the distinction between independent but parallel business actions [18] and a "conscious commitment to a common scheme designed to achieve an unlawful **[**31]** objective" which excludes the possibility of independent action. Monsanto Co., 465 U.S. at 768. Only the latter is prohibited by the antitrust laws. Conduct equally consistent with permissible business activity as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Matsushita, 475 U.S. at 588. According to the Second Circuit Court of Appeals:

> **HN14**[] a plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy,

Apex Oil Co. v. Dimauro, 822 F.2d 246, 253-54 (2d Cir.), *cert. denied*, *484 U.S. 977, 98 L. Ed. 2d 487, 108 S. Ct. 489 (1987)*. These plus factors should not be considered in isolation; the important determination is whether the evidence viewed as a whole supports a reasonable inference of conspiracy. Id. at 254-55. Because each defendant had an independent incentive to engage in tax spinning in order to minimize the amount of tax paid on their crude oil under the U.K. tax system, [19] these "plus" factors assume extreme importance. This Court finds that the following factors, considered together, support **[**32]** a reasonable inference of conspiracy.

Circular and other Transactions

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[18] Defendants argue that there was little "commonality of conduct" among them as each producer adopted different rules for tax spinning and engaged in spinning for different motives. Nonetheless, defendants' conduct shared important common features in that each defendant entered into significant numbers of matched buy/sell transactions for tax purposes.

[19] Transnor's own experts admit that it was not necessary for defendants to collude in order to benefit individually from tax spinning. Spuller Dep. at 290, 308, 337; Robinson Dep. at 174.

Between November 27, 1985 and February 4, 1986, defendants Exxon, BP, Shell, Conoco and alleged co-conspirator Mobil were parties to at least 16 circular sales [20] whereby the identical amount, grade and delivery date of oil was traded among them on the same day at the same price. Transnor argues that it is unlikely that independent business reasons caused these defendants to trade exactly the same quality, amount and grade of oil on the same day among themselves. Transnor argues that these transactions tend to exclude the possibility that the defendants were acting **[**33]** independently, especially considering that they occurred at identical prices when Brent prices can fluctuate over wide ranges in the course of a day.

These transactions are certainly unusual in that the only parties who entered into them were certain defendants and Mobil. Defendants argue that Transnor lacks any documentary records establishing prearrangement **[*1484]** and cannot rely solely on the fact that these transactions occurred. However, since all the parties acknowledge that many Brent transactions are arranged over the telephone, the absence of such records is not critical. In any event, the striking similarities among these transactions strongly supports an inference that there was some form of coordination among the parties thereto. The inference of coordination is strengthened by the fact that defendants Exxon and Conoco were able to enter into 87 and 69 buy/sells, respectively, at identical prices during a volatile period in the Brent market.

Disappearance of Evidence

"***HN15***[] The nonproduction of material evidence in the control **[**34]** of a party raises an inference that evidence is unfavorable to that party." *Tupman Thurlow Co. v. S.S. Cap Castillo, 490 F.2d 302, 308 (2d Cir. 1974)*; *see also* *INA Aviation Corp. v. United States, 468 F. Supp. 695 (E.D.N.Y. 1979)*, *aff'd*, *610 F.2d 806 (2d Cir. 1979)*. Transnor argues that Exxon's failure to produce the notebook of Diane Sharp, the Exxon trader responsible for the Conoco and Mobil accounts, covering the period from October 1985 to July 1986 presents an additional "plus" factor. A trader's notebooks generally contain a detailed chronological record of the trader's dealings. Sharp's notebook is clearly material as it involves the time period of the alleged conspiracy and likely contained information relating to the circular transactions with Conoco and Mobil. Pursuant to Transnor's document requests, Exxon produced all their traders' notebooks, except Sharp's notebook covering the aforementioned period. Sharp testified that the notebook existed and was in Exxon's control when she left Exxon's employ in July 1986, several months after Transnor served its document production request.

HN16[] An inference that the missing evidence is harmful can be rebutted by an adequate **[**35]** explanation of the reason for nonproduction. *Tupman Thurlow, 490 F.2d at 308*. Exxon claims that the notebook was inadvertently lost when Sharp left the company during a massive reduction in work-force. There is merit in defendants' argument that Transnor's failure to identify any evidence of collusion from Conoco's traders' notebooks or to attempt to obtain Mobil's traders' notebooks weakens the suspicion that Sharp's notebook might be a "smoking gun."

Therefore, considered alone, the absence of this notebook clearly could not support an inference of conspiracy. However, it is an additional element which must be considered as part of the whole. *See* *Apex, 822 F.2d at 254-55*.

Internal Documents

Transnor points to a number of internal documents which it believes contain evidence of a coordinated strategy among defendants to rig prices in the tax-spin transactions. A November 1, 1985 memorandum written by Exxon employee E.H. Gassenheimer discussed the tax-spinning strategies of Exxon, Conoco, Shell and BP. Transnor suggests this memorandum is based on information conveyed to Exxon by the other named companies rather than information gleaned from independent research or analysis. **[**36]** Examination of the memorandum, however, reveals statements such as "[Shell] is believed to be trading only one or two months ahead." Further, the

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[20] Except for one four-way transaction, these transactions involved three parties and the original selling party ended up with exactly what it had sold.

memorandum explicitly states that it is based on "market information." If the memorandum were based on information conveyed by the alleged co-conspirators, it would not have been necessary for the author to speculate as to what the other producers were doing. Furthermore, the author's failure to mention the strategies of other integrated producers, a failure which Transnor deems suspicious, may logically be attributable to the author's view that the other producers were not engaged in tax spinning. [21]

Transnor next points to an Exxon "commercial telecon" dated November 11, 1985, which states in relevant part: "[Esso Petroleum Company] later reported that Shell have 44 BSM [Brent System] buy/sells in **[*1485]** place for Dec of which only 13 can be spins." Defendants respond that the number of buy/sells entered into in a given month was available from other **[**37]** market participants, such as brokers. Defendants also claim that it is obvious that only 13 Shell trades for a given month could have been spins because Shell was entitled to lift only 13 Brent equity cargoes a month. This telecon is therefore not strong evidence that the information was provided by Shell, since it could have been provided by other market participants as well.

Another Exxon "commercial telecon" dated January 21, 1986 states "1 equity cargo has been nom. out to BP. Next one will be 8th Feb cargo to Conoco. Signalled continue Feb spinning." The document does not indicate whether the individuals or entities signalled were, as Transnor contends, defendants BP and Conoco or Exxon's own traders. While this document provides support for the fact that defendants' engaged in tax-spinning transactions, which defendants do not dispute, standing alone it is too ambiguous to support an inference that defendants signalled to one another, and thereby conspired, to collude in tax spinning.

After careful consideration of the evidence presented, this Court finds that Transnor has sufficiently met its burden under *Matsushita* to survive defendants' summary judgment motion. The evidence **[**38]** submitted, when viewed as a whole, could permit the trier of the facts to draw a reasonable conclusion that the actions of the defendants were not independent but the product of a conspiracy to engage in joint conduct which had the foreseeable effect of lowering the price of Brent Oil.

Causation

HN17[] A plaintiff must prove that its business injury was caused by defendants' violation of the antitrust laws in order to recover damages under the Clayton Act. [22] *See Argus, Inc. v. Eastman Kodak Co., 801 F.2d 38, 41 (2d Cir. 1986)*, *cert. denied*, *479 U.S. 1088, 94 L. Ed. 2d 151, 107 S. Ct. 1295 (1987)*. Of course, "***HN18***[] mere conjecture or speculation by the party resisting summary judgment does not provide a basis upon which to deny [a summary judgment] motion." *Id. at 42* (quoting *Quarles v. General Motors Corp., 758 F.2d 839, 840 (2d Cir. 1985)*. Defendants argue that Transnor cannot establish a causal connection between its injury and the alleged antitrust violation. In order to avoid summary judgment, Transnor must be able to provide material facts to support its claim that the 1986 price decline was caused by defendants' tax spinning rather than by other causes.

[39]** The Court must first consider whether defendants actually traded at below-market prices. [23] This requires a basic understanding of the two major ways in which Brent cargoes were traded. [24] "Dated Brent" refers to cargoes

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[21] Another Exxon document relied on by Transnor discusses the tax spinning strategies of Shell and BP, making statements such as "believe BP is selling equity; buying cheapest alternative."

[22] *Section 4* of the Clayton Act, *15 U.S.C. § 15 (1976)* provides that, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained."

[23] Defendants maintain that "Transnor's case depends on its ability to prove as *fact* that defendants traded at below-market." Defendants' Reply Brief at 2. Since a violation of *section 1* of the Sherman Act occurs when there is even an unconsummated agreement in restraint of trade, *see American Tobacco Co. v. United States, 328 U.S. 781, 789, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 n. 59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*, the Court will address the issue of causation in those terms.

which were sold for delivery at a specific date and "15-Day Brent" refers to cargoes which were sold for delivery during a specific forward month, on 15 days notice to the buyer of the date on which the cargo should be **[*1486]** lifted. Brent was sold for delivery both in the current month and for delivery up to five months in the future. In the Brent market, prices vary depending on the date the oil will be delivered and the market participants' expectations as to how future events will affect prices. Thus, dated and undated Brent contracts essentially involve two different markets. *See* Sas, "The Legal Aspects of the 15 Day Brent Market (Part I)," *5 Journal of Energy and Natural Resources Law* 109, 111 (1987) ("although dated and 15-day Brent involve the same commodity, the purposes and methods of trading each are sufficiently different to justify regarding them as two distinct (albeit interrelated) markets."). According to defendants, the 1986 decline in prices **[**40]** for forward Brent cargoes resulted from the expectation of participants in the Brent market that future Brent prices would decline.

[41]** Transnor defines "below-market prices" as (1) prices lower than those at which the Brent market was previously trading before defendants undercut it or (2) prices below the average price of non-defendants' trades for the same period. Plaintiff's Opposition Brief at 41. Defendants first respond that Transnor cannot support its claim that defendants' prices were below the average of non-defendants' trading prices. This is unclear. Colin Darracott, a former trader for the British National Oil Corporation, analyzed trading records for Transnor, and concluded that defendants traded Brent Oil at an average of 66 cents per barrel below the remainder of the market between November 25, 1985 and February 7, 1986. At first glance, this appears to support Transnor's theory of below-market prices. However, by comparing the range of prices which occur on any given trading day, Darracott's calculations fail to take into account that 1) the price of Brent Oil varies depending on the delivery month; 2) as prices declined, they were lower for more remote months than for near months; and 3) the volume of trading done near the beginning of the price decline and near the end differed. Thus, it is doubtful **[**42]** whether these calculations support a conclusion of below-market trading.

Darracott also compared average prices for defendants and non-defendants for a given day and delivery month and found that in the 127 direct comparisons, defendants' average prices were below non-defendants' average prices 57% percent of the time and equal to or above non-defendants' average prices 43% percent of the time. However, as defendants point out, this analysis fails to take into consideration the amount by which these averages differed or whether defendants' trades were within the range of those of non-defendants.

Defendants' expert Franklin Fisher, Professor of Economics at the Massachusetts Institute of Technology, compared trades to which defendants, and Mobil, were parties to trades where no defendant was a party and concluded that defendants did not engage in below-market trading. Only some of his conclusions will be summarized here. Like Darracott's second set of calculations, Fisher compared the transaction prices of defendants and nondefendants on a given day and delivery month. Between the period of November 26, 1985 and March 31, 1986, the period of the steepest price decline, defendants' **[**43]** average transaction prices averaged 1.2 cents below non-defendants' average transaction prices, a difference statistically indistinguishable from zero. [25] At the time, the average spread between the day's high and low prices for non-defendants was 35.7 cents per barrel. Of the 86 trading days in this period, there were twenty days in which defendants' average price was below the non-defendants' average price for all months traded for which comparisons were possible, and twenty-two days in which defendants' average prices were at or above non-defendants' prices for all months traded.

After careful review of the calculations presented by the parties, this Court concludes that there are simply no material facts showing that defendants' trades were **[*1487]** below the average prices of non-defendants' trades.

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[24] The parties have agreed to enter into a stipulation as to the terms of Exxon's, Conoco's, SUKO's and SITCO's contracts for the purchase and sale of crude oil, and have agreed, where supported by documentary evidence, on the contract's date of entry, price, grade, and month of delivery. No agreement has yet been reached with respect to BP contracts. The prices, dates and delivery months of non-defendant transactions were derived from Petroleum Argus Ltd. ("Argus"), a London-based spot market crude oil reporting service which gathers its information directly from market participants, which the parties have agreed to stipulate are accurate.

[25] Transnor does not contradict this conclusion. When Fisher performed the same calculations using the same time period as Darracott's calculations, defendants were found to have traded an average of 0.96 cents *above* non-defendants.

However, Transnor explains the lack of statistical difference between defendants' and non-defendants' prices as demonstrating the devastating success of defendants' **[**44]** tax-spinning scheme, which so influenced the market that all trades were conducted at lower prices. Thus, Transnor essentially contends that "below-market prices" should be defined as prices below what the market prices would be in the absence of tax spinning. However, Transnor must still prove that defendants caused prices to fall; the mere fact that prices declined is obviously insufficient to support a conclusion that defendants caused the price decline.

Transnor asserts that defendants' volume of low-priced tax-spin transactions led other traders to assume there was a downward price trend and to decrease their prices accordingly, creating a downward price spiral. Transnor argues that other market participants, not knowing the reasons for the lower-priced transactions, [26] followed the lead of the major oil companies. As previously described, oil producers were either taxed at the price in an arms-length sale or, in the case of an interaffiliate transfer, upon the TRP -- the market average for the 30 days prior thereto. Defendants could save taxes by tax-spinning only when the tax-spin price was less than the TRP. Transnor claims defendants colluded to set prices for their **[**45]** tax spins below the TRP in order to achieve tax savings. Exxon trader Jay Wald confirmed that tax spinning was utilized only when the spin price was lower than the expected TRP. Defendants answer that although the tax-spin price was below the expected TRP when the market was in decline, it was not below the market price. Transnor responds that the tax-spin prices were not a response to a declining market, but its cause. This cause-effect conundrum is an issue for the jury to decide.

While Transnor does not present evidence that defendants traded at low prices earlier in the day to set off a chain reaction of lower prices, this does not, as defendants contend, invalidate Transnor's claim that defendants undercut the market. This Court fails to discern why defendants could not, for **[**46]** example, trade at low prices in the middle of the day with the result that those low trades would affect prices later in the same day or over the course of several days.

Defendants also argue that their reported trades did not influence the market. For example, with reference to the sixteen days on which defendants' low prices were below the low prices of non-defendants for all months traded, where comparisons are possible, prices declined on four of the days and increased on seven. On the day after each of the sixteen days, prices declined on seven days but not on the other nine. While these examples show no predictable corollation between defendants' low-priced trades and prices on the same or next day, this does not conclusively establish that other market participants were not affected by defendants' low-priced trades.

While defendants emphatically deny that their tax spinning caused prices to decline, the view that tax spinning contributed to lower prices was expressed in an internal Exxon document which stated that tax spinning "directionally effects downward pressure on market (especially forward months)." However, the document also stated that "crude surplus judged to be by **[**47]** far the major factor influencing current market drop." A report on an Oxford North Sea Study sponsored by, among others, Shell and Exxon, also contained a hypothesis that a higher volume of tax spinning has a downward price bias. On September 8, 1986, Argus stated, "the impetus to the fall in prices in the first quarter of this year was provided by vigorous tax spinning, as companies attempted to minimize their tax exposure." Transnor's **[*1488]** Supp. Exh. 3. Transnor thus provides documentary evidence that tax spinning was believed to depress prices.

Defendants argue that the Brent Oil price decline was instead caused by a worldwide oversupply of crude oil, attributable to the policies and actions of Saudi Arabia and OPEC. In 1983, OPEC agreed to oil production quotas and Saudi Arabia agreed to serve as the "swing producer" and adjust its production to absorb movements above and below the expected demand for OPEC's output. By September 1985, this agreement had failed and Saudi Arabia began to increase its output and to offer customers a "netback contract" whereby the crude oil price was determined by the spot price of the refined product less transport and processing cost and a profit margin **[**48]**

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[26] Transnor provides evidence that other market participants were unaware of the extent of tax spinning. For example, Exxon trader Sharp testified that non-participants in the tax spin did not know whether a given transaction was a tax spin or not. This was confirmed by Morgan Stanley trader Nancy Kropp, who stated that she could not tell what percentage of Exxon's or Conoco's trades were tax spins.

for the buyer. In response, other OPEC countries also increased their output. At a meeting in December 1985, OPEC shifted its official policy from production quotas to increasing OPEC market share. Defendants argue that as oil from earlier netback sales arrived in markets, product prices decreased and led to reduced crude oil prices. The oversupply of OPEC crude also displaced Brent as a feedstock for European refineries, forcing Brent Oil producers to sell Brent Oil at lower prices in other markets. [27]

A material issue of fact whether supply exceeded consumption, is created by the view of Transnor's expert Robinson that world consumption **[**49]** exceeded supply in the first quarter of 1986 when the consumption of non-industrialized countries is taken into account. Furthermore, Robinson contends that by early January 1986, the market had adjusted to the impact of changes in Saudi policy and the OPEC meeting and even if the $ 5.00 per barrel decline in oil prices between late November 1985 and January 9, 1986 were attributed to OPEC and the Saudis, the further $ 15.00 per barrel drop is attributable only to tax spinning. [28] In a paper given at an energy seminar in September 1986, President of former defendant SITCO Sylvan Robinson, stated that "netback deals . . . have not created automatic downward pressures." Although his paper did not attribute the decline in Brent prices to tax spinning, it supports Transnor's theory to the extent that OPEC's actions did not cause the price declines in question.

[50]** From the evidence provided, there are material questions of fact whether tax spinning, OPEC actions or some combination of the two caused prices to decline on the Brent market. Of course, plaintiff must be able to segregate damages caused by defendants' illegal behavior from damages caused by other factors. *See e.g., Southern Pac. Com. Co. v. American Tel. & Tel. Co., 556 F. Supp. 825 (D.D.C. 1982)*, *aff'd*, *740 F.2d 980*, (D.C.Cir. 1984), *cert. denied*, *470 U.S. 1005, 105 S. Ct. 1359, 84 L. Ed. 2d 380 (1985)*. While defendants vigorously contend that Robinson's estimates as to the extent of the price decline caused by tax spinning is mere speculation, it is the jury's task, not the Court's, to weigh Robinson's theory that the market had already adjusted to OPEC's actions and that the price decline which forced Transnor's defaults was caused by tax spinning. These issues of material facts preclude summary judgment.

[*1489] APPLICABILITY OF THE CEA

Next, defendants challenge the Court's subject matter jurisdiction over the commodities claims, contending that the Brent transactions were "cash forward contracts" specifically exempted from the scope of the CEA. ***HN19***[] While *section 2(a)(1)* of the CEA provides **[**51]** the Commission with regulatory jurisdiction over "contracts of sale of a commodity for future delivery," [29] it further provides that the term future delivery "shall not include any sale of a cash commodity for deferred shipment or delivery." [30] **[**52]** This case presents the Court with a novel type of

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[27] Defendants note that market analysts and commentators in late 1985 and early 1986 overwhelmingly attributed the price decline to OPEC. One piece of evidence which defendants provide is a January 1986 telex written by E. Roy Moor, a principal of Transnor, in which he stated that Transnor had "become increasingly concerned about the price distortions created in the crude oil markets by the impact of refined product netback related crude oil and in particular the effects of increased Saudi Arabia crude oil production/netback sales." Moor Exh. 81.

[28] in Robinson's deposition, taken before he submitted these calculations, he testified that he was "not sure" how to make these calculations and had seen no literature which explained the principles to apply. Robinson Dep. 258-59. Although Robinson claims that the market had fully adjusted to OPEC policy by January 1986, he also attributes a $ 2.00 per barrel price drop to reaction to a March 1986 OPEC meeting. Thus, it appears that, contrary to his earlier statements, Robinson claims that tax spinning accounted for a $ 13.00, not a $ 15.00, drop in price per barrel.

[29] "***HN20***[] Contracts of sale" is defined as "sales, agreements of sale, and agreements to sell." *7 U.S.C. § 2 (1976)*. "***HN21***[] Commodity" is broadly defined to include, among others, "all other goods and articles . . ., and all services, rights, and interests in which contracts for future delivery presently or in the future dealt in." *Id*. Defendants do not contest that the Brent transactions were contracts of sale of commodities as defined by *section 2(a)(1)* of the Act.

[30] ***HN22***[] Cash commodity contracts for deferred shipment or delivery are commonly known as "cash forward contracts," whereas contracts of sale of a commodity for future delivery are called "futures contracts." *See* H.R.Rep.No. 93-975, 93rd Cong., 2d Sess. 129-30 (1974).

transaction, which appears to be a hybrid of a futures contract and a forward contract. [31] Examination of the distinctions between the two, their purposes and the caselaw construing them, leads the Court to conclude that Transnor's 15-day Brent transactions are futures contracts within the meaning of the Act, and are therefore subject to the Commission's regulatory powers.

HN23[] Sales of cash commodities for deferred shipment or delivery generally have been recognized to be transactions in physical commodities in which delivery in fact occurs but is delayed or deferred for purposes of convenience or necessity. See *Commodity Futures Trading Comm. v. Co Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1982)*; *In re Stovall*, [1977-1980 Transfer Binder]Comm. Fut. L. Rep. (CCH) P20,941, 23,777 (CFTC 1979); *52 Fed. Reg. 47022* ("Regulation of Hybrid and Related Instruments: Advance Notice of Proposed Rulemaking") (CFTC, December 11, 1987). Forward contracts have thus been defined as transactions in which the commercial parties intend and can accommodate physical transfer of the actual commodity. *See Co Petro, 680 F.2d at 578-79*; *NRT Metals, Inc. v. Manhattan Metals (Non-Ferrous), Ltd., 576 F. Supp. 1046, 1050-51 (S.D.N.Y. 1983)*. By contrast, futures contracts are undertaken primarily **[**53]** to assume or shift price risk without transferring the underlying commodity. As a result, futures contracts providing for delivery may be satisfied either by delivery or offset. *See 54 Fed. Reg. 30694, 30695* ("Policy Statement Concerning Swap Transactions") (CFTC, July 21, 1989). Once distinguished by unique features, futures and forward contracts have begun to share certain characteristics due to increasingly complex and dynamic commercial realities. The predominant distinction between the two remains the intention of the parties and the overall effect of the transaction.

HN24[] The Commodity Futures Trading Commission ("CFTC") has recognized that commodity transactions between commercial participants in certain markets have evolved from privately negotiated contracts for deferred delivery of a physical commodity under which delivery generally occurs to transactions that have highly standardized terms and are frequently satisfied by payments based upon intervening market price changes. *See* Regulation of Hybrid and Related Instruments: Advance Notice of Proposed Rulemaking, *supra* at 47027. 15-day Brent is such a market. The 15-day Brent market involves sales or purchases of a **[**54]** cargo for delivery on an unspecified day of a given month. The actual delivery dates are determined at the seller's option, the buyer being entitled to clear notice of a three-day loading range. 15-day Brent sales are therefore highly specialized forward sales which start out **[*1490]** "dry" [32] but ultimately become "wet," [33] subject to liquidation of the contract. *See* The Legal Aspects of the 15-Day Brent Market, *supra*, at 110. Because the contracts do not provide for offset without the consent of the parties and because the sellers cannot predict in advance whether a particular buyer will insist on physical delivery, the market remains one based on physical trading. *Id. at 116*. Yet, because 15-day Brent oil can be sold without physical cover initially, participants can take long or short positions in the market for purposes of hedging and speculation, explaining the high ratio between barrels traded and barrels delivered. The three major motivations in Brent market activity, hedging, speculation and tax spinning, *id*.; R. Bacon, The Brent Market: An Analysis of Recent Developments, WPM8, Oxford Institute for Energy Studies (1986), have led at least one commentator to describe **[**55]** the market as an "unregulated and unguaranteed form of futures trading." The Legal Aspects of the 15-Day Brent Market, *supra*, at 117 (quoting International Petroleum Exchange of London: "Brent Crude Oil, Trading of Brent Crude. Notes for Discussion," February 26, 1986). The 15-day Brent Market has thus assumed aspects of the futures market while retaining elements of the forward contract.

Forward Contracts

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[31] The Commission intends to adopt regulations concerning the scope of the forward contract's jurisdictional exclusion in a future release. *54 Fed. Reg. 1128, 1130 n. 14* ("Proposed Rules Concerning Regulation of Hybrid Instruments") (CFTC January 11, 1989).

[32] A "dry" or "paper" deal refers to the purchase or sale of a claim on a cargo of Brent in some future month.

[33] A "wet" deal refers to a physical transaction in which a specific cargo actually changes hands.

The legislative history of the forward contract exclusion, fully set forth by the Ninth Circuit Court in [Commodity Futures Trading Comm. v. Co Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1982)](), reveals its narrow purpose: to facilitate commodities transactions within the commercial supply chain. Policy Statement Concerning Swap Transactions, *supra*, at 30695. The exemption originated in the 1921 Act to meet the particular need of a farmer to sell part of next season's harvest at a set price to a grain elevator or miller. *See* S. Rep. No. **[**56]** 212, 67th Cong. 1st Sess. 1 (1921), H.R. Rep. No. 345, 67th Cong. 1st Sess. 7 (1921). The exemption was predicated upon the contemplation of actual, albeit future, delivery of the underlying commodity. [34] *Co Petro, 680 F.2d at 578*; *NRT Metals, Inc. v. Manhattan Metals (Non-Ferrous), Ltd., 576 F. Supp. 1046 1050 (S.D.N.Y. 1983)*. The more recent 1974 version of the Act has left unchanged the exemption's limited scope, confirming the view that a forward contract is one in which the parties contemplate the future transfer of the commodity. *See* *Co Petro, 680 F.2d at 578* (citing H.R. Rep. No. 975, 93rd Cong. 2d Sess. 129-30 (1974)); *NRT Metals, 576 F. Supp. at 1050*. [35] "Nothing in the legislative history surrounding . . . [the exemption] suggests that Congress intended to encompass agreements for the future delivery of commodities sold . . . for . . . speculative purposes." *Co Petro, 680 F.2d at 579*. The *Co Petro* Court summed up that,

> ***HN25***[] this exclusion is unavailable to contracts for sale for commodities which are sold **[*1491]** merely for speculative purposes and which are not predicated upon the expectation that delivery of the actual commodity by the seller to **[**57]** the original contracting buyer will occur in the future.

Id.; see *NRT Metals, 576 F. Supp. at 1051*.

HN26[]

[58]** In determining whether a particular transaction is exempt from the Act's jurisdiction as a forward contract, the Courts and the CFTC have required that the contract's terms and the parties' practice under the contract make certain that both parties to the contract deal in and contemplate future delivery of the commodity. *See* *Co Petro, 680 F.2d at 578*; *50 Fed. Reg. 39656, 39657-58* ("Characteristics Distinguishing Cash and Forward Contracts and 'Trade' Options") (CFTC, September 30, 1985).

In *Co Petro*, the relevant agency agreements in gasoline obligated Co Petro to perform an offsetting service for its customers which would satisfy their contractual duties without delivery. Co Petro customers could also liquidate their positions in the face of adverse price fluctuations through a cash settlement by cancelling their contracts and paying only the liquidated damages provided for in the agreements. The Ninth Circuit Court likened Co Petro's customers to those customers who trade on organized futures markets because they could deal in commodities futures without the forced burden of actual delivery, *Co Petro, 680 F.2d at 570, 580*, and accordingly held that "the contracts here **[**59]** represent speculative ventures in commodities which were marketed to those for whom delivery was not an expectation." *Id. at 581*.

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[34] During the hearings prior to enactment of the CEA's predecessor, the Futures Trading Act, which sought to bring federal control to futures trading, witnesses expressed concern that there were a variety of legitimate off-exchange commercial transactions, such as cash grain contracts between farmers and grain elevator operators for the future delivery of grain, in which delivery of the commodity was delayed. Then-Secretary of Agriculture Henry Wallace urged preservation of the right to buy or sell next season's crop which had not yet been planted or harvested but which would exist at the delayed delivery date. 1921 Senate Hearings at 462. Senator Capper, the sponsor of the Senate version of the bill, also stated that the bill dealt only with transactions in which the transfer of actual grain was not contemplated and that the entire business of sales or purchases of actual grain, either for present or future delivery, is expressly excluded from coverage. 61 Cong. Rec. 4762, 67th Cong., 1st Sess. (Aug. 9, 1921); *Co Petro, 680 F.2d at 578*.

[35] A House Report on the recent amendments focused on the "inherent value" of the commodity to the buyer because of the nature of his business in reselling, distributing, manufacturing or otherwise dealing with the underlying commodity. *See* *Co Petro, 680 F.2d at 578*.

In *Commodity Futures Trading Comm. v. Comercial Petrolera Internacional S.A*., [1980-82 Transfer Binder]Comm. Fut. L. Rep. (CCH) P21,222 at 25,088 (S.D.N.Y. 1981), Judge Knapp similarly held that the relevant oil contracts were intended as "investment vehicles" in which the parties had never anticipated delivery. *Id*. at 25,098. The court's reasoning emphasized the language in the contracts that obligated the buyers to "purchase a specified amount of oil at a fixed price *or* to notify the dealer to sell the oil at the going price on or before a specified future date." *Id*. at 25,092-93.

In *Habas v. American Board of Trade*, [1986-87 Transfer Binder]Comm. Fut. L. Rep. (CCH) P23,500 at 33,320 (CFTC 1987), the Judgment Officer, viewing the transactions as a whole to be futures contracts, noted that "the company's literature implies the opportunity to offset and the company permits entering into an opposite offsetting transaction prior to the maturity of the contract, both of which are characteristic of a futures contract." The **[**60]** Judgment Officer further considered the transactions' standardized terms as a means of facilitating offsetting transactions. *Id*. at 33,321.

In determining whether the parties to copper contracts intended delivery of the commodity, Judge Carter in *NRT Metals, Inc. v. Manhattan Metals (Non-Ferrous), Ltd., 576 F. Supp. 1046, 1050 (S.D.N.Y. 1983)*, focused on whether the parties maintained facilities to accomodate physical delivery of the 500 metric tons of copper and whether the parties simultaneously bought and sold copper futures contracts. The district court concluded that both factors contraindicated any intention of actual delivery. *Id. at 1051*.

In the present case, defendants have acknowledged the tax advantages of trading in 15-day Brent and do not dispute that during the relevant period, 15-day Brent oil contracts were routinely settled by means other than delivery, most typically through the clearing techniques of offset and bookout. However, defendants maintain that because the contracts lack a contractual right to avoid delivery, they are predicated upon actual delivery of the oil and thus constitute forward contracts within the Act's definition. The Court disagrees. **[**61]** The high levels of speculation and performance without delivery, as well as the relatively standardized contracts, distinguish the 15-day Brent transactions from the forward contracts contemplated by the drafters of the Act.

The Court acknowledges that 15-day Brent contracts may represent binding commitments to buy or sell physical oil. The real question, however, is whether the **[*1492]** transactions are more like bargains for the purchase and sale of crude oil than speculative transactions tacitly expected to end by means other than delivery. The Ninth Circuit Court's "forced burden of delivery" language in *Co Petro* does not mandate forward contract classification of those contracts imposing a forced burden which is not expected to be enforced. The Ninth Circuit Court held only that the *absence* of a forced burden of delivery is indicative of the speculative nature of futures contracts. That court did not have before it contracts imposing a forced burden of delivery, and thus did not rule on the effect of the *presence* of such a burden. Accordingly, this Court need not disagree with or deviate from *Co Petro*, but merely considers as relevant whether the contracts provide for an opportunity **[**62]** to avoid delivery. This is consistent with the reasoning of the *Habas* court, which speaks in terms of "opportunity to offset." This Court concludes that ***HN27***[] even where there is no "right" of offset, the "opportunity" to offset and a tacit expectation and common practice of offsetting suffices to deem the transaction a futures contract.

Defendants admit that the incentive to spin and respin was to ensure that taxes were paid on the basis of a more favorable market price. Defendants' 328 tax spin transactions reveal that the underlying purpose was not to transfer physical supplies of oil. Defendants' expert, Donald Miller, states in his Affidavit that,

> Many participants in the Brent Market have no intention of taking delivery of oil either to store or refine it and others who sell Brent do not produce it.

Miller Aff. para. 16. Indeed, "only a minority of transactions in the Brent market result in delivery." *Securities and Investments Board, Consultative Document on the Future Regulation of the Oil Markets* at 2 (February 1988). The customary use of offsetting and booking out strongly suggests that physical delivery was not contemplated by the parties.

Moreover, the high degree **[**63]** of standardization of terms such as quantity, grade, delivery terms, currency of payment and unit of measure, which facilitate offset, bookout and other clearing techniques available on the Brent market, further evidence the investment purpose of Brent trading. The 15-day Brent market does not remotely resemble the commercial trading originally excepted from the Act. While this Court recognizes that commercial transactions have increased in complexity since the predecessor to the CEA was enacted, the interests of Brent participants, which include investment and brokerage houses, do not parallel those of the farmer who sold grain or the elevator operator who bought it for deferred delivery, so that each could benefit from a guaranteed price. [36]

While there is no contractual entitlement to satisfy Brent obligations by means other than delivery, the likelihood **[**64]** of avoiding delivery has enabled participants to develop what is essentially a "paper" market for speculative or hedging purposes rather than one for physical transfer. The Court therefore concludes that the 15-day Brent transactions do not constitute forward contracts excepted from the CEA.

Futures Contracts

After deciding that the relevant contracts were not forward contracts, the *Co Petro* court considered whether the contracts constituted futures contracts. In making that determination, the court found that,

> no bright line definition or list of characterizing elements is determinative. The transaction must be viewed as a whole with a critical eye toward its underlying purpose.

Co Petro, 680 F.2d at 581. The Ninth Circuit Court then held that, due to their speculative nature, the contracts at issue were "contracts for sale of a commodity for future delivery." In a recent policy **[*1493]** statement, the Commodity Futures Trading Commission affirmed and amplified *Co Petro's* holding by declaring,

> In determining whether a transaction constitutes a futures contract, the Commission and the courts have assessed the transaction "as a whole with a critical eye toward its underlying **[**65]** purpose" [citing *Co Petro*]. Such an assessment entails a review of the "overall effect" of the transaction as well as a determination as to "what the parties intended." Although there is no definitive list of the elements of futures contracts, the CFTC and the courts recognize certain elements as common to such contracts. Futures contracts are contracts for the purchase or sale of a commodity for delivery in the future at a price that is established when the contract is initiated, with both parties to the transaction obligated to fulfill the contract at the specified price. In addition, futures contracts are undertaken principally to assume or shift price risk without transferring the underlying commodity. As a result, futures contracts providing for delivery may be satisfied either by delivery or offset. The Commission has explained that this does not mean that all commodity futures contracts must have these elements [citation omitted]. To hold otherwise would permit ready evasion of the CEA.

Policy Statement Concerning Swap Transactions, *supra*, at 30694-95. [37] Therefore, there is no exhaustive check-list by which a contract can be measured. Addressing the essentials of **[**66]** the futures contract, the Court is convinced that the 15-day Brent transactions satisfy the criteria.

Transnor's contracts for 15-day Brent, a commodity within the CEA's meaning, were dated December 1985 and called for March 1986 delivery, indicating that sales of 15-day Brent could occur several months ahead of the specified loading month. Transnor's Brent contracts established a price for a standardized volume when the contract was initiated in December 1985, despite the +/- 5% volume tolerance, and both parties to the contracts were obligated to fulfill the contract at the specified price. Most importantly, the Brent contracts were undertaken

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[36] Nor will finding the 15-day Brent transactions to constitute futures contracts effectively eliminate the CEA's forward contract exception. The intentions of the parties still govern and the opportunity to satisfy a contract through means other than delivery is alone insufficient to categorize the nature of the transaction.

[37] The Commission outlines additional elements characteristic of exchange-traded futures contracts, the "presence or absence [of which] is not dispositive of whether a transaction is a futures contract." Policy Statement Concerning Swap Transactions, *supra*, at 30694-95. Accordingly, defendants' claim that the absence of certain of these elements dooms Transnor's off-exchange contracts is spurious at best.

mainly to assume or shift price risk without transferring the underlying commodity. Defendants acknowledge that the volume of Brent **[**67]** contract trading greatly exceeded the amount of physical oil available to satisfy such contracts. The volume of contracts traded and the high standardization of the contracts demonstrate the essential investment character of the 15-day Brent market. "With an eye toward [their] underlying purpose," the Court concludes that Transnor's 15-day Brent transactions constitute futures contracts.

SUFFICIENCY OF TRANSNOR'S CLAIM UNDER THE CEA

Defendants next argue that Transnor cannot state a claim under ***HN28***[] the anti-manipulation provisions of the CEA *§§ 9(b)* and 4(c) which require proof of each of the following four elements: (1) manipulative conduct; (2) a specific intent to create an artificial price which is not determined by the forces of supply and demand; (3) a causal relationship between the manipulative conduct and a change in market prices; and (4) an artificial price. *Cargill, Inc. v. Hardin, 452 F.2d 1154, 1162-63 (8th Cir. 1971)*, *cert. denied*, *406 U.S. 932, 92 S. Ct. 1770, 32 L. Ed. 2d 135 (1972)*; *In re Cox*, [1986-87 Transfer Binder]Comm. Fut. L. Rep. (CCH) P23,786, at 34,061 (CFTC July 15, 1987); T. Russo, *Regulation of the Commodity Futures and Options Markets*, § 12.11 at 12-18 (1983). **[**68]** Because Transnor has raised issues of material fact, not properly decided on this motion, summary judgment is denied.

Manipulative Conduct

Transnor's central allegation concerning manipulative conduct is that defendants' **[*1494]** tax-spinning transactions constituted prohibited "wash sales" entered into for the purpose of artificially depressing the price of oil. ***HN29***[] Wash trading, not defined in the Act itself, is the practice of entering into or purporting to enter into transactions for the purpose of giving the appearance that trades are being or have been made but without having actually taken a market position. *See* 80 Cong. Rec. 7858 (May 25, 1936); *accord* Admin. D. 200 (May 25, 1966). The existence of a wash result -- the purchase and sale of the same futures contract at a similar price -- is an insufficient showing to establish a wash sale in violation of § 4c(a) of the CEA. *See In re Collins*, ("Collins III") [1986-87 Transfer Binder]Comm. Fut. L. Rep. (CCH) P23,401 at 33,077 (CFTC Nov. 26, 1986). Prohibited wash sales are proved only if it is demonstrated that the trader "knowingly participated in transactions initiated with intent to avoid a *bona fide* market position." **[**69]** *Id.; Stoller v. Commodity Futures Trading Comm., 834 F.2d 262, 265 (2d Cir. 1987)*; *In re Goldwurm*, 7 Agric.Dec. 265, 274 (1948) ("The essential and identifying characteristic of a 'wash sale' seems to be the intent not to make a genuine, bona fide trading transaction . . ."). In *Stoller*, the Second Circuit Court acknowledged that prior rulings on wash sales had concerned transactions that were "virtually riskfree, often prearranged, and intentionally designed to mislead, or to serve other illicit purposes." *Stoller, 834 F.2d at 266* (citations omitted). Whether a transaction constitutes a wash sale "inevitably turns on the particular facts and circumstances of individual cases and not on any absolute formula." *Collins III*, at 33,077.

Defendants argue that because the 15-day Brent Market involves binding commitments to take or make delivery of physical oil, the fact that a tax spin leaves a company in a net unchanged position as to price spreads does not mean that it has avoided a *bona fide* market position. Defendants claim that, to the contrary, a company completing a spin has assumed the risks of non-performance by its seller and buyer as well as the credit **[**70]** risks of both counterparties, unlike an offsetting transaction on a exchange-traded futures market where participants look directly to the central clearing house for performance of contractual obligations. Defendants claim that these non-market risks distinguish this case from *In re Goldwurm*, 7 Agric.Dec. 265 (1948), and *In re Siegel Trading Co.*, [1977-80 Transfer Binder]Comm. Fut. L. Rep. (CCH) P20,452 at 21,827 (CFTC July 26, 1977), which ruled that trades intended as tax avoidance mechanisms are "artificial as far as futures trading is concerned. . . . [and] fictitious from the standpoint of reality and substance." *In re Siegel*, at 21,844. Transnor maintains that it is market risk, not credit or performance risk, that makes commodities transactions "*bona fide* market positions," citing *In re Gimbel*, [1988]Comm. Fut. L. Rep. (CCH) P24,213; *1988 CFTC LEXIS 204* (CFTC April 14, 1988), *aff'd*, *872 F.2d 196 (7th*

Cir. 1989), and *Campbell v. Shearson American Express, Inc*., [1985-86 Transfer Binder]Fed. Sec. L. Rep. (CCH) P92,303 at 92,047, 92,050 n. 5 (E.D.Mich. Aug. 9, 1985), *aff'd*, *829 F.2d 38 (6th Cir. 1987)*. [38]

[71]** While In re Gimbel, 1988 CFTC LEXIS 204, at 4, n. 7, states that "to be ficticious within the meaning of Section 4c(a)(A), . . . it is sufficient if the transaction is structured to negate price competition or market risk," the Commission did not consider credit or performance risk because the clearing house guaranteed the contractual obligations. Neither the Commission nor any court has considered risks other than price competition or market risk in determining whether a party "negated risk" because hybrid transactions such as those at bar have not until now been deemed futures contracts. Nonetheless, the purpose of the prohibition, to prevent cheating and fraudulent practices "employed to give a false appearance of trading and to cause prices to be registered which are not true prices," 80 Cong. Rec. 7858 (May 25, 1936 **[*1495]** (comments of bill's sponsor, Senator Pope), is served by prohibiting transactions that negate market risk. [39] As stated by the Commission in *In re Collins*, ("Collins II") [1986-87 Transfer Binder]Comm. Fut. L. Rep. (CCH) P22,982 at 31,896 (CFTC April 4, 1986), "the common denominator of the specific abuses in Section 4c(a) -- [including] wash sales **[**72]** . . . -- and the central characteristic of the general category of fictitious sales, is the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk or price competition incident to such a market."

Transnor asserts that defendants' 16 circular transactions in which the identical amount, grade and delivery date of the oil was traded among the defendants and Mobil on the same day at the same price, as well as defendants' 328 buy/sell transactions with one other party, at identical prices during an erratic Brent Market period, negated market risk. Because defendants do not dispute that these transactions left the companies "in a net unchanged position as to price spreads," this Court concludes that defendants' tax spins feigned a non-existent market position and potentially misled other Brent Market traders, despite any non-market risks incurred. To hold otherwise would **[**73]** defeat the purpose of the CEA's clear prohibition. [40]

Specific Intent

Defendants next claim that Transnor cannot establish the required intention to induce an artificial price because the transactions were **[**74]** entered into for legitimate commercial or investment purposes, citing *In re Indiana Farm Bureau Coop. Ass'n*, [1982-84 Transfer Binder]Comm. Fut. L. Rep. (CCH) P21,796 at 27,279 (CFTC Dec. 17, 1982). *See* Russo, *supra* at § 12.19. Defendants maintain that tax-spinning transactions were routine commercial transactions entered into for permissible purposes, including tax certainty. Transnor first refutes the relevance of

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[38] *Campbell's* footnote does nothing more than explain the distinction between two risks in a completely unrelated 10(b)(5) securities claim.

[39] Moreover, ***HN30***[] section 4c(a)(A)'s broad prohibition of any transaction ". . . of the character of, or commonly known to the trade as, a 'wash sale,'" suggests that negating market risk sufficiently eliminates any significant risk to fall within the prohibition.

[40] Transnor also claims that defendants paired buy/sell transactions were prearranged. ***HN31***[] While prearrangement is not a necessary element for finding a wash sale violation, it is one method used to avoid a *bona fide* market position. *See Collins II*, at 31,897. Because it is improbable that a pattern of matched orders or wash results represents the true interplay of market forces, the existence of such a pattern may "raise an inference that the results were intentionally achieved by means of prearrangement." *Id*. Defendants' matched transactions during the relevant period raise an inference of prearrangement, negating price competition, and would be grounds for denial of summary judgment even if the transactions were not deemed wash sales.

Transnor also argues that defendants engaged in manipulative conduct by trading at artificially low prices. This contention, analyzed earlier in connection with Transnor's antitrust claims, need not be further discussed here.

any legitimate purpose to a determination of manipulation and alternatively asserts that defendants' activities, constituting tax fraud, further evidence wash sales. [41]

HN32[] Where a trader acts with a legitimate investment or commercial purpose, no manipulative intent can be found. Stoller, 834 F.2d at 266 (citing with approval the distinction between legitimate market purpose and manipulative intent drawn in **[**75]** *In re Collins*, ("Collins I") [1977-80 Transfer Binder]Comm. Fut. L. Rep. (CCH) P20,908 at 23,687 (CFTC Aug. 16, 1979); Russo, *supra* § 12.19 at 12-34. The "legitimate market purpose" test for conduct alleged to constitute wash sales is intended to avoid charging a knowing violation and causing undue prejudice to a litigant who may have relied on an agency's prior interpretation or policy. *See* Stoller, at 265-266. A second purpose of the test recognizes that a trader is entitled to act in his best interest so long as he does not act with manipulative intent. *See In re Indiana Bureau Coop. Ass'n*., [1982-84 **[*1496]** Transfer Binder]Comm. Fut. L. Rep. (CCH) P21,767 at 27,279 (CFTC Dec. 17, 1982). [42]

[76]** In *Stoller*, the court reversed the Commission's ruling of liability because, in its view, the public was not apprised that the Commission considered the practice of "roll forward" trading to be encompassed within the wash-sale prohibition of the Act. The Second Circuit Court accepted defendant's claim that the transactions at issue were "*designed to fulfill a purpose generally considered legitimate in the industry*" and declined to hold the public accountable under the Commission's construction of the statute without appropriate notice. Stoller, 834 F.2d at 266-67 (emphasis added). [43]

In the case at bar, the alleged legitimate market purpose is tax certainty. However, it is obvious that the incentive behind tax spinning was the achievement not merely of a more certain tax but of a lower **[**77]** tax. Defendants claim that OTO's subsequent sanction of the transactions as legitimate distinguish their activities from the proscribed tax structurings in *Goldwurm* and *In re Siegel*. Transnor maintains that the *Goldwurm* and *In re Siegel* rulings fairly apprised defendants that achieving tax advantages by engaging in offsetting transactions at artificial prices is within the prohibition of "wash sales" and, moreover, that at the time of the tax spins, defendants did not act to "fulfill a purpose generally considered legitimate in the industry," making irrelevant that the U.K. subsequently condoned their conduct. [44]

Clearly, *Goldwurm* and *In re Siegel* gave public notice that illicit tax maneuverings are prohibited under the Act. The more difficult question is whether the U.K.'s subsequent approval of the transactions retroactively renders the purpose of the transactions legitimate. This Court believes that it does not. More appropriate to a determination of legitimate market purpose than subsequently **[**78]** adjudicated legality is whether the transaction was "designed to fulfill a purpose generally considered legitimate in the industry." Stoller, 834 F.2d at 266. Although defendants offer testimony that U.K. tax law as it existed prior to March 1987 permitted integrated oil companies to sell and buy back future cargoes to establish the lowest price for tax purposes, Transnor has refuted that "portfolio pricing" in particular was generally considered legitimate in the industry, citing the deposition testimony of Exxon chief-of-

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[41] This Court rejects Transnor's proposition that *Stoller* recognizes that an illicit purpose indicates the existence of a wash sale. A clear reading reveals that the Second Circuit Court merely stated that wash sales had in the past been found in transactions motivated by illicit purposes, not that illegal motives mandate a finding of wash sales.

[42] The Court rejects Transnor's argument that *In re Gimbel*, para. 24,313 at 35,003 n. 5, mandates abandonment of the legitimate market purpose test. That the Commission "remains of the view" that commercial motivations underlying transactions are not relevant, neither binds nor persuades this Court in light of the Second Circuit Court's ruling in Stoller, 834 F.2d at 266, which is also cited in the footnote. *Stoller* recognized that the statutory language permits the Commission to define its meaning although it may hold the public accountable only upon proper notification.

[43] *Stoller* overrules a prior CFTC ruling, *Collins II*, at 31,896, that there is "no basis in the statutory language of Section 4c(a) or the legislative history to imply an exception so that otherwise prohibited trading techniques, such as wash sales, would become acceptable when used for an alleged 'legitimate market purpose.'" *See* In re Gimbel, 1988 CFTC LEXIS 204, at 3, n. 6.

[44] Transnor's argument that OTO would never have accepted defendants' transactions had it been apprised of the true facts is beyond the scope of this inquiry.

trading Morey Lorenz, Exxon trader Diane Sharp, Conoco trader Player Edwards, Morgan Stanley trader Nancy Kropp, and defendants' expert witness Donald Miller. Transnor also offers the testimony of its U.K. tax expert James Bentley that defendants trading constituted attempted tax fraud. Because there remains a question of material fact as to whether defendants' transacted with a legitimate market purpose in mind, summary judgment is denied.

Causal Relationship

Defendants assert that the tax spinning transactions were not responsible for the decline in oil prices thereby defeating Transnor's manipulation claim for lack of causation. Defendants submit testimony **[**79]** that the drop in oil prices resulted from the actions of OPEC, particularly its decision to compete for market share. However, ***HN33***[] where "multiple causes of an artificial **[*1497]** price . . . can be sorted out, and [defendants] are a 'proximate' cause of the artificial price, a charge of manipulation can be sustained." *In re Cox*, at 34,066. As discussed earlier, Transnor presents a question of fact as to causation.

Artificial Price

Finally, defendants contend that their conduct did not result in the creation of an artificial price, a requisite to Transnor's CEA manipulation claim. Transnor contends otherwise. This issue of material fact precludes summary judgment.

CONCLUSION

For the reasons outlined above, defendants' motion for summary judgment is denied.

SO ORDERED.

Dated: New York, New York

April 18, 1990

Delaware & H. R. Co. v. Conrail

United States Court of Appeals for the Second Circuit

April 4, 1990, Argued ; April 20, 1990, Decided

No. 89-9034

Reporter
902 F.2d 174 *; 1990 U.S. App. LEXIS 6583 **; 1990-1 Trade Cas. (CCH) P69,001

DELAWARE & HUDSON RAILWAY COMPANY, Appellant, v. CONSOLIDATED RAIL CORPORATION, Appellee

Prior History: [1]** Appeal from a summary judgment entered November 20, 1989, in the Northern District of New York, Neal P. McCurn, Chief Judge, rejecting appellant's antitrust claims in an action by one railroad against another.

Disposition: Reversed and remanded.

Core Terms

buy, tracks, monopolization, railroads, genuine issue of material fact, district court, summary judgment, newsprint, monopoly power, rates, transportation, cooperation, profits, route, triable issue, short haul, competitor

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Summary Judgment, Opposing Materials**

On an appeal from a summary judgment, a court reviews the record de novo to determine whether there are genuine issues of material fact. *Fed. R. Civ. P. 56(c)*. The court assesses the record in the light most favorable to the non-movant and draws all reasonable inferences in its favor. The non-movant, however, who must sustain the ultimate burden of proof, must demonstrate in opposing a summary judgment motion that there is some evidence which would create a genuine issue of material fact. Conclusory allegations will not suffice to create a genuine issue. There must be more than a scintilla of evidence, and more than some metaphysical doubt as to the material facts.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2[] **Monopolies & Monopolization, Actual Monopolization**

To establish the offense of monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must demonstrate (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The fact that profit maximization is a goal of a monopolist's policy provides support for an argument that the policy is a legitimate practice, but does not shield the policy from judicial scrutiny. A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] **Monopolies & Monopolization, Actual Monopolization**

Denial of an essential facility and, by implication, a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, relies on a four-factor test: 1) Control of the essential facility by a monopolist; (2) A competitor's inability practically or reasonably to duplicate the essential facility; (3) The denial of the use of the facility to a competitor; and (4) The feasibility of providing the facility.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN5[] **Monopolies & Monopolization, Actual Monopolization**

The third element in determining whether an essential facility had been denied, the denying of the use of the facility to a competitor, does not require an outright refusal to deal in order to find that denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN6[] **Attempts to Monopolize, Sherman Act**

To make out a successful claim of attempted monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must demonstrate: (1) anti-competitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power.

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Judges: Feinberg, Timbers and Walker, Circuit Judges.

Opinion by: TIMBERS

Opinion

[*176] TIMBERS, Circuit Judge:

Appellant Delaware & Hudson Railway Co. ("D & H") appeals from a summary judgment entered November 20, 1989 in the Northern District of New York, Neal P. McCurn, *Chief Judge*, in favor of appellant Consolidated Rail Corp. ("Conrail") in this antitrust action. *724 F. Supp. 1073 (N.D.N.Y. 1989)*. **[**2]**

The district court found that D & H failed to raise a genuine issue of material fact with respect to any of its three claims, viz. monopolization, denial of an "essential facility" and attempted monopolization. On appeal, D & H asserts as error the district court's rejection of each of these three claims. It asserts that the court misconstrued the applicable law and, contrary to the approved practice at the summary judgment stage, failed to draw proper factual inferences in its favor.

After careful consideration, we hold that D & H's contentions are meritorious. For the reasons which follow, we vacate the judgment of the district court and remand the action.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

A brief overview of recent developments in the freight railroad industry may help to place this dispute in context. Conrail was organized in the early 1970's in an effort to preserve the viability of freight transportation by rail in the northeastern and midwestern United States. *Regional Rail Reorganization Act Cases, 419 U.S. 102, 108-09, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974)*. **[**3]** Several large railroads, including the giant Penn Central, had become insolvent. Congress saw as the solution a single system run on a for-profit basis. *Id.* Subsequently, Conrail absorbed still more insolvent railroads.

D & H is a much older and smaller system than Conrail. It controlled about 1,700 miles of track at its peak, while Conrail controls about 17,000. Conrail does not challenge the fact that, as a result of the disparity, D & H is forced to rely on Conrail's system in order to compete. In the market involved on this appeal -- shipment of newsprint from eastern Canada to locations in the mid-Atlantic states of this Country -- only Conrail can provide transport from start to finish in most instances.

An example used by the district court and by both parties in their briefs may illustrate the parties' relationship: A newsprint shipper seeks to have newsprint delivered from a point in Quebec, Canada, to Lancaster, Pa. There are two relevant options. One option would entail delivery via a Canadian railroad to Conrail's border facility. Conrail then would carry the cargo on its tracks for the entire journey. Under the other option, after receiving the cargo at its border **[**4]** facility, D & H would carry the cargo on its tracks only as far as **[*177]** Harrisburg, Pa. From there, it would have to complete the journey on Conrail's tracks.

Most of D & H's newsprint shipments therefore require the cooperation of Conrail. That cooperation takes the form of "joint rates". A joint rate is a cooperative rate -- less than the sum of the separate rates of the individual railroads -- charged to the shipper when the shipment requires the use of the tracks of two or more railroads. Each railroad's share of the rate usually is in proportion to the percentage of miles traveled on that railroad's tracks.

Until 1980, the Interstate Commerce Commission required cooperation in the setting of joint rates. In that year Congress moved to deregulate the railroads. The Staggers Rail Act of 1980, *49 U.S.C. § 10101 et seq. (1988)*, left to the railroads the decision whether or not to cooperate, albeit subject to antitrust and other laws. H.R.Conf.Rep. No. 1430, 96th Cong., 2d Sess. 83 (1980), *reprinted in* 1980 U.S.Code Cong. & Admin.News 4110, 4114.

The dispute leading to this appeal arose when Canadian shippers and railroads sought to lower **[**5]** rates so that rail carriage of newsprint could compete more readily with carriage by truck. Conrail agreed to lower its rates on trips where it was the sole American carrier. It did not decline outright to cooperate in cases where it was the secondary ("short haul") carrier to D & H, but instituted a policy, called "make or buy", that achieved the same effect. Under that policy, Conrail would agree to the reduced rate only if its profit, called "contribution", matched its profit on the route where it was the sole carrier.

The effect of the make or buy policy can be demonstrated by reference to the example referred to above. On a Quebec-Lancaster carriage entirely on Conrail tracks, Conrail would earn $ 30,000 in revenue, less $ 20,000 in costs, for a contribution of $ 10,000. Prior to the make or buy policy, Conrail's revenue for the Harrisburg-Lancaster short haul route, when D & H was responsible for the long haul, would be $ 2,000, less costs of $ 750, for a contribution of $ 1,250. The make or buy policy was intended to assure that Conrail would receive the same contribution for any carriage in which it participated, whether it was the short or long haul carrier. Accordingly, **[**6]** under its new policy, Conrail demanded a contribution of $ 10,000 for the Harrisburg-Lancaster short haul route, an increase of 800%. The price for D & H's failure to agree to those terms was the denial by Conrail of any joint rates.

Conrail's action placed D & H in a bind between giving up almost all of its profits on a given route and losing entirely the ability to carry freight on the route. It decided not to concur in joint rates where the make or buy policy was in effect. It commenced the instant action in July 1986. In June 1988, D & H sought protection under Chapter 11 of the United States Bankruptcy Code.

After surviving a motion to dismiss, *654 F. Supp. 1195 (N.D.N.Y. 1987)*, and after extensive discovery, D & H's antitrust claims were rejected by the district court on Conrail's motion for summary judgment. The three claims, all of which relate to the same product market (shipment of newsprint from eastern Canada to the mid-Atlantic states) and the same conduct (Conrail's make or buy policy), are those set forth in the second paragraph of this opinion.

From the summary judgment rejecting these claims, this appeal was taken by D&H which asserts that, since **[**7]** there are genuine issues of material fact with respect to the three claims, summary judgment was improper. We agree.

II.

HN1[] On an appeal from a summary judgment, we review the record de novo to determine whether there are genuine issues of material fact. *Fed.R.Civ.P. 56(c)*. We assess the record in the light most favorable to the non-movant and we draw all reasonable inferences in its favor. *Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465* (2 Cir. 1989). The non-movant, however, who must sustain the ultimate burden of proof, must demonstrate in opposing a summary judgment motion that there is some evidence which would create **[*178]** a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Conclusory allegations will not suffice to create a genuine issue. There must be more than a "scintilla of evidence," *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*, and more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. **[**8]**

III.

We turn first to the question whether the make or buy policy constituted the offense of monopolization under *§ 2* of the Sherman Act, *15 U.S.C. § 2 (1988)*. *HN2*[] To establish the defendant's liability, the plaintiff must demonstrate "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*.

(A)

Addressing the second element first, we must affirm the district court's ruling unless D & H has demonstrated that there is a genuine issue of material fact as to whether Conrail's make or buy policy constituted willful anti-competitive conduct in the relevant newsprint transportation market. Conrail's most significant contention in this regard is that, since the policy was intended to increase short-term, as well as long-term, profits, Conrail is insulated from liability.

[9]** Conrail finds support for this contention primarily in two opinions. The first is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. There the Court affirmed a decision that the defendant had engaged in actionable conduct in its refusal to continue cooperating with a competitor. The Court held that a monopolist would not be liable merely because its actions adversely affected a competitor, if such actions were motivated by a valid business justification. *Id. at 605*. In determining that there was no valid justification, the Court found significant the fact that the defendant "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id. at 610-11*. Conrail infers from *Aspen Skiing* that conduct which has profit maximization as a goal cannot violate *§ 2*.

Conrail finds further support for this contention in *United States Football League v. National Football League, 842 F.2d 1335* (2 Cir. 1988). There, we approved a jury instruction which included the following:

> "[A] monopolist **[**10]** is under no duty affirmatively to help or aid its competitors and is free to set as its legitimate goal the maximization of its own profits *so long as it does not exercise its power to maintain that [monopoly] power*."

Id. at 1361 (emphasis added).

The plain language of the above excerpt from *United States Football League* demonstrates that Conrail's contention is incorrect. *HN3*[] The fact that profit maximization is a goal of the make or buy policy provides support for an argument that the policy is a legitimate practice, but does not shield the policy from judicial scrutiny. A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits. *Aspen Skiing* does not hold to the contrary.

Our review of the record in the instant case satisfies us that there is evidence which would support a jury finding that Conrail is liable for monopolization. Here are a few examples: First, James Hagen, Conrail's former Senior Vice President -- Marketing, stated that the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits. Second, **[**11]** several Conrail employees, including its President, Stuart M. Reed, stated that a shift of D & H's traffic to Conrail would be desirable. Third, David Kalapos, an analyst for Conrail, stated that D & H would be unlikely to concur in a joint rate under the make or buy policy as its profits "would be almost **[*179]** ludicrously low." Fourth, there is no question that D & H was harmed by the implementation of the policy. D & H introduced in evidence a letter from a Conrail vice president stating "I'm for a monopoly in total . . . So let's Conrail take and rationalize the entire D & H."

We agree with the district court that the vice president's letter, standing alone, would not give rise to a *§ 2* violation. *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101, 1113* (1 Cir. 1989), *cert. denied*, *494 U.S. 1027, 110 S. Ct. 1473, 108 L. Ed. 2d 610 (1990)*; *Olympia Equipment Leasing Company. v. Western Union Tel. Co., 797 F.2d 370, 373, 379* (7 Cir. 1986) (intent that "these turkeys . . . be flushed" did not give rise to liability), *cert. denied*, *480 U.S. 934 (1987)*. In view of the evidence **[**12]** referred to above, however, we hold that D & H has proffered evidence sufficient to support a verdict in its favor by a reasonable jury on the question whether Conrail's conduct violated *§ 2*. Obviously, therefore, this issue could not properly be decided against D & H on a motion for summary judgment.

(B)

The district court assumed for purposes of argument that Conrail had monopoly power in the relevant market, transportation of newsprint from eastern Canada to the mid-Atlantic states. Conrail now asserts as an alternative ground for affirming the district court that this assumption was incorrect. D & H's evidence on the subject, it contends, was insufficient to create a triable issue.

D & H's expert witness, Gordon Fay, stated in an affidavit that Conrail had two-thirds of the market in rail transportation of newsprint and one-half of the total market (including truck transportation). While market share is not the sole factor in the determination of market power, it is a highly significant one. *Broadway Delivery Corp. v. United Parcel Service, Inc., 651 F.2d 122, 128* (2 Cir.), *cert. denied*, *454 U.S. 968, 70 L. Ed. 2d 384, 102 S. Ct. 512 (1981)*. **[**13]**

The parties and the district court seem not to have devoted significant attention to the question of monopoly power. Conrail did not even take the deposition of the witness Fay. We are not presented with a well-developed record on that question. Nevertheless, on the record before us, we are persuaded that D & H has presented a genuine issue of material fact as to monopoly power, precluding summary judgment in favor of Conrail on this issue.

IV.

We turn next to the question whether the make or buy policy constituted ***HN4***[] denial of an essential facility and, by implication, a violation of *§ 2*. The alleged essential facility is Conrail's tracks used for short haul routes, e.g., the Harrisburg-Lancaster tracks in the hypothetical Quebec-Lancaster run. The district court rejected D & H's claim, relying on the four-factor test set forth in *MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33* (7 Cir.) ("(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial **[**14]** of the use of the facility to a competitor; and (4) the feasibility of providing the facility."), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*; *see also* *Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 568-69* (2 Cir. 1990) (applying *MCI.*)

There is no question that Conrail controls the short haul tracks, thus satisfying the first element. With respect to the second element, we agree with the district court's statement that "physical duplication of [Conrail's] lines would be an impractical and unreasonable project to undertake." *724 F. Supp. at 1079*. The fourth element, feasibility, is demonstrated by the fact that D & H was permitted continuous use of the tracks until the make or buy policy foreclosed that use.

HN5[] The third element -- whether Conrail impermissibly denied to D & H the use of the tracks -- is the one on which the district court based its decision. The court held correctly that there need not be an outright **[*180]** refusal to deal in order to find that denial of an essential facility **[**15]** occurred. It is sufficient if the terms of the offer to deal are unreasonable. In this context the following passage is particularly appropriate:

> "Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies."

United States v. Terminal Railroad Assoc., 224 U.S. 383, 411, 56 L. Ed. 810, 32 S. Ct. 507 (1912); *see also* Areeda & Hovenkamp, ***Antitrust Law*** para. 736.1, at 700-01 (1989 Supp.).

We disagree, however, with the district court's conclusion that the terms of the make or buy policy were reasonable as a matter of law. We return to the earlier illustration to make the point clear. Prior to the implementation of the policy, Conrail received a contribution of $ 1,250 for D & H's use of its Harrisburg-Lancaster tracks. Under the policy, Conrail demanded a contribution of $ 10,000, an increase **[**16]** of 800%. The magnitude of that increase may be sufficient in itself to create a triable issue as to whether the terms were unreasonable. Whether it is or is not, however, the various statements of Conrail executives, excerpted above, support our conclusion that there is a triable issue.

The relatively sparse case law on this question supports our conclusion. In *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 704 F. Supp. 1309 (D.Md. 1989)*, the court found that the defendant's offer to transport cargo for $.01 per ton above the defendant's own variable cost was reasonable. *Id. at 1323-24*. While it is difficult to extrapolate economic reasonableness from one case to another, we hold that a sudden price rise of 800% raises a genuine issue of material fact under *Laurel Sand*.

We need not determine on this appeal the circumstances under which a legitimate business practice will shield a defendant from liability for conduct that otherwise would constitute denial of an essential facility. *MCI, supra, 708 F.2d at 1133* (suggesting that a legitimate practice may serve as a shield from liability). In our discussion above on the monopolization **[**17]** claim, we held that there is a genuine issue of material fact with respect to the question whether the make or buy policy was a legitimate practice. That holding is equally applicable here.

V.

D & H also contends that the make or buy policy constituted the *§ 2* offense of attempted monopolization. *HN6*[] To make out a successful claim of attempted monopolization, a plaintiff must demonstrate: (1) anti-competitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power. *International Distrib. Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 790* (2 Cir.), *cert. denied*, *482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987)*. These elements essentially track those required for a successful monopolization claim. We held with respect to the monopolization claim that the development and implementation of the make or buy policy raised triable issues on the questions of conduct and intent. Likewise, evidence of Conrail's monopoly power that is sufficient to withstand a motion for summary judgment also suffices to raise a triable **[**18]** issue as to whether there was a dangerous probability that Conrail would obtain monopoly power.

VI.

To summarize:

> We hold that there are genuine issues of material fact with respect to whether the development and implementation by Conrail of its make or buy policy constituted the antitrust offenses of monopolization, denial of essential facilities and attempted monopolization.

Nothing in this opinion is to be construed as an expression of our views on the merits of the issues to be tried. All we hold today is that there are genuine **[*181]** issues of material fact which should not be decided by summary judgment.

Reversed and remanded.

[Cal. v. Am. Stores Co.](#)

Supreme Court of the United States

January 16, 1990, Argued ; April 30, 1990, Decided

No. 89-258

Reporter
495 U.S. 271 *; 110 S. Ct. 1853 **; 109 L. Ed. 2d 240 ***; 1990 U.S. LEXIS 2214 ****; 58 U.S.L.W. 4529; 1990-1 Trade Cas. (CCH) P69,003

CALIFORNIA v. AMERICAN STORES CO. ET AL.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *872 F. 2d 837*, reversed and remanded.

Core Terms

divestiture, dissolution, merger, injunctive relief, Clayton Act, injunction, district court, violations, antitrust, equitable, Sherman Act, authorize, encompass, stock, threatened loss, anti trust law, decrees, legislative history, mandatory, remedies, cases, preliminary injunction, subcommittee, acquisition, conditions, principles, provisions, settlement, divest, merged

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1[] **Legislation, Interpretation**

When Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret a provision generously so as to effectuate important congressional goals.

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 25*.

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 26*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

Mergers & Acquisitions Law > Antitrust > General Overview

HN4[] **Civil Actions, Divestiture**

The general language of *15 U.S.C.S. § 25* is broad enough to authorize divestiture. Indeed, in government actions divestiture is the preferred remedy for an illegal merger or acquisition. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when *15 U.S.C.S. § 18*, which particularizes the Sherman Act standard of illegality, is involved.

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

15 U.S.C.S. § 26 states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order. Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief. The plain text of *§ 26* authorizes divestiture decrees to remedy *15 U.S.C.S. § 18* violations.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Patent Law > Remedies > Equitable Relief > Injunctions

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Patent Law > Remedies > General Overview

Patent Law > Remedies > Equitable Relief > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN6[] Private Actions, Remedies

Injunctions issued pursuant to 15 U.S.C.S. § 26 have been upheld regardless of whether they are mandatory or prohibitory in character. Section 26 has been enacted not merely to provide private relief, but to serve as well the high purpose of enforcing antitrust laws. The remedy that § 26 affords, like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Governments > Legislation > Statute of Limitations > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN7[] Legislation, Statute of Limitations

The Clayton Act's provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers. 15 U.S.C.S. § 18 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect may be substantially to lessen competition. 11 U.S.C.S. § 26, construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger.

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] Antitrust & Trade Law, Clayton Act

Distinction between divestiture and injunctions that prohibit future conduct for purposes of 15 U.S.C.S. § 26 is illusory.

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN9[] Preliminary Considerations, Equity

The essence of equity jurisdiction has been the power of a court to do equity and to mould decrees to the necessities of a particular case. Flexibility rather than rigidity distinguishes it.

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN10[] **Preliminary Considerations, Equity**

When Congress endows federal courts with equitable jurisdiction, Congress acts aware of a longstanding tradition of flexibility. Unless a statute in so many words, or by a necessary and inescapable inference, restricts a court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

HN11[] **Civil Actions, Divestiture**

In a government case under *15 U.S.C.S. § 25*, a proof of a violation of law may itself establish sufficient public injury to warrant relief. A private litigant, however, must have standing under *15 U.S.C.S. § 26* and must prove threatened loss or damage to his own interests in order to obtain relief.

Lawyers' Edition Display

Decision

Divestiture held to be form of injunctive relief authorized by 16 of Clayton Act (*15 USCS 26*), where antitrust suit by state of California claimed that supermarket merger violated 7 of Act (*15 USCS 18*).

Summary

Section 16 of the Clayton Act (*15 USCS 26*) provides that any person, firm, corporation, or association shall be entitled to have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. After a company which operated supermarkets in many states, including California, notified the Federal Trade Commission (FTC), under *15 USCS 18a*, that the company intended to acquire all of a major competitor's outstanding stock, the FTC negotiated a settlement which included a condition that the acquirer comply with a "Hold Separate Agreement" preventing the acquirer from integrating the two companies' assets and operations until after the acquirer had divested itself of several designated supermarkets. The state of California then filed an action in the United States District Court for the Central District of California.

The complaint alleged that the merger violated federal antitrust statutes, including 7 of the Clayton Act (*15 USCS 18*), which generally prohibits acquisitions whose effect may be substantially to lessen competition. Meanwhile, the company consummated the merger as a matter of legal form under Delaware corporation law, but the two companies' business operations were not combined, as a matter of practical fact, due to the "Hold Separate Agreement." The District Court eventually entered a preliminary injunction--which ordered the acquirer, during the pendency of the action, to take all steps necessary to operate the two companies independently in California, and to refrain from taking any action to modify the status quo as to the California operations of the two companies, other than in the ordinary course of business--and expressed the view that (1) the state of California had proved a prima facie violation of 7; (2) the state had made an adequate showing of irreparable harm to Californians; (3) such harm outweighed the harm that the acquirer would suffer as a result of the injunction; and (4) under the circumstances, the injunction was not prohibited by United States Court of Appeals for the Ninth Circuit precedent to the effect that divestiture was not an authorized form of injunctive relief under 16 (*697 F Supp 1125*). On interlocutory appeal, the Court of Appeals, ordering that the preliminary injunction be set aside, expressed the view that (1) the District Court had not abused its discretion in finding that the state had proved (a) a likelihood of success on the merits, and (b) the probability of irreparable harm; but (2) divestiture was not an available remedy in private actions under 16; and (3) 16 did not permit indirect divestiture by means of an injunction which, as in the case at hand, (a) did not on its face order divestiture, but (b) had the same effect (*872 F2d 837*).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by Stevens, J., expressing the unanimous view of the court, it was held that divestiture is a form of injunctive relief within the meaning of 16, and that the District Court, with respect to the case at hand, had the power under 16 to divest the acquirer of any part of the acquirer's ownership interest in the acquired company--either by forbidding the exercise of the owner's normal right to integrate the operations of two previously separate companies, or by requiring the acquirer to sell certain assets located in California--because (1) if the merger violated antitrust laws, and if it were correctly found that the conduct of the merged enterprise threatened economic harm to California consumers, then the literal text of 16 was sufficient to authorize injunctive relief, including an order of divestiture, that would prohibit that conduct from causing that harm; (2) such a construction harmonizes 16 with its statutory context, which (a) favors private enforcement, (b) subjects mergers to searching scrutiny, and (c) regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger; (3) even though it was alleged that excerpts from subcommittee hearings on the adoption of the Act demonstrated that a conduct-structure distinction had been recognized and that Congress had rejected a private dissolution remedy, and thereby had rejected divestiture as well, such allegations were not confirmed by anything that had been called to the Supreme Court's attention in the committee reports, floor debates, conference report, or contemporaneous judicial interpretations concerning the Act, given the historical importance of the distinction between dissolution and divestiture; (4) the equitable principles that govern 16 support a construction that would enable a chancellor to impose the most effective, usual, and straightforward remedy to rescind an unlawful purchase of assets; and (5) the fact that the term "divestiture" is used to describe what is typically no more than the familiar remedy of rescission does not place the remedy beyond the normal reach of the chancellor.

Kennedy, J., concurring, expressed the view that (1) Congress has not yet enacted a strict rule prohibiting divestiture after a negotiated settlement with the FTC; but (2) *15 USCS 18a*, by establishing a time period for review of merger proposals by the FTC, may lend a degree of objectivity to the determination whether divestiture is barred by laches.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §70 > STATUTES §108.5 > Clayton Act -- private injunctive relief -- divestiture -- dissolution -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[

] [1F]**LEdHN[1G]**[] [1G]**LEdHN[1H]**[] [1H]**LEdHN[1I]**[] [1I]**LEdHN[1J]**[] [1J]**LEdHN[1K]**[] [1K]**LEdHN[1L]**[] [1L]**LEdHN[1M]**[] [1M]

Divestiture is a form of injunctive relief within the meaning of 16 of the Clayton Act (*15 USCS 26*)--which authorizes any person to have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity--and a Federal District Court, with respect to a state's claim that one company's acquisition of another company violated 7 of the Act (*15 USCS 18*), has the power under 16 to divest the acquirer of any part of the acquirer's ownership interest in the acquired company--either by forbidding the exercise of the owner's normal right to integrate the operations of two previously separate companies, or by requiring the acquirer to sell certain assets located in the state--because (1) if the merger violated antitrust laws, and if it is correctly found that the conduct of the merged enterprise threatens economic harm to the state's consumers, then the literal text of 16 is sufficient to authorize injunctive relief, including an order of divestiture, that will prohibit that conduct from causing that harm, where (a) 16's authority, on its face, would seem to encompass divestiture just as plainly as the comparable language in 15 of the Act (*15 USCS 25*) with respect to actions intitiated by the Federal Government, which language, to the effect that antitrust violations shall be enjoined or otherwise prohibited, is agreed to be broad enough to authorize divestiture, (b) 16's requirement of threatened loss or damage (i) is satisfied under the assumed circumstances, and (ii) if divestiture is an appropriate means of preventing such harm, does not negate the power to grant such relief, and (c) 16's reference to threatened conduct is not the equivalent of a directive that unlawful conduct may be prohibited, but structural relief may not be mandated, since any distinction between conduct and structure, or between prohibitory and mandatory relief, is illusory in a case of this kind; (2) such a construction harmonizes 16 with its statutory context, which (a) favors private enforcement, (b) subjects mergers to searching scrutiny, and (c) regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger; (3) even though it is alleged that excerpts from subcommittee hearings on the adoption of the Act demonstrate that a conduct-structure distinction was recognized and that Congress rejected a private dissolution remedy, and thereby rejected divestiture as well, such allegations are not confirmed by anything that has been called to the United States Supreme Court's attention in the committee reports, floor debates, conference report, or contemporaneous judicial interpretations concerning the Act, given the historical importance of the distinction between dissolution and divestiture, where dissolution, at the time of the Act's adoption, was an ambiguous term that could (a) include divestiture, or (b) refer to greater penalties ranging up to a "corporate death sentence"; (4) the equitable principles that govern 16 support a construction that would enable a chancellor to impose the most effective, usual, and straightforward remedy to rescind an unlawful purchase of assets; and (5) the fact that the term "divestiture" is used to describe what is typically no more than the familiar remedy of rescission does not place the remedy beyond the normal reach of the chancellor.

APPEAL §1339.5 > STATUTES §145.4 > language -- legislative history -- review of Federal Court of Appeals' decision -- certiorari -- > Headnote:
LEdHN[2A][] [2A]**LEdHN[2B]**[] [2B]

On certiorari to review a Federal Court of Appeals' judgment which set aside a Federal District Court's preliminary injunction on the ground of the alleged limits on such injunctive relief under 16 of the Clayton Act (*15 USCS 26*), the statutory text is the natural place for the United States Supreme Court to begin its analysis; although the Supreme Court does not believe the statutory language to be ambiguous, the Supreme Court will nonetheless consider the legislative history that persuaded the Court of Appeals to place a narrow construction on 16; in order to understand such history, however, it is necessary to place the statute in its historical perspective.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > divestiture -- > Headnote:
LEdHN[3][] [3]

Under 15 of the Clayton Act (*15 USCS 25*)--which provides that, in actions initiated by the Federal Government, antitrust violations shall be enjoined or otherwise prohibited--divestiture is the preferred remedy for an illegal merger or acquisition; divestiture, which is simple, relatively easy to administer, and sure, should always be in the forefront of a court's mind when a violation of 7 of the Act (*15 USCS 18*) has been found.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger -- violation -- > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]

Section 7 of the Clayton Act (*15 USCS 18*) particularizes the Sherman Act (*15 USCS 1 et seq.*) standard of illegality and creates a relatively expansive definition of antitrust liability, as a plaintiff, in order to show that a merger is unlawful under 7, need only prove that the merger's effect "may be" substantially to lessen competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §74 > STATUTES §145.4 > injunctive relief -- forms -- equitable principles -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]***LEdHN[5C]***[] [5C]***LEdHN[5D]***[] [5D]***LEdHN[5E]***[] [5E]

The text of 16 of the Clayton Act (*15 USCS 26*) states no restrictions or exceptions to the forms of injunctive relief that a private plaintiff may seek, or that a federal court may order, as 16 authorizes any person to have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity; rather, the language of 16 indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief, and a fair reading of the entire legislative history supports the conclusion that 16 means what it says when it endorses the conditions and principles governing injunctive relief in the courts of equity--that 16 should be construed generously and flexibly, pursuant to the principles of equity; the evident import of 16's reference to threatened loss or damage is not to constrict the availability of injunctive remedies against violations that have already begun or occurred, but rather to expand such remedies' availability against harms that are as yet unrealized; the reference in 16 to threatened conduct that will cause loss or damage is not a limitation on the power to grant relief, but part of the general reference to the standards that should be applied in fashioning injunctive relief.

APPEAL §1363 > review of preliminary injunction -- satisfaction of conditions -- > Headnote:
LEdHN[6][] [6]

On certiorari to review a Federal Court of Appeals' setting aside of a Federal District Court's preliminary injunction under 16 of the Clayton Act (*15 USCS 26*)--which authorizes such injunctions in certain situations which involve threatened loss or damage by a violation of the antitrust laws--the United States Supreme Court will conclude that 16's requirement of threatened loss or damage is satisfied, where the allegations of a complaint filed by a state, the findings of the District Court, and the opinion of the Court of Appeals all assume that, even if the merger is a completed violation of law, the threatened harm to the state's consumers will persist.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > STATUTES §180 > divestiture -- dissolution -- > Headnote:
LEdHN[7][] [7]

In interpreting 16 of the Clayton Act (*15 USCS 26*)--which authorizes any person to have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity--the fact that divestiture was encompassed within the concept of dissolution at the time of the Act's framing does not imply that the equitable formulation of 16 cannot permit divestiture while excluding the more severe sanctions, ranging up to a "corporate death sentence," that also traveled at that time under the name "dissolution," for the rejection of a proposed remedy that would terminate the corporate existence of a company and would appoint a receiver to supervise the disposition of the company's assets is not the equivalent of the rejection of a remedy that would merely rescind a purchase of stock or assets.

EQUITY §1 > jurisdiction -- statutory grant -- > Headnote:
LEdHN[8][] [8]

Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

EVIDENCE §979 > LIMITATION OF ACTIONS §27 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §70 > divestiture -- government suit -- private suit -- sufficiency of proof -- standing -- laches -- > Headnote:
LEdHN[9][] [9]

A conclusion that a Federal District Court has the power to order divestiture in appropriate private antitrust cases brought under 16 of the Clayton Act (*15 USCS 26*) does not mean that such power should be exercised in every situation in which the Federal Government would be entitled to such relief under 15 of the Act (*15 USCS 25*), for (1) in a Federal Government case, the proof of the violation of law may itself establish sufficient public injury to warrant relief; but (2) a private litigant must have standing--that is, such a litigant must prove threatened loss or damage to the litigant's own interest in order to obtain relief under 16; and (3) equitable defenses such as laches, or perhaps "unclean hands," may protect consummated transactions from belated attacks by private parties when it would not be too late for the Federal Government to vindicate the public interest.

APPEAL §1363 > preliminary injunction -- what reviewable -- > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

On certiorari to review a Federal Court of Appeals' setting aside of a Federal District Court's preliminary injunction, under 16 of the Clayton Act (*15 USCS 26*), against a company which acquired another company--where the Court of Appeals based its decision on the court's view that divestiture is not an available remedy in private actions under 16--the United States Supreme Court (1) is merely confronted with the naked question whether the District Court had the power to divest the acquirer of any part of the acquirer's ownership interest in the acquired company, either

(a) by forbidding the exercise of the owner's normal right to integrate the operation of two previously separate companies, or (b) by requiring the acquirer to sell certain assets located in a particular state; and (2) is not presented with questions as to whether divestiture is appropriate in the particular case, with respect to such issues as the plaintiff's standing or the possible existence of equitable defenses such as laches, or perhaps "unclean hands."

Syllabus

Shortly after respondent American Stores Co., the fourth largest supermarket chain in California, acquired all of the outstanding stock of the largest chain, the State filed suit in the District Court alleging, inter alia, that the merger constituted an anticompetitive acquisition violative of *§ 7* of the Clayton Act and would harm consumers throughout the State. The court granted the State a preliminary injunction requiring American to operate the acquired stores separately pending resolution of the suit. Although agreeing that the State had proved a likelihood of success on the merits and the probability of irreparable harm, the Court **[****2]** of Appeals set aside the injunction on the ground that the relief granted exceeded the District Court's authority under § 16 of the Act to order "injunctive relief." The court relied on an earlier decision in which it had concluded on the basis of its reading of excerpts from subcommittee hearings that § 16's draftsmen did not intend to authorize the remedies of "dissolution" or "divestiture" in private litigants' actions. Thus, held the court, the "indirect divestiture" effected by the preliminary injunction was impermissible.

Held: Divestiture is a form of "injunctive relief" authorized by § 16. Pp. 278-296.

(a) The plain text of § 16 -- which entitles "[a]ny person . . . to . . . have injunctive relief . . . against threatened loss or damage . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity" -- authorizes divestiture decrees to remedy *§ 7* violations. On its face, the simple grant of authority to "have injunctive relief" would seem to encompass that remedy just as plainly as the comparable language in § 15 of the Act, which authorizes the district courts **[****3]** to "prevent and restrain violations" in antitrust actions brought by the United States, and under which divestiture is the preferred remedy for illegal mergers. Moreover, § 16 states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek or a court may order, but, rather, evidences Congress' intent that traditional equitable principles govern the grant of such relief. The section's "threatened loss or damage" phrase does not negate the court's power to order divestiture. Assuming, as did the lower courts, that the merger in question violated the antitrust laws, and that the conduct of the merged enterprise threatens economic harm to consumers, such relief would prohibit that conduct from causing that harm. Nor does the section's "threatened conduct that will cause loss or damage" phrase limit the court's power to the granting of relief against anticompetitive "conduct," as opposed to "structural relief," or to the issuance of prohibitory, rather than mandatory, injunctions. That phrase is simply a part of the general reference to the standards that should be applied in fashioning injunctive relief. Section 16, construed to authorize a private **[****4]** divestitutre remedy, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger. Pp. 278-285.

(b) The legislative history does not require that § 16 be construed narrowly. American's reliance on the subcommittee hearing excerpts cited by the *Court of Appeals and on Graves v. Cambria Steel Co., 298 F. 761* -- each of which contains statements indicating that private suits for dissolution do not lie under § 16 -- is misplaced. At the time of the Act's framing, dissolution was a vague and ill-defined concept that encompassed the drastic remedy of corporate termination as well as divestiture. Thus, the fact that Congress may have excluded the more severe sanction does not imply that the equitable formulation of § 16 cannot permit divestiture. Since the inferences that American draws simply are not confirmed by anything else in the legislative history or contemporaneous judicial interpretation, § 16 must be taken at its word when it endorses the "conditions and principles" governing injunctive relief in equity courts. There **[****5]** being nothing in the section that restricts courts' equitable jurisdiction, the provision should be construed generously and flexibly to enable a chancellor to impose the most effective, usual, and straightforward remedy to rescind an unlawful stock purchase. Pp. 285-295.

(c) Simply because a district court has the power to order divestiture in appropriate § 16 cases does not mean that it should do so in every situation in which the Government would be entitled to such relief under § 15. A private litigant must establish standing by proving "threatened loss or damage" to his own interests, and his suit may be barred by equitable defenses such as laches or "unclean hands." Pp. 295-296.

Counsel: H. Chester Horn, Jr., Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were John K. Van de Kamp, Attorney General, Andrea Sheridan Ordin, Chief Assistant Attorney General, Michael J. Strumwasser, Special Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General, and Lawrence R. Tapper and Ernest Martinez, Deputy Attorneys General.

Rex E. Lee argued the cause for respondents. With him on the brief were Carter G. Phillips, **[****6]** Mark D. Hopson, Donald B. Holbrook, and Kent T. Anderson. *

[**7]**

Judges: STEVENS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, post, p. 296.

Opinion by: STEVENS

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* Briefs of amici curiae urging reversal were filed for the State of Alabama et al. by Jim Mattox, Attorney General of Texas, Mary F. Keller, First Assistant Attorney General, Lou McCreary, Executive Assistant Attorney General, Allene D. Evans, Assistant Attorney General, and Donna L. Nelson, Assistant Attorney General, Don Siegelman, Attorney General of Alabama, and Walter S. Turner, Chief Assistant Attorney General, Douglas B. Baily, Attorney General of Alaska, and Thomas E. Wagner, Assistant Attorney General, John Steven Clark, Attorney General of Arkansas, Duane Woodard, Attorney General of Colorado, Clarine Nardi Riddle, Attorney General of Connecticut, and Robert M. Langer, Assistant Attorney General, Robert A. Butterworth, Attorney General of Florida, and Jerome W. Hoffman, Assistant Attorney General, Warren Price III, Attorney General of Hawaii, and Robert A. Marks and Ted Gamble Clause, Deputy Attorneys General, Jim Jones, Attorney General of Idaho, and Catherine K. Broad, Deputy Attorney General, Neil F. Hartigan, Attorney General of Illinois, Robert Ruiz, Solicitor General, and Christine H. Rosso, Senior Assistant Attorney General, Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Robert T. Stephan, Attorney General of Kansas, Frederic J. Cowan, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General, James E. Tierney, Attorney General of Maine, and Stephen L. Wessler, Deputy Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, and Michael F. Brockmeyer and R. Hartman Roemer, Assistant Attorneys General, James M. Shannon, Attorney General of Massachusetts, and George K. Weber and Thomas M. Alpert, Assistant Attorneys General, Hubert H. Humphrey III, Attorney General of Minnesota, Stephen P. Kilgriff, Deputy Attorney General, Thomas F. Pursell, Assistant Attorney General, and James P. Spencer, Special Assistant Attorney General, Brian McKay, Attorney General of Nevada, and J. Kenneth Creighton, Deputy Attorney General, Peter N. Perretti, Jr., Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Lloyd E. Constantine, Assistant Attorney General, Lacy H. Thornburg, Attorney General of North Carolina, James C. Gulick, Special Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Eugene F. Waye, Chief Deputy Attorney General, and Carl S. Hisiro, Senior Deputy Attorney General, James E. O'Neil, Attorney General of Rhode Island, and Edmund F. Murray, Jr., Special Assistant Attorney General, Roger A. Tellinghuisen, Attorney General of South Dakota, and Jeffrey P. Hallem, Assistant Attorney General, Charles W. Burson, Attorney General of Tennessee, and Perry Craft, Deputy Attorney General, Jeffrey L. Amestoy, Attorney General of Vermont, and Julie Brill, Assistant Attorney General, Mary Sue Terry, Attorney General of Virginia, Kenneth O. Eikenberry, Attorney General of Washington, and Carol A. Smith, Assistant Attorney General, Roger W. Tompkins, Attorney General of West Virginia, Daniel N. Huck, Deputy Attorney General, and Robert William Schulenberg III, Senior Assistant Attorney General, and Joseph B. Meyer, Attorney General of Wyoming; and for the Center for Public Interest Law by Robert C. Fellmeth.

Briefs of amici curiae urging affirmance were filed for the Business Roundtable by Thomas B. Leary and Janet L. McDavid; for the California Retailers Association et al. by Theodore B. Olson, James R. Martin, Phillip H. Rudolph, and Adrian A. Kragen; and for the United Food and Commercial Workers International Union et al. by George R. Murphy, Nicholas W. Clark, Robert W. Gilbert, Laurence D. Steinsapir, and D. William Heine.

Opinion

[*274] [*248] [**1855]** JUSTICE **STEVENS** delivered the opinion of the Court.

LEdHN[1A][] [1A]By merging with a major competitor, American Stores Co. (American) more than doubled the number of supermarkets that it owns in California. The State sued, claiming that the merger violates the federal antitrust laws and will harm consumers in 62 California cities. The complaint prayed for a preliminary injunction requiring American to operate the acquired stores separately until the case is decided, and then to divest itself of all of the acquired assets located in California. The District Court granted a preliminary injunction preventing American from integrating the operations of the two companies. The Court of Appeals for the Ninth Circuit agreed with the District Court's conclusion that California had made **[*275]** an adequate showing of probable success on the merits, but held that the relief granted by the District Court exceeded its authority under § 16 of **[****8]** the Clayton Act, 38 Stat. 737, as amended, *15 U.S.C. § 26*. In its view, the "injunctive **[**1856]** relief . . . against threatened loss or damage" authorized by § 16 does not encompass divestiture, and therefore the "indirect divestiture" effected by the preliminary injunction was impermissible. *872 F. 2d 837 (1989)*. We granted certiorari to resolve a conflict in the Circuits over whether divestiture is a form of injunctive relief within the meaning of § 16. *493 U.S. 916 (1989)*. We conclude that it is.

I

American operates over 1,500 retail grocery stores in 40 States. Prior to the merger, its 252 stores in California made it the fourth largest supermarket chain in that State. Lucky Stores, Inc. (Lucky), which operated in seven Western and Midwestern States, was the largest, with 340 stores. The second and third largest, Von's Companies and Safeway Stores, were merged in December 1987. *697 F. Supp. 1125, 1127 (CD Cal. 1988)*; Pet. for Cert. 3.

On March 21, 1988, American notified the Federal Trade Commission (FTC) that it intended to acquire all of Lucky's outstanding stock for a price of $ 2.5 billion. **[****9]** [1] The FTC conducted an investigation and negotiated a settlement with American. On May 31, it simultaneously filed both a complaint alleging that the merger violated *§ 7* of the Clayton **[***249]** Act and a proposed consent order disposing of the *§ 7* charges subject to certain conditions. Among those conditions was a requirement that American comply with a "Hold Separate Agreement" preventing it from integrating the two companies' assets and operations until after it had divested itself of **[*276]** several designated supermarkets. [2] American accepted the terms of the FTC's consent order. In early June, it acquired and paid for Lucky's stock and consummated a Delaware "short form merger." *872 F. 2d, at 840*; Brief for Respondent 2. Thus, as a matter of legal form American and Lucky were merged into a single corporate entity on June 9, 1988, but as a matter of practical fact their business operations have not yet been combined.

[**10]** On August 31, 1988, the FTC gave its final approval to the merger. The next day California filed this action in the United States District Court for the Central District of California. The complaint alleged that the merger violated *§ 1* of the Sherman Act, *15 U.S.C. § 1*, and *§ 7* of the Clayton Act, *15 U.S.C. § 18*, and that the acquisition, "if consummated," would cause considerable loss and damage to the State: Competition and potential competition "in many relevant geographic markets will be eliminated," App. 61, and "the prices of food and non-food products might be increased." Id., at 62. In its prayer for relief, California sought, inter alia, (1) a preliminary injunction "requiring American to hold and operate separately from American all of Lucky's California assets and businesses

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[1] See *15 U.S.C. § 18a* (Hart-Scott-Rodino Antitrust Improvements Act of 1976).

[2] Among other requirements, the Hold Separate Agreement obligated American to maintain separate books and records for the acquisition; to prevent any waste or deterioration of the acquired company's California operation; to refrain from replacing the company's executives; to assure that it is maintained as a viable competitor in California; to refrain from selling or otherwise disposing of the acquired company's warehouse, distribution or manufacturing facilities, or any retail grocery stores in California; and to preserve separate purchasing for its retail grocery sales. *697 F. Supp. 1125, 1134 (CD Cal. 1988)*.

pending final adjudication of the merits"; (2) "such injunctive relief, including rescission . . . as is necessary and appropriate to prevent the effects" alleged in the complaint; and (3) "an injunction requiring American to divest itself of all of Lucky's assets and businesses in the State of California." Id., at 65, 66-67.

[*277] The District **[****11]** Court granted California's motion for a temporary restraining order and, after considering extensive statistical evidence, entered a preliminary injunction. Without reaching the Sherman Act claim, the **[**1857]** court concluded that the State had proved a prima facie violation of *§ 7* of the Clayton Act. On the question of relief, the District Court found that the State had made an adequate showing "that Californians will be irreparably harmed if the proposed merger is completed," *697 F. Supp., at 1134*, and that the harm the State would suffer if the merger was not enjoined "far outweighs" the harm that American will suffer as the result of an injunction. *Id., at 1135*. The court also rejected American's argument that the requested relief was foreclosed by a prior decision of the Court of Appeals for the Ninth Circuit holding that divestiture is not a remedy authorized by § 16 of the Clayton Act. American contended that the proposed injunction was "tantamount to divestiture" since the merger of the two companies **[***250]** had already been completed, but the District Court disagreed. It held that since the FTC's Hold Separate Agreement was still in effect, **[****12]** the transaction was not a completed merger. [3]

American filed an interlocutory appeal pursuant to *28 U.S.C. § 1292(a)(1)*. The Court of Appeals for the Ninth Circuit first held that the District Court had not abused its discretion in finding that California had proved a likelihood of success on the merits and the probability of irreparable harm. Nevertheless, on the authority of its earlier decision in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp., 518 F. 2d 913 (1975)* **[****13]** (IT&T), **[*278]** it set aside the injunction. The Court of Appeals reasoned that its own prior decisions established both that "'divestiture is not an available remedy in private actions under § 16 of the Clayton Act,'" and that "section 16 does not permit indirect divestiture, that is, an injunction which on its face does not order divestiture but which has the same effect. IT&T, 518 F. 2d at 924." *872 F. 2d, at 844*. The Court of Appeals applied this rule to conclude that the injunction issued by the District Court was legally impermissible. Observing that under the injunction "these stores must operate as if Lucky had never been acquired by American Stores at all," the Court of Appeals held that "such an injunction requires indirect divestiture." *Id., at 845*. Finally, the Court of Appeals added that the District Court had "compounded its misapprehension of the law of divestiture" by misunderstanding "the legal status of the merger." Specifically, the District Court erred by concluding that the "FTC's consent order" undid "the legal effect of this merger" which "had already taken place" according to Delaware corporation law. Ibid.

[**14]** On California's application, JUSTICE O'CONNOR entered a stay continuing the District Court's injunction pending further review by this Court. *492 U.S. 1301 (1989)*. We then granted certiorari to resolve the conflict between this decision and the earlier holding of the Court of Appeals for the First Circuit in *CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F. 2d 404 (1985)*. We now reverse.

II

In its IT&T opinion, the Court of Appeals for the Ninth Circuit reasoned that the term "injunctive relief" as used in § 16 is ambiguous and that it is necessary to review the statute's legislative history to determine whether it includes divestiture. Then, based on its reading of a colloquy during a hearing before a subcommittee of the Judiciary Committee of the House of Representatives, it concluded that the draftsmen of the bill did not intend to authorize the remedies of **[*279]** "dissolution" or "divestiture" in actions **[**1858]** brought by private litigants. *518 F. 2d, at 921-922*. The Court of Appeals **[***251]** for the First Circuit has rejected that reasoning. It found instead that a fair reading of the statutory text, buttressed **[****15]** by recognized canons of construction, [4] required a construction of

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[3] The District Court observed that because the Hold Separate Agreement was still in effect, "this is not a completed merger. [American] and Lucky, pursuant to the Hold Separate Agreement, are performing numerous functions as separate entities. They retain their separate names and with them their respective corporate identities." The court stated that only by completing a "linguistic triathalon" could one conclude that an injunction stopping such a merger was "tantamount to divestiture." *697 F. Supp., at 1134*.

the words "injunctive relief" broad enough to encompass divestiture. Moreover, it doubted whether the references to "dissolution" in the legislative history referred to "divestiture," and did not consider this evidence sufficiently probative, in any event, to justify a restrictive reading of the Act that seemed inconsistent with its basic policy. *754 F. 2d, at 415-428*.

[**16]** American endorses the analysis of the Court of Appeals for the Ninth Circuit, but places greater reliance on two additional arguments. First, it argues that there is a significant difference between the text of § 15 of the Act, which authorizes equitable relief in actions brought by the United States, and the text of § 16, which applies to other parties. Specifically, it argues that the former is broad enough to encourage "structural relief" whereas the latter is limited to relief against anticompetitive "conduct." Second, reading § 16 in its historical context, American argues that it reflects a well-accepted distinction between prohibitory injunctions (which are authorized) and mandatory injunctions (which, American argues, are not).

LEdHN[1B][] [1B] ***LEdHN[2A]***[] [2A]American's argument directs us to two provisions in the statutory text, and that is the natural place to begin our analysis. Section 15 grants the federal district courts jurisdiction "to prevent and restrain violations of this Act" when **[*280]** United States attorneys "institute proceedings **[****17]** in equity to prevent and restrain such violations" through petitions "praying that such violation shall be enjoined or otherwise prohibited." [5] **[****18]** Section 16 entitles "any person, firm, corporation, or association . . . to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." [6]

[*252]** ***LEdHN[1C]***[] [1C] ***LEdHN[3]***[] [3] ***LEdHN[4A]***[] [4A] **[****19]** ***HN4***[] It is agreed that the general language of § 15, which provides that antitrust violations "shall be enjoined or otherwise prohibited," is broad enough to authorize divestiture. Indeed, in Government actions divestiture is the preferred **[*281]** remedy for an illegal merger **[**1859]** or acquisition. As we wrote in the Du Pont case:

"Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when *§ 7* of

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[4] The Court of Appeals observed:***HN1***[]

"Although we have no way of definitively determining the congressional intent in passing § 16, there remains at least one secure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." *CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F. 2d 404, 428 (1985)*.

[5] ***HN2***[] The section provides in pertinent part:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. . . ." *15 U.S.C. § 25*.

[6] ***HN3***[] The section provides in pertinent part:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss of damage is immediate, a preliminary injunction may issue . . . ." *15 U.S.C. § 26*.

the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated *§ 7* cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of *§ 7* has been found." *United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 329-331 (1961)* (footnotes omitted).

LEdHN[1D][] [1D] ***LEdHN[5A]***[] [5A] **[****20]** On its face, the simple grant of authority in § 16 to "have injunctive relief" would seem to encompass divestiture just as plainly as the comparable language in § 15. Certainly § 16's reference to "injunctive relief . . . against threatened loss or damage" differs from § 15's grant of jurisdiction to "prevent and restrain violations," but it obviously does no follow that one grant encompasses remedies excluded from the other. [7] Indeed, we think it could plausibly be argued that § 16's terms are the more expansive. ***HN5***[] In any event, however, as the Court of Appeals for the First Circuit correctly observed, § 16 "states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order. . . . Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief." *754 F. 2d, at* ***[*282]*** *416*. We agree that the plain text of § 16 authorizes divestiture decrees to remedy *§ 7* violations.

[**21]** American rests its contrary argument upon two phrases in § 16 that arguably narrow its scope. The entitlement "to sue for and have injunctive relief" affords relief "against threatened loss or damage by a violation of the antitrust laws." Moreover, the right to such relief exists "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

LEdHN[1E][] [1E] ***LEdHN[5B]***[] [5B] ***LEdHN[6]***[] [6]In this case, however, the requirement of "threatened loss or damage" is unquestionably satisfied. The allegations of the complaint, **[***253]** the findings of the District Court, and the opinion of the Court of Appeals all assume that even if the merger is a completed violation of law, the threatened harm to California consumers persists. If divestiture is an appropriate means of preventing that harm, the statutory reference to "threatened loss or damage" surely does not negate the court's power to grant **[****22]** such relief. [8]

LEdHN[1F][] [1F] ***LEdHN[5D]***[] [5D]The second phrase, which refers to "threatened conduct that will cause loss or damage," is not drafted as a limitation on the power to grant relief, but rather is a part of the general reference to the standards that should be applied in fashioning injunctive relief. It is surely not the equivalent of a directive stating that unlawful conduct may be prohibited but structural **[****23]** relief may not be mandated. Indeed, as the Ninth Circuit's analysis of the issue demonstrates, the distinction between conduct and structure -- or between prohibitory and mandatory relief -- **[**1860]** is illusory in a case of this kind. Thus, in the IT&T case the court recognized that an injunction prohibiting **[*283]** the parent company from voting the stock of the subsidiary should not be treated differently from a mandatory order of divestiture. [9] **[****24]** And in this case the court treated

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[7] That the two provisions do differ is not surprising at all, since § 15 was largely copied from *§ 4* of the Sherman Act, see 26 Stat. 209, ch. 647, *15 U.S.C. § 4*, while § 16, which had to incorporate standing limits appropriate to private actions -- see *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)* -- had no counterpart in the Sherman Act.

[8] ***LEdHN[5C]***[] [5C]

Indeed, the evident import of Congress' reference to "threatened loss or damage" is not to constrict the availability of injunctive remedies against violations that have already begun or occurred, but rather to expand their availability against harms that are as yet unrealized. See *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, and n. 24 (1969)*.

[9] The District Court in the IT&T case had observed that "'[i]f it were necessary to strain terminology in order to accomplish the same result, a court could easily phrase a "negative injunction" in such terms as to enjoin the activities of a corporation to such a degree that divestiture would be the only economical choice available to that corporation.'" *518 F. 2d, at 924*. The Court of Appeals admitted the force of this observation, agreeing with the District Court that the Standard Oil dissolution decree, *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 78 (1911)*, served as an example of an "'indirect' divestiture decre[e]." *518 F. 2d, at 924*.

the Hold Separate Agreement as a form of "indirect divestiture." In both cases the injunctive relief would unquestionably prohibit "conduct" by the defendants. American's textual arguments -- which rely on a distinction between mandatory and prohibitive relief -- do not explain why such remedies would not be appropriate. [10]

If we assume that the merger violated the antitrust laws, and if we agree with the District Court's finding that the conduct of the merged enterprise threatens economic harm to California consumers, the literal text of § 16 is plainly sufficient to authorize injunctive relief, including an order of divestiture, that will prohibit that conduct from causing that harm. ***HN6***[] This interpretation is consistent with our precedents, which have upheld injunctions issued pursuant to § 16 regardless of whether they were mandatory or prohibitory in character. See *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 129-133 (1969)* (reinstating injunction that required defendants to withdraw from patent pools); see also *Silver v. New York Stock Exchange, 373 U.S. 341, 345, 365 (1963)* **[****25]** (reinstating judgment for defendants in suit to compel **[*284]** installation of wire services). We have recognized when construing § 16 that it was enacted "not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp., 395 U.S., at 130-131*. We have accordingly applied the section "with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" Ibid., quoting *Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944)*.

LEdHN[1G][] [1G] ***LEdHN[4B]***[] [4B]Finally, by construing § 16 to encompass divestiture decrees we are better able than is American to harmonize the section with its statutory context. ***HN7***[] The Act's other provisions manifest a clear intent to encourage vigorous private **[****26]** litigation against anticompetitive mergers. *Section 7* itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect "may be substantially to lessen competition." Clayton Act *§ 7*, 38 Stat. 731, *15 U.S.C. § 18* (emphasis supplied). See *Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962)*. In addition, *§ 5* of the Act provided that during the pendency of a Government action, the statute of limitations for private actions would be tolled. The section also permitted plaintiffs to use the final judgment in a Government antitrust suit as prima facie evidence of liability in a later civil suit. Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition. See *Minnesota Mining & Mfg. Co. v. New* ***[**1861]*** *Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965)*. Congress also made express its view that divestiture was the most suitable remedy in a suit for relief from a *§ 7* violation: In § 11 of the Act, Congress directed the FTC to issue orders requiring that a violator **[****27]** of *§ 7* "cease and desist from the violation," and, specifically, that the violator **[*285]** "divest itself of the stock held" in violation of the Act. [11] Section 16, **[***255]** construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger.

[**28]** III

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[10] Notably, the Court of Appeals for the Ninth Circuit did not rely on either of the textual arguments that American has advanced here. Had it done so, it would have been forced to acknowledge a distinction between direct divestiture and indirect divestiture.

[11] In the context of construing the FTC's authority to issue such "cease and desist" orders, this Court -- speaking through Justice McReynolds, who had served as President Wilson's chief antitrust enforcement officer at the time the Clayton Act was framed -- had no difficulty finding that the continuing ownership of stock unlawfully acquired was itself a continuing violation of the Act:

"The order here questioned was entered when respondent actually held and owned the stock contrary to law. The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold. Further violations of the Act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed." *FTC v. Western Meat Co., 272 U.S. 554, 559 (1926)* (McReynolds, J.).

The suggestion that continuing ownership of stock unlawfully acquired might constitute a "further violatio[n] of the Act" would cast some doubt upon the utility of American's distinction between mandatory and prohibitory injunctions even were we inclined to accept the relevance of that distinction. As we reject the distinction, we have, however, no cause to pursue this line of inquiry further.

LEdHN[1H][] [1H] **LEdHN[2B]**[] [2B]Although we do not believe the statutory language is ambiguous, we nonetheless consider the legislative history that persuaded the Ninth Circuit to place a narrow construction on § 16. To understand that history, however, it is necessary to place the statute in its historical perspective.

The Sherman Act became law just a century ago. It matured some 15 years later, when, under the administation of Theodore Roosevelt, the Sherman Act "was finally being used against trusts of the dimension that had called it into **[*286]** being, and with enough energy to justify the boast that the President was using a Big Stick." W. Letwin, Law and Economic Policy in America 240 (1965). Two of the most famous prosecutions concluded in 1911, with decisions from this Court endorsing the "Rule of Reason" as the principal guide to the construction of the Sherman Act's general language. *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1*; *United States v. American Tobacco Co., 221 U.S. 106*. In consequence **[****29]** of the violations found in those two cases, wide-ranging injunctions were entered requiring the separation of the "oil trust" and the "tobacco trust" into a number of independent, but still significant, companies. The relief granted received mixed reviews. In some quarters, the cases were hailed as great triumphs over the forces of monopoly; in others, they were regarded as Pyrrhic victories. [12]

[**30]** **[**1862]** Concern about the adequacy of the Sherman Act's prohibition against combinations in restraint of trade prompted President Wilson to make a special address to Congress in 1914 recommending that the antitrust laws be strengthened. 2 The New Democracy, The Public Papers of Woodrow Wilson 81-89 (R. Baker & W. Dodd eds. 1926). Congressman Clayton, the Chairman of the House Judiciary Committee, promptly appointed a subcommittee to prepare the legislation. The bill drafted by the subcommittee contained most of the provisions that were eventually enacted into the law now known as the Clayton Act. The statute reenacted certain provisions of the Sherman Act and added new provisions of both a substantive and procedural character. Letwin, **[*287]** Law and Economic Policy in America, at 272-273; 2 A. Link, Wilson: The New Freedom 426 (1956). Thus, *§ 4* of the Sherman Act, which authorizes equitable **[***256]** relief in actions brought by the United States, was reenacted as § 15 of the Clayton Act, while § 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions. *Section 7* of the Clayton Act made stock acquisitions of competing companies more **[****31]** vulnerable, and *§§ 4* and *5* gave special procedural advantages to private litigants. The reform project had broad social significance, and it is obvious that the Act as a whole is fairly characterized as important remedial legislation.

Some proponents of reform, however, were critical of the bill for not going further. Thus, for example, proposals that were never enacted would have expressly authorized private individuals to bring suit for the dissolution of corporations adjudged to have violated the law and for appointment of receivers to wind up the corporation's affairs. [13] Samuel Untermyer, a New York lawyer who urged Congress to give private plaintiffs express authority to seek dissolution decrees, stated his views in a colloquy with Congressman John Floyd during a hearing on the bill before a subcommittee of the House Judiciary Committee. Floyd told Untermyer that "We did not intend by section 13 to give the individual the same power to bring a suit to dissolve the corporation that the Government has," and added that the committee Members **[*288]** had discussed the matter very thoroughly. Untermyer replied that "the very

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[12] The Taft Administration received the decisions warmly, but they provoked bitter criticism from the Democratic Party leadership. Antitrust policy was sharply debated during the 1912 Presidential campaign. See W. Letwin, Law and Economic Policy in America 266, 269 (1965). Upon becoming Woodrow Wilson's first Attorney General shortly thereafter, James McReynolds promised to deliver dissolutions "free from the fundamental defect in the plans adopted in the Standard Oil and Tobacco cases where the separate parts into which the business was divided were left under the control of the same stockholders." Annual Report of Attorney General, H.R. Doc. No. 460, 63d Cong., 2d Sess., 7 (1913).

[13] An amendment passed by the Senate, but rejected by the House, provided:

"That whenever a corporation shall acquire or consolidate the ownership or control of the plants, franchises, or property of other corporations, co-partnerships, or individuals, so that it shall be adjudged to be a monopoly or combination in restraint of trade, the court rendering such judgment shall decree its dissolution and shall to that end appoint receivers to wind up its affairs and shall cause all of its assets to be sold in such manner and to such persons as will, in the opinion of the court, restore competition as fully and completely as it was before said corporation or combination began to be formed. The court shall reserve in its decree jurisdiction over said assets so sold for a sufficient time to satisfy the court that full and free competition is restored and assured." 51 Cong. Rec. 15863 (1914).

relief that the man needs nine times out of ten **[****32]** is the dissolution of the corporation, because . . . it may not be doing any specific act of illegality, but its very existence, in violation of law, is the thing that is injuring him." Hearings on Trust Legislation before the House Committee on the Judiciary, 63d Cong., 2d Sess. 842-846 (1914) (House Hearings).

[**33]** Two weeks later, Louis Brandeis, testifying on behalf of the administration before the same committee, was asked whether he favored a proposal "to give the individual the right to file a bill in equity for the dissolution of one of these combinations, the same right which the Government now has and which it is its duty to perform." Brandeis responded that the proposal was not sound and added:

"It seems to me that the right to change the status [of the combination], which is the right of dissolution, is a right which ought to be exercised only by the Government, although the right for full redress for grievances and protection against future **[**1863]** wrongs is a right which every individual ought to enjoy.

"Now, all of this procedure ought to be made so as to facilitate, **[***257]** so far as possible, the enforcement of the law in aid, on the one hand, of the Government, and in aid, on the other hand, of the individual. But that fundamental principle is correct, that the Government ought to have the right, and the sole right, to determine whether the circumstances are such as to call for a dissolution of an alleged trust." *Id., at 649-650*.

LEdHN[1I][] [1I] **[****34]** American relies on these exchanges to support two slightly different arguments. First, it suggests that the committee recognized a distinction between relief directed at conduct and relief that is designed to change a company's status or structure. Second, it suggests that Congressman Floyd's statements permit an inference that the Congress as a whole rejected the possibility of a private dissolution remedy, and **[*289]** thereby rejected divestiture as well, because divestiture is a species of dissolution. Neither suggestion is persuasive.

HN8[] We have already concluded that the suggested distinction between divestiture and injunctions that prohibit future conduct is illusory. These excerpts, moreover, from the legislative history provide even less support for such a categorical distinction than does the text of § 16 itself.

The flaw in American's second suggestion is its assumption that the dissolution proposals submitted to Congress contemplated nothing more extreme than divestiture. Dissolution could be considerably more awesome. As the New York Court of Appeals ominously declared **[****35]** before affirming a decree against the North River Sugar Refining Company, dissolution was a "judgment . . . of corporate death," which "represent[ed] the extreme rigor of the law." [14] **[****36]** This meaning is evident from the text of the Senate amendment proposing private dissolution suits, which provided for a receiver to administer the doomed corporation's assets. [15]

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[14] *People v. North River Sugar Refining Co., 121 N.Y. 582, 608, 24 N.E. 834 (1890)*. The New York attorney general had sought dissolution of the company for its participation in the sugar trust, relying upon two theories: that dissolution was appropriate because the company had violated the terms of its charter by entering the trust, and that dissolution was appropriate under the state antitrust laws. The Court of Appeals agreed that dissolution was appropriate on the first ground, and so declined to reach the second. *Id., at 626, 24 N.E., at 841*.

Judge Finch, writing for a unanimous court, began the opinion by announcing, "The judgment sought against the defendant is one of corporate death." *Id., at 608, 24 N.E., at 834*. He then said that although the "life of a corporation is indeed less than that of the humblest citizen," "destruction of the corporate life" may not be effected "without clear and abundant reason." Ibid. The ensuing opinion bristles with the rhetoric of moral condemnation; when characterizing the corporation's defense, for example, Judge Finch commented that the court had been asked "to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure." *Id., at 626, 24 N.E., at 837*.

[15] See n. 13, supra. Senator Reed, the sponsor of the Senate amendment which would have expressly authorized dissolution proceedings, stated that the statute's dissolution remedy should guarantee that "we shall have a real decree, that there shall be a real burial, and that we shall sod down the grave upon the monster that was created in defiance of law, but that we shall at the same time preserve its parts and restore them to competition and activity . . . ." 51 Cong. Rec. 15864 (1914).

[*290] ***LEdHN[1J]***[] [1J] ***LEdHN[7]***[] [7]The concept of dissolution, of course, also encompassed remedies comparable to divestiture, or to our present-day understanding of **[***258]** dissolution. [16] **[****39]** It was one thing to **[**1864]** dissolve a **[*291]** pool, trust, combination, or merger, and quite another to atomize, or to revoke the charter of, a large corporation. [17] In the early part of this century, however, new forms of corporate organization were arising at a pace that **[****37]** outstripped the vocabulary used to describe them. [18] Concern about monopoly and competition dominated domestic politics, but people disagreed about **[***259]** what these things were, and about why, and to what extent, they were good or bad. [19] **[****40]** Men like McReynolds, Wilson's Attorney General, and Brandeis, the President's chief adviser on antitrust policy, could concur upon the need for forceful antitrust legislation and prosecution while finding themselves parted -- as their later battles on this Court made clear -- by a vast gulf in their understandings of economic theory and marketplace ethics. [20] Absent **[*292]** agreement

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[16] There is a common core to present-day and early 20th-century understandings of the distinction between dissolution and divestiture:

"As applied in both early and more recent antitrust cases, 'dissolution' refers to an antitrust judgment which dissolves or terminates an illegal combination or association -- putting it out of business, so to speak. 'Divestiture' is used to refer to situations where the defendants are required to divest or dispossess themselves of specified property in physical facilities, securities, or other assets." Oppenheim, Divestiture as a Remedy Under the Federal Antitrust Laws, 19 Geo. Wash. L. Rev. 119, 120 (1950).

Nevertheless, for at least the past four decades dissolution and divestiture have been treated as interchangeable terms in ***antitrust law***. See *United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 330, n. 11 (1961)* (terms are to a "large degree interchangeable"); see also Oppenheim, 19 Geo. Wash. L. Rev., at 121 (recognizing technical distinction between terms, but treating them as interchangeable nonetheless).

During the first decades of this century, however, "dissolution" was the favored term for a remedy that put an end to an unlawful combination and "divestiture" was rarely mentioned in the antitrust context. The early 20th-century treatise writers seem to have spoken exclusively in terms of dissolution. See, e.g., W. Thornton, A Treatise on the Sherman Anti-Trust Act § 372 (1913). Not surprisingly, all of the legislative history cited by the parties to this case refers to dissolution, not to divestiture.

Yet even without using the term "divestiture," Congress could and did recognize the appropriateness of a divestiture remedy in merger cases: § 11 of the Clayton Act expressly authorizes the FTC to order a defendant corporation to "divest itself of the stock held . . . contrary to the provisions of sectio[n] seven . . . of this Act." 38 Stat. 735. Indeed, the term "divestiture" appears to have entered the antitrust vocabulary as a consequence of FTC proceedings against alleged violators of *§ 7* of the Act. See, e.g., *Arrow-Hart & Hegeman Electric Co. v. FTC, 291 U.S. 587 (1934)*; *FTC v. Western Meat Co., 272 U.S. 554 (1926)*. Use of the term in those cases is unsurprising, for the text of the Act suggested that "divestiture," rather than "dissolution," was the remedy being sought.

By 1944, Justice Douglas was using the two terms in close proximity, see *United States v. Crescent Amusement Co., 323 U.S. 173, 188-189 (1944)* (Sherman Act case), although it is at least arguable that his usage preserved the technical distinction that was to be generally elided less than a decade later. Cf. *Swift & Co. v. United States, 276 U.S. 311, 319 (1928)* (referring to "divestiture of the instrumentalities" in a case raising both Sherman Act and Clayton Act claims). It would appear that, as the moral conception of dissolution lost favor and divestiture decrees became paradigmatic of dissolution remedies, the two concepts were collapsed into one another.

[17] For discussion of the scope of various dissolution decrees entered pursuant to the federal antitrust laws, see Hale, Trust Dissolution: "Atomizing" Business Units of Monopolistic Size, 40 Colum. L. Rev. 615 (1940); Adams, Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 Ind. L.J. 1 (1951). See also 2 A. Link, Wilson: The New Freedom 417-423 (1956).

[18] See, e.g., H. Thorelli, The Federal Antitrust Policy 72-87 (1954). Thorelli observes that "[n]o general incorporation law before 1888 explicitly sanctioned intercorporate stockholdings; some state laws even explicitly forbade them in the absence of special permission by the legislature. Common law rules did not recognize such relationships between corporations." Id., at 83. Perhaps because of the rapid pace of developments in corporate law, the politically charged "trust" concept came to embrace any large corporate combination as well as one specific device for creating such combinations. Id., at 84-85. See also D. Martin, Mergers and the Clayton Act 15, 43 (1959).

[19] See, e.g., Thorelli, The Federal Antitrust Policy 108-163, 309-352.

on the terms of debate, dissolution could mean the corporate death sentence, or the decrees of the Standard Oil and American Tobacco cases, or something else. [21] So long as this ambiguity persisted, dissolution had to be considered a public remedy, one that encompassed a power peculiarly suited to transgressions so "material and serious" as to "harm or menace the public welfare" in a manner transcending the " **[**1865]** quarrels of private litigants." [22] For those like Brandeis, who viewed dissolution as desirable only if treated not as a moral penalty **[****38]** but rather as a necessary economic remedy, [23] it would be imprudent to allow private parties to control a weapon potentially so lethal. Although it may now be second nature to conceive of dissolution in economic terms compatible with the policy Brandeis championed, [24] this view was anything but uncontroversial when the Act was drafted. [25]

[**41]** Once the historical importance of the distinction between dissolution and divestiture is understood, American's argument from the legislative history becomes singularly unpersuasive. The rejection of a proposed remedy that would terminate the corporate existence of American and appoint a **[*293]** receiver to supervise the disposition of its assets is surely not the equivalent of the rejection of a remedy that would merely rescind a purchase of stock or assets. Dissolution was too vague and ill defined a remedy to be either incorporated into or excluded from § 16 as such; Congress instead sensibly avoided the problematic word and spoke in terms of equitable relief drawn to redress damage or loss which a private party might suffer by consequence of the Act's violation. [26] That **[***260]** divestiture was encompassed within the concept of dissolution as understood at the time of the Clayton Act's framing does not imply that the equitable formulation of § 16 cannot permit divestiture while excluding more severe sanctions that also traveled under the name "dissolution."

[**42]** For similar reasons, we need not consider how much weight might otherwise be due to *Graves v. Cambria Steel Co., 298 F. 761 (NY 1924)*, a brief District Court decision by Judge Learned Hand upon which American relies heavily. [27] The suit appears to have been brought by dissatisfied shareholders of a target corporation who wished

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[20] See 2 Link, Wilson: The New Freedom 117, n. 83.

[21] See *CIA. Petrolera Caribe, Inc., 754 F. 2d, at 419-422*.

[22] *North River Sugar Refining Co., 121 N.Y., at 609, 24 N.E., at 835*.

[23] "[Brandeis] believed that anti-trust policy should be constructive rather than destructive: '. . . we should approach this subject from the point of view of regulation rather than of restriction; because industrial crime is not a cause, it is an effect -- the effect of a bad system.'" A. Mason, Brandeis: A Free Man's Life 402 (1956) (footnote omitted).

[24] Cf. *United States v. Du Pont & Co., 366 U.S., at 326* ("divestiture" is the "most drastic, but most effective, of antitrust remedies," yet it should be imposed only to "restore competition" and must not be "punitive"). See also Comment, The Personification of the Business Corporation in American Law, *54 U. Chi. L. Rev. 1441, 1478-1483 (1987)* (discussing decline of moral conceptions of the corporation).

[25] The notion that a proper remedy for violating the antitrust laws is complete dissolution of the wrongdoer persists in some state antitrust statutes that allow termination of a foreign corporation's right to do business within the State when the corporation is found guilty of violating the law. See e.g., *Wis. Stat. § 133.12* (1987-1988).

[26] Congress could, of course, have referred expressly to the divestiture remedy, as was done in § 11 of the Act, directing that the FTC shall require a violator of *§ 7* to "divest itself of the stock" unlawfully acquired. There was, however, no reason for Congress to itemize the various remedies which might be available in a § 16 suit. Moreover, while divestiture might be the appropriate remedy in every *§ 7* case prosecuted by the FTC, there is no reason to believe that the same would be true in private *§ 7* cases. There is thus nothing remarkable about the absence of any specific reference to divestiture in § 16.

[27] American also seeks to buttress its position by citations to *Fleitmann v. Welsbach Co., 240 U.S. 27 (1916)*; *Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921)*; *General Investment Co. v. Lake Shore & M.S.R. Co., 260 U.S. 261, 287 (1922)*; *Continental Securities Co. v. Michigan Cent. R. Co., 16 F. 2d 378 (CA6 1926)*, cert. denied, ***274 U.S. 741 (1927)***; and *Venner v. Pennsylvania Steel Co. of New Jersey, 250 F. 292 (NJ 1918)*. Several of these cases seem to us to involve issues entirely

to dissolve the new merged entity. The plaintiffs sought relief **[*294]** under § 16 of the Clayton **[**1866]** Act. Judge Hand remarked that the suit "is really a suit for the dissolution of a monopoly pro tanto. I cannot suppose that any one would argue that a private suit for dissolution would lie under section 16 of the Clayton Act." *298 F., at 762*. Not only does Hand, like Floyd, Untermyer, and Brandeis before him, refer to dissolution rather than divestiture, but, moreover, the state corporation law overtones of the inchoate complaint make it possible that the suit implicated the more drastic forms of dissolution.

[**43]** ***LEdHN[1K]***[] [1K] ***LEdHN[5E]***[] [5E] ***LEdHN[8]***[] [8]The inferences that American draws from its excerpts from the subcommittee hearings simply are not confirmed by anything that has been called to our attention in the Committee Reports, the floor debates, the Conference Report, or contemporaneous judicial interpretations. [28] Indeed, a fair reading **[***261]** of the entire legislative history supports the conclusion that § 16 means exactly what it says when it endorses the "conditions and principles" governing injunctive relief in courts of equity: that the provision should be construed generously and flexibly pursuant to principles of equity. See **[*295]** *CIA. Petrolera Caribe, Inc., 754 F. 2d, at 418-427*. As the Court stated in *Hecht Co. v. Bowles, 321 U.S., at 329*:

HN9[] "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each **[****44]** decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

HN10[] More recently, in *Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)*, we observed that when Congress endows the federal courts with equitable jurisdiction, Congress acts aware of this longstanding tradition of flexibility. "'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" Ibid., quoting *Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)*. These principles unquestionably support a construction of the statute that will enable a chancellor to impose the most effective, usual and straightforward remedy to rescind an unlawful purchase of stock or assets. The fact that the term "divestiture" is used to describe what is typically nothing more than the familiar remedy of rescission does not place the remedy beyond the normal reach of the chancellor.

[**45]** IV

LEdHN[1L][] [1L] ***LEdHN[9]***[] [9] ***LEdHN[10A]***[] [10A]Our conclusion that a district court has the power to order divestiture in appropriate cases brought under § 16 of the Clayton Act does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief under § 15. ***HN11***[] In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief. See *Du Pont, 366 U.S., at 319-321*; see also *Virginian R. Co. v. Railway Employees, 300 U.S. 515,*

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distinct from those posed here, and, in any event, in none of these precedents do we find anything that casts any doubt upon the rule we announce today.

[28] Professors Areeda and Turner have criticized the Court of Appeals for the Ninth Circuit on the ground that it did not correctly evaluate the legislative history of § 16 in IT&T. Areeda and Turner state that the "fragment of legislative history" relied upon by the Court of Appeals "cannot bear the weight the court placed upon it, when the reports of the relevant House and Senate committees were silent on the point, which also did not appear to have been mentioned on the House or Senate floor." They point out that "other courts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers," and conclude that "divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff." 2 P. Areeda & D. Turner, ***Antitrust Law*** § 328b (1978) (footnotes omitted). Other commentators have likewise reasoned that § 16 affords private plaintiffs a divestiture remedy. See, e.g., Peacock, Private Divestiture Suits Under Section 16 of the Clayton Act, 48 Tex. L. Rev. 54 (1969); Note, Availability of Divestiture in Private Litigation as a Remedy for violation of *Section 7* of the Clayton Act, 49 Minn. L. Rev. 267 (1964); Note, Divestiture as a Remedy in Private Actions Brought Under Section 16 of the Clayton Act, *84 Mich. L. Rev. 1579 (1986)*.

*552 [**1867] (1937)* ("Courts of equity may and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved"); *United States v. San Francisco, 310 U.S. 16, 30-31 (1940)* **[*296]** (authorizing issuance **[****46]** of injunction at Government's request without balancing of the equities). A private litigant, however, must have standing -- in the words of § 16, he must prove "threatened loss or damage" to his own interests in order to obtain relief. See *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)*. Moreover, equitable defenses such as laches, or perhaps "unclean hands," may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest.

LEdHN[1M][] [1M] ***LEdHN[10B]***[] [10B]Such questions, however, are not presented in this case. We are merely confronted **[***262]** with the naked question whether the District Court had the power to divest American of any part of its ownership interests in the acquired Lucky Stores, either by forbidding the exercise of the owner's normal right to integrate the operations of the two previously separate companies, or by requiring it to sell certain assets located in California. We hold that such a remedy is a form **[****47]** of "injunctive relief" within the meaning of § 16 of the Clayton Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: KENNEDY

Concur

JUSTICE KENNEDY, concurring.

In agreement with our holding that § 16 of the Clayton Act does authorize divestiture as a remedy for violations of *§ 7* of the Clayton Act, I join the Court's opinion. I write further to note that both the respondents and various interested labor unions, the latter as amici curiae, have argued for a different result on the basis of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Clayton Act § 7A, as added and amended), *15 U.S.C. § 18a*. See Brief for Respondents 47-48; Brief for United Food and Commercial International Union et al. as Amici Curiae 7-15. Although I do not believe that § 7A is controlling as an interpretation of the earlier **[*297]** enacted § 16, it may be of vital relevance in determining whether to order divestiture in a particular case.

Section 7A enables the Federal Government to review certain transactions that might violate *§ 7* before **[****48]** they occur. The provision, in brief, requires those contemplating an acquisition within its coverage to provide the Federal Trade Commission (FTC) with the information necessary for determining "whether such acquisition may, if consummated, violate the antitrust laws." *15 U.S.C. § 18a(d)(1)*. During the mandatory waiting period that follows the submission of this information, see *§ 18a(b)(1)*, the agency may decide, as it did in this case, to negotiate a settlement intended to eliminate potential violations. See *16 CFR §§ 2.31-2.34 (1989)*. The procedure may resolve antitrust disputes in a manner making it easier for businesses and unions to predict the consequences of mergers and to conform their economic strategies in accordance with the probable outcome.

The respondents, and the unions in their brief as amici, argue that a State or private person should not have the power to sue for divestiture under § 16 following a settlement approved by the FTC. They maintain that the possibility of such actions will reduce the Federal Government's negotiating strength and destroy the predictability that Congress sought to provide when it enacted § 7A. It is plausible, **[****49]** in my view, that allowing suits under § 16 may have these effects in certain instances. But the respondents and unions have identified nothing in § 7A that contradicts the Court's interpretation of *§ 7* and § 16. Section 7A, indeed, may itself contain **[**1868]** language contrary to their position. See, e.g., *15 U.S.C. § 18a(i)(1)*. Although Congress might **[***263]** desire at some point to enact a strict rule prohibiting divestiture after a negotiated settlement with the FTC, it has not done so yet.

The Court's opinion, however, does not render compliance with the Hart-Scott-Rodino Antitrust Improvements Act irrelevant to divestiture actions under § 16. The Act, for instance, may bear upon the issue of laches. By establishing a **[*298]** time period for review of merger proposals by the FTC, § 7A may lend a degree of objectivity to the laches determination. Here the State received the respondents' § 7A filings in mid-April 1988, see Brief for Petitioner 3, and so had formal notice of the parties' intentions well before completion of the merger or the settlement with the FTC. It elected not to act at that time, but now seeks a divestiture **[****50]** which, the facts suggest, would upset labor agreements and other matters influenced in important ways by the FTC proceeding. These considerations should bear upon the ultimate disposition of the case. As the Ninth Circuit stated:

"California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney General chose not to do so. California must accept the consequences of his choice." *872 F. 2d 837, 846 (1989)*.

With the understanding that these consequences may include the bar of laches, I join the Court's decision.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 370, *378*, *385*, *387*

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:381, 54:383, 54:384, 54:399-54:409

12B Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:269, 48:270, 48:303, 48:311

18 Am Jur Pl & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, **[****51]** Form 17

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 26

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Index to Annotations, Dissolution or Liquidation; Divestiture; Injunctions ;Restraints of Trade and Monopolies

Annotation References:

Propriety and scope of injunctive relief in federal antitrust case. *55 L Ed 2d 892*.

Construction, by Supreme Court of the United States, of 7 of Clayton Act (*15 USCS 18*), dealing with acquisition by one corporation of stock of another. *14 L Ed 2d 784*.

Standing of private party under 16 of Clayton Act (*15 USCS 26*) to seek injunction to prevent merger or acquisition allegedly prohibited under 7 of the Act (*15 USCS 18*). 78 ALR Fed 159.

Divestiture as available relief under 16 of Clayton Act (*15 USCS 26*) in action by private parties. 77 ALR Fed 509.

United States v. Syufy Enterprises

United States Court of Appeals for the Ninth Circuit

August 14, 1989, Argued and Submitted, San Francisco, California ; May 9, 1990, Filed

No. 89-15475

Reporter

903 F.2d 659 *; 1990 U.S. App. LEXIS 7396 **; 1990-1 Trade Cas. (CCH) P69,018

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. SYUFY ENTERPRISES; RAYMOND J. SYUFY, Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Northern District of California. D.C. No. CV-86-3057-WHO. William H. Orrick, Jr., District Judge, Presiding.

Core Terms

competitors, theatres, films, barriers, movie, first-run, distributors, monopoly power, screens, prices, market share, consumer, district court, monopoly, anti trust law, suppliers, antitrust, monopolization, percent, producers, acquisition, monopolist, buying, drive, terms, big, power to exclude, license fee, enterprise, exhibition

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN1[] **Regulated Practices, Market Definition**

Competition is the driving force behind a free enterprise system. Unlike centrally planned economies, where decisions about production and allocation are made by government bureaucrats who ostensibly see the big picture and know to do the right thing, capitalism relies on decentralized planning, millions of producers and consumers making hundreds of millions of individual decisions each year, to determine what and how much will be produced. Competition plays the key role in this process: It imposes an essential discipline on producers and sellers of goods to provide a consumer with a better product at a lower cost; it drives out inefficient and marginal producers, releasing resources to higher-valued uses; it promotes diversity, giving consumers choices to fit a wide array of personal preferences; it avoids permanent concentrations of economic power, as even the largest firm can lose market share to a feistier and hungrier rival.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN2[] **Regulated Practices, Market Definition**

It is a simple but important truth that antitrust laws are designed to protect the integrity of the market system by assuring that competition reigns freely. Ultimately a court must resolve a practical question in every monopolization case: Is this the type of situation where market forces are likely to cure a perceived problem within a reasonable period of time? Or, have barriers been erected to constrain the normal operation of a market, so that a problem is not likely to be self-correcting? In the latter situation, it might well be necessary for a court to correct a market imbalance; in the former, a court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market forces, bringing about the very ills antitrust laws are meant to prevent.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN3[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Monopsony is defined as a market situation in which there is a single buyer or a group of buyers making joint decisions. Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN4[] **Regulated Practices, Market Definition**

All antitrust cases must make economic sense. Competition, not government intervention, is the touchstone of a healthy, vigorous economy. Monopoly power is the power to exclude competition or control prices.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN5[] **Regulated Practices, Market Definition**

Many legitimate market arrangements diminish the number of competitors. It would be odd if they did not, as the nature of competition is to make winners and losers. If there are no significant barriers to entry eliminating competitors will not enable survivors to reap a monopoly profit; any attempt to raise prices above a competitive level will lure into a market new competitors able and willing to offer their commercial goods or personal services for less.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] **Regulated Practices, Market Definition**

A basic fact of economic life is that a high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > Antitrust > General Overview

HN7[] **Regulated Practices, Market Definition**

If entry into a market is so easy that existing competitors cannot succeed in raising price for any significant period of time, the United States Department of Justice is unlikely to challenge mergers in that market.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN8[] **Standards of Review, Clearly Erroneous Review**

An appellate court determines if trial court factual findings are clearly erroneous.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9[] **Regulated Practices, Market Definition**

A district court acts within the legitimate scope of its discretion in determining that evidence of a high market share establishes a prima facie antitrust violation, shifting to a defendant the burden of rebutting a prima facie violation. The converse is not true, however; evidence of a high market share does not require a district court to conclude that there is an antitrust violation. In fact, such a conclusion normally should not be drawn where the evidence also indicates that there is no barrier to entry into a relevant market. An absence of entry barriers into a market constrains anticompetitive conduct, irrespective of a market's degree of concentration. The explanation is simple; where entry barriers are low, market share does not accurately reflect a party's market power.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] **Regulated Practices, Monopolies & Monopolization**

In evaluating monopoly power, it is not market share that counts, but the ability to maintain market share.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN11[] **Regulated Practices, Monopolies & Monopolization**

It cannot be said often enough that antitrust laws protect competition, not competitors. Competition is essential to effective operation of a free market because it encourages efficiency, promotes consumer satisfaction and prevents the accumulation of monopoly profits. When a producer is shielded from competition, he is likely to provide lesser service at a higher price; the victim is a consumer who gets a raw deal. This is the evil antitrust laws are meant to avert. When a producer deters competitors by supplying a better product at a lower price, when he eschews monopoly profits, when he operates his business so as to meet consumer demand and increase consumer satisfaction, the goals of competition are served, even if no actual competitors see fit to enter a market at a particular time. While the successful competitor should not be raised above the law, neither should he be held down by law.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN12[] Regulated Practices, Monopolies & Monopolization

Unlawful monopoly power is distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident which are off limits to an enforcer of antitrust laws. If a dominant supplier acts consistent with a competitive market, out of fear perhaps that potential competitors are ready and able to step in, the purpose of antitrust laws is amply served. An efficient, vigorous, aggressive competitor is not a villain antitrust laws are aimed at eliminating. Fostering an environment where businesses fight it out using the weapon of efficiency and consumer goodwill is what antitrust laws are meant to champion. Courts have failed to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN13[] Regulated Practices, Monopolies & Monopolization

In a free economy a market itself imposes a tough enough discipline on all market actors, large and small. Every supplier of goods and services is integrated into an endless chain of supply and demand relationships, making it dependent on the efficiency and goodwill of upstream suppliers, as well as the patronage of customers. Absent structural constraints that keep competition from performing its leveling function, few businesses can dictate terms to customers or suppliers with impunity. It is risky business even to try. A larger company often is more vulnerable to a squeeze play than a smaller one. It is for that reason that neither size nor market share alone suffice to establish a monopoly. Without the power to exclude competition, large companies that try to throw their weight around may find themselves sitting ducks for leaner, hungrier competitors. Such a tactic may boomerang, causing big trouble with suppliers.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

HN14[] Public Enforcement, US Federal Trade Commission Actions

Some of the most insuperable barriers in the great race of competition are the result of government regulation. Regulation often helps entrench existing businesses by placing new entrants at a competitive disadvantage. It is perhaps less well appreciated that litigation itself can be a form of regulation; lawsuits brought by the government impose significant costs on enterprises that are sued, and create significant disincentives for those that are not.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

HN15[] Regulated Practices, Market Definition

In a competitive market buying out competitors is not merely permissible, it contributes to market stability and promotes the efficient allocation of resources. The fact is, a relentless, growing competitor is frequently the most logical buyer of a business that is declining. For competitors in a free market to fear buying each other out lest they be hit with the expense and misery of an antitrust enforcement action amounts to a burden only slightly less palpable than a direct governmental prohibition against such a purchase. In a free enterprise system decisions such as these should be made by market actors responding to market forces, not by government bureaucrats pursuing their notions of how a market should operate. Personal initiative, not government control, is the fountainhead of progress in a capitalist economy.

Counsel: Robert B. Nicholson, Department of Justice, Washington, District of Columbia, for the Plaintiff-Appellant. Maxwell M Blecher, Blecher & Collins, Los Angeles, California, for the Defendants-Appellees.

Judges: Charles Wiggins and Alex Kozinski, Circuit Judges, and Justin L. Quackenbush, District Judge. * Quackenbush, District Judge, concurring.

Opinion by: KOZINSKI

Opinion

[*661] KOZINSKI, Circuit Judge:

Suspect that giant film distributors like Columbia, Paramount and Twentieth Century-Fox had fallen prey to Raymond Syufy, the canny operator of a chain of Las Vegas, Nevada, movie theatres, the United States Department of Justice brought this civil antitrust action to force Syufy to disgorge the theatres he had purchased in 1982-84 from his former competitors. The case is unusual in a number of respects: The Department of Justice concedes that moviegoers in Las Vegas suffered **[**2]** no direct injury as a result of the allegedly illegal transactions; nor does the record reflect complaints from Syufy's bought-out competitors, as the sales were made at fair prices and not precipitated by any monkey business; and the supposedly oppressed movie companies have weighed in on Syufy's side. The Justice Department nevertheless remains intent on rescuing this platoon of Goliaths from a single David.

After extensive discovery and an 8 1/2 day trial, the learned district judge entered comprehensive findings of fact and conclusions of law, holding for Syufy. He found, inter alia, that Syufy's actions did not injure competition because there are no barriers to entry -- others could and did enter the market -- and that Syufy therefore did not have the power to control prices or exclude the competition. While Justice raises a multitude of issues in its appeal, these key findings of the district court present the greatest hurdle it must overcome.

Facts

Gone are the days when a movie ticket cost a dime, popcorn a nickel and theatres had a single screen: This is the age of the multiplex. With more than 300 new films released every year -- each potentially the next Batman or **[**3]** E.T. -- many successful theatres **[*662]** today run a different film on each of their six, twelve or eighteen screens. The multiplex offers something for everyone: Moviegoers can choose from a wider selection of films; theatre operators are able to balance profits and losses from blockbusters and flops, and to reduce manpower by consolidating concession islands; the producers, of course, like having the extra screens on which to display their wares.

* The Honorable Justin L. Quackenbush, United States District Judge for the Eastern District of Washington, sitting by designation.

Raymond Syufy understood the formula well. In 1981, he entered the Las Vegas market with a splash by opening a six-screen theatre. Newly constructed and luxuriously furnished, it put existing facilities to shame. Syufy's entry into the Las Vegas market caused a stir, precipitating a titanic bidding war. [1] Soon, theatres in Las Vegas were paying some of the highest license fees in the nation, while distributors sat back and watched the easy money roll in.

[4]** It is the nature of free enterprise that fierce, no holds barred competition will drive out the least effective participants in the market, providing the most efficient allocation of productive resources. And so it was in the Las Vegas movie market in 1982. After a hard fought battle among several contenders, Syufy gained the upper hand. Two of his rivals, Mann Theatres and Plitt Theatres, saw their future as rocky and decided to sell out to Syufy. While Mann and Plitt are major exhibitors nationwide, neither had a large presence in Las Vegas. Mann operated two indoor theatres with a total of three screens; Plitt operated a single theatre with three screens. Things were relatively quiet until September 1984; in September, Syufy entered into earnest negotiations with Cragin Industries, his largest remaining competitor. [2] Cragin sold out to Syufy midway through October, leaving Roberts Company, a small exhibitor of mostly second-run films, as Syufy's only competitor for first-run films in Las Vegas.

[5]** It is these three transactions -- Syufy's purchases of the Mann, Plitt and Cragin theatres -- that the Justice Department claims amount to antitrust violations. [3] As government counsel explained at oral argument, the thrust of its case is that "you may not get monopoly power by buying out your competitors." Tr. of Oral Arg. at 1.

Discussion

HN1[] Competition is the driving force behind our free enterprise system. Unlike centrally planned economies, where decisions about production and allocation are made by government bureaucrats who ostensibly **[**6]** see the big picture and know to do the right thing, capitalism relies on decentralized planning -- millions of producers and consumers making hundreds of millions of individual decisions each year -- to determine what and how much will be produced. **[*663]** Competition plays the key role in this process: It imposes an essential discipline on producers and sellers of goods to provide the consumer with a better product at a lower cost; it drives out inefficient and marginal producers, releasing resources to higher-valued uses; it promotes diversity, giving consumers choices to fit a wide array of personal preferences; it avoids permanent concentrations of economic power, as even the largest firm can lose market share to a feistier and hungrier rival. If, as the metaphor goes, a market economy is governed by an invisible hand, competition is surely the brass knuckles by which it enforces its decisions.

When competition is impaired, producers may be able to reap monopoly profits, denying consumers many of the benefits of a free market. ***HN2***[] It is a simple but important truth, therefore, that our **[**7]** antitrust laws are designed to protect the integrity of the market system by assuring that competition reigns freely. While much has

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[1] Film distributors do not hand out prints for free; they sell exhibition licenses. These licenses normally specify a percentage of weekly house receipts, known as license fees, payable by the theatre owner to the distributor. Where more than one theatre in a given area volunteers to pay the license fee for a particular film, the distributor has several options: It can license the film to more than one theatre in the area; it can award the film to a particular theatre with which it has an ongoing relationship; or it can let them all bid for exclusive exhibition rights. Where the distributor adopts the competitive bidding approach, as virtually all distributors did in Las Vegas prior to October 1984, the high bid usually includes a guarantee -- a minimum fee payable to the distributor even if the film bombs.

As bidding in Las Vegas grew more fierce, guarantee amounts went over the top. Too often, the bids were so high that theatre owners ran up substantial losses. The industry refers to these as busted guarantees, meaning that because the film did less business than was expected, the theatre was trapped into paying the higher guarantee amount instead of the percentage of box office it had negotiated. Occasionally, guarantees in Las Vegas were so high that they exceeded the gate at a particular theatre.

[2] Cragin's Redrock Theatre was an 11-screen multiplex. It was sold to Syufy when the enterprise fell upon hard times because of a dispute between partners Lucille Cragin and Horst Schmidt.

[3] Specifically, the government's complaint alleges monopolization and/or attempted monopolization of a part of commerce in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2 (1988)*, and substantial lessening of competition by acquisition within a line of commerce in violation of *Section 7* of the Clayton Act, *15 U.S.C. § 18 (1988)*.

been said and written about the antitrust laws during the last century of their existence, ultimately the court must resolve a practical question in every monopolization case: Is this the type of situation where market forces are likely to cure the perceived problem within a reasonable period of time? Or, have barriers been erected to constrain the normal operation of the market, so that the problem is not likely to be self-correcting? In the latter situation, it might well be necessary for a court to correct the market imbalance; in the former, a court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market forces, bringing about the very ills the antitrust laws were meant to prevent. *See* R. Coase, *The Firm, The Market, and the Law* 117-19 (1988); R. Posner, *Economic Analysis of Law* 324-25, 338-39 (3d ed. 1986).

It is with these observations in mind that we turn to the case before us. Perhaps the most remarkable aspect of this case is that the accused monopolist is **[**8]** a relatively tiny regional entrepreneur while the alleged victims are humongous national corporations with considerable market power of their own. While this is not dispositive -- it is conceivable that a little big man may be able to exercise monopoly power locally against large national entities -- chances are it is not without significance. Common sense suggests, and experience teaches, that monopoly power is far more easily exercised by larger, economically more powerful entities against smaller, economically punier ones, than vice versa.

Also of significance is the government's concession that Syufy was only a monopsonist, not a monopolist. [4] Thus, the government argues that Syufy had market power, but that it exercised this power only against its suppliers (film distributors), not against its consumers (moviegoers). This is consistent with the record, which demonstrates that Syufy always treated moviegoers fairly: The movie tickets, popcorn, nuts and the Seven-Ups cost about the same in Las Vegas as in other, comparable markets. While it is theoretically possible to have a middleman who is a monopolist upstream but not downstream, this is a somewhat counterintuitive scenario. **[**9]** Why, if he truly had significant market power, would Raymond Syufy have chosen to take advantage of the big movie distributors while giving a fair shake to ordinary people? And why do the distributors, the alleged victims of the monopolization scheme, think that Raymond Syufy is the best thing that ever happened to the Las Vegas movie market?

The answers to these questions are significant because, like ***HN4***[] all antitrust cases, this one must make economic sense. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 594 n. 19, 596-97, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). **[**10]** Keeping in mind that competition, not government intervention, **[*664]** is the touchstone of a healthy, vigorous economy, we proceed to examine whether the district court erred in concluding that Syufy does not, in fact, hold monopoly power. There is universal agreement that monopoly power is the power to exclude competition or control prices. *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *Syufy Enters. v. American Multicinema, Inc., 793 F.2d 990, 993 (9th Cir. 1986)*, *cert. denied*, *479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876 (1987)*. The district court determined that Syufy possessed neither power. As the government's case stands or falls with these propositions, the parties have devoted much of their analysis to these findings. So do we.

1. Power to Exclude Competition

It is true, of course, that when Syufy acquired Mann's, Plitt's and Cragin's theatres he temporarily diminished the number of competitors in the Las Vegas first-run film market. But this does not necessarily indicate foul play; **[**11]** ***HN5***[] many legitimate market arrangements diminish the number of competitors. It would be odd if they did not, as the nature of competition is to make winners and losers. [5] If there are no significant barriers to entry, however, eliminating competitors will not enable the survivors to reap a monopoly profit; any attempt to raise prices above the

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[4] ***HN3***[] Monopsony is defined as a "market situation in which there is a single buyer or a group of buyers making joint decisions. Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side." R. Lipsey, P. Steiner & D. Purvis, *Economics* 976 (7th ed. 1984).

[5] *See* 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 608e, at 20-21 (1978); L. Sullivan, *Handbook of the Law of Antitrust* § 34, at 96 (1977). Given this reality, it would be perverse to expect rivals engaged in head on competition to act like best friends; indeed, it would be cause for suspicion if they did.

competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less. *See* Metro Mobile CTS, Inc. v. NewVector Commun., Inc., 892 F.2d 62 (9th Cir. 1989).

Time after time, we have recognized **HN6**[] this basic fact of economic life:

> A high market share, though it may **[**12]** ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.

Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir.), *cert. denied*, *488 U.S. 870, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988)* (citation omitted). *See also* Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980), *cert. denied*, *450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981)* ("Blind reliance upon market share, divorced from commercial reality, [can] give a misleading picture of a firm's actual ability to control prices or exclude competition."). [6] There is nothing magic about this proposition; it is simple common sense, embodied in the Antitrust Division's own Merger Guidelines:

> **HN7**[] If entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Department is unlikely to challenge mergers in that market.

Antitrust Policies and Guidelines, U.S. Dep't of Justice, Merger Guidelines **[**13]** § 3.3, reprinted in 4Trade Reg. Rep. (CCH) P 13,103 at 20,562 (1988).

The district court, after taking testimony from a dozen and a half witnesses and **[*665]** examining innumerable graphs, charts, statistics and other exhibits, found that there were no barriers to entry in the Las Vegas movie market. **HN8**[] Our function is narrow: we must determine whether that finding is clearly erroneous. *See* Oahu Gas, 838 F.2d at 363, 367. Our review of the record discloses that the district court's finding is amply supported by the record.

[14]** We bypass as surplusage the hundreds of pages of expert and lay testimony that support the district court's finding, and focus instead only on a single -- to our minds conclusive -- item. Immediately after Syufy bought out the last of his three competitors in October 1984, he was riding high, having captured 100% of the first-run film market in Las Vegas. But this utopia proved to be only a mirage. That same month, a major movie distributor, Orion, stopped doing business with Syufy, sending all of its first-run films to Roberts Company, a dark horse competitor previously relegated to the second-run market. [7] Roberts Company took this as an invitation to step into the major league and, against all odds, began giving Syufy serious competition in the first-run market. Fighting fire with fire,

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[6] We have previously held that **HN9**[] a district court acts within the legitimate scope of its discretion in determining that evidence of a high market share establishes a prima facie antitrust violation, shifting to the defendant the burden of rebutting the prima facie violation. *See* California v. American Stores Co., 872 F.2d 837, 842 (9th Cir. 1989), reversed on other grounds, 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990). The converse is not true, however; evidence of a high market share does not require a district court to conclude that there is an antitrust violation. In fact, such a conclusion normally should not be drawn where the evidence also indicates that there is no barrier to entry into the relevant market. *See* Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir.), *cert. denied*, ***488 U.S. 870 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988)***; *accord* American Stores, 872 F.2d at 842 ("An absence of entry barriers into a market constrains anticompetitive conduct, irrespective of the market's degree of concentration."). The explanation is simple; where entry barriers are low, market share does not accurately reflect the party's market power. United States v. Waste Mgmt., Inc., 743 F.2d 976, 982-83 (2d Cir. 1984).

[7] Second-run films are the same as first-run films, only older. When a film is initially released for public exhibition, it is in its first run. Once public demand for the film has fallen off (but usually before it is reduced to a dead calm), the first-run theatre will ship it out to make room for something more recent. The film may then open elsewhere in the same area, usually at a lower ticket price, this being the film's second run.

Roberts opened three multiplexes within a 13-month period, each having six or more screens. By December 1986, Roberts was operating 28 screens, trading places with Syufy, who had only 23. At the same time, Roberts was displaying a healthy portion of all first-run films. In fact, Roberts got exclusive exhibition rights to many of its films, meaning that Syufy could not show them at all.

[15]** By the end of 1987, Roberts was showing a larger percentage of first-run films than was the Redrock multiplex at the time Syufy bought it. Roberts then sold its theatres to United Artists, the largest theatre chain in the country, and Syufy continued losing ground. It all boils down to this: Syufy's acquisitions did not short circuit the operation of the natural market forces; Las Vegas' first-run film market was more competitive when this case came to trial than before Syufy bought out Mann, Plitt and Cragin. [8]

[16]** The Justice Department correctly points out that Syufy still has a large market share, but attributes far too much importance to this fact. [9] ***HN10***[] In evaluating **[*666]** monopoly power, it is not market share that counts, but the ability to *maintain* market share. *See* Oahu Gas, 838 F.2d at 366. Syufy seems unable to do this. In 1985, Syufy managed to lock up exclusive exhibition rights to 91% of all the first-run films in Las Vegas. By the first quarter of 1988, that percentage had fallen to 39%; United Artists had exclusive rights to another 25%, with the remaining 36% being played on both Syufy and UA screens.

[17]** Syufy's share of box office receipts also dropped off, albeit less precipitously. [10] **[**18]** In 1985, Syufy raked in 93% of the gross box office from first-run films in Las Vegas. By the first quarter of 1988, that figure had fallen to

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[8] The government argues that the district court's finding that "Roberts was a *successful* competitor of Syufy in Las Vegas," United States v. Syufy Enters., 712 F. Supp. 1386, 1393 (N.D.Cal. 1989) (emphasis added), is clearly erroneous because it conflicts with a stipulation that "Roberts was not an *effective* competitor." *United States v. Syufy Enters.*, No. C-86-3057-WHO at 6 (N.D.Cal. Nov. 3, 1988) (Stipulated Facts) (emphasis added). We see no reason to resolve this semantic squabble. The stipulation on which the government relies goes on to state that "Roberts expanded its operation in Las Vegas from five screens in 1983 to 28 screens in 1987." *Id.* It is this fact that colors our conclusion, not the particular adjective selected by the parties or by the district court.

The stipulation -- even if read as the government suggests -- does not undermine the district court's separate findings that United Artists, Roberts' successor, "competes vigorously with Syufy, a substantially smaller chain," that UA is "much more successful than was Roberts because of its substantial 'clout' with distributors," and that UA could, if it wished to, compete with Syufy even more vigorously. 712 F. Supp. at 1394. All of this amply supports the district court's determination that Syufy faces substantial competition.

[9] The government also challenges the district court's definition of the relevant upstream product market in Las Vegas. The court defined the market broadly to include not only first-run theatrical exhibition, but also "exhibition on home video, cable television, and pay-per-view television." 712 F. Supp. at 1389. We agree with the government that this is not the proper market definition in examining Syufy's power over film distributors. While moviegoers may well view these alternative methods of film exhibition as readily substitutable, film distributors do not. Distributors use first-run theatrical exhibition to make sure that audiences are exposed to a film so that, even if it gets bad reviews and fails to turn a profit in theatres, people switching channels or checking out videos will recognize the title and be induced by its fame to watch it. That first-run theatrical exhibition enhances a film's performance in auxiliary markets does not mean that auxiliary markets can substitute for theatrical release. The district court was therefore mistaken in relying on testimony that "of the 578 films produced in 1987, 214 were released on home video and not in the theatres," id. at 1400, as there was no suggestion that any of these 214 films were suitable for theatrical release, or that any film has ever been released first on home video and then later played in first-run theaters. Jane Fonda's Low Impact Aerobic Workout may be a best-selling videocassette, but it is unlikely to be the hit at a local movie theatre.

The district court's erroneous definition of the relevant upstream product market does not warrant reversal, however. The district court repeatedly made alternative findings using the government's narrower market definition limited solely to first-run exhibition. Our review of the record convinces us that these alternative findings are supported by substantial evidence.

[10] The district court was entitled to rely on any of several indicia of Syufy's market share, including its percentage of first-run films, its percentage of first-run playdates and its percentage of gross box office receipts. As each of these indices points in the same direction -- toward Syufy's decreasing market share -- we fail to understand what the government hopes to gain by arguing that box office receipts are the only meaningful indicator of market share.

75%. The government insists that 75% is still a large number, and we are hard-pressed to disagree; but that's not the point. The antitrust laws do not require that rivals compete in a dead heat, only that neither is unfairly kept from doing his personal best. Accordingly, the government would do better to plot these points on a graph and observe the pattern they form than to focus narrowly on Syufy's market share at a particular time. The numbers reveal that Roberts/UA has steadily been eating away at Syufy's market share: In two and a half years, Syufy's percentage of exclusive exhibition rights dropped 52% and its percentage of box office receipts dropped 18%. During the same period, Roberts/UA's newly opened theatres evolved from absolute beginners, barely staying alive, into a big business. [11]

The government concedes that there are no structural barriers to entry into the market: Syufy does not operate a bank or similar enterprise where entry is **[*667]** limited by government regulation or licensing requirements. Nor is this the type of industry, like heavy manufacturing or mining, which requires onerous front-end investments that might deter competition from all but the hardiest and most financially secure investors. [12] **[**20]** **[**19]** *See* R. Posner, *supra* p. 663, at 290. Nor do we have here a business dependent on a scarce commodity, control over which might give the incumbent a substantial structural advantage. Nor is there a network of exclusive contracts or distribution arrangements designed to lock out potential competitors. To the contrary, the record discloses a rough-and-tumble industry, marked by easy market access, fluid relationships with distributors, an ample and continuous supply of product, and a healthy and growing demand. [13] It would be difficult to design a market less susceptible to monopolization.

In any event, we are unable to agree with the government on this issue. By focusing exclusively on box office receipts, the government attributes to Syufy a prescience he does not possess. No one, not even Syufy, can accurately predict how every movie will do at the box office. As demonstrated by the large number of busted guarantees, exhibitors in Las Vegas often had great expectations for films that eventually disappeared without a trace. That does not necessarily mean that the films were bad or that the theatres that played them did not want them very much; it simply means that the exhibitor did not have perfect foresight. Thus, for example, the government stepped out of bounds in disparaging Powwow Highway. *See* Reply Brief for Appellant at 7-8 n. 7. While somewhat off beat, the film garnered terrific reviews and captured the Filmmakers Trophy at the Sundance United States Film Festival in Park City, Utah. LA Times, Jan. 31, 1989, at VI-7, col. 4. Film critic Sheila Benson described it as "a little zinger of a comedy with a rare backbone of intelligence"; "a pretty irresistible movie . . . that fixes [itself] permanently in our affections." LA Times, March 17, 1989, at VI-1, col. 2, VI-16, col. 1. *See also* L. Maltin, *Leonard Maltin's TV Movies & Video Guide* 204 (1989). Reviews this good are not common; some theatre operators, seeing that a movie had become the critic's choice, might well be willing to go for the longshot rather than the sure thing.

[11] The Antitrust Division's Merger Guidelines adopt a two-year test in determining whether there are barriers to entry in a market: if successful entry is likely within two years, there are no significant entry barriers, and the government will not challenge mergers in that market. Merger Guidelines § 3.3, reprinted in 4Trade Reg. Rep. (CCH) P 13,103 at 20,562 (1988). Had the government applied the two-year test here, it surely would not have pursued this suit against Syufy. The critical acquisition occurred in October 1984; by December 1986, Roberts had not only successfully entered the market, it was operating five more first-run screens than was Syufy.

[12] The Justice Department argues that it is expensive to build a multiplex, but the district court was rightly unimpressed by this contention. Syufy was neither the first nor the last to open a multiplex in Las Vegas: Cragin's 11-screen Redrock was there before Syufy came into the market and, soon thereafter, Roberts opened three multiplexes in quick succession. In fact, Roberts was spared the expense of construction, as several of its theatres were financed by shopping center developers from whom Roberts later leased space. *See* RT 2:254-55, 2:261, 2:272-73, 2:278-79.

[13] The Justice Department claims that the district court misunderstood the evidence on this point. It argues that Las Vegas is "overscreened," *i.e.*, that potential competitors declined to enter the market because there was not enough business to go around. The district court made detailed contrary findings: The rule of thumb in the film industry is that it takes 10,000 people to support one screen. Las Vegas is populated by approximately 600,000 residents and 100,000 tourists at any given time, leaving room for as many as 70 screens. Yet, at the time of trial, there were only 50 first-run screens in the city, meaning that the Las Vegas market offered ample opportunities to potential entrants. In addition, Las Vegas is a boom town, growing at the rate of 30,000 people a year. Thus, the potential for new entry into the first-run film market will continue. RT 2:300, 3:338, 6:989. "Because untapped potential provides a mouth-watering incentive for vigorous competition, it is axiomatic that monopoly power

[21]** Confronted with this record and the district court's clear findings, the government trots out a shopworn argument we had thought long abandoned: that efficient, aggressive competition is itself a structural barrier to entry. According to the government, competitors will be deterred from entering the market because they could not hope to turn a profit competing against Syufy. In the words of government counsel:

> There is no legal barrier. There is no law that says you can't come into this market, it's not that kind of barrier. . . . But, the fact of mere possibility in the literal sense, is not the appropriate test. Entry, after all, must, to be effective to dissipate the monopoly power that Syufy has, entry must hold some reasonable prospect of profitability for the entrant, or else the entrant will say, as Mann Theatres said . . . this is not an attractive market to enter. There will be shelter. And the reason is very clear. You have **[*668]** to compete effectively in this market. And witness after witness testified you would need to build anywhere from 12 to 24 theatres, which is a very expensive and time consuming proposition. *And, you would then find yourself in* **[**22]** *a bidding war against Syufy*.

Tr. of Oral Arg. at 5 (emphasis added).

The notion that the supplier of a good or service can monopolize the market simply by being efficient reached high tide in the law 44 years ago in Judge Learned Hand's opinion in *United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)*. [14] In the intervening decades the wisdom of this notion has been questioned by just about everyone who has taken a close look at it. *See, e.g., MCI Commun. Corp. v. AT & T, 708 F.2d 1081, 1107-08* (7th Cir.), *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*; 3 P. Areeda & D. Turner, *supra* n. 5, P. 608e, at 22 ("It is absurd to classify such behavior as unlawfully 'exclusionary.'"); L. Sullivan, *supra* n. 5, at 103 ("The Hand formulation . . . fails to clearly identify the differences between guilty and innocent conduct."). It has

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is unlikely to arise in dynamic industries marked by a rapidly expanding volume of demand and low barriers to entry." *Metro Mobile CTS, Inc. v. NewVector Commun., Inc., 892 F.2d 62, 63 (9th Cir. 1989)*.

More fundamentally, the government's static model, which assumes that there is only so much demand for a particular product, is alien to modern economic theory, as well as common sense, which teach us that things change. The demand for movie tickets can fluctuate with a variety of factors such as price, quality of the movie theatre, cost of related goods such as concession stand products, and quality of films shown. Even assuming that the Las Vegas movie market was, in some static sense, operating at capacity, the entry of a new competitor might, as the district court found, simply result in "the exit of some of the less attractive and less efficient theatres in Las Vegas." *712 F. Supp. at 1396*. Or, a new competitor with high hopes might price movie tickets lower, increase advertising, provide more convenient parking facilities, or otherwise induce people to go to the movies more often. Or, a theatre operator might hit the jackpot by catering to parents of small children who might be more likely to patronize drive-in theatres. We cannot and should not speculate as to the details of a potential competitor's performance; we need only determine whether there were barriers to the entry of new faces into the market. As we discuss in greater detail below, in making that determination we are not concerned with whether, once in the market, the competitor will wind up doing well. The thing to remember is that doing business in the crucible of free enterprise is inherently unpredictable.

[14] In *Alcoa*, Judge Hand concluded that defendant corporation violated the antitrust laws simply by making all the right moves, in particular, by filling the demand of which it was the creator:

> True, it stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked. . . . "Alcoa" avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. . . . We may assume that all it claims for itself is true. . . . [But] it was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. . . . That was to "monopolize" that market, however innocently it otherwise proceeded.

148 F.2d at 430-32.

been soundly repudiated by the Second Circuit. *See* [*Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273-74 (2d Cir. 1979)*](), *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*.

[23]** The argument government counsel presses here is a close variant of *Alcoa*: The government is not claiming that Syufy monopolized the market by being too efficient, but that Syufy's effectiveness as a competitor creates a structural barrier to entry, rendering illicit Syufy's acquisition of its competitors' screens. We hasten to sever this new branch that the government has caused to sprout from the moribund *Alcoa* trunk.

HN11[] It can't be said often enough that the antitrust laws protect competition, *not* competitors. As we noted earlier, competition is essential to the effective operation of the free market because it encourages efficiency, promotes consumer satisfaction and prevents the accumulation of monopoly profits. When a producer is shielded from competition, he is likely to provide lesser service at a higher price; the victim is the consumer who gets a raw deal. This is the evil the antitrust laws are meant to avert. But when a producer deters competitors by supplying a better product at a lower price, when he eschews monopoly profits, when he operates his business so as to **[**24]** meet consumer demand and increase consumer satisfaction, the goals of competition are served, even if no actual competitors see fit to enter the market at a particular time. While the successful competitor should not be raised above the law, neither should he be held down by law.

The Supreme Court has accordingly distanced itself from the *Alcoa* legacy, taking care to distinguish ***HN12***[] unlawful monopoly power from "growth or development as a consequence of a superior product, business acumen, or historic accident," *United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*, which are off limits to the enforcer of our antitrust laws. If a dominant **[*669]** supplier acts consistent with a competitive market -- out of fear perhaps that potential competitors are ready and able to step in -- the purpose of the antitrust laws is amply served. We make it clear today, if it was not before, that an efficient, vigorous, aggressive competitor is not the villain antitrust laws are aimed at eliminating. Fostering an environment where businesses fight **[**25]** it out using the weapon of efficiency and consumer goodwill is what the antitrust laws are meant to champion. As the Second Circuit has said: "We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition." *United States v. Waste Mgmt., Inc., 743 F.2d 976, 984 (2d Cir. 1984)*.

But we need not rely on theory alone in rejecting the government's argument. The record here conclusively demonstrates that neither acquiring the screens of his competitors nor working hard at better serving the public gave Syufy deliverance from competition. Immediately following the disappearance of Mann, Plitt and Cragin, Roberts took up the challenge, aggressively competing with Syufy for first-run films -- and with considerable success. United Artists, with substantial resources at its disposal and nationwide experience in running movie theatres, considered the market sufficiently open that it bought out Roberts in 1987. We see no indication that competition suffered in the Las Vegas movie market as a result of Syufy's challenged acquisitions. [15] The district court certainly had ample basis in the record **[**26]** for its finding that Syufy lacked the power to exclude competitors. Indeed, on this voluminous record we are hard-pressed to see how the district court could have come to the other conclusion.

[27]** 2. Power to Control Prices

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[15] The government points out that the interiors of United Artists' theatres were not as luxurious as those of Syufy. We have no clue what sinister inference the government would have us draw from this fact. As the district court noted, "No one stopped United Artists from remodeling Roberts' theatres after it acquired them. As the largest exhibitor in the nation, it certainly has the resources to do so." *712 F. Supp. at 1402*. Competitors need not provide a perfectly undifferentiated product in order to be competitive; it is a strength of our free market economy that competitors often provide products that cater to the varied tastes and preferences of consumers. Syufy made a business decision to invest in luxury theatres while Roberts and United Artists apparently decided to dispose of their profits in some other fashions. It remains to be seen which strategy will ultimately prevail. Indeed, it is not a winner take all situation; in a free market, any number can play and any number can win. We therefore agree with the district court's refusal to conclude that this difference in business strategies was an indication of market failure.

The crux of the Justice Department's case is that Syufy, top gun in the Las Vegas movie market, had the power to push around Hollywood's biggest players, dictating to them what prices they could charge for their movies. The district court found otherwise. This finding too has substantial support in the record.

Perhaps the most telling evidence of Syufy's inability to set prices came from movie distributors, Syufy's supposed victims. At the trial, distributors uniformly proclaimed their satisfaction with the way the Las Vegas first-run film market operates; none complained about the license fees paid by Syufy. Columbia's President of Domestic Distribution testified that "Syufy paid a fair amount of film rental" that compared favorably with other markets. RT 5:715. A representative of Buena Vista, a division of Disney, testified that Syufy had never refused to accept its standard terms. RT 6:924. Particularly damaging to the government's case was the testimony of the former head of distribution for MGM/UA that his company "never had any difficulty . . . in acquiring the terms that we thought were reasonable," RT 6:888, explaining that the license fees **[**28]** Syufy paid "were comparable or better than any place in the United States. And in most cases better." RT 6:911. Indeed, few if any of the distributors were willing to say anything to support the government's claim.

The documentary evidence bears out this testimony. Syufy has at all times paid **[*670]** license fees far in excess of the national average, even higher than those paid by exhibitors in Los Angeles, the Mecca of Moviedom. In fact, Syufy paid a higher percentage of his gross receipts to distributors in 1987 and 1988 than he did during the intensely competitive period just before he acquired Cragin's Redrock. [16]

[29]** While successful, Syufy is in no position to put the squeeze on distributors. The one time he tried there was an immediate backlash. In 1984, about seven days after allegedly acquiring its monopoly, Syufy informed Orion Releasing Group that he had cold feet about The Cotton Club and would not honor the large guarantees he had contracted for, only to see his gambit backfire. Orion sued Syufy for breach of contract, *see* *Orion Pictures Distrib. Corp. v. Syufy Enters., 829 F.2d 946 (9th Cir. 1987)*, licensed the film to Roberts and cut Syufy off cold turkey. To this day, Orion refuses to play its films in any Syufy theatre, in Las Vegas or elsewhere. *712 F. Supp. at 1393*. Accordingly, Syufy lost the opportunity to exhibit top moneymakers like Robocop, Platoon, Hannah and Her Sisters and No Way Out. [17] The district court found no evidence that Orion considered Roberts/UA's theatres a less than adequate substitute for Syufy's. *Id.*

[30]** Because he needs plenty of first-run films to fill his many screens (22 at the time of trial; 34 now), Syufy is vulnerable. Distributors like Orion have substantial leverage over Syufy and they know it. One witness, the President of Domestic Distribution for Columbia, testified at length about the power he and other distributors wield over Syufy:

> . . . With Syufy having 23 first-run screens, he could not get into a two and a half percent fight with Columbia; he had so many mouths to feed in those theatres, that he was more or less compelled to pay national suggested terms for films.
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> . . . He could have tried [to dictate terms], but he wouldn't have gotten away with it, your Honor. He was very vulnerable. My point is that he was very vulnerable in that market. He could not -- he needed the flow of product to fill those screens, and to take on -- to get into a fight with the distributor over terms, or film rentals paid to a distributor, would create an attitude where we could sell [to] his opposition and he'd be egregiously hurt.
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[16] The government argues that the district court erred in finding this earlier level of competition to be "unhealthy." *712 F. Supp. at 1394*. While we agree, we need not reverse because of the insignificance of the error. The erroneous finding was relevant to only one of three elements needed to prove the government's attempted monopolization claim. As the government was unable to demonstrate that Syufy had the power to control prices or to exclude competition, it cannot prevail even though we disregard the district court's finding of unhealthy competition.

[17] The list of Orion films that played exclusively at Roberts theaters also includes such popular fare as Amadeus, Back to School, Bull Durham, Colors, Hoosiers, Married to the Mob, Radio Days and the unforgettable Throw Momma From the Train.

> . . . He was his own competition, your Honor. He had created such a large amount of screens that he was -- he was himself **[**31]** -- he was himself vulnerable. As I described before, if he would have pressed, and if he would have come to Jimmie Spitz and said, "I'm not going to pay you this percentage for the film," I would have said, "Fine, Ray, we'll stay out of the marketplace." He couldn't afford -- he has to -- he has to have film in his theatres. And that's the leverage that this company had with Mr. Syufy.

RT 5:714-16 (testimony of James Spitz).

After hours of such testimony, the judge quite rightly concluded that Syufy did not have the power to control license fees. This evidence, moreover, reveals the trap in the oftmade assumption that, by virtue of being a leviathan, a company will automatically have the power to wield a big stick with which to push around suppliers, customers and competitors. While size no doubt provides significant business advantages, it can also have very substantial **[*671]** drawbacks, such as increased management costs and other diseconomies of scale. [18]

[32]** More fundamentally, ***HN13***[] in a free economy the market itself imposes a tough enough discipline on all market actors, large and small. Every supplier of goods and services is integrated into an endless chain of supply and demand relationships, making it dependent on the efficiency and goodwill of upstream suppliers, as well as the patronage of customers. Absent structural constraints that keep competition from performing its levelling function, few businesses can dictate terms to customers or suppliers with impunity. It's risky business even to try. As Syufy learned in dealing with Orion and his other suppliers, a larger company often is more vulnerable to a squeeze play than a smaller one. It is for that reason that neither size nor market share alone suffice to establish a monopoly. Without the power to exclude competition, large companies that try to throw their weight around may find themselves sitting ducks for leaner, hungrier competitors. Or, as Syufy saw, the tactic may boomerang, causing big trouble with suppliers.

On this record, we have no basis for overturning the district court's **[**33]** finding that Syufy lacked the power to set the prices he paid his suppliers. As with the district court's finding as to Syufy's power to exclude competition, we believe the record here lent itself to only one sensible conclusion. [19]

[34]** 3. Additional Considerations

Undeterred by the district court's carefully crafted 45 page opinion, the government sets out a variety of other contentions. [20] **[**35]** We have dealt with the principal ones during the course of our discussion and the rest are largely beside the point. By finding that Syufy did not possess the power to set prices or to exclude competition, the

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[18] *See generally* A. Alchian & W. Allen, *University Economics* 270, 301 (1964); 2 P. Areeda & D. Turner, *supra* n. 5, § 407b, at 286-87; R. Posner, *supra* slip op. at p. 6, at 318 n. 2, 368. In business, as elsewhere in life, it is sometimes true that the bigger they are, the harder they fall.

[19] The Justice Department throws out a volley of numbers which, it claims, show that Syufy managed to depress license fees after buying out his competitors. The government attributes the lower fees to the exercise of monopoly power, but it is mistaken. The percentage of box office receipts paid to movie distributors rises and falls due to a combination of factors; it is not an accurate measure of the competitiveness of the market.

For example, in 1985, Syufy paid Universal a very low license fee (48.1%). The fact is, however, Syufy paid more money to Universal that year than in any other from 1983 to 1988. The percentage only looks low because, in 1985, Universal released the hugely successful Back to the Future. The film played in Syufy's first-run theatres for more than six months; the longer a film's run, the lower the percentage of gross receipts payable to the distributor. Thus, the low percentage rate was based on factors other than monopoly power, as the district court quite reasonably found. Support is missing in the record for the Justice Department's theory of a shakedown by a ruthless predator.

[20] Among them are the following: (1) the district court misdefined the relevant market; (2) the court did not understand that this was a monopsony case; (3) the court erred in looking beyond Syufy's large market share; (4) the court mistakenly looked at the number of first-run movies shown as indicative of market share; (5) the court was wrong to call the preacquisition level of competition "unhealthy"; (6) aggressive competition is itself a barrier to entry; (7) Las Vegas is "overscreened"; and (8) Roberts/United Artists' theatres are not as luxurious as Syufy's.

district court removed the firing pins from the government's litigation arsenal. Without these essential elements, it can make out a violation of neither the Sherman nor Clayton Acts; its lawsuit collapses like a house of cards. [21]

[36]** **[*672]** It is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend limited taxpayer resources. [22] Yet we cannot help but wonder whether bringing a lawsuit like this, and pursuing it doggedly through 27 months of pretrial proceedings, about two weeks of trial and now the full distance on appeal, really serves the interests of free competition.

[37]** The record here demonstrates in graphic detail that Syufy's entry into the Las Vegas first-run movie market resulted in a vast improvement for movie distributors and consumers alike. By all accounts, Raymond Syufy's theatres are among the finest built and best run in the nation, making him somewhat of a local hero. At the same time, movie distributors have nothing but praise for Syufy, as his being there has invigorated theatre attendance in Las Vegas, substantially driving up their revenues. As is often the case when a vigorous competitor enters the market, more complacent theatre operators were eliminated, but there was no credible evidence that Syufy did anything improper to drive them out. *712 F. Supp. at 1390-91*. Indeed, by buying them out, Syufy may well have helped cushion the losses they would have suffered had they been required to sell the theatres at fire sale prices or leave them abandoned.

What then was the problem the government sought to solve by bringing this lawsuit? At oral argument, the lawyer for the government explained it thus:

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[21] Absent any power to exclude competition, the government cannot prevail on its claim of monopolization under *Section 2* of the Sherman Act, as that requires a showing that Syufy possesses monopoly power. Similarly, the attempted monopolization claim fails because the government cannot show that there was a dangerous probability that Syufy would succeed in destroying competition. Finally, the lack of entry barriers prevents the government from prevailing on its Clayton Act claim, as Syufy's acquisition of its competitors was not likely to substantially lessen competition.

In his concurrence, Judge Quackenbush complains that our focus on the lack of entry barriers is too narrow; he lists other factors that ought to be considered. Concurrence at 673. While we agree that these other factors are relevant, as explained in the preceding paragraph, the total lack of entry barriers in Las Vegas determines the outcome of these factors in this case: Because others easily could (and did) enter the market successfully, Syufy lacked "the ability to maintain [market] share, the power to control prices, [and] the capability of excluding competitors." *Id.*

Judge Quackenbush suggests that, under our holding, no one having "less than 100 percent of market share" could ever have a monopoly "since the existence of competitors in the market would apparently establish the lack of barriers to entry." Concurrence at 674. We respectfully disagree. Entry barriers pertain not to those already in the market, but to those who would enter but are prevented from doing so. *See* Merger Guidelines § 3.3, reprinted in 4Trade Reg.Rep. (CCH) P 13,103 at 20,562 (1988) (focusing on difficulty of "entry into a market"). Thus, a market containing two firms, each having a 50% share, could well be deemed monopolistic if entry barriers prevented other firms from gaining a foothold.

[22] The concurrence disputes our benign characterization of Syufy, relying largely on his conduct in another market. Concurrence slip op. at 4554-55. As a general matter, we do not agree with this logic. Antitrust violations must be judged on a market-by-market basis. That Syufy may have been guilty of some impropriety in the past would not justify the government's decision to pursue a drawn-out legal battle as to his conduct in Las Vegas unless there was substantial evidence of wrongdoing *in* Las Vegas.

In any event, *Syufy Enters. v. American Multicinema, Inc., 793 F.2d 990 (9th Cir. 1986)*, *cert. denied*, *479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876 (1987)*, on which Judge Quackenbush relies, does not support his point; rather, it supports ours. In *American Multicinema*, we *reversed* an antitrust jury verdict against Syufy for insufficient evidence. *See* *793 F.2d at 1001-03*. Given the infrequency with which we reverse jury verdicts, the Antitrust Division might have considered this, if at all, as a sign that Syufy was not the evildoer he was made out to be.

> Basically if you drive down by anti-competitive conduct the price at which theatre owners buy film licenses, then **[**38]** there will be less films ultimately produced, because there will be a distortion in the natural market in the competitive forces, and people who go to movies like you and me would ultimately have less choice.

Tr. of Oral Arg. at 9. It is, we suppose, not out of the question that what Raymond Syufy and other local theatre operators do in their respective markets could stem the avalanche of movies that comes to us out of Hollywood every year. Yet movie distributors are not exactly a powerless lot, likely to surrender the first time they are presented with hard choices by a theatre operator; nor are they reluctant to precipitate a showdown when they believe their rights are being infringed. [23] And, as we have seen, the market has its own fail-safe mechanisms. Where the government inserts **[*673]** an antitrust enforcement action into this type of situation, there is a real danger of stifling competition and creativity in the marketplace.

[39]** It is well known that ***HN14***[] some of the most insuperable barriers in the great race of competition are the result of government regulation. Regulation often helps entrench existing businesses by placing new entrants at a competitive disadvantage. It is perhaps less well appreciated that litigation itself can be a form of regulation; lawsuits brought by the government impose significant costs on enterprises that are sued, and create significant disincentives for those that are not.

In this case, the government was suspicious because Syufy bought out the movie theatres of his retreating competitors. But, ***HN15***[] in a competitive market, buying out competitors is not merely permissible, it contributes to market stability and promotes the efficient allocation of resources. The fact is, a relentless, growing competitor is frequently the most logical buyer of a business that is declining. For competitors in a free market to fear buying each other out lest they be hit with the expense and misery of an antitrust **[**40]** enforcement action amounts to a burden only slightly less palpable than a direct governmental prohibition against such a purchase. [24] In a free enterprise system decisions such as these should be made by market actors responding to market forces, not by government bureaucrats pursuing their notions of how the market should operate. Personal initiative, not government control, is the fountainhead of progress in a capitalist economy.

[41]** Conclusion

The judgment of the district court is affirmed.

Concur by: QUACKENBUSH

Concur

QUACKENBUSH, District Judge, concurring:

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[23] *See, e.g., Columbia Pictures Indus. v. Professional Real Estate Investors, Inc., 866 F.2d 278 (9th Cir. 1989)*, *Orion Pictures Distrib. Corp. v. Syufy Enters., 829 F.2d 946 (9th Cir. 1987)*; *Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983)*, *Paramount Pictures Corp. v. Thompson Theatres, Inc., 621 F.2d 1088 (10th Cir. 1980)*.

[24] We are aware, of course, that even in a monopoly situation competitors may buy each other out where the selling company is failing. *See United States v. General Dynamics Corp., 415 U.S. 486, 507, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974)*; *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814, 817-18 (2d Cir. 1979)*. But establishing a failing company defense is not easy; a competitor must be in critical condition to be subject to acquisition under that doctrine. In a competitive market, however, there is no need to rely on a failing company defense, and the ability to buy out competitors who are merely ailing may well promote market efficiency, enhance consumer welfare and foster competition.

I concur in the result reached in Parts 1 and 2 of the opinion since I agree that the district court's findings were supported by the record and were not clearly erroneous. I further agree that the district court did not err in its conclusion that Syufy did not have monopoly power over the first-run movie distributors.

I do not agree with those portions of Parts 1 and 2 which state that if there are no significant barriers to entry, there can be no monopoly as a matter of law. I believe that the issue of barriers to entry is just one of the factors which should be considered by the court in determining whether monopoly power exists.

The offense of monopolization under *Section 2* of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)*. **[**42]** In the instant case, there is no contention that Syufy did not willfully acquire 100 percent of the first-run movie market in Las Vegas in 1985. Syufy clearly accomplished that position by the purchase of its competitors.

If the opinion stands for the proposition that a finding of lack of barriers to entry *mandates* a finding of lack of monopoly power, then I disagree with the opinion. While I agree that the issue of monopoly power often depends heavily upon market share and barriers to entry, the analysis should also include consideration of the extent of the alleged monopolist's market share, the ability to maintain that share, the power to control prices, the capability **[*674]** of excluding competitors, and the intent of the alleged monopolist, along with the existence of barriers to entry. *Oahu Gas Serv., Inc. v. Pacific Resources Inc., 838 F.2d 360, 366* (9th Cir.), *cert. denied*, *488 U.S. 870 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988)*.

If lack of barriers to entry precluded a finding of monopoly power, then the existence of less than 100 percent of market share would seem to preclude a finding of a monopoly, regardless of other factors, **[**43]** since the existence of competitors in the market would apparently establish the lack of barriers to entry. I do not believe this to be the proper interpretation of *Section 2* of the Sherman Act, nor has the Supreme Court so interpreted monopoly power.

If absence of barriers to entry mandated a finding of lack of monopoly, the United States Supreme Court could not have held, as it did, that Standard Oil Company of New Jersey and John D. Rockefeller and their associates, with between 50 percent and 90 percent of the petroleum business, were monopolists, since there was no finding of barriers to entry and others were in competition in the petroleum business. *Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. Likewise, if absence of barriers to entry required a finding of lack of monopoly power, the Supreme Court could not have held, as it did, in *FTC v. Procter & Gamble Co., 386 U.S. 568, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967)*, that the merger of Proctor & Gamble with Clorox would violate the laws prohibiting monopolies where the merged company would have control of 65 percent of the country's sales of liquid bleach, **[**44]** since there were many other existing competitors in the liquid bleach market.

I do not believe that Congress intended to isolate a business or industry from the strictures of *§ 2* of the Sherman Act solely because there are no barriers to entry. All relevant factors should be considered in the monopoly determination. If Congress intended to except markets from scrutiny solely by reason of absence of barriers to entry, it would have done so. "Where exceptions are made, Congress should make them." *United States v. Line Material Co., 333 U.S. 287, 310, 68 S. Ct. 550, 92 L. Ed. 701 (1948)*.

I am unable to concur in Part 3 of the opinion which takes the Justice Department to task for the expenditure of government funds and the initiation of this action against an alleged "paper tiger." I do not agree that Syufy was a "paper tiger" or that there was not a reasonable basis for the initiation of this action.

In 1985, shortly before the commencement of this case, Syufy had completed the acquisition of all of its first-run theatre competitors. Syufy's final acquisition was of the 11-screen Red Rock theatres for which he paid $ 4,850,000 in cash, giving him ownership of **[**45]** all first-run theatres in Las Vegas. In 1985, Syufy had over 93 percent of the total box office receipts from first-run films. The only reason Syufy did not have 100 percent of the market was because of a dispute which arose between Syufy and Orion Pictures when Syufy, 7 days after acquiring Red Rock theatres, cancelled guarantees he had previously made to Orion.

The foregoing circumstances appear to have warranted the Antitrust Division in initiating this action. Syufy's prior actions belied a conclusion that it was a completely innocent party. Not only had Syufy spent large amounts of money to buy up all of its competitors in the first-run theatre business in Las Vegas, but it had a track record of monopolization, having been found, shortly before the commencement of this action, to have monopolized the exhibition of major feature films in the San Jose area. *Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990* (9th Cir.), *cert. denied*, *479 U.S. 1031, 107 S. Ct. 876, 93 L. Ed. 2d 830 (1987)*. While I concur in the opinion that Judge Orrick's decision in this case was not erroneous, I do not concur in Part 3 of the opinion. [1]

[46]**

End of Document

[1] In Part 3 of the opinion, the majority, in footnote 21, construes my citation of a prior case involving Syufy Enterprises, in which Syufy was found to be a monopolist, as a suggestion on my part that such a finding of prior monopolistic action, in and of itself, justified the initiation of this action. That was not my intent. The citation of the case in question, *Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990 (9th Cir. 1986)*, was for the purpose of demonstrating that Syufy, who spent almost 5 million dollars in cash in purchasing all of his competitors, was not a "paper tiger" as suggested by the majority.

In footnote 22, the majority also contends that the finding of monopolistic actions by Syufy in the San Jose major feature films market was reversed by the Ninth Circuit in *American Multicinema* for insufficient evidence. To the contrary, this jury finding was found to have been supported by substantial evidence. At page 996 of *American Multicinema*, the court stated: "In conclusion, we hold that there is substantial evidence to support a jury verdict in favor of AMC on its first *Section 2* monopolization theory; that Syufy monopolized the market for the exhibition of industry anticipated top-grossing films in the San Jose area."

Atl. Richfield Co. v. USA Petroleum Co.

Supreme Court of the United States

December 5, 1989, Argued ; May 14, 1990, Decided

No. 88-1668

Reporter

495 U.S. 328 *; 110 S. Ct. 1884 **; 109 L. Ed. 2d 333 ***; 1990 U.S. LEXIS 2543 ****; 58 U.S.L.W. 4547; 1990-1 Trade Cas. (CCH) P69,019

ATLANTIC RICHFIELD CO. v. USA PETROLEUM CO.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *859 F. 2d 687*, reversed and remanded.

Core Terms

antitrust, prices, competitor, vertical, dealers, conspiracy, predatory, anti trust law, Sherman Act, price-fixing, consumers, retail, gasoline, price competition, maximum price, Clayton Act, maximum-price-fixing, anticompetitive, nonpredatory, distributor, stations, effects, losses, price fixing, sales, per se rule, practices, damages, per se violation, conspirators

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

HN1[] **Remedies, Damages**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, is a remedial provision that makes available treble damages to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN2[] **Remedies, Damages**

A private plaintiff may not recover antitrust damages under *15 U.S.C.S. § 15* merely by showing injury causally linked to an illegal presence in a market. Instead, a plaintiff must prove the existence of antitrust injury, which is to say injury of the type antitrust laws are intended to prevent and that flows from that which makes a defendant's acts unlawful. Injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anticompetitive aspect of a practice under scrutiny, since it is inimical to antitrust laws to award damages' for losses stemming from continued competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN3[] **Vertical Restraints, Nonprice Restraints**

A maximum-price vertical agreement is per se illegal and operates by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market and may severely intrude upon the ability of buyers to compete and survive in a market. Maximum prices may be fixed too low for a dealer to furnish services essential to the value which goods have for a consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. By limiting the ability of small dealers to engage in nonprice competition, a maximum-price-fixing agreement might channel distribution through a few large or specifically advantaged dealers. If the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of a dealer, a scheme tends to acquire all the attributes of an arrangement fixing minimum prices.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN4[] **Vertical Restraints, Price Fixing**

A vertical, maximum price-fixing agreement is per se unlawful because of its potential effects on dealers and consumers, not because of its effect on competitors. If a vertical agreement fixes maximum prices too low for a dealer to furnish services desired by consumers, or in such a way as to channel business to large distributors, then a firm dealing in a competing brand would not be harmed. A competitor may not complain of conspiracies that set minimum prices at any level.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, business lost by rivals cannot be viewed as an "anticompetitive" consequence of a claimed violation. A firm complaining about the harm it suffers from nonpredatory price competition is really claiming that it is unable to raise prices. This is not antitrust injury; indeed, cutting prices in order to increase business often is the very essence of competition. The antitrust laws are enacted for the protection of competition, not competitors. To hold that the antitrust laws protect competitors from the loss of profits due to nonpredatory price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.

Antitrust & Trade Law > Sherman Act > Claims

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN6[] **Sherman Act, Claims**

Price fixing violates *§ 1* of the Sherman Act (Act) even if a single firm's decision to price at the same level would not create *§ 2* of the Act liability. In a *§ 1* case, a price agreement itself is illegal. Although a vertical, maximum-price-fixing agreement is unlawful under *§ 1*, it does not cause a competitor antitrust injury unless it results in predatory pricing. Antitrust injury does not arise for purposes of *15 U.S.C.S. § 15* until a private party is adversely affected by an anticompetitive aspect of a defendant's conduct. In the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN7[] Clayton Act, Claims

Nonpredatory price competition for increased market share, as reflected by prices that are below "market price" or even below the costs of a firm's rivals, is not activity forbidden by the antitrust laws. When prices are not predatory, any losses flowing from them cannot be said to stem from an anticompetitive aspect of a defendant's conduct. It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN8[] Regulated Practices, Private Actions

The per se rule is a method of determining whether *§ 1* of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under *15 U.S.C.S. § 15*. Per se and rule-of-reason analysis are but two methods of determining whether a restraint is "unreasonable," that is, whether its anticompetitive effects outweigh its procompetitive effects. The per se rule is a presumption of unreasonableness based on business certainty and litigation efficiency. It represents a longstanding judgment that the prohibited practices by their nature have a substantial potential for impact on competition. Once experience with a particular kind of restraint enables a court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that a restraint is unreasonable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Both per se rules and the rule of reason are employed to form a judgment about the competitive significance of a pricing restraint. Whether an ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same - whether or not a challenged restraint enhances competition.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN10[] Private Actions, Remedies

The antitrust injury requirement under *15 U.S.C.S. § 15* ensures that the harm claimed by a plaintiff corresponds to the rationale for finding a violation of antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief. Actions per se unlawful under antitrust laws may nonetheless have some procompetitive effects, and private parties might suffer losses therefrom. Conduct in violation of antitrust laws may have three effects, often interwoven: in some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the per se rule as under the rule of reason.

Antitrust & Trade Law > Clayton Act > General Overview

HN11[] Antitrust & Trade Law, Clayton Act

Proof of a per se violation and of antitrust injury under *15 U.S.C.S. § 15* are distinct matters that must be shown independently.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN12[] Standing, Clayton Act

Even in cases involving per se violations, the right of action under *15 U.S.C.S. § 15* is available only to those private plaintiffs who have suffered antitrust injury. Plaintiffs are required to show that a conspiracy caused them an injury for which antitrust laws provide relief. A restraint of trade may be illegal per se in the sense that it could be condemned even without proof of its actual market effect, but even if it may have been unlawful, it does not, of course, necessarily follow that still another party .is a person injured by reason of a violation of the antitrust laws within the meaning of *§ 15*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Regulated Practices > Private Actions > Private Attorneys General

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[] Vertical Restraints, Price Fixing

The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to perform the office of a private attorney general.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN14[] Vertical Restraints, Price Fixing

A competitor is not injured by anticompetitive effects of vertical, maximum price-fixing, and does not have any incentive to vindicate the legitimate interests of a rival's dealer. A competitor will not bring suit to protect a dealer against a maximum price that is set too low, inasmuch as a competitor would benefit from such a situation. Instead, a competitor will be motivated to bring suit only when a vertical restraint promotes interbrand competition between a competitor and a dealer subject to a restraint. A competitor will be injured and hence motivated to sue only when a vertical, maximum-price-fixing arrangement has a procompetitive impact on a market. Therefore, providing a competitor a cause of action will not protect the rights of dealers and consumers under antitrust laws.

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Decision

Firm held not to suffer "antitrust injury," and thus held unable to sue under 4 of Clayton Act (*15 USCS 15*), for alleged loss of sales to competitor charging nonpredatory prices pursuant to vertical, maximum price-fixing scheme.

Summary

Section 4 of the Clayton Act (*15 USCS 15*) generally authorizes a treble damages suit by any person injured in the person's business or property by reason of anything forbidden in the antitrust laws. The United States Supreme Court has held that, in order for a private plaintiff to bring such a 4 suit, the plaintiff must prove the existence of "antitrust injury"--injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. An independent retail marketer of gasoline competed with the dealers of an integrated oil company. The marketer brought a suit against the oil company in the United States District Court for the Central District of California and included in the suit an antitrust claim of the existence of a vertical, maximum price-fixing agreement prohibited by 1 of the Sherman Act (*15 USCS 1*). The District Court, however, in granting summary judgment for the oil company on the 1 claim, expressed the view that (1) even assuming that the marketer could establish a vertical conspiracy to maintain low prices, the marketer could not satisfy the "antitrust injury" requirement of 4, without showing such prices to be predatory; and (2) the marketer could make no such showing of predatory pricing, because, given the oil company's market share and the ease of entry into the market, the oil company was in no position to exercise market power. On appeal, the United States Court of Appeals for the Ninth Circuit, reversing, expressed the view that (1) injuries resulting from vertical, nonpredatory, maximum price-fixing agreements could constitute "antitrust injury" for purposes of a private suit under 4; and (2) in the case at hand, the marketer's claimed injuries were the direct result and, if the marketer's allegations were accepted as true, the intended objective of the alleged price-fixing scheme, where, according to the marketer, the purpose of the alleged price fixing was to disrupt the market of retail gasoline sales (*859 F2d 687*).

On certiorari, the Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by Brennan, J., joined by Rehnquist, Ch. J., and Marshall, Blackmun, O'Connor, Scalia, and Kennedy, JJ., it was held that--assuming for the purposes of decision that the oil company's pricing was not predatory in nature, and that vertical, maximum price fixing was subject to a per se rule of illegality under 1--(1) a firm does not suffer an antitrust injury, and thus the firm cannot bring a treble damages suit under 4, when the firm allegedly loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme allegedly prohibited by 1, because (a) the firm's losses do not flow from the aspects of the vertical, maximum price fixing that render it illegal, (b) the business lost by the firm as a rival cannot be viewed as an anticompetitive consequence of the claimed violation, (c) any differences between liability under 1 and liability under 2 of the Sherman Act (*15 USCS 2*) do not affect the result, (d) similarly, no salient difference results from the fact that the source of the nonpredatory price competition is an agreement alleged to be unlawful under 1 of the Sherman Act, rather than a merger alleged to be unlawful under 7 of the Clayton Act (*15 USCS 18*), and (e) the fact that a vertical price-fixing scheme may facilitate predatory pricing in some circumstances is no reason to dispense with the antitrust-injury requirement in an action by the firm against the competitor's vertical agreement; (2) the allegation of a per se violation of 1 does not obviate the need to satisfy the antitrust-injury test; and (3) there is no need to encourage private enforcement in such circumstances, and thus to permit the dilution of the antitrust-injury requirement.

Stevens, J., joined by White, J., dissenting, expressed the view that the court's opinion undermined the enforceability of a substantive price-fixing violation with a flawed construction of 4, which erroneously assumed that (1) the level of a price fixed by a 1 conspiracy is relevant to legality, and (2) all vertical arrangements conform to a single model.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > STATUTES §108.5 > damages suit -- vertical, maximum price-fixing scheme by competitor -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]***LEdHN[1G]***[] [1G]***LEdHN[1H]***[] [1H]***LEdHN[1I]***[] [1I]***LEdHN[1J]***[] [1J]***LEdHN[1K]***[] [1K]***LEdHN[1L]***[] [1L]***LEdHN[1M]***[] [1M]

A firm does not suffer an "antitrust injury," and thus the firm cannot bring a treble damages suit under 4 of the Clayton Act (*15 USCS 15*), when the firm allegedly loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme allegedly prohibited by 1 of the Sherman Act (*15 USCS 1*), because, even assuming for the purposes of decision that vertical, maximum price fixing is subject to a per se rule of illegality under 1, (1) the firm's losses do not flow from the aspects of the vertical, maximum price fixing that render it illegal, for, even if the agreement had ultimately acquired all the attributes of a minimum price-fixing scheme, the competitor's higher prices would work to the firm's advantage; (2) when a competitor, or even a group of competitors adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an anticompetitive consequence of the claimed violation, for a firm complaining about the harm it suffers from nonpredatory pricing is really claiming that the firm is unable to raise prices; (3) any differences between liability under 1 and liability under 2 of the Sherman Act (*15 USCS 2*) do not affect the result, for although a vertical, maximum price-fixing agreement may be unlawful under 1, such an agreement does not cause a competitor antitrust injury unless the agreement results in predatory pricing, for, in the context of pricing practices, only predatory pricing has requisite anticompetitive effect; (4) for similar reasons, no salient difference, for purposes of the antitrust-injury requirement, results from the fact that the source of the nonpredatory price competition is an agreement alleged to be unlawful under 1 of the Sherman Act, rather than a merger alleged to be unlawful under 7 of the Clayton Act (*15 USCS 18*); and (5) the fact that a vertical price-fixing scheme may facilitate predatory pricing in some circumstances is no reason to dispense with the antitrust-injury requirement in an action by a firm against a competitor's vertical agreement, because a firm always is able to challenge directly a competitor's pricing as predatory. (Stevens and White, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > damages suit -- injury to plaintiff -- per se violation -- equitable relief -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]***LEdHN[2D]***[] [2D]***LEdHN[2E]***[] [2E]

The allegation of a per se violation of 1 of the Sherman Act (*15 USCS 1*) does not obviate a private plaintiff's need to satisfy the "antitrust injury" test, in order to bring a treble damages suit under 4 of the Clayton Act (*15 USCS 15*), because the per se rule, which is a method for determining whether 1 has been violated, does not indicate whether a plaintiff has suffered antitrust injury, for (1) the antitrust-injury requirement has the different purpose of (a) insuring that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and (b) preventing losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief; (2) the antitrust-injury requirement insures that a plaintiff can recover only if the loss stems from the competition-reducing aspect or effect of the defendant's behavior, rather than any competition-increasing or competition-neutral aspect or effect of such behavior; (3) the need for such a showing is at least as great under the per se rule as under the rule of reason; (4) insofar as the per se rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust-injury requirement is underscored; and (5) thus, proof of a per se violation and of antitrust injury are distinct matters that must be shown independently. (Stevens and White, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- encouragement of enforcement -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]***LEdHN[3C]***[] [3C]***LEdHN[3D]***[] [3D]***LEdHN[3E]***[] [3E]***LEdHN[3F]***[] [3F]***LEdHN[3G]***[] [3G]***LEdHN[3H]***[] [3H]

With respect to the requirement that a private plaintiff show "antitrust injury" in order to bring a treble damages suit under 4 of the Clayton Act (*15 USCS 15*), even if it is assumed for the purposes of decision that vertical, maximum price fixing is subject to a per se rule of illegality under 1 of the Sherman Act (*15 USCS 1*), there is no need to encourage a rival firm's private enforcement of such a rule, and thus to permit the dilution of the antitrust-injury requirement when the firm allegedly loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme, because (1) if such a scheme causes anticompetitive consequences so as to result in a per se violation of 1, consumers and the manufacturer's own dealers may bring suit; and (2) providing the firm, as a rival, with a cause of action will not protect the rights of dealers and consumers under the antitrust laws, for the firm's injury is not inextricably intertwined with the antitrust injury that a dealer would suffer, where the firm (a) is not injured by the anticompetitive effects of vertical, maximum price fixing, and (b) will be injured, and hence motivated to sue, only when the competitor's vertical, maximum price-fixing arrangement has a procompetitive impact on the market. (Stevens and White, JJ., dissented from this holding.)

APPEAL §1289 > summary judgment -- inferences from facts -- > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]

On certiorari, in a case coming to the United States Supreme Court on review of summary judgment, inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

APPEAL §1331.5 > what reviewable -- predatory pricing -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]***LEdHN[5C]***[] [5C]***LEdHN[5D]***[] [5D]

On certiorari to determine whether a firm suffers an "antitrust injury," for purposes of the firm's ability to bring a treble damages suit, under 4 of the Clayton Act (*15 USCS 15*), for sales allegedly lost to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme, the United States Supreme Court, upon assuming for the purposes of decision that the competitor's pricing was not predatory in nature, has no occasion (1) to consider the proper definition of "predatory pricing," or (2) to determine whether an accurate statement of the law was made by the Supreme Court's dictum, in a prior case, that predatory pricing might consist of pricing below the level necessary to sell the offender's products.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > suit for damages -- injury -- > Headnote:
LEdHN[6][] [6]

A private plaintiff may not recover damages under 4 of the Clayton Act (*15 USCS 15*) merely by showing injury causally linked to an illegal presence in the market; instead, such a plaintiff must prove the existence of "antitrust injury"--injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > minimum prices -- damages suit -- > Headnote:
LEdHN[7][] [7]

In a treble damages suit under 4 of the Clayton Act (*15 USCS 15*) for an alleged violation of 1 of the Sherman Act (*15 USCS 1*), a competitor may not complain of conspiracies that set minimum prices at any level.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose -- > Headnote:
LEdHN[8A][] [8A]***LEdHN[8B]***[] [8B]

Under the antitrust laws, which were enacted for the protection of competition, not competitors, the statutory policy precludes inquiry into the question whether competition is good or bad.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > nonpredatory pricing -- damages suit -- > Headnote:
LEdHN[9A][] [9A]***LEdHN[9B]***[] [9B]

For purposes of the requirement that a private plaintiff show "antitrust injury" in order to bring a treble damages suit under 4 of the Clayton Act (*15 USCS 15*), such a plaintiff cannot claim antitrust injury from nonpredatory price competition on the asserted ground that it is "ruinous," for to hold that the antitrust laws protect competitors from the loss of profits due to nonpredatory price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. (Stevens and White, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > STATUTES §108.5 > price-fixing violations -- > Headnote:
LEdHN[10][] [10]

Price fixing violates 1 of the Sherman Act (*15 USCS 1*) as an agreement in restraint of trade, even if a single firm's decision to price at the same level would not create liability under 2 of the Act (*15 USCS 2*) as an attempt to monopolize, because, in a 1 case, the price agreement itself is illegal; 1 in general and the per se rule in particular are grounded on faith in price competition as a market force, and not on a policy of low selling prices at the price of eliminating competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- injury -- > Headnote:
LEdHN[11A][] [11A]***LEdHN[11B]***[] [11B]

"Antitrust injury" does not arise, for purposes of a private party's ability to maintain a treble damages suit under 4 of the Clayton Act (*15 USCS 15*), until the private party is adversely affected by an anticompetitive aspect of the defendant's conduct; for purposes of 4, injury in fact cannot be equated with "antitrust injury," and the antitrust-injury requirement cannot be met by broad allegations of harm to the "market" as an abstract entity; although all antitrust violations, under both per se and rule-of-reason analyses, "distort" the market, not every loss stemming from a violation counts as antitrust injury.

EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > violations per se -- rule of reason -- presumptions -- > Headnote:
LEdHN[12A][] [12A]***LEdHN[12B]***[] [12B]

For purposes of determining whether 1 of the Sherman Act (*15 USCS 1*) has been violated, per se and rule-of-reason analyses are but two methods of determining whether a restraint is "unreasonable," that is, whether the restraint's anticompetitive effects outweigh its procompetitive effects; both per se rules and the rule of reason are employed to form a judgment about the competitive significance of the restraint; whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same--whether the challenged restraint enhances competition; a per se rule (1) is a presumption of a reasonableness based on business certainty and litigation efficiency, and (2) represents a long-standing judgment that the prohibited practices, by their nature, have a substantial potential for impact on competition; and once experience with a particular type of restraint enables the United States Supreme Court to predict with confidence that the rule of reason will condemn the restraint, the Supreme Court applies a conclusive presumption that the restraint is unreasonable.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > rule of reason -- > Headnote:
LEdHN[13A][] [13A]***LEdHN[13B]***[] [13B]

With respect to whether a manufacturer's vertical arrangements with a dealer violate 1 of the Sherman Act (*15 USCS 1*), exclusive territorial arrangements and other nonprice restrictions are subject to only rule-of-reason scrutiny, rather than to a rule of per se illegality.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > suit for damages -- injury -- > Headnote:
LEdHN[14][] [14]

For purposes of determining the required "antitrust injury" that a private plaintiff must suffer in order to bring a treble damages suit under 4 of the Clayton Act (*15 USCS 15*), the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to perform the office of a private attorney general.

Syllabus

Petitioner Atlantic Richfield Company (ARCO), an integrated oil company, increased its retail gasoline sales and market share by encouraging its dealers to match the prices of independents such as respondent USA Petroleum Company, which competes directly with the dealers at the retail level. When USA's sales dropped, it sued ARCO in the District Court, charging, inter alia, that the vertical, maximum-price-fixing scheme constituted a conspiracy in restraint of trade in violation of *§ 1* of the Sherman Act. The court granted summary judgment to ARCO, holding that USA could not satisfy the "antitrust injury" requirement for purposes of a private damages suit under **[****2]** § 4 of the Clayton Act because it was unable to show that ARCO's prices were predatory. The Court of Appeals reversed, holding that injuries resulting from vertical, nonpredatory, maximum-price-fixing agreements could constitute "antitrust injury." Reasoning that any form of price fixing contravenes Congress' intent that market forces alone determine what goods and services are offered, their prices, and whether particular sellers succeed or fail, the court concluded that USA had shown that its losses resulted from a disruption in the market caused by ARCO's price fixing.

Held:

1. Actionable "antitrust injury" is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Injury, although casually related to an antitrust violation, will not qualify unless it is attributable to an anticompetitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109-110*. P. 334

2. A vertical, maximum-price-fixing conspiracy in violation of *§ 1* of the Sherman **[****3]** Act must result in predatory pricing to cause a competitor antitrust injury. Pp. 335-341.

(a) As a competitor, USA has not suffered "antitrust injury," since its losses do not flow from the harmful effects on dealers and consumers that rendered vertical, maximum price fixing per se illegal in *Albrecht v. Herald Co., 390 U.S. 145*. USA was benefited rather than harmed if ARCO's pricing policies restricted ARCO's sales to a few large dealers or prevented its dealers from offering services desired by consumers. Even if the maximum price agreement acquired all of the attributes of a minimum-price-fixing scheme, USA still would not have suffered antitrust injury, because higher ARCO prices would have worked to USA's advantage. Pp. 335-337.

(b) USA's argument that, even if it was not harmed by any of the Albrecht anticompetitive effects, its lost business caused by ARCO's agreement lowering prices to above predatory levels constitutes antitrust injury is rejected, since cutting prices to increase business is often the essence of competition. Pp. 337-338.

(c) It is not inappropriate to require a showing of predatory pricing before antitrust injury can be established **[****4]** in a case under *§ 1* of the Sherman Act. Although under *§ 1* the price agreement itself is illegal, all losses flowing from the agreement are not by definition antitrust injuries. Low prices benefit consumers regardless of how they are set. So long as they are above predatory levels, they do not threaten competition and, hence, cannot give rise to antitrust injury. Pp. 338-341.

3. A loss flowing from a per se violation of *§ 1* does not automatically satisfy the antitrust injury requirement, which is a distinct matter that must be shown independently. The purpose of per se analysis is to determine whether a particular restraint is unreasonable. Actions per se unlawful may nonetheless have some procompetitive effects, and private parties might suffer losses therefrom. The antitrust injury requirement, however, ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. Pp. 341-345.

4. Providing competitors with a private cause of action to enforce the rule against vertical, maximum price fixing would not protect the rights of dealers and consumers -- the class of persons whose self-interest would **[****5]** normally motivate them to vindicate Albrecht's anticompetitive consequences -- under the antitrust laws. USA's injury is not inextricably intertwined with a dealer's antitrust injury, since a competitor has no incentive to vindicate the legitimate interests of a rival's dealer and will be injured and motivated to sue only when the arrangement has a procompetitive impact on the market. Pp. 345-346.

Counsel: Ronald C. Redcay argued the cause for petitioner. With him on the briefs were Matthew T. Heartney, Otis Pratt Pearsall, Philip H. Curtis, Francis X. McCormack, Donald A. Bright, and Edward E. Clark.

John G. Roberts, Jr., argued the cause for the United States et al. as amici curiae urging reversal. With him on the brief were General Boudin, Deputy Solicitor General Shapiro, Michael R. Dreeben, Catherine G. O'Sullivan, and Kevin J. Arquit.

Maxwell M. Blecher argued the cause for respondent. With him on the brief were Alicia G. Rosenberg and Lawrence A. Sullivan. *

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* Daniel K. Mayers, David Westin, and W. Terry Maguire filed a brief for the American Newspaper Publishers Association as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the State of California et al. by John K. Van de Kamp, Attorney General of California, Andera S. Ordin, Chief Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General8 Thomas P. Dove

[**6]**

Judges: BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and MARSHALL, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, post, p. 346.

Opinion by: BRENNAN

Opinion

[*331] [*341] [**1887]** JUSTICE **BRENNAN** delivered the opinion of the Court.

LEdHN[1A][] [1A] ***LEdHN[2A]***[] [2A] ***LEdHN[3A]***[] [3A]This case presents the question whether a firm incurs an "injury" within the meaning of the antitrust laws when it loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme. We hold that such a firm does not suffer an "antitrust injury" and that it therefore cannot bring suit under § 4 of the Clayton Act, 38 Stat. 731, as amended, *15 U.S.C. § 15*. [1]

[**7]** I

Respondent USA Petroleum Company (USA) sued petitioner Atlantic Richfield Company (ARCO) in the United States District Court for the Central District of California, alleging the existence of a vertical, maximum-price-fixing agreement prohibited by *§ 1* of the Sherman Act, 26 Stat. 209, as amended, *15 U.S.C. § 1*, an attempt to monopolize the local retail gasoline sales market in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*, and other misconduct not relevant here. Petitioner ARCO is an integrated oil company that, inter alia, markets gasoline in the Western United States. It sells gasoline to consumers both directly through its own stations and indirectly through ARCO-brand dealers. Respondent USA is an independent retail marketer of gasoline which, like other independents, buys gasoline from major petroleum **[***342]** companies for resale under its own brand name. Respondent competes directly with ARCO dealers at the retail level. Respondent's outlets typically are low-overhead, high-volume "discount" stations that charge less than stations selling equivalent quality gasoline under major brand names.

LEdHN[4A][] [4A] **[****8]** In early 1982, petitioner ARCO adopted a new marketing strategy in order to compete more effectively with discount **[*332]** independents **[**1888]** such as respondent. [2] Petitioner encouraged its

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and Richard N. Light, Deputy Attorneys General, Douglas B. Baily, Attorney General General of Alaska,and Richard D. Monkman, Assistant Attorney General, Warren Price III, Attorney General of Hawaii8 Thomas J. Miller, Attorney General of Iowa, and Gordan E. Allen, Duputy Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and Anne F. Benoit, Assistant Attorney General, Robert M. Spire, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, Brian McKay, Attorney General of Nevada, and J. Kenneth Creighton, Deputy Attorney General, Dave Frohnmayer, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Eugene F. Wayne, Chief Deputy Attorney General, and Carl S. Hisiro, Senior Deputy Attorney General, Charles W. Burson, Attorney General of Tennessee, and Gerry Craft, Duputy Attorney General, R. Paul Van Dam, Attorney General of Utah, and Arthur M. Strong, Assistant Attorney General; for the Service Station Dealers of America by Dimitri G. Daskalopoulos; and for the Society of Independent Gasoline Marketers of America by William W. Scott and Christopher J. MacAvoy.

[1] Section 4 of the Clayton Act is ***HN1***[] a remedial provision that makes available treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

[2] ***LEdHN[4B]***[] [4B]

dealers to match the retail gasoline prices offered by independents in various ways; petitioner made available to its dealers and distributors such short-term discounts as "temporary competitive allowances" and "temporary volume allowances," and it reduced its dealers' costs by, for example, eliminating credit card sales. ARCO's strategy increased its sales and market share.

[**9]** ***LEdHN[1B]***[] [1B] ***LEdHN[3B]***[] [3B] ***LEdHN[5A]***[] [5A]In its amended complaint, respondent USA charged that ARCO engaged in "direct head-to-head competition with discounters" and "drastically lowered its prices and in other ways sought to appeal to price-conscious consumers." First Amended Complaint para. 19, App. 15. Respondent asserted that petitioner conspired with retail service stations selling ARCO brand gasoline to fix prices at below-market levels: "Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition tht would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artifically low and uncompetitive levels." para. 27, App. 17. Respondent alleged that petitioner "has solicited its dealers and distributors to participate or acquiesce in the conspiracy and has used threats, intimidation and coercion to secure compliance **[****10]** with its terms." para. 37, App. 19. According to respondent, this conspiracy drove many independent gasoline dealers in California out of business. para. 39, App. 20. Count one of the amended complaint charged that petitioner's vertical, maximum-price-fixing scheme constituted an agreement in restraint of trade and thus violated *§ 1* of the Sherman Act. Count two, later withdrawn with prejudice by respondent, **[*333]** asserted that petitioner had engaged in an attempt to monopolize the retail gasoline market through predatory pricing in violation of *§ 2* of the Sherman Act. [3]

[**11]** The District Court granted summary judgment for ARCO on the *§ 1* claim. The court stated that "[e]ven **[***343]** assuming that [respondent USA] can establish a vertical conspiracy to maintain low prices, [respondent] cannot satisfy the 'antitrust injury' requirement of Clayton Act § 4, without showing such prices to be predatory." App. to Pet. for Cert. 3b. The court then concluded that respondent could make no such showing of predatory pricing because, given petitioner's market share and the ease of entry into the market, petitioner was in no position to exercise market power.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. *859 F. 2d 687 (1988)*. Acknowledging that its decision was in conflict with the approach of the Court of Appeals for the Seventh Circuit in several recent cases, [4] see *id., at 697, n. 15*, the Ninth Circuit nonetheless held that injuries resulting from vertical, nonpredatory, maximum pricefixing agreements could constitute "antitrust **[**1889]** injury" for purposes of a private suit under § 4 of the Clayton Act. The court reasoned that any form of price fixing contravenes Congress' intent that **[****12]** "market forces alone determine what goods and services are offered, at what price these goods and services **[*334]** are sold, and whether particular sellers succeed or fail." *Id., at 693*. The court believed that the key inquiry in determining whether respondent suffered an "antitrust injury" was whether its losses "resulted from a disruption . . . in the . . . market caused by the . . . antitrust violation." Ibid. The court concluded that "[i]n the present case, the

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Because the case comes to us on review of summary judgment, "'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)* (quoting *United States v. Diebold, Inc., 369 U.S. 654, 655 (1962))*.

[3] ***LEdHN[1C]***[] [1C] ***LEdHN[3C]***[] [3C] ***LEdHN[5B]***[] [5B]

The District Court granted petitioner's motion to dismiss the *§ 2* claim as originally pleaded. *577 F. Supp. 1296, 1304 (1983)*. Respondent subsequently amended its *§ 2* claim, but shortly after petitioner filed for summary judgment, respondent voluntarily dismissed that claim with prejudice. See App. 76-78. The Court of Appeals framed the issue as "whether a competitor's injuries resulting from vertical, non-predatory, maximum price fixing fall within the category of 'antitrust injury.'" *859 F. 2d 687, 689 (CA9 1988)* (emphasis added). For purposes of this case we likewise assume that petitioner's pricing was not predatory in nature.

[4] See *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F. 2d 1409, 1418-1420 (1989)*; *Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F. 2d 1197, 1201-1203 (1986)*; *Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F. 2d 698, 708-709*, cert. denied, ***469 U.S. 1018 (1984)***.

inquiry seems straightforward: USA's claimed injuries were the direct result, and indeed, under the allegations we accept as true, the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries." Ibid.

[**13]** We granted certiorari, *490 U.S. 1097 (1989)*.

II

LEdHN[6][] [6]***HN2***[] A private plaintiff may not recover damages under § 4 of the Clayton Act merely by showing "injury causally linked to an illegal presence in the market." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)*. Instead, a plaintiff must prove the existence of "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Ibid. (emphasis in original). In *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)*, we reaffirmed that injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anticompetitive aspect of the practice under scrutiny, "since '[i]t is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition." *Id., at 109-110* (quoting *Brunswick, supra, at 488*). **[****14]** **[***344]** See also *Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 539-540 (1983)*; *Blue Shield of Virginia v. McCready, 457 U.S. 465, 483, and n. 19 (1982)*; *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981)*.

[*335] ***LEdHN[1D]***[] [1D] ***LEdHN[2B]***[] [2B] ***LEdHN[3D]***[] [3D]Respondent argues that, as a competitor, it can show antitrust injury from a vertical conspiracy to fix maximum prices that is unlawful under *§ 1* of the Sherman Act, even if the prices were set above predatory levels. In addition, respondent maintains that any loss flowing from a per se violation of *§ 1* automatically satisfies the antitrust injury requirement. We reject both contentions and hold that respondent has failed to meet the antitrust injury test in this case. We therefore reverse the judgment of the Court of Appeals.

A

LEdHN[1E][] [1E] ***LEdHN[3E]***[] [3E] **[****15]** In *Albrecht v. Herald Co., 390 U.S. 145 (1968)*, we found that a vertical, maximum-price-fixing scheme was unlawful per se under *§ 1* of the Sherman Act because it threatened to inhibit vigorous competition by the dealers bound by it and because it threatened to become a minimum-price-fixing scheme. [5] That case concerned a newspaper distributor who sought to charge his customers more than the suggested retail price advertised by the publisher. After the publisher attempted to discipline the distributor by hiring another carrier to take away some of the distributor's customers, the distributor brought suit under *§ 1*. The Court found that "the combination **[**1890]** formed by the [publisher] in this case to force [the distributor] to maintain a specified price for the resale of newspapers which he had purchased from [the publisher] constituted, without more, an illegal restraint of trade under *§ 1* of the Sherman Act." *Id., at 153*.

[**16]** In holding such a maximum-price vertical agreement illegal, we analyzed the manner in which it might restrain competition by dealers. ***HN3***[] First, we noted that such a scheme, "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market." *Id., at 152*. We further explained that "[m]aximum **[*336]** prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay." *Id., at 152-153*. By limiting the ability of small dealers to engage in nonprice competition, a maximum-price-fixing agreement might "channel distribution through a few large or specifically advantaged dealers." *Id., at 153*. Finally, we observed that "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is

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[5] ***LEdHN[1F]***[] [1F] ***LEdHN[3F]***[] [3F]

We assume, arguendo, that Albrecht correctly held that vertical, maximum price fixing is subject to the per se rule.

increasingly likely as the maximum price approaches the **[****17]** actual cost of the dealer, the scheme tends to acquire all the attributes of **[***345]** an arrangement fixing minimum prices." Ibid.

LEdHN[1G][] [1G] **LEdHN[7]**[] [7]Respondent alleges that it has suffered losses as a result of competition with firms following a vertical, maximum-price-fixing agreement. **HN4**[] But in Albrecht we held such an agreement per se unlawful because of its potential effects on dealers and consumers, not because of its effect on competitors. Respondent's asserted injury as a competitor does not resemble any of the potential dangers described in Albrecht. [6] For example, if a vertical agreement fixes "[m]aximum prices . . . too low for the dealer to furnish services" desired by consumers, or in such a way as to channel business to large distributors, *id., at 152-153*, then a firm dealing in a competing brand would not be harmed. Respondent was benefited rather than harmed if petitioner's pricing policies restricted ARCO **[*337]** **[****18]** sales to a few large dealers or prevented petitioner's dealers from offering services desired by consumers such as credit card sales. Even if the maximum-price agreement ultimately had acquired all of the attributes of a minimum-price-fixing scheme, respondent still would not have suffered antitrust injury because higher ARCO prices would have worked to USA's advantage. A competitor "may not complain of conspiracies that . . . set minimum prices at any level." *Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574, 585, n. 8 (1986)*; see also *id., at 582-583* ("[R]espondents [cannot] recover damages for any conspiracy by petitioners to charge higher than competitive prices in the . . . market. Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price . . ."). Indeed, the gravamen of respondent's complaint -- that the price-fixing scheme between petitioner and its dealers enabled those dealers to increase their sales -- amounts to an assertion that the dangers with which we were concerned in Albrecht **[**1891]** **[****19]** have not materialized in the instant case. In sum, respondent has not suffered "antitrust injury," since its losses do not flow from the aspects of vertical, maximum price fixing that render it illegal.

[**20]** **LEdHN[1H]**[] [1H] **LEdHN[8A]**[] [8A] **LEdHN[9A]**[] [9A]Respondent argues that even if it was not harmed by any of the anticompetitive effects identified in Albrecht, it nonetheless suffered antitrust injury because of the low prices produced by the vertical restraint. We disagree. **HN5**[] When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed **[***346]** violation. [7] A firm **[*338]** complaining about the harm it suffers from nonpredatory price competition "is really claiming that it [is] unable to raise prices." Blair & Harrison, Rethinking Antitrust Injury, *42 Vand. L. Rev. 1539, 1554 (1989)*. This is not antitrust injury; indeed, "cutting prices in order to increase business often is the very essence of competition." *Matsushita, supra, at 594*. The antitrust laws were enacted for "the protection of competition, **[****21]** not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)* (emphasis in original). "To hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." *Cargill, 479 U.S., at 116*.

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[6] Albrecht is the only case in which the Court has confronted an unadulterated vertical, maximum-price-fixing arrangement. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951)*, we also suggested that such an arrangement was illegal because it restricted vigorous competition among dealers. The restraint in Kiefer-Stewart had an additional horizontal component, however, see *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348, n. 18 (1982)*, since the agreement was between two suppliers that had agreed to sell liquor only to wholesalers adhering to "maximum prices above which the wholesalers could not resell." *Kiefer-Stewart, supra, at 212*.

[7] **LEdHN[8B]**[] [8B] **LEdHN[9B]**[] [9B]

The Court of Appeals implied that the antitrust injury requirement could be satisfied by a showing that the "long-term" effect of the maximum-price agreements could be to eliminate retailers and ultimately to reduce competition. *859 F. 2d, at 694, 696*. We disagree. Rivals cannot be excluded in the long run by a nonpredatory maximum-price scheme unless they are relatively inefficient. Even if that were false, however, a firm cannot claim antitrust injury from nonpredatory price competition on the asserted ground that it is "ruinous." Cf. *United States v. Topco Associates, Inc., 405 U.S. 596, 610-612 (1972)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-221 (1940)*. "[T]he statutory policy precludes inquiry into the question whether competition is good or bad." *National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978)*.

[**22]** ***LEdHN[1I]***[] [1I] ***LEdHN[10]***[] [10]Respondent further argues that it is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted antitrust violation is an agreement in restraint of trade illegal under *§ 1* of the Sherman Act, rather than an attempt to monopolize prohibited by *§ 2*. Respondent notes that the two sections of the Act are quite different. ***HN6***[] Price fixing violates *§ 1*, for example, even if a single firm's decision to price at the same level would not create *§ 2* liability. See generally *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-769 (1984)*. In a *§ 1* case, the price agreement itself is illegal, and respondent contends that all losses flowing from such an agreement must by definition constitute "antitrust injuries." Respondent observes that *§ 1* in general and the per se rule in particular are grounded "'on faith in price competition as a market force **[*339]** **[****23]** [and not] on a policy of low selling prices at the price of eliminating competition.'" *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348 (1982)* (quoting Rahl, Price Competition and the Price Fixing Rule -- Preface and Perspective, 57 Nw. U.L. Rev. 137, 142 (1962)). In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under *§ 2* of the Sherman Act.

LEdHN[1J][] [1J] ***LEdHN[11A]***[] [11A]We reject respondent's argument. Although a vertical, maximum-price-fixing agreement is unlawful under *§ 1* of the Sherman Act, it does not cause a competitor antitrust injury unless it results in **[**1892]** predatory pricing. [8] **[****25]** Antitrust injury **[***347]** does not arise for purposes of § 4 of the Clayton Act, see n. 1, supra, until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct, see *Brunswick, 429 U.S., at 487*; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. **[****24]** [9] See Areeda & Turner, Predatory Pricing and Related **[*340]** Practices Under *Section 2* of the Sherman Act, 88 Harv. L. Rev. 697, 697-699 (1975); McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289, 292-294 (1980). Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

LEdHN[1L][] [1L] ***LEdHN[5C]***[] [5C]We have adhered to this principle regardless of the type of antitrust claim involved. In *Cargill, Inc. v. Monfort of Colorado, Inc., supra*, for example, we found that a plaintiff competitor had not shown antitrust injury and thus could not challenge a merger that was assumed **[****26]** to be illegal under § 7 of the Clayton Act, even though the merged company threatened to engage in vigorous price competition that would reduce the plaintiff's profits. ***HN7***[] We observed that nonpredatory price competition for increased market share, as reflected by prices that are below "market price" or even below the costs of a firm's rivals, "is not activity forbidden by the antitrust laws." *479 U.S., at 116*. Because the prices charged were not predatory, we found no antitrust injury. Similarly, we determined that antitrust injury was absent in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, even though the plaintiffs alleged that an illegal acquisition threatened to bring a "'deep pocket' parent

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[8] ***LEdHN[11B]***[] [11B]

The Court of Appeals erred by reasoning that respondent satisfied the antitrust injury requirement by alleging that "[t]he removal of some elements of price competition distorts the markets, and harms all the participants." *859 F. 2d, at 694*. Every antitrust violation can be assumed to "disrupt" or "distort" competition. "[O]therwise, there would be no violation." P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 340.3b, p. 411 (1989 Supp.). Respondent's theory would equate injury in fact with antitrust injury. We declined to adopt such an approach in *Brunswick Corp. v. Pueblo Bowl-O-Mat., Inc., 429 U.S. 477 (1977)*, and *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)*, and we reject it again today. The antitrust injury requirement cannot be met by broad allegations of harm to the "market" as an abstract entity. Although all antitrust violations, under both the per se rule and rule-of-reason analysis, "distort" the market, not every loss stemming from a violation counts as antitrust injury.

[9] ***LEdHN[1K]***[] [1K]

This is not to deny that a vertical price-fixing scheme may facilitate predatory pricing. A supplier, for example, can reduce its prices to its own downstream dealers and share the losses with them, while forcing competing dealers to bear by themselves the full loss imposed by the lower prices. Cf. *FTC v. Sun Oil Co., 371 U.S. 505, 522 (1963)*. But because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement.

into a market of 'pygmies,'" *Id., at 487*, a scenario that would cause the plaintiffs economic harm. We opined nevertheless that "if [the plaintiffs] were injured, it was not 'by reason of anything forbidden in the antitrust laws': while [the plaintiffs'] loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which **[****27]** made the acquisitions unlawful." *Id., at 488*. To be sure, the source of the price competition in the instant case was an agreement allegedly unlawful **[***348]** under *§ 1* of the Sherman Act rather than a merger in violation of § 7 of the Clayton Act. But that difference is not salient. When prices are not predatory, any losses flowing from them cannot be said to stem from an anticompetitive aspect of the defendant's **[*341]** conduct. [10] **[****28]** "'It is in the interest of competition to permit dominant firms **[**1893]** to engage in vigorous competition, including price competition." *Cargill, 479 U.S., at 116* (quoting *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F. 2d 1050, 1057* (CA6), cert. denied, *469 U.S. 1036 (1984))*. [11]

B

LEdHN[2C][] [2C] ***LEdHN[12A]***[] [12A]We also reject respondent's suggestion that no antitrust injury need be shown where a per se violation is involved. ***HN8***[] The **[*342]** per se rule is a method of determining whether *§ 1* of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton **[****29]** Act. Per se and rule-of-reason analysis are but two methods of determining whether a restraint is "unreasonable," i.e., whether its anticompetitive effects outweigh its procompetitive effects. [12] The per se rule is a presumption of **[***349]** unreasonableness based on "business certainty and litigation efficiency." *Arizona v. Maricopa County Medical Society, 457 U.S., at 344*. It represents a "longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" *FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 433 (1990)* (quoting *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984))*. "Once experience with a particular kind of restraint

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[10] ***LEdHN[5D]***[] [5D]

We did not reach a contrary conclusion in *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)*, where we declined define precisely the term "predatory pricing" but stated instead that "[f]or purposes of this case it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Id., at 585, n. 8*. This statement does not imply that losses from nonpredatory pricing might qualify as antitrust injury; we were quite careful to limit our discussion in that case to predatory pricing. See ibid. (nonpredatory prices would not cause antitrust injury because they would "leave respondents in the same position as would market forces"). We noted that "[e]xcept for the alleged conspiracy to monopolize the . . . market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an 'antitrust injury.'" *Id., at 586*. We also observed that "respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, caused such an injury." *Id., at 584, n. 7* (citations omitted); see also Id., at *id., at 594*; *Cargill, supra, at 117, n. 12* (interpreting our decision in Matsushita). We have no occasion in the instant case to consider the proper definition of predatory pricing, nor to determine whether our dictum in Matsushita that predatory pricing might consist of "pricing below the level necessary to sell [the offender's] products," *475 U.S., at 585, n. 8*, is an accurate statement of the law. See n. 3, supra.

[11] The Court of Appeals purported to distinguish Cargill and Brunswick on the ground that those cases turned on an "attenuated or indirect" relationship between the alleged violation -- the illegal merger -- and the plaintiffs' injury. *859 F. 2d, at 695*. We disagree. The Court in both cases described the injury as flowing directly from the alleged antitrust violation. See *Cargill, 479 U.S., at 108*; *Brunswick, 429 U.S., at 487*.

[12] ***LEdHN[12B]***[] [12B]

"***HN9***[] Both per se rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint.'" *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103 (1984)* (quoting *National Society of Professional Engineers v. United States, 435 U.S., at 692*). "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition." *468 U.S., at 104*.

enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Maricopa County Medical Society, supra, at 344*.

[**30]** ***LEdHN[2D]***[] [2D] ***LEdHN[13A]***[] [13A]The purpose of the antitrust injury requirement is different. ***HN10***[] It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either **[**1894]** damages or equitable relief. Actions per se unlawful under the antitrust laws may nonetheless have some procompetitive effects, and private parties might suffer losses **[*343]** therefrom. [13] See *Maricopa County Medical Society, supra, at 351*; *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, n. 16 (1977)*. Conduct in violation of the antitrust **[*344]** laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. **[****31]** The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the per se rule as under the rule of reason. Indeed, insofar as the per se rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored. "[P]ro-competitive or efficiency-enhancing aspects of practices that nominally violate the antitrust laws may cause serious harm to individuals, but this kind of harm is the essence of competition and should play no role in the definition of antitrust damages." Page, The Scope of Liability for Antitrust Violations, *37 Stan. L. Rev. 1445, 1460 (1985)*. ***HN11***[] Thus, "proof of a per se violation and of antitrust injury are distinct matters that must be shown independently." P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 334.2c, p. 330 (1989 Sup.).

[**32]** ***HN12***[]

For this reason, we have previously recognized that even in cases involving per se violations, the right of action under § 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury. For example, in a case involving horizontal price fixing, "perhaps the paradigm of an unreasonable restraint of trade,"

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[13] ***LEdHN[13B]***[] [13B]

When a manufacturer provides a dealer an exclusive area within which to distribute a product, the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist. The manufacturer acts not out of altruism, of course, but out of a desire to increase its own sales -- whereas the dealer's incentive, like that of any monopolist, is to reduce output and increase price. If an exclusive dealership is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing distributors. Vertical, maximum price fixing thus may have procompetitive interbrand effects even if it is per se illegal because of its potential effects on dealers and consumers. See *Albrecht v. Herald Co., 390 U.S. 145, 159 (1968)* (Harlan, J., dissenting) (maximum price ceilings "do not lessen horizontal competition" but instead "drive prices toward the level that would be set by intense competition," by "prevent[ing] retailers or wholesalers from reaping monopoly or supercompetitive profits"). Indeed, we acknowledged in Albrecht that "[m]aximum and minimum price fixing may have different consequences in many situations." *Id., at 152*. The procompetitive potential of a vertical maximum price restraint is more evident now than it was when Albrecht was decided, because exclusive territorial arrangements and other nonprice restrictions were unlawful per se in 1968. See *id., at 154*; *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375-376 (1967)*. These agreements are currently subject only to rule-of-reason scrutiny, making monopolistic behavior by dealers more likely. See *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984)*; *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47-59 (1977)*.

Many commentators have identified procompetitive effects of vertical, maximum price fixing. See, e.g., P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 340.3b, p. 378, n. 24 (1988 Supp.); Blair & Harrison, Rethinking Antitrust Injury, *42 Vand. L. Rev. 1539, 1553 (1989)*; Blair & Schafer, Evolutionary Models of Legal Change and the Albrecht Rule, 32 Antitrust Bull. 989, 995-1000 (1987); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, part 2, 75 Yale L.J. 373, 464 (1966); Easterbrook, Maximum Price Fixing, 48 U. Chi. L. Rev. 886, 887-890 (1981); Hovenkamp, Vertical Integration by the Newspaper Monopolist, *69 Iowa L. Rev. 451, 452-456 (1984)*; Polden, Antitrust Standing and the Rule Against Resale Price Maintenance, 37 Cleveland State L. Rev. 179, 216-217 (1989); Turner, The Durability, Relevance, and Future of American Antitrust Policy, *75 Calif. L. Rev. 797, 803-804 (1987)*.

[1895]** National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85, 100 (1984), we observed that the plaintiffs were still required to "show that the conspiracy caused them an injury for which the antitrust laws provide relief." Matsushita, 475 U.S., at 584, n. 7 (citing Brunswick) (emphasis added). Similarly, in Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519 (1983), we noted that a restraint of trade was illegal per se in the sense that it could "be condemned even without proof of its actual market effect," but we maintained that even if it "may have **[*345]** been unlawful, it does not, of course, necessarily follow that still **[****33]** another party . . . is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act." Id., at 528-529.

C

LEdHN[3G][] [3G] **LEdHN[14]**[] [14]We decline to dilute the antitrust injury requirement here because we find that there is no need to encourage private enforcement by competitors of the rule against vertical, maximum price fixing. If such a scheme causes the anticompetitive consequences detailed in Albrecht, consumers and the manufacturers' own dealers may bring suit. **HN13**[] The "existence of an identifiable class of persons whose self-interest would normally motivate **[***351]** them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." Associated General Contractors, 459 U.S., at 542.

LEdHN[3H][] [3H] **[****34]** Respondent's injury, moreover, is not "inextricably intertwined" with the antitrust injury that a dealer would suffer, McCready, 457 U.S., at 484, and thus does not militate in favor of permitting respondent to sue on behalf of petitioner's dealers. **HN14**[] A competitor is not injured by the anticompetitive effects of vertical, maximum price-fixing, see supra, at 336-337, and does not have any incentive to vindicate the legitimate interests of a rival's dealer. See Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 33-39 (1984). A competitor will not bring suit to protect the dealer against a maximum price that is set too low, inasmuch as the competitor would benefit from such a situation. Instead, a competitor will be motivated to bring suit only when the vertical restraint promotes interbrand competition between the competitor and the dealer subject to the restraint. See n. 13, supra. In short, a competitor will be injured and hence motivated to sue only when a vertical, maximum-price-fixing arrangement has a procompetitive impact on the market. Therefore, **[****35]** providing **[*346]** the competitor a cause of action would not protect the rights of dealers and consumers under the antitrust laws.

III

LEdHN[1M][] [1M] **LEdHN[2E]**[] [2E]Respondent has failed to demonstrate that it has suffered any antitrust injury. The allegation of a per se violation does not obviate the need to satisfy this test. The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Dissent by: STEVENS

Dissent

JUSTICE **STEVENS**, with whom JUSTICE **WHITE** joins, dissenting.

The Court today purportedly defines only the contours of antitrust injury that can result from a vertical, nonpredatory, maximum-price-fixing scheme. But much, if not all, of its reasoning about what constitutes injury actionable by a competitor would apply even if the alleged conspiracy had been joined by other major oil companies doing business in California, as well as their retail outlets. [1] The Court undermines the enforceability of a **[**1896]**

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[1] For example, the Court reasons:

substantive price-fixing violation with a flawed **[****36]** construction of § 4, erroneously assuming that the level of a price fixed by a *§ 1* conspiracy is relevant to legality and that all vertical arrangements conform to a single model.

[*352]** I

Because so much of the Court's analysis turns on its characterization of USA's cause of action, it is appropriate to **[*347]** begin with a more complete description of USA's theory. As the case comes to us on review of summary judgment, we assume the truth of USA's allegation that ARCO conspired with its retail dealers to fix the price of gas at specific ARCO stations that compete directly with USA stations. It is conceded that this price-fixing conspiracy is a per **[****37]** se violation of *§ 1* of the Sherman Act.

USA's theory can be expressed in the following hypothetical example: In a free market ARCO's advertised gas might command a price of $ 1 per gallon while USA's unadvertised gas might sell for a penny less, with retailers of both brands making an adequate profit. If, however, the ARCO stations reduce their price by a penny or two, they might divert enough business from USA stations to force them gradually to withdraw from the market. [2] **[****38]** The fixed price would be lower than the price that would obtain in a free market, but not so low as to be "predatory" in the sense that a single actor could not lawfully charge it under *15 U.S.C. § 2* or *§ 13a*. [3]

This theory rests on the premise that the resources of the conspirators, combined and coordinated, are sufficient to sustain below-normal profits in selected localities long enough to force USA to shift its capital to markets where it can receive a normal return on its investment. [4] Thus, during the initial **[*348]** period of competitive struggle between the conspirators and the independents, consumers will presumably benefit from artificially low prices. If the alleged campaign is successful, however -- and as the case comes to us we must assume it will be -- in the long run there will be less competition, or potential competition, from independents such as USA, and the character of the market will be different **[****39]** than if the conspiracy had never taken place. USA alleges that, in fact, the independent market already has suffered significant losses. [5]

[**40]** **[***353]** **[**1897]** II

"Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." Ante, at 340.

"When prices are not predatory, any losses flowing from them cannot be said to stem from an anticompetitive aspect of the defendant's conduct." Ante, at 340-341.

[2] "31. Arco and its co-conspirators have engaged in limit pricing practices in which prices are deliberately set on gasoline at a level below their competitors' cost with the purpose and effect of making it impossible for plaintiff and other independents to compete. For example, Arco and its co-conspirators have sold gasoline, ex tax, at the retail pump for less than independents, such as plaintiff, can purchase gasoline at wholesale." Amended Complaint, App. 18.

[3] "27. Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition that would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels. . . ." Amended Complaint, App. 17.

[4] It may be that ARCO could have accomplished its objectives independently, merely by reducing its own prices sufficiently to induce its retail customers to charge abnormally low prices and divert business from USA stations. See, e.g., Amended Complaint para. 30, App. 18. Such independent action by ARCO, followed by independent action by its retail customers, of course would be lawful, even if it produced the same consequences as the alleged conspiratorial program. See *United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960)*. Indeed, a full trial might establish that that is what happened. Nevertheless, as the case comes to us, we assume that ARCO is the architect of an illegal conspiracy.

[5] "18. For the last few years, there has been, and still is, a steady and continuous reduction in the competitive effectiveness of independent refiners and marketers selling in California and the western United States. During this time period, more than a dozen large independents have sold out, liquidated or drastically curtailed their operations, and many independent retail stations have been closed. The barriers to entry into this market have been high, and today such barriers are effectively insurmountable; once an independent is eliminated, it is highly unlikely that it will be replaced." Amended Complaint, App. 15.

ARCO's alleged conspiracy is a naked price restraint in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. [6] It is undisputed that ARCO's price-fixing arrangement, as alleged, **[*349]** is illegal per se under the rule against maximum price fixing, which is "'grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.' Rahl, Price Competition and the Price Fixing Rule -- Preface and Perspective, 57 Nw. U.L. Rev. 137, 142 (1962)." *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348 (1982)*. At issue is only whether a maximum price, administered on a host of retail stations that are ostensibly competing with one another as well as with other retailers, may be challenged by the competitor targeted by the pricing scheme.

[**41]** Section 4 of the Clayton Act allows private enforcement of the antitrust laws by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. See *Simpson v. Union Oil Co. of California, 377 U.S. 13, 16 (1964)* (quoting *Radovich v. National Football League, 352 U.S. 445, 454 (1957))* (laws allowing private enforcement of the antitrust laws by an aggrieved party "'protect the victims of the forbidden practices as well as the public'"). In order to invoke § 4, a plaintiff must prove that it suffered an injury that (1) is "of the type the antitrust laws were intended to prevent" and (2) "flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)*. In Brunswick, the plaintiff businesses claimed that they were deprived of the benefits of the increased concentration that would have resulted had failing businesses not been acquired by petitioner, allegedly in violation of § 7. In concluding that the plaintiffs had failed to prove "antitrust injury," we found that neither condition of § **[****42]** 4 standing was satisfied: First, the plaintiffs sought to recover damages because the mergers had preserved businesses and competition, which is not the type of injury that the antitrust laws are designed to prevent; and second, the plaintiffs had not been harmed by any potential change in the market structure **[*350]** effected by the entry of the "'deep pocket' parent." *Id., at 487-488*.

[*354]** In this case, however, both conditions of standing are met. First, *§ 1* is intended to forbid price-fixing conspiracies that are designed to drive competitors out of the market. See *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959)* (illegal coordination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy"). USA alleges that ARCO's pricing scheme aims at forcing independent refiners and marketers out of business and has created "an immediate and growing probability that the independent **[**1898]** segment of the industry will be destroyed altogether." [7]

[**43]** In Brunswick, we recognized that requiring a competitor to show that its loss is "of the type" antitrust laws were intended to prevent

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[6] We have long held under the Sherman Act that "a combination for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-223 (1940)*. See also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951)* (maximum resale prices); *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984)* (vertical resale prices); *Albrecht v. Herald Co., 390 U.S. 145 (1968)* (vertical maximum resale prices).

[7] USA's Amended Complaint specifically alleges:

"39. As a direct and proximate result of the above-described combinations and conspiracy and of the acts taken in furtherance thereof:

"(a) the price of gasoline has been artificially fixed, maintained and stabilized;

"(b) independent refiners and marketers have suffered substantial losses of sales and profits and their ability to compete has been seriously impaired;

"(c) independent refiners and marketers have gone out of business or been taken over by Arco;

"(d) there is an immediate and growing probability that the independent segment of the industry will be destroyed altogether and that control of the discount market will be acquired by Arco." App. 20.

> "does not necessarily mean . . . that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior -- predatory below-cost pricing, for example -- may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually **[*351]** are driven from the market and competition is thereby lessened." *429 U.S., at 489, n. 14*.

The pricing behavior in the Court's hypothetical example may cause actionable injury because it is "predatory." This is so because the Court assumes that a predatory price is illegal. The direct relationship between the illegality and the harm is what makes the competitor's short-term loss "antitrust injury." The fact that the illegality in the case before us today stems from the illegal conspiracy, rather than the predatory character of the price, does not change the analysis of "that which makes defendants' acts unlawful." [8] **[****45]** **[***355]** Thus, notwithstanding any temporary benefit **[****44]** to consumers, the unlawful pricing practice that is harmful in the long run to competition causes "antitrust injury" for which a competitor may seek damages. [9]

[*352] Second, USA is directly and immediately harmed by this price-fixing scheme, that is to say, by "that which makes defendants' acts unlawful." *Id., at 489*. In Brunswick, the allegedly illegal conduct at issue -- the merger -- itself did not harm the plaintiffs; similarly, in *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)*, the alleged injury arose not from the illegality of the proposed merger, but merely from possible postmerger behavior. Although the link between the illegal mergers and the alleged harms was insufficient to prove antitrust injury in either Brunswick or Cargill, both of those cases recognize that illegal pricing practices may **[**1899]** cause competitors "antitrust injury." [10]

[**46]** The Court accepts that, as alleged, the vertical price-fixing scheme by ARCO is per se illegal under *§ 1*. Nevertheless, it denies USA standing to challenge the arrangement because it is neither a consumer nor a dealer in the vertical arrangement, but only a competitor of ARCO: The "antitrust laws were enacted for 'the protection of competition, not competitors.'" Ante, at 338 (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))*. This proposition -- which is often used as a test of whether a violation of law occurred -- cannot be read to deny all remedial actions by competitors. **[*353]** When competitors are injured by illicit agreements among their rivals rather than by the free play of market forces, the antitrust laws protect competitors precisely for the purpose of

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[8] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)*. The analysis in *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)*, also supports this conclusion. There, the respondent alleged "antitrust injury" on alternative theories: first, that after the challenged merger petitioners' company would be able to lower its prices because it would be more efficient; and second, that it might attempt to drive respondent out of business by engaging in sustained predatory pricing. We rejected the first theory because independent decisions to reduce prices based on efficiencies are legal and precisely what the antitrust laws are intended to encourage. *Id., at 116-117*. We rejected the second theory because respondent "neither raised nor proved any claim of predatory pricing before the District Court." *Id., at 119*. However, in discussing the second theory, we recognized that predatory pricing "is a practice that harms both competitors and competition," and because it aims at "the elimination of competition . . . . is thus a practice 'inimical to the purposes of [the antitrust] laws,' *Brunswick, 429 U.S., at 488*, and one capable of inflicting antitrust injury." *Id., at 117-118* (footnote omitted). Again, a competitor suffers the same "antitrust injury" from an illegal conspiracy setting prices designed to eliminate it as it would suffer from a single firm setting predatory prices.

[9] See also Blair & Harrison, Rethinking Antitrust Injury, *42 Vand. L. Rev. 1539, 1561-1565 (1989)* (unsuccessful predatory efforts cause "antitrust injury" even though consumers have not suffered).

[10] I agree that not every loss that is causally related to an antitrust violation is "antitrust injury," ante, at 339, n. 8, but a scheme that prices the services of conspirators below those of competitors may cause injury for which the competitor may recover damages under § 4. In *Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)*, the presumed injury to competitors was strong enough to support even an indirect action by a patient of the competitor. Petitioners, a medical insurance company and an organization of psychiatrists, conspired in violation of *§ 1* to compensate patients for the services of psychiatrists, but not those of psychologists. We recognized that if patients had chosen to go to psychiatrists, the "antitrust injury would have been borne in the first instance by the [psychologist] competitors of the conspirators." *Id., at 483*. Instead, patient McCready went to a psychologist at her own expense. We held that "[a]lthough McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on the psychologists and the psychotherapy market." *Id., at 483-484*.

protecting competition. The Court nevertheless interprets the proposition as categorically excluding actions by a competitor who suffers when others charge "nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme." Ante, at 331. In the context of a *§ 1* violation, however, the distinctions both of the price level **[***356]** and of the vertical nature of the conspiracy **[****47]** are unfounded. Each of these two analytical errors merits discussion.

III

The Court limits its holding to cases in which the noncompetitive price is not "predatory," ante, at 331, 333, n. 3, 335, 339, 340, essentially assuming that any nonpredatory price set by an illegal conspiracy is lawful, see n. 1, supra. This is quite wrong. Unlike the prohibitions against monopolizing or underselling in violation of *§ 2* or *§ 13a*, the gravamen of the price-fixing conspiracy condemned by *§ 1* is unrelated to the level of the administered price at any particular point in time. A price fixed by a single seller acting independently may be unlawful because it is predatory, but the reasonableness of the price set by an illegal conspiracy is wholly irrelevant to whether the conspirators' work product is illegal.

If any proposition is firmly settled in the law of antitrust, it is the rule that the reasonableness of the particular price agreed upon by defendants does not constitute a defense to a price-fixing charge. [11] **[****50]** In *United States v. Trenton Potteries* ***[*354]*** *Co., 273 U.S. 392 (1927)*, the Court explained that "[t]he reasonable price fixed today may through economic **[****48]** and business changes become the unreasonable price of tomorrow," *id., at 397*, and cautioned that

> " **[**1900]** in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable -- a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." *Id., at 398*.

See also *United States v. Masonite Corp., 316 U.S. 265, 281-282 (1942)*. This reasoning applies with equal force to a rule that provides conspirators with a defense if their agreed upon prices are nonpredatory, but no defense if their prices fall below the elusive line that defines predatory pricing. [12] **[***357]** By assuming that the level of a price is relevant to the inquiry in a *§ 1* conspiracy case, the Court sets sail on the "sea of doubt" that Judge Taft condemned in his classic opinion in the Addyston Pipe & Steel case:

> "It is true that there are some cases in which the courts, mistaking, as we conceive, **[****49]** the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of **[*355]** doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not." *United States v. Addyston Pipe & Steel Co., 85 F. 271, 283-284 (CA6 1898)*.

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[11] See *United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927)*; see also *United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897)*; *United States v. Addyston Pipe & Steel Co., 85 F. 271, 291 (CA6 1898)* ("[T]he association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly").

[12] Like the determination of a "reasonable" price, determination of what is a "predatory price" is far from certain. The Court declines to define predatory pricing for the purpose of the § 4 inquiry it creates today, ante, at 341, n. 10. Predatory pricing by a conspiracy, rather than a single actor, may result from more than pricing below an appropriate measure of cost. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585, n. 8 (1986)*. See also *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F. 2d 1396, 1400 (CA7 1989)* (describing the many considerations in a single firm case that make it difficult to infer predatory conduct from the relation of price to cost).

IV

The Court is also careful to limit its holding to cases involving "vertical" price-fixing agreements. In a thinly veiled circumscription of the substantive reach of *§ 1*, the Court simply interprets "antitrust injury" under § 4 so that it excludes challenges by any competitor alleging a vertical conspiracy: "[A] vertical price-fixing scheme may facilitate predatory **[****51]** pricing . . . [b]ut because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement." Ante, at 339, n. 9. [13] This focus on the vertical character of the agreement is misleading because it incorrectly assumes that there is a sharp distinction between vertical and horizontal arrangements, and because it assumes that all vertical arrangements affect competition in the same way.

The characterization of ARCO's price-fixing arrangement as "vertical" does not limit its potential consequences to a neat category of injuries. A horizontal conspiracy among ARCO retailers administered by, for example, trade association executives instead of executives **[****52]** of their common supplier would generate exactly the same anticompetitive consequences. ARCO and its retail dealers all share an interest in excluding independents like USA from the market. The fact **[*356]** that each member of a group of price fixers may have made a separate, individual agreement with their common agent does not destroy the horizontal character of the agreement. We so held in the Masonite case:

> **[**1901]** "[T]here can be no doubt that this is a price-fixing combination which is illegal per se under the *Sherman Act. United States v. Trenton Potteries Co., 273 U.S. 392* [(1927)]; *Ethyl Gasoline Corp. v. United States, 309 U.S. 436* [(1940)]; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150* [(1940)]. That is true though the District Court found that, in negotiating and entering into the first agreements, each appellee, other than Masonite, acted independently **[***358]** of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the **[****53]** others, and had no discussions with any of the others. . . . Prices are fixed when they are agreed upon. *United States v. Socony-Vacuum Oil Co., supra, p. 222*. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action. Id." [14]

Differences between vertical and horizontal agreements may support an argument that the former are more reasonable, and therefore more likely to be upheld as lawful, than the latter. But such differences provide no support for the Court's contradictory reasoning that the direct and intended consequences of one form of conspiracy **[****54]** do not constitute "antitrust injury," while precisely the same consequences of the other form do.

[*357] Finally, the Court's treatment of vertical maximum-price-fixing arrangements necessarily assumes that all such conspiracies have the same competitive consequences. Ante, at 337, 339-340, 345. The Court is again quite wrong. [15] For example, a price agreement that is ancillary to an exclusive distributorship might protect consumers

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[13] Thus, a victim of a vertical maximum-price-fixing conspiracy that is successfully driving it from the market cannot bring an action under *§ 1* as long as the conspirators take care to fix their prices at "nonpredatory" levels.

[14] *United States v. Masonite Corp., 316 U.S. 265, 274-276 (1942)*. See also ante, at 336, n. 6 (suggesting a horizontal component of the maximum-price-fixing arrangement in Kiefer-Stewart); *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 744-748 (1988)* (STEVENS, J., dissenting).

[15] Indeed, the Court elsewhere acknowledges that "'[m]aximum and minimum price fixing may have different consequences in many situations.'" Ante, at 343, n. 13 (quoting *Albrecht, 390 U.S., at 152*). This is quite true. See, e.g., *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348 (1982)* (the per se rule against maximum prices guards against the elimination of competition, discouraging entry into the market, deterring experimentation, and allowing hidden price setting); *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51, n. 18 (1977)* (vertical price fixing reduces interbrand and intrabrand competition and may facilitate cartelizing). In Sylvania, the Court also recognized that "Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States." Ibid. See also *White Motor Co. v. United States, 372 U.S. 253, 268 (1963)*

from an attempt by the distributor to exploit its limited monopoly. However, a conclusion that such an agreement would not cause any antitrust injury lends no support to the Court's holding that an illegal price arrangement designed to drive a competitor out of business is immune from challenge by its intended victim. [16]

[**55]** **[*358]** **[***359]** **[**1902]** V

In a conspiracy case we should always ask ourselves why the defendants have elected to act in concert rather than independently. [17] Although in certain situations collective action may actually foster competition, see, e.g., *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984)*, we normally presume that the free market functions most effectively when individual entrepreneurs act independently. This is true with respect to both maximum and minimum pricing arrangements.

[**56]** Professor Sullivan recognized that producers fixing maximum prices "are not acting from undiluted altruism," but **[*359]** from self-interested goals such as prevention of new entries into the market. L. Sullivan, Law of Antitrust 211 (1977). He described the broad policy reasons to prohibit collusive pricing:

> "The policy which insists on individual decisions about price thus has at its source more than a preference for the independence of the small businessman (though that is surely there) and more than a preference for the lower prices which such a policy will usually yield to consumers (though that too is strongly present). Also at work is the theoretical conviction that the most general function of the competitive process, the allocation and reallocation of resources in a rational yet automatic manner, can be carried out only if independence by each trader is scrupulously required. Created out of the confluence of these parallel strivings, the policy has a breadth **[***360]** which makes it as forbidding to maximum price arrangements as to the more common ones which forestall price decreases." *Id., at 212*.

(BRENNAN, J., concurring) ("Resale price maintenence is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands").

[16] The Court grudgingly "assume[s], arguendo, that Albrecht correctly held that vertical, maximum price fixing is subject to the per se rule," ante, at 335, n. 5, but seeks to limit that holding to "potential effects on dealers and consumers, not . . . competitors," ante, at 336. However, in its zeal to narrow antitrust injury, the Court assumes that all vertical maximum-price-fixing arrangements mimic the circumstances present or discussed in Albrecht, in which there was monopoly power at both the production and exclusive distributorship stages. This approach is incorrect. For example, in Albrecht itself the Court identified possible injury to consumers as one basis for its per se rule, even though there was no evidence of actual consumer injury in that case. *390 U.S., at 152-153*. Furthermore, the Albrecht Court did not treat Albrecht himself as a "dealer" in the conspiracy, but essentially as a "competitor" targeted by the price-fixing conspiracy between Herald Company and the new dealers that were hired "to force petitioner to conform to the advertised retail price" by selling newspapers in his territory at lower, fixed prices. *Id., at 149-150*, and n. 6. Although Albrecht was a potential Herald dealer -- and thus not strictly a "dealer" or a "competitor" in the Court's use of those terms -- what is critical is that he had standing to bring a *§ 1* action as the victim of a vertical conspiracy to underprice his sales. Finally, the Court contradicts its own contrived model when it admits that vertical maximum-price-fixing schemes may facilitate predatory pricing for which a competitor could suffer "antitrust injury" in violation of *§ 2*. Ante, at 339, n. 9.

[17] Until today, the Court has clearly understood why *§ 1* fundamentally differs from other antitrust violations:

"The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-769 (1984)*.

In carving out this exception to the enforcement of *§ 1*, **[****57]** the Court has chosen to second-guess the wisdom of our per se rules and to embark on the questionable enterprise of parsing illegal conspiracies. This approach fails to heed the prudence urged in *United States v. Topco Associates, Inc., 405 U.S. 596 (1972)*:

> "The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against **[**1903]** promotion of competition in another sector is one important reason we have formulated per se rules.
>
> "In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition. **[*360]** E.g., *United States v. General Motors Corp., 384 U.S. 127, 146-147 (1966)*; *United States v. Masonite Corp., 316 U.S. 265 (1942)*; *Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941)*." *Id., at 609-610*.

The Court, in its haste to excuse illegal behavior in the name of efficiency, [18] has cast aside a century of understanding **[****58]** that our antitrust laws are designed to safeguard more than efficiency and consumer welfare, [19] and that private actions not only compensate the injured, but also deter wrongdoers. [20]

[**59]** **[*361]** **[***361]** As we explained in *United States v. American Tobacco Co., 221 U.S. 106, 183 (1911)*: "[I]t was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-trust Act." The conspiracy alleged in this complaint poses the kind of threat to individual liberty and the free market that the Sherman Act was enacted to prevent. In holding such a conspiracy immune from challenge by its intended victim, the Court is unfaithful to its history of **[**1904]** respect for this "charter of freedom." [21]

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[18] See, e.g., ante, at 337-338, n. 7 ("Rivals cannot be excluded in the long run by a nonpredatory maximum-price scheme unless they are relatively inefficient"); ante, at 344 ("[I]nsofar as the per se rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored"). Firms may properly go out of business because they are inefficient; market inefficiencies may also create imperfections leading to some firms' demise. The Court sanctions a new force -- the super-efficiency of an illegally combined group of firms who target their resources to drive an otherwise competitive firm out of business. Cf. Note, Below-Cost Sales and the Buying of Market Share, *42 Stan. L. Rev. 695, 741 (1990)* (discussing long-term displacement of "otherwise efficient producers" by pricing to buy out a market share in a geogaphic area).

[19] Chief Justice Hughes regarded the Sherman Act as a "charter of freedom," *Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933)*. Judge Learned Hand recognized Congress' desire to strengthen small business concerns and to "put an end to great aggregations of capital because of the helplessness of the individual before them," *United States v. Aluminum Co. of America, 148 F. 2d 416, 428-429 (CA2 1945)*, and we recently reaffirmed that the Sherman Act is "the Magna Carta of free enterprise," *United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)*. See also, e.g., Handler, Is Antitrust's Centennial a Time for Obsequies or for Renewed Faith in its National Policy? 10 Cardozo L. Rev. 1933 (1989); Hovenkamp, Distributive Justice and the Antitrust Laws, 51 Geo. Wash. L. Rev. 1 (1982); Flynn & Ponsoldt, Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes, *62 N.Y.U.L. Rev. 1125, 1137-1141 (1987)* (discussing the political, social, and moral -- as well as economic -- goals motivating Congress in enacting antitrust legislation).

[20] See, e.g., *Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964)*; see also Polden, Antitrust Standing and the Rule Against Resale Price Maintenance, 37 Clev. St. L. Rev. 179, 208-209, 220-221 (1989) (§ 4 furthers congressional objectives of deterrence and compensation by allowing private suits by injured competitors); Blair & Harrison, 42 Vand. L. Rev., at 1564-1565 (treating losses of firms that are targeted by unsuccessful predatory efforts as "antitrust injury" furthers private enforcement of antitrust laws and avoids "suboptimal levels of deterrence").

The Court of Appeals below observed that barring competitor standing leaves enforcement of the "vast majority of unlawful maximum resale price agreements" in the hands of "an unenthusiastic Department of Justice and, under certain circumstances, the dealers who are parties to the resale price maintenance agreement." *859 F. 2d 687, 694, n. 5 (CA9 1988)*.

[21] *Appalachian Coals, Inc., 288 U.S., at 359*.

I respectfully dissent.

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24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:175

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Index to Annotations, Dealers and Distributors; Gas and Oil; Price Fixing; Restraints of Trade and Monopolies; Vertical Arrangements

Annotation References:

Standing to sue, under 4 of the Clayton Act (*15 USCS 15*) and predecessor statute, to recover treble damages for antitrust violation-- Supreme Court cases. *73 L Ed 2d 1427*.

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 USCS 1 et seq*.). *64 L Ed 2d 997*.

Vertical restraints on sales territory or location as violative of 1 of Sherman Act (*15 USCS 1*) **[****61]** --post-GTE Sylvania cases. 92 ALR Fed 436.

"Target area" doctrine as basis for determining standing to sue under 4 of Clayton Act (*15 USCS 15*) allowing treble damages for violation of antitrust laws. 70 ALR Fed 637.

Vertical territorial and customer restraints as per se violations of 1 of the Sherman Act (*15 USCS 1*): Post-Schwinn cases. 30 ALR Fed 19.

Comment Note.--What constitutes "attempt to monopolize," within meaning of 2 of Sherman Act (*15 USCS 2*). 27 ALR Fed 762.

Lawline v. The American Bar Ass'n

United States District Court for the Northern District of Illinois, Eastern Division

May 24, 1990 ; May 25, 1990, Docketed

No. 88 C 7203

Reporter

738 F. Supp. 288 *; 1990 U.S. Dist. LEXIS 6338 **; 1990-1 Trade Cas. (CCH) P69,088

LAWLINE, et al., Plaintiffs, v. THE AMERICAN BAR ASSOCIATION, et al., Defendants

Disposition: **[**1]** DISMISSED.

Core Terms

provisions, antitrust liability, plaintiffs', nonlawyers, unauthorized practice of law, private association, Sherman Act, promulgation, partnership, lawyers, immune, disciplinary rule, state action, Antitrust, bar association, practice of law, defendants', reasons

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

In ruling on a motion for dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)* the court must presume all of the well-pleaded allegations of plaintiffs' complaint to be true. In addition, the court must view those allegations in the light most favorable to the plaintiffs. Dismissal is proper only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Monopolies & Monopolization, Attempts to Monopolize**

No violation of the Sherman Act can be made out where a restraint upon trade or monopolization is the result of valid governmental action as opposed to private action. Moreover, the Sherman Act does not prohibit persons from associating together in an attempt to persuade a governmental entity to take particular action with respect to a law that would produce a restraint or a monopoly.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN3[] **Regulated Practices, Price Fixing & Restraints of Trade**

Where an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no Noerr immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace. In contrast, where governmental imposition of a standard is the sole source of a trade restraint, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Scope, Exemptions**

The Sherman Act was not intended to restrain a state or its officers or agents from activities directed by a state legislature. Moreover, a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

The United States and its agencies or instrumentalities are not persons within the meaning of the Sherman Act.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Legal Ethics > Unauthorized Practice of Law

HN6[] **Equal Protection, Nature & Scope of Protection**

The distinction between lawyers and nonlawyers implicates neither a suspect classification nor a fundamental right.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Public Health & Welfare Law > Healthcare > General Overview

HN7[] **Equal Protection, Nature & Scope of Protection**

In applying the rational basis test, if this court can hypothesize plausible reasons for legislation that are within the legitimate goals of a government, nothing else is required to validate the governmental classification and it does not matter whether the reasons advanced actually motivated the legislative action.

Judges: James F. Holderman, United States District Judge.

Opinion by: HOLDERMAN

Opinion

[*290] MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, UNITED STATES DISTRICT JUDGE.

I. BACKGROUND FACTS

Lawline is a non-incorporated association of lawyers, paralegals and laypersons founded in 1978 by plaintiff Thomas O'Connell Holstein, an Illinois attorney. According to plaintiffs' voluminous complaint [1] **[**2]** the purposes of Lawline are fourfold:

> (1) to use law students, paralegals, and lawyers to answer the legal questions of members of the general public over the telephone without charge and to assist them in *pro se* representation and routine quasi-administrative proceedings;
> (2) to make referrals to public and private agencies providing free legal services;
> (3) to refer members of the public with limited financial resources to young lawyers who charge reduced fees; and
> (4) to create a "prototype" legal delivery system as an alternative to legal aid which would be subsidized by referral fees.

(para. 29. [2])

In accordance with these purposes, for ten years the lawyers, paralegals, and laypersons of Lawline have answered legal questions over the telephone, have assisted litigants acting *pro se*, and have made attorney referrals. (paras. 30-32.) Although Lawline concentrates its services in Illinois, Indiana and Wisconsin, it also provides similar but more limited services on a national level through a toll free telephone number, 1-800-553-KNOW. Over 500,000 persons have been served by Lawline, which advertises extensively throughout the United States. (para. 38.)

Three individual plaintiffs bring this action: Mr. Holstein, managing director and one of the supervising attorneys for Lawline, Le Nore Nelson, officer and head paralegal for Lawline, and Joyce Novak, a layperson who received legal information over the telephone from Lawline (in this instance from Ms. Nelson) and used this information to, *pro se*, successfully obtain a discharge of her debts in bankruptcy. (paras. 1, 3-4.)

Plaintiffs bring this suit against myriad **[**3]** defendants: the American Bar Association ("ABA"), the Illinois State Bar Association ("ISBA"), the Chicago Bar Association ("CBA"), the Justices of the Illinois Supreme Court in their

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[1] *Federal Rule of Civil Procedure 8* requires a complaint to contain a "short and plain" statement of the claim arranged in "simple, concise, and direct" averments. Plaintiffs have organized their complaint in over three hundred numbered paragraphs consuming more than one hundred pages. The complaint is often confusing, needlessly repetitious, and permeated with unnecessary evidentiary allegations. Thus, in addition to the deficiencies discussed in detail in this opinion, *Rule 8* provides an additional basis for dismissing plaintiffs' complaint. *See* *Mutuelle Generale Francaise Vie v. Life Assurance Co., 688 F. Supp. 386, 391 (N.D. Ill. 1988)*.

[2] All paragraph references are to plaintiffs' first amended complaint.

official capacities and the members of the Illinois Supreme Court Committee on Professional Responsibility (collectively "Justices"), the members of the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court ("ARDC"), members of the Executive Committee of this court in their official capacities ("Executive Committee"), and M. Scott Michel, the United States Trustee for the Northern District of Illinois and his assistant Clifford L. Meacham (collectively "U.S. Trustee"). (paras. 6-15.)

Plaintiffs challenge the defendants' promulgation, adoption, and enforcement of certain portions of the ABA Model Code of Professional Responsibility ("ABA Model Code"). The ABA Model Code and ABA Model Rules prohibit lawyers from forming **[*291]** partnerships with nonlawyers if any activities of the partnership consist of the practice of law. Plaintiffs claim that this prohibition violates the Sherman Antitrust Act and plaintiffs' constitutional rights.

At the risk of overusing acronyms, the posture of **[**4]** this case is as follows: defendants ABA, ISBA, CBA, Justices, ARDC, and U.S. Trustee all have moved to dismiss plaintiffs' complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. The Executive Committee is unrepresented by counsel and has made no motions in this case. For the following reasons the defendants' motions to dismiss must be granted.

II. DISCUSSION

HN1[] In ruling on a motion for dismissal pursuant to *Federal Rule of Civil Procedure 12(b)(6)* the court must presume all of the well-pleaded allegations of plaintiffs' complaint to be true. *Miree v. DeKalb County, Georgia, 433 U.S. 25, 27 n. 2, 97 S. Ct. 2490, 2492 n. 2, 53 L. Ed. 2d 557 (1977)*. In addition, the court must view those allegations in the light most favorable to the plaintiffs. *Gomez v. Illinois State Board of Education, 811 F.2d 1030, 1039 (7th Cir. 1987)*. Dismissal is proper only if it appears "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)*.

A. *ABA Model Code*

Plaintiffs challenge the promulgation, adoption, and enforcement of certain provisions of the ABA Model Code.

[5]** In 1978 the Illinois Supreme Court created the Committee on Professional Responsibility to prepare a draft Code of Professional Responsibility for attorneys in Illinois. Using the ABA Model Code as a blueprint from which to work, the committee prepared a draft Code of Professional Responsibility and transmitted its proposal to the court in December of 1978.

After considering the comments of various individuals and bar associations, on June 3, 1980 the court officially adopted the Illinois Code of Professional Responsibility. (para. 73; Committee Comments, Preface, Illinois Code of Professional Responsibility, *Ill.Ann.Stat*. ch. 110A, Article VIII [Smith-Hurd 1985].) The three provisions of the Illinois Code of Professional Responsibility at issue here are identical to their ABA Model Code counterparts. *Compare* Illinois Code of Professional Responsibility Canon 3, Rule 3-101(A) and Rule 3-103 to ABA Model Code Canon 3, DR 3-101(A) and DR 3-103.

In 1982 the District Court for the Northern District of Illinois also embraced the ABA Model Code. General Rule 3.54(B) of this court states that any attorney authorized to practice before this court who fails to abide by the provisions **[**6]** of the ABA Model Code "may be disbarred from further practice before this Court." The Executive Committee has exclusive responsibility for enforcement of General Rule 3.54. General Rule 3.51.

Plaintiffs challenge the promulgation, adoption, and enforcement of certain portions of the ABA Model Code. They challenge three provisions in particular: (1) ABA Model Code Canon 3, which states that "[a] lawyer should assist in preventing the unauthorized practice of law"; (2) Disciplinary Rule 3-101(A), which states that "[a] lawyer shall not aid a nonlawyer in the unauthorized practice of law"; and (3) Disciplinary Rule 3-103 which states that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."

(para. 19.) Plaintiffs claim that these three provisions violate federal ***antitrust law*** and certain constitutional provisions. [3]

[7]** **[*292]** B. *Count I: Sherman Antitrust Act*

Count I of plaintiffs' complaint alleges that defendants' promulgation, adoption, and enforcement of the ABA Model Code provisions at issue violate the Sherman Act, *15 U.S.C. Sections 1* and *2*. For analytic convenience the defendants in this case can be divided into two groups: the private associations (ABA, ISBA, and CBA) and the governmental actors (the Justices, the Executive Committee, and the U.S. Trustee).

1. The Private Associations

It is undisputed that if plaintiffs are restrained from practicing law, it is because of the Illinois Supreme Court's enactment of the Illinois Code of Professional Responsibility and this court's adoption of General Rule 3.54. However, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* the Supreme Court held that ***HN2***[] no violation of the Sherman Act can be made out where a restraint upon trade or monopolization is the result of valid governmental action as opposed to private action. *365 U.S. at 136, 81 S. Ct. at 529*. Moreover, the Sherman Act does not prohibit persons from associating together in an attempt to persuade a governmental entity to take particular **[**8]** action with respect to a law that would produce a restraint or a monopoly. *Id*.

Citing *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* plaintiffs seek to escape the effect of the *Noerr* doctrine by arguing that a private association's promulgation and adoption of particular standards do not qualify for *Noerr* immunity simply because those standards are routinely adopted by state and local governments. However, as the CBA ably notes, this case is unlike *Allied Tube*. In *Allied Tube* the anticompetitive effect at issue was caused solely by a private association's action -- in that case exclusion of plaintiff's product from the association's code. No damages were imposed for the incorporation of that code by any government. *108 S. Ct. at 1937*. The Court held:

> ***HN3***[] At least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has *of its own force* in the marketplace.

108 S. Ct. at 1942 (emphasis **[**9]** added).

In contrast, where governmental imposition of a standard is the sole source of a trade restraint, "those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Allied Tube, 108 S. Ct. at 1936*. Thus, even if the defendant private associations in this case participated in the process that lead

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[3] Plaintiffs also challenge "Rule 3-101(a) and 3-103(a) of the newly proposed Illinois Code." (*See, e.g.*, para. 19.)

On February 8, 1990 the Illinois Supreme Court repealed the Code of Professional Responsibility and replaced it with the Illinois Rules of Professional Conduct ("New Rules"). *See* Order entered February 8, 1990, reported in the Chicago Daily Law Bulletin, Feb. 14, 1990, at 4-6. The New Rules take effect August 1, 1990.

The Justices argue that a challenge to the New Rules is not yet ripe. However, the court need not address the ripeness issue: the substantial similarity between the New Rules and the challenged language of the ABA Model Code compels the same result in this case. *See, e.g.*, New Rule 5.4(b) ("A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.") and New Rule 5.5 ("A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.").

to adoption of provisions of the ABA Model Code, they are immune from antitrust liability because plaintiffs have plead no facts demonstrating that the Code has any significant effect beyond that attributable to its adoption and enforcement by the Illinois Supreme Court and this court. [4]

[10]** In addition to their participation in the process leading to the adoption of the ABA Model Rules by the Illinois Supreme Court and Executive Committee, plaintiffs allege that certain ethics opinions rendered by the private associations violate the Sherman Act. (paras. 178, 220, 249.) However, any antitrust claims based on those ethics opinions are barred by the Clayton Act's **[*293]** four-year statute of limitations. *15 U.S.C. § 15b*.

The Illinois Supreme Court and this court adopted the relevant provisions of the ABA Model Code in 1980 and 1982, respectively. [5] Moreover, these two courts exercise exclusive power to regulate and discipline attorney conduct. *See, e.g., People ex. rel. Brazen v. Finley, 119 Ill. 2d 485, 519 N.E.2d 898, 901-02, 116 Ill. Dec. 683 (1988)*; General Rule 3.51. Therefore, any ethics opinions issued by the private associations could not have had any cognizable anticompetitive effects after 1982. *Cf. In re Airport Car Rental Antitrust Litigation, 521 F. Supp. 568, 574 (N.D. Cal. 1981)*, *aff'd*, *693 F.2d 84 (9th Cir. 1982)*. Because plaintiffs filed their original complaint six years after there could have been any significant anticompetitive effect from the private **[**11]** associations' ethics opinions, plaintiffs' claims based on these opinions are time-barred.

Therefore, the *Noerr* doctrine and the statute of limitations for federal antitrust cases immunize defendants ABA, ISBA, and CBA from the antitrust liability alleged in plaintiffs' complaint.

2. The Governmental Actors

The Justices, the Executive Committee, the ARDC, and the U.S. Trustee also are immunized from antitrust liability, but for different reasons.

The Justices and the ARDC are immune from antitrust liability under the state-action doctrine of *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. In *Parker v. Brown* the Supreme Court held that ***HN4***[] the Sherman Act was not intended to restrain a state or its officers or agents from activities directed by a state legislature. *317 U.S. at 350-51, 63 S. Ct. at 313*. Moreover, a state supreme **[**12]** court, when acting in a legislative capacity, occupies the same position as that of a state legislature. *Bates v. State Bar of Arizona, 433 U.S. 350, 360, 97 S. Ct. 2691, 2697, 53 L. Ed. 2d 810 (1977)*. Therefore, the Illinois Supreme Court's adoption and enforcement of the challenged provisions of the ABA Model Code are exempt from Sherman Act liability as state action. *Hoover v. Ronwin, 466 U.S. 558, 568, 104 S. Ct. 1989, 1995, 80 L. Ed. 2d 590 (1984)*.

Moreover, the members of the ARDC serve merely as agents of the Illinois Supreme Court. *See Ill. Ann. Stat*. ch. 110A, paras. 751-753 (Smith-Hurd Supp 1989.); *In re Mitan, 75 Ill. 2d 118, 387 N.E.2d 278, 280, 25 Ill. Dec. 622 (1979)* ("The [ARDC] and its various officers, as well as the Inquiry Board, the hearing panel and the Review Board, serve only as agents of this court in administering the disciplinary functions that have been delegated to them."). Therefore, the members of the ARDC, too, are exempt from antitrust liability. *Bates, 433 U.S. at 361, 97 S. Ct. at 2691*; *Hoover, 466 U.S. at 572-73, 104 S. Ct. at 1997*.

Additionally, the Executive Committee and U.S. Trustee also are insulated from antitrust liability. ***HN5***[] The United States and its agencies or instrumentalities **[**13]** are not "person[s]" within the meaning of the Sherman Act. *Rex Systems, Inc. v. Holiday, 814 F.2d 994, 997 (4th Cir. 1987)*; *see also North Jersey Secretarial School, Inc. v. McKiernan, 713 F. Supp. 577, 584 (S.D.N.Y. 1989)* ("Antitrust lawsuits brought against United States agencies and their officials cannot be maintained."). This court's Executive Committee consists of five federal district court

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[4] Although plaintiffs argue in their memorandum in opposition that the associations' adoption of the ABA Model Code and ABA Model Rules restrain competition "of their own force," they fail to allege any anticompetitive effects directly attributable to the associations' involvement with these codes and *not* the Illinois Supreme Court and Executive Committee's adoption thereof.

[5] According to the Office of the Clerk for the United States District Court for the Northern District of Illinois the present form of Local Rule 3.54(b) was adopted October 4, 1982.

judges charged with the responsibility of supervising and disciplining attorneys admitted to practice before this court. (para. 15; General Rule 3.51-3.56; *Brown v. McGarr, 774 F.2d 777, 782 (7th Cir. 1985)*.) Plaintiffs sue the members of the Executive Committee only in their official capacity. (para. 15.) Therefore, the actions of the members of the Executive Committee in adopting and enforcing the provisions of the ABA Model Code in question are exempt from antitrust liability. *Rex Systems, 814 F.2d at 997*.

Plaintiffs have alleged that the U.S. Trustee violated the Sherman Act by moving in the bankruptcy court for an order both requiring Lawline to disgorge a fee **[*294]** received for the unauthorized practice of law and enjoining Lawline from further bankruptcy practice. (para. **[**14]** 201 and Exhibit G attached to complaint.) Plaintiffs also complain that the U.S. Trustee reported Lawline's alleged unauthorized practice of law to the ARDC. (paras. 190-94).

The U.S. Trustee and his assistant, however, are federal executive officers appointed by the United States Attorney General. *28 U.S.C. §§ 581-82*. Among the official duties of the U.S. Trustee is the monitoring of attorney fee applications in bankruptcy cases. *28 U.S.C. § 586(a)(3)(A)*. The U.S. Trustee may raise and appear and be heard on any issue relating to his responsibilities in a bankruptcy case. Bankruptcy Rule X-1009. Challenging unwarranted fee applications is a part of the U.S. Trustee's duties. *In re Pierce, 809 F.2d 1356, 1359 n. 8 (8th Cir. 1987)*. Therefore, as a federal officer, the U.S. Trustee's alleged actions before the bankruptcy court are exempt from federal antitrust liability. *Rex Systems, 814 F.2d at 997*.

Moreover, while the U.S. Trustee's reporting of the unauthorized practice of law to the ARDC is not specifically provided for by statute, plaintiffs have presented (and this court has found) no authority for the proposition that making such a report exceeds the U.S. Trustee's official **[**15]** duties. On the contrary, the Supreme Court had stated that such free and open cooperation between federal and state officers is to be "commended and encouraged." *Elkins v. United States, 364 U.S. 206, 221, 80 S. Ct. 1437, 1446, 4 L. Ed. 2d 1669 (1960)*.

Thus, plaintiffs have alleged no facts supporting allegations that the U.S. Trustee performed anything other than official duties and acted in anything other than an official capacity in dealing with Lawline. Therefore, as federal officials the U.S. Trustee and his assistant also are not subject to federal antitrust liability in this case. *Rex Systems, 814 F.2d at 997*.

Because all of the defendants in this case are immune from federal antitrust liability, Count I must be dismissed.

C. *Count II: Section 1983 Claim*

Plaintiffs bring Count II of their complaint under *42 U.S.C. Section 1983* ("*Section 1983*"). Plaintiffs allege that defendants' promulgation, adoption, and enforcement of the portions of the ABA Model Code at issue violated the *First Amendment*, the Due Process Clause, and the *Equal Protection Clause*.

1. State Action

It is axiomatic that state action is a necessary element of *Section 1983* and *Fourteenth Amendment* claims. *National **[**16]** Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454, 461, 102 L. Ed. 2d 469 (1988)*. However, as the Court stated in *Tarkanian*:

> In *Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*, we established that the State Supreme Court's enforcement of disciplinary rules transgressed by members of its own bar was state action. Those rules had been adopted *in toto* from the American Bar Association Code of Professional Responsibility. *Id., at 360 n. 12, 97 S. Ct., at 2697 n. 12*. *It does not follow, however, that the ABA's formulation of those disciplinary rules was state action*. The State Supreme Court retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own. See *id., at 362, 97 S. Ct., at 2698*.

109 S. Ct. at 463 (emphasis added; footnote omitted). Thus, both *Bates* and *Tarkanian* definitively resolve that the alleged action by the private associations of promulgating a disciplinary code later adopted and enforced by the Illinois Supreme Court and this court is not state action. [6] Therefore, Count II must be dismissed against the **[*295]** ABA, ISBA, and CBA for failure to state a claim **[**17]** upon which relief can be granted. [7]

2. Constitutional Provisions

Because Count II fails to state a claim against the private associations, only the Justices, the Executive Committee, the ARDC, and the U.S. Trustee remain. Plaintiffs allege that by adopting and enforcing the portions of the ABA Model Code at issue these defendants violated the First Amendment, the Due Process Clause, and the Equal Protection Clause. It is true that these state actors enjoy judicial and prosecutorial immunity from liability for money damages in this case. *See, e.g.,* Galahad v. Weinshienk, 555 F. Supp. 1201, 1204 (D. Colo. 1983); Supreme Court of Virginia v. Consumers Union, Etc., 446 U.S. 719, 731-737, 100 S. Ct. 1967, 1974-1977, 64 L. Ed. 2d 641 (1980). However, because plaintiffs also seek a declaration that the provisions of the ABA Model Code at issue are unconstitutional, this court's determination of the constitutional challenge will most efficiently resolve defendants' motions to dismiss.

a. Equal Protection and Due Process

The Justices aptly note, as they have throughout their well-reasoned memoranda, that to the extent plaintiffs have raised **[**19]** equal protection and due process challenges to the ABA Model Rules in question the standard of review is the same and thus both claims should be treated together. Sutker v. Illinois State Dental Society, 808 F.2d 632, n. 1 (7th Cir. 1986).

As noted, Disciplinary Rules 3-101(A) and 3-103 of the ABA Model Code prevent lawyers from making certain arrangements with nonlawyers involving the unauthorized practice of law. However, ***HN6***[] the distinction between lawyers and nonlawyers implicates neither a suspect classification nor a fundamental right. *Cf.* Illinois Health Care Assoc. v. Dept. of Public Health, 879 F.2d 286, 288 (7th Cir. 1989); Sutker, 808 F.2d at 634. Therefore, the lawyer/non-lawyer classification created by the ABA Model Code provisions at issue are presumed constitutional and need only be "rationally related to a legitimate state interest" to survive equal protection or due process analysis. Sutker, 808 F.2d at 634.

HN7[] In applying the rational basis test, if this court "can hypothesize plausible reasons for legislation that are within the legitimate goals of a government, nothing else is required to validate the governmental classification and it does not matter **[**20]** whether the reasons advanced actually motivated the legislative action." Illinois Health Care Assoc., 879 F.2d at 289, *quoting* Evans v. City of Chicago, 873 F.2d 1007, 1016 (7th Cir. 1989).

The Illinois Supreme Court has stated that the purpose of the attorney disciplinary process is "to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach." In re

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[6] *See also,* Consumers Union of the United States, Inc. v. American Bar Association, 427 F. Supp. 506, 516 (E.D. Va. 1976) (educational programs, counselling, and the drafting of model provisions to influence a state bar without more do not constitute state action), *vacated on other grounds in light of* ***Bates, Virginia State Bar v. Consumers Union of the United States, Inc., 433 U.S. 917, 97 S. Ct. 2993, 53 L. Ed. 2d 1104 (1977)***.

[7] Plaintiffs' allegations that the private associations somehow conspired with the state actors do not save Count III. In order to sustain a Section 1983 conspiracy claim there must be some evidence of some concerted effort or plan between the private associations and the state actors to deny plaintiffs their constitutional rights. Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1352 (7th Cir. 1985); Mirshak v. Joyce, 652 F. Supp. 359, 369 (N.D. Ill. 1987).

Plaintiffs have alleged no such facts. On the contrary, plaintiffs incredibly state in their memorandum in response to the motions to dismiss that a more definitive statement of conspiracy facts might subject them to sanctions under Federal Rule of Civil Procedure 11. (Memorandum at 36.) However, plaintiffs cannot file a complaint merely to gain access to discovery with the hopes of later finding facts to support their otherwise insufficient allegations. Count II must be dismissed. **[**18]**

Schelly, 94 Ill. 2d 234, 446 N.E.2d 236, 239, 68 Ill. Dec. 502 (1983). Disciplinary rules preventing lawyers from aiding nonlawyers in the unauthorized practice of law and from forming partnerships with nonlawyers if any of the activities of the partnership consist of the practice of law are rationally related to those goals. [8] **[**21]** Therefore, plaintiffs' **[*296]** equal protection and due process claims must be dismissed. [9]

b. First Amendment

Plaintiffs' *First Amendment* claims also must be dismissed. In *Turner v. American Bar Association, 407 F. Supp. 451 (N.D. Tex. 1975)* plaintiffs, citing much of the same case law as the plaintiffs in this case, claimed that they had, *inter alia*, a *First Amendment* right to have unlicensed lay counsel assist them in court proceedings. The court disagreed. Said the court:

> [Freedom of association cases such as *NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)]* did not involve the question of securing redress of grievances in Court **[**22]** by unlicensed counsel. Rather, they held that collective activity undertaken to obtain meaningful access to the Courts is a fundamental right within the protection of the *first Amendment*, and that a State cannot, under its unauthorized practice of law statutes or solicitation of legal business statutes, prohibit such activity. . . . This Court [is] holding that the Constitution of the United States, in particular the *First* and *Sixth Amendments*, does not grant to the Plaintiffs the right to have an unlicensed layman represent them in Court proceedings. The corollary of this holding is that unlicensed laymen cannot under the Constitution demand the right to represent other litigants.

407 F. Supp. at 478. Thus, the court in *Turner* rejected the plaintiffs' claims that allowing only licensed counsel to represent others in court violated the *First Amendment* guarantees of either free association or free speech. *Id. at 479*; *see also Lindstrom v. State of Illinois, 632 F. Supp. 1535, 1538-39 (N.D. Ill. 1986)*, *dismissed without opinion*, *828 F.2d 21 (7th Cir. 1987)*.

For the same reasons, this court holds that the ABA Model Code prohibitions on aiding nonlawyers in the unauthorized **[**23]** practice of law and on forming partnerships with nonlawyers if any of the activities of the partnership consist of the practice of law do not violate any *First Amendment* guarantees. Therefore, Count II as well must be dismissed for failure to state a claim upon which relief can be granted.

D. *Count III*

Finally, in Count III plaintiffs seek relief under the Declaratory Judgment Act, *28 U.S.C. Sections 2201-2202*. (para. 18.) However, the Declaratory Judgment Act is strictly remedial in nature and does not provide a separate basis for subject matter jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72, 70 S. Ct. 876, 879, 94 L. Ed. 1194 (1950)*. Therefore, dismissal of Counts I and II of plaintiffs' complaint compels dismissal of Count III as well.

III. CONCLUSION

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[8] *See, e.g., ABA Model Code of Professional Responsibility* EC 3-1 (1987) ("The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession."); *Gassman v. State Bar, 18 Cal. 3d 125, 553 P.2d 1147, 1151, 132 Cal. Rptr. 675 (1976)* ("prohibited fee-splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit, rather than the client's fate . . . .").

[9] In their complaint plaintiffs also include language alleging that the challenged provisions of the ABA Model Code are unconstitutionally vague. Apparently plaintiffs object to the phrase "practice of law." However, it has long been settled that this language is sufficiently clear to withstand constitutional scrutiny. *Hackin v. Arizona, 102 Ariz. 218, 427 P.2d 910, 912-13 (1967)*, *appeal dismissed*, *389 U.S. 143, 19 L. Ed. 2d 347, 88 S. Ct. 325* (for want of a federal question); *see also Wright v. Lane County Dist. Court, 647 F.2d 940, 941 (9th Cir. 1981)*.

For the reasons stated in this memorandum opinion and order plaintiffs' complaint is DISMISSED under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted. This case is dismissed in its entirety.

Soap Opera Now, Inc. v. Network Pub. Corp.

United States District Court for the Southern District of New York

May 30, 1990

No. 88 Civ. 984 (RJW)

Reporter

737 F. Supp. 1338 *; 1990 U.S. Dist. LEXIS 6469 **; 1990-1 Trade Cas. (CCH) P69,041

SOAP OPERA NOW, INC., Plaintiff, v. NETWORK PUBLISHING CORPORATION d/b/a SOAP OPERA DIGEST, Defendant

Core Terms

soap opera, monopolization, advertising, relevant market, competitor, newsletter, summary judgment, monopoly power, subscribers, facilities, monopolist, viewers, leveraging, magazine, monopoly, products, attempt to monopolize, antitrust, consists, compete, parties, consumers, marketing, publish, cases, soap, antitrust claim, interchangeable, undisputed, pages

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

The standards for granting summary judgment are well established. A court may grant this extraordinary remedy only when it is clear both that no genuine issue of material fact remains to be resolved at trial and that the movant is entitled to judgment as a matter of law. In deciding the motion, the Court is not to resolve disputed issues of fact, but rather, while resolving ambiguities against the moving party, to assess whether material issues remain for the trier of fact. Only where the entire record would inevitably lead a rational trier of fact to find for the moving party is summary judgment warranted.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] **Summary Judgment, Opposing Materials**

While the party seeking summary judgment bears the initial burden of demonstrating the lack of material factual issues in dispute, the non-movant, who must sustain the ultimate burden of proof, must demonstrate in opposing the summary judgment motion that there is some evidence which would create a genuine issue of material fact. Conclusory allegations will not suffice to create such a genuine issue. There must be more than a scintilla of evidence, and more than some metaphysical doubt as to the material facts.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN3[] **Actual Monopolization, Monopoly Power**

In the context of a claim of illegal monopolization, a refusal to deal may constitute a form of willful acquisition or maintenance of monopoly power, satisfying the second element of a monopolization claim. A refusal to deal with a competitor may also comprise an element of a claim of attempted monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN4[] **Scope, Monopolization Offenses**

The offense of monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, consists of two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN5[] **Monopolies & Monopolization, Attempts to Monopolize**

To make out a successful claim of attempted monopolization, a plaintiff must demonstrate: (1) anti-competitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN6[] **Monopolies & Monopolization, Actual Monopolization**

The "essential facilities" doctrine is often treated as a distinct claim under *§ 2* of the Sherman Act, *15 U.S.C.S. §2*. However, the United States District Court for the Southern District of New York finds it analytically more helpful to conceive of the essential facilities doctrine as constituting not a distinct claim under *§ 2*, but instead either as a form of, or evidence of, a firm's willful acquisition or maintenance of monopoly power in satisfaction of the second element of a monopolization claim, or in certain situations as an element of an attempt claim.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN7[] **Monopolies & Monopolization, Attempts to Monopolize**

A refusal to deal may amount to an attempt to monopolize when a firm with monopoly power in one market attempts through the use of that power to monopolize a related or downstream market. To withstand summary judgment on a claim of attempt to monopolize a second market by leveraging a monopoly position in a first market, a plaintiff must demonstrate that the defendant: (1) intended to monopolize the second market; (2) engaged in conduct designed to carry out that intent; and (3) had a dangerous probability of success.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN8[] **Regulated Practices, Monopolies & Monopolization**

The relevant market in a *§2*, *15 U.S.C.S. § 2*, consists of the geographic market -- the location in which a potential buyer may rationally seek specific goods or services -- and the product market, the boundaries of which are set by the reasonable interchangeability of use or the cross-elasticity of demand.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9[] **Relevant Market, Product Market Definition**

For antitrust purposes, a product market consists of a class of products -- either goods or services -- which are reasonably interchangeable with one another such that producers of the products have the ability to take significant amounts of business away from each other. Although it is proper to identify the ultimate consumer of the product in order to make a determination as to whether two products are reasonable substitutes for one another, and therefore are in the same product market, a definition of the market itself which consists of consumers or potential consumers may, obfuscate the issues of monopoly power and reasonable interchangeability.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN10[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

In order to make out a claim under the essential facilities doctrine, a plaintiff must demonstrate a competitor's inability practically or reasonably to duplicate the essential facility, and the denial of the use of the facility to a competitor.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws protect competition, not competitors. Simply because a particular plaintiff with peculiar advertising needs decides that it cannot remain profitable without advertising in a certain publication, that publication does not automatically rise to the level of an "essential facility" in the general market unless some substantial number of market entrants or competitors would also be foreclosed.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

Even if a defendant is a monopolist in its product market, unless plaintiff and defendant are in competition with one another, defendant has no duty to deal with plaintiff.

Counsel: **[**1]** Gilbride, Tusa, Last & Spellane, New York, New York, Eric H. Seltzer, Esq., of counsel, Attorneys for Plaintiff.

Battle Fowler, New York, New York, W. Bruce Johnson, Esq., Lori B. Katz, Esq., of counsel, Attorneys for Defendant.

Judges: Robert J. Ward, United States District Judge.

Opinion by: WARD

Opinion

[*1339] ROBERT J. WARD, UNITED STATES DISTRICT JUDGE.

In a Memorandum Decision filed May 24, 1988, this Court granted the motion of plaintiff Soap Opera Now, Inc. ("SONOW") for a preliminary injunction requiring defendant Soap Opera Digest and its publisher Network Publishing Corporation (collectively, the "Digest") to include plaintiff's advertisements in Soap Opera Digest. The parties subsequently completed discovery, and defendant now moves for summary judgment pursuant to *Rule 56, Fed. R. Civ. P.* For the reasons that follow, the Court vacates the preliminary injunction, grants defendant's motion for summary judgment with respect to plaintiff's antitrust claims, and dismisses the pendent state claim for lack of subject matter jurisdiction.

BACKGROUND

The history of the instant litigation is both varied and contentious. Soap Opera Now is a six-page, black and white weekly newsletter, published out of the home of one of plaintiff's principals, which **[**2]** focuses on daytime soap opera news, gossip and coming attractions. Its readership has ebbed and flowed from month to month since its inception in 1983, ranging during 1987, the year preceding the commencement of the instant action, from 5,209 to 6,728. Soap Opera Digest is a well-known bi-weekly, 150-page color soap opera magazine with 350,000 subscribers and a readership of 1,050,000.

From 1983 until November 1987, plaintiff advertised its newsletter in the Digest. During those years, the relationship between the parties was somewhat stormy, with the Digest from time to time threatening to terminate SONOW's ads and imposing various conditions on their continued publication. In November of 1987, the Digest cancelled plaintiff's advertisements, and thereafter, on February 16, 1988, plaintiff moved by order to show cause for a preliminary injunction requiring the Digest to publish SONOW's ads. In its complaint, SONOW alleged that the Digest was guilty of an illegal attempt to monopolize trade in violation of *§ 2* of the Sherman Antitrust Act of 1890, as amended, *15 U.S.C. § 2 (1982)*, and damages resulting therefrom. [1] In addition, the complaint alleged that the Digest, by its refusal **[**3]** to publish SONOW's ads, had breached an alleged contract between the parties.

On February 19, 1988, the Court heard oral argument on plaintiff's motion for a preliminary injunction. Finding that plaintiff **[*1340]** had adequately demonstrated irreparable injury, a balance of hardships tipping decidedly in its favor, and sufficiently serious questions going to the merits to make them a fair ground for litigation, the Court granted plaintiff's motion and directed defendant to permit SONOW to advertise in the Digest during the pendency of the action at the same rates that it charged for ads by similar publications. [2]

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[1] SONOW later amended its complaint to add a claim of illegal monopolization.

[2] This directive alone produced a flood of letters between the parties and to the Court, with the parties unable to agree on appropriate price and payment terms for the SONOW ads. The parties ultimately entered into an escrow agreement, pursuant to which SONOW agreed to pay into an escrow account the differential between the normal rate card price and the discount price to which SONOW claimed it was entitled, pending the final outcome of the case. Subsequent allegations of late payments,

[4]** According to plaintiff, the Digest is the dominant entity in the relevant market, which it defines as "the market for the mass dissemination of soap opera news," consisting of "subscribers and potential subscribers of soap opera publications." Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, filed December 8, 1988, at 9 ("Plaintiff's Opposition Brief"). Plaintiff contends that the Digest's share in this market is approximately 80 percent. Defendant, on the other hand, asserts that the relevant market should be more broadly defined to include general interest publications that regularly feature soap opera news, such as *TV Guide*. Thus, it claims, the market share of the Digest is not nearly so great as alleged by plaintiff. Further, defendant argues that plaintiff has failed to present any evidence to support its claim that it and the Digest are in the same relevant market.

Defendant has submitted evidence suggesting that no barriers exist to entry into the relevant market, even as narrowly defined by plaintiff. It is undisputed that the actual product -- soap opera news -- is readily available to potential publishers from the networks. In **[**5]** addition, in order to start a newsletter one needs only "good writers, an organization to produce and assemble it and mail it promptly and access to a place to promote it." Appendix to Defendant's Motion for Summary Judgment at 216 ("Def. App.") (Deposition of Kenneth Stein). In fact, SONOW was begun with a very small initial capital investment. It is further undisputed that several soap opera publications, in addition to the Digest, have either existed for several years or have recently been started. These publications do not advertise in the Digest. Plaintiff, however, asserts that the competing publications are either very small, very unstable, or infrequently published in comparison to the Digest.

The gravamen of plaintiff's claim is that it will be unable to compete successfully, or indeed to survive, in the relevant market unless it is able to advertise SONOW in the pages of the Digest. Thus, plaintiff argues that the Digest's advertising pages constitute an "essential facility" in the relevant market. According to plaintiff, past attempts to promote its product in other media have been unsuccessful. Although SONOW concededly places ads in some of the smaller and newer soap opera **[**6]** magazines, it claims that these are not sufficient to maintain it as a viable entity for any length of time, although it admits that ads placed in a recent market entrant, Soap Opera Update, have been profitable. SONOW has never done demographic or market studies in an attempt to discover alternate methods of reaching its target audience, which it defines as soap opera "fanatics." It is plaintiff's contention that all of these "fanatics" read the Digest, and indeed that all of its readers are also Digest readers.

Defendant insists that, even if plaintiff were able to demonstrate that the Digest has monopoly power in the relevant market, it is not an essential facility both because other competitors in the market are able to survive without advertising in the Digest, and because there exist alternative methods by which SONOW can reach its audience -- namely, those methods used by **[*1341]** the Digest itself, as well as other promotional techniques available to newsletters, including direct mailings and flyers. The Digest intimates that SONOW's out-of-hand rejection of various alternate marketing vehicles is insufficient to support the instant claims, and demonstrates only that SONOW wishes to **[**7]** take advantage of the Digest's aggressive marketing techniques by reaching its readers without investing the resources that other competitors in the market must expend.

Plaintiff's antitrust claims ultimately rest on its contention that a black and white newsletter such as SONOW, which contains no advertising pages and has a relatively tiny circulation, cannot survive as a viable entity using the same types of promotion and marketing techniques as the Digest, a "gorgeous" four-color magazine. According to plaintiff, the only way that a small newsletter such as Soap Opera Now can remain a viable competitor in the market for the mass dissemination of soap opera news is to reach its target consumers by advertising in the publication which plaintiff insists they all read -- the Digest.

DISCUSSION

I. *Summary Judgment*.

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improper placement of the ads, and disputes over the propriety of the escrow agreement's continued application have constituted a continuing saga in the tortured history of this case.

HN1[] The standards for granting summary judgment in this Circuit are well-established. A court may grant this extraordinary remedy only when it is clear both that no genuine issue of material fact remains to be resolved at trial and that the movant is entitled to judgment as a matter of law. In deciding the motion, the Court is not to resolve disputed issues of fact, but **[**8]** rather, while resolving ambiguities against the moving party, to assess whether material issues remain for the trier of fact. *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986)*, *cert. denied*, *480 U.S. 932, 94 L. Ed. 2d 762, 107 S. Ct. 1570 (1987)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986))*. Only where the entire record would inevitably lead a rational trier of fact to find for the moving party is summary judgment warranted. *National Railroad Passenger Corp. v. City of New York, 882 F.2d 710 (2d Cir. 1989)*.

Although the movant faces a difficult burden to succeed, motions for summary judgment, properly employed, permit a court to terminate frivolous claims and defenses, and to concentrate its resources on meritorious litigation. *Knight v. U.S. Fire Ins. Co., supra, 804 F.2d at 12*. The motion thus:

> is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." *Fed. Rule Civ. Proc. 1*. . . . *Rule 56* must be construed with due regard not only for the rights of persons asserting claims and defenses **[**9]** that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

HN2[] While the party seeking summary judgment bears the initial burden of demonstrating the lack of material factual issues in dispute, *Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9 (2d Cir. 1983)*, "the non-movant, . . . who must sustain the ultimate burden of proof, must demonstrate in opposing the summary judgment motion that there is some evidence which would create a genuine issue of material fact." *Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174, 177-78 (2d Cir. 1990)* (citing *Celotex Corp. v. Catrett, supra, 477 U.S. at 322-23*). "Conclusory allegations will not suffice to create such a genuine issue. There must be more than a 'scintilla of evidence', *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*, and more than 'some metaphysical doubt as to the material facts.' **[**10]** *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*." **[*1342]** *Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990)*. With the foregoing principles in mind, the Court turns to the instant motion.

II. *The Antitrust Claims*.

Plaintiff's amended complaint contains two substantive antitrust counts, consisting of a claim of illegal monopolization and a claim of attempted monopolization, both in violation of *§ 2* of the Sherman Antitrust Act, *15 U.S.C. § 2 (1988)*. The amended complaint alleges that the Digest attempted to monopolize the market for soap opera publications by refusing to deal with plaintiff, and that the Digest illegally monopolized this market by its refusal to deal. Both of its antitrust claims thus rest entirely upon plaintiff's assertion that, because of its position in the alleged relevant market, defendant had a duty to deal with SONOW and thus that its refusal to deal constitutes anticompetitive or exclusionary conduct in violation of *section 2*. [3] Because of the confusion that often surrounds this area of law, and the consequent ease with which a "plaintiff denied access to a **[**11]** firm's goods, services or resources may characterize that which he desires as an 'essential facility' and claim that its denial violates the antitrust laws," P. Areeda & H. Hovencamp, III ***Antitrust Law*** 677 (1988 Supp.), it is instructive first to set out the basic contours of the law regarding refusals to deal.

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[3] In its amended complaint, SONOW refers to "exclusionary and predatory conduct, including, but not limited to," defendant's refusal to deal with plaintiff. However, no other anticompetitive or predatory conduct has been either alleged or supported in any way by the facts uncovered during discovery, and therefore plaintiff's claim must be understood to rest only upon the allegedly wrongful refusal to deal.

It has been said that questions concerning the circumstances under which a single firm monopolist has a duty to deal with other firms are some of the "most unsettled and vexatious in the antitrust field." *Byars v. Bluff City News Co., Inc., 609 F.2d 843, 846 (6th Cir. 1979)*. In various cases, courts **[**12]** have found refusals to deal by single firm monopolists actionable under *§ 2*. ***HN3***[] In the context of a claim of illegal monopolization, a refusal to deal may constitute a form of "willful acquisition or maintenance of [monopoly] power," satisfying the second element of a monopolization claim. *See White Directory of Rochester, Inc. v. Rochester Telephone Corp., 714 F. Supp. 65, 69 (W.D.N.Y. 1989)*. [4] A refusal to deal with a competitor may also comprise an element of a claim of attempted monopolization under *§ 2*. *See, e.g., Twin Laboratories, Inc. v. Weider Health & Fitness, supra, 900 F.2d at 570-571*. [5] In fashioning the various doctrinal frameworks in which refusals to deal with competitors may amount to violations of *§ 2*, courts have likely been mindful of the Second Circuit's observation that:

> in passing the Sherman Act, Congress recognized that it could not enumerate all the activities that would constitute monopolization. *Section 2*, therefore, in effect conferred upon the federal courts "a new jurisdiction to a apply a 'common law' against monopolizing." 3 P. Areeda & D. Turner, ***Antitrust Law*** 40 (1978).

Berkey Photo, Inc. v. Eastman Kodak Co., ***[**13]*** *603 F.2d 263, 272 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*.

As this "common law" of monopolization has evolved, the situations in which a refusal to deal by a monopolist may violate **[**14]** *§ 2* have grouped themselves around several **[*1343]** formulae. The Sixth Circuit, in *Byars*, described the groupings of cases as follows:

> there exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist. The first is a straightforward "intent" test [under which] a business is free to deal with whomever it pleases so long as it has no "purpose to create or maintain a monopoly" . . . .
>
> There also exists a second, related line of cases which has been styled as promulgating the "bottleneck [or essential facilities] theory of ***antitrust law***." Under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.

Byars v. Bluff City News Co., Inc., supra, 609 F.2d at 856.

HN6[] The "essential facilities" doctrine described by the *Byars* court is often treated as a distinct claim under *§ 2*. In the instant case, however, plaintiff did not plead an "essential facilities" count in its complaint, but instead relies on the essential facilities doctrine as a theory supporting its monopolization and attempt to monopolize claims. Although it is clear that a separate test is applied **[**15]** in evaluating claims under the essential facilities doctrine, this Court finds it analytically more helpful to conceive of the essential facilities doctrine as constituting not a distinct claim under *§ 2*, but instead either as a form of, or evidence of, a firm's "willful acquisition or maintenance" of monopoly power in satisfaction of the second element of a monopolization claim, or in certain situations as an element of an attempt claim.

There are several reasons for this approach. As a practical matter, it is helpful for courts to keep in mind that, in evaluating any essential facilities claim involving a single firm, the possessor of the facility must first be found to be

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[4] ***HN4***[] The offense of monopolization under *§ 2* of the Sherman Act consists of two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *Delaware & Hudson Railway Co. v. Consolidated Rail Corp., supra, 902 F.2d at 178*.

[5] ***HN5***[] "To make out a successful claim of attempted monopolization, a plaintiff must demonstrate: (1) anti-competitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power." *Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174 (2d Cir. 1990)*.

a monopolist. *See* *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33* (7th Cir.) (first element of four part essential facilities test is "control of the essential facility by a monopolist"), *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*; *Twin Laboratories, Inc. v. Weider, supra, 900 F.2d at 569* (assuming for purposes of essential facilities discussion that defendant possessed monopoly power in relevant market). In effect, this requirement coincides with the first prong of the **[**16]** *Grinnell* test. Furthermore, although the doctrine has never been explicitly relied on by the Supreme Court, in those cases in which the Supreme Court has found a duty on the part of a single firm to share an essential product or service with its competitors, it has done so either under the rubric of the second prong of the *Grinnell* monopolization test, *see* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)* (record supported inference that refusal to deal was "predatory," constituting willful maintenance of monopoly power as distinguished from legitimate growth or development), or as constituting an attempt to monopolize. *See* *Otter Tail Power Co. v. United States, 410 U.S. 366, 377, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)* (refusal to deal part of a scheme of use of monopoly power to destroy threatened competition, in violation of the "attempt to monopolize" clause of *§ 2*); *Lorain Journal Co. v. United States, 342 U.S. 143, 154, 96 L. Ed. 162, 72 S. Ct. 181 (1951)* (same). *See also* *United States v. Terminal Railroad Ass'n, 224 U.S. 383, 409, 56 L. Ed. 810, 32 S. Ct. 507 (1912)* (where inherent conditions of railroad market are such as to prohibit any other reasonable means of entering a city, combination of every terminal **[**17]** facility under the exclusive ownership and control of less than all of the companies under compulsion to use them is a violation of *§ 1* as well as an attempt to monopolize under *§ 2*).

HN7[] As the latter set of cases makes clear, a refusal to deal may amount to an attempt to monopolize when a firm with monopoly power in one market attempts through the use of that power to monopolize a related or downstream market. To withstand summary judgment on a claim of attempt to monopolize a second market by leveraging a monopoly position in a first market, a plaintiff must demonstrate that the defendant "(1) intended to monopolize **[*1344]** the [second] market; (2) engaged in conduct designed to carry out that intent; and (3) had a 'dangerous probability' of success." *Twin Laboratories, Inc. v. Weider Health & Fitness, supra, 900 F.2d at 570*.

Finally, some courts have suggested that the last element of the attempt test -- a dangerous probability of success -- may not have to be proven by a plaintiff under a theory of "monopoly leveraging," which is sometimes seen as a distinct *§ 2* cause of action. This theory:

> holds that it is an act of monopolization for a firm having monopoly power in one market **[**18]** to exploit that power as a 'lever' to secure competitive advantages in a second market, irrespective of the degree of market power actually achieved by the defendant within the second market.

In re Air Passenger Computer Reservations Systems Antitrust Litigation, 694 F. Supp. 1443, 1472 (C.D.Cal. 1988) (rejecting monopoly leveraging as distinct *§ 2* claim). The case most often cited as recognizing the monopoly leveraging theory is *Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F.2d at 276*, in which the Second Circuit stated in dictum that "the use of monopoly power in one market to gain a competitive advantage in another is a violation of *Section 2*, even if there has not been an attempt to monopolize the second market." *Id*. Recently, however, the Second Circuit has called into question the applicability of this dictum to non-"tying" cases, and has reaffirmed that there remains in any case the requirement of "tangible harm to competition." *See* *Twin Laboratories, Inc. v. Weider Health & Fitness, supra, 900 F.2d at 571*.

1. the market or markets at issue --

Having set out the various doctrinal frameworks within which a firm's refusal to deal may be actionable **[**19]** under *§ 2*, the first step in the Court's analysis must be to define the relevant market or markets involved in this case. *See, e.g.,* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391-93, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. To say that the various market formulations propounded by the parties have been confused would be kind.

HN8[] "The relevant market consists of the geographic market -- the location in which a potential buyer may rationally seek specific goods or services -- and the product market, the boundaries of which are set by the 'reasonable interchangeability of use or the cross-elasticity of demand.'" *Metropolitan Life Ins. Co. v. Adler, No. 87 Civ. 2632, 1988 U.S. Dist. LEXIS 1146 (S.D.N.Y. 1988)* (available on Lexis at *1988 U.S.Dist. LEXIS 1146*).

In the instant case, it is undisputed that the relevant geographic market is a national one. Plaintiff alleges variously that the relevant product market consists of (1) publications devoted solely to soap opera news, (2) the mass dissemination of soap opera news, and (3) subscribers or potential subscribers to soap opera publications. Defendant, too, fluctuates in its assertions of the relevant market. At times it argues that certain **[**20]** general interest publications which contain soap opera news in addition to other types of news should be included based upon the fact that these publications compete with the Digest for both advertisers and supermarket check-out space, [6] as well as the fact that they contain some soap opera news. In other instances, defendant defines the market with reference to the total number of soap opera viewers in the United States.

As noted above, both plaintiff and defendant at times describe the relevant market in terms of the "subscribers and potential subscribers of soap opera publications," *e.g.*, Plaintiff's Opposition Brief at 9, rather than the actual product. Defendant thus suggests that the entire audience of soap opera viewers, which plaintiff agrees numbers at least **[**21]** 60 million, should be counted in the relevant market in determining the Digest's market share. Such an approach is erroneous. *See* *Redmond v. Missouri Western State College, 1988 U.S. Dist. LEXIS 12230*, No. 84-6139-CV-SJ-6, **[*1345]** slip op. (W.D.Mo. November 2, 1988) (available on Lexis at *1988 U.S.Dist. LEXIS 12230*) ("An attempt to define the relevant market in terms of a certain class of prospective purchasers runs contrary to the classic tests used in a monopolization case").

HN9[] For antitrust purposes, a product market consists of a class of products -- either goods or services -- which are reasonably interchangeable with one another such that producers of the products "have the ability . . . to take significant amounts of business away from each other." *Smithkline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063* (3d Cir.), *cert. denied*, *439 U.S. 838, 99 S. Ct. 123, 58 L. Ed. 2d 134 (1978)*. Although it is proper to identify the ultimate consumer of the product in order to make a determination as to whether two products are reasonable substitutes for one another (i.e. whether two products enjoy cross-elasticity of demand), and therefore are in the same product market, *see* *Levitch v. Columbia Broadcasting System, Inc.,* ***[**22]*** *495 F. Supp. 649, 664 (S.D.N.Y. 1980)*, *aff'd*, *697 F.2d 495 (2d Cir. 1983)*, a definition of the market itself which consists of consumers or potential consumers may, as here, obfuscate the issues of monopoly power and reasonable interchangeability. [7]

[23]** In the instant case, plaintiff, having completed discovery, has utterly failed to present any evidence which demonstrates that it competes with the Digest in any relevant antitrust market. In fact, all of the evidence adduced during discovery, including the uncontradicted statements of plaintiff's president and secretary, indicates that exactly the opposite is true.

As noted above, for two products to be included in the same relevant market for antitrust purposes, they must be reasonably interchangeable in the eyes of the ultimate consumer of the product. Here, both parties have defined consumers of their respective products as subscribers or potential subscribers to publications devoted to soap opera news. The parties agree that this group consists of some or all of the millions of viewers of television soap operas. However, as discussed previously, the mere fact that two products are targeted at the same consumer group does not compel the conclusion that the products are reasonable substitutes for one another -- i.e. that they are in the same relevant antitrust market. [8] Here, the undisputed evidence suggests that although SONOW and the

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[6] These arguments confuse the Digest's competition in the market for the service of advertisements -- a product distinct from that of soap opera magazines -- with its competition in the market in which it is alleged by plaintiff to be a monopolist.

[7] For example, it is impossible to determine whether two products are reasonably interchangeable, and therefore in the same market for antitrust purposes, when the market is defined as a group of potential purchasers rather than as a product. The confusion in this case may be related to fact that many of the witnesses and parties have advertising backgrounds, where it is customary to define a market as a group of target purchasers of the product being advertised. Thus, Kenneth Stein of SONOW notes that the "market" for SONOW consists of soap opera "fanatics." However the term "relevant market" has a very different and specific meaning in the context of antitrust analysis, as previously noted. Products targeted at the same advertising "market" may nonetheless be in entirely different antitrust markets.

Digest are both aimed at some segment of **[**24]** the soap opera viewer population, they are not reasonably interchangeable and thus are not competitors in the same relevant market.

Kenneth Stein ("Stein"), the president of plaintiff, stated in deposition testimony that it was "obvious" to him that SONOW's "readers are not the soap viewer. They are the great soap fan or even fanatic and it is obvious . . . that *every one of them* ***[**25]*** *will buy the 150-page four color gorgeous Soap Opera Digest before they will buy our six-page black and white*." Deposition of Kenneth Stein, Appendix to Defendant's Motion for Summary Judgment **[*1346]** ("App.") at 366 ("Stein Dep.") (emphasis added). At another point in his deposition testimony, Stein explained that SONOW's readers consist of soap opera viewers who "have an extra interest in the subject." Likening the situation to that of a sports "fanatic" who, in addition to reading Sports Illustrated, would look for other sources of sports news in order to supplement the news in that magazine, App. at 328-29, he stated that all of those soap viewers who are interested enough in soap operas to read a newsletter such as SONOW would "for sure" also read the Digest. App. at 166. Thus, Stein stated that SONOW "can't be first choice," because it is "a six-page black and white as opposed to a 150-page four-color magazine." App. at 329.

In another instance during Stein's deposition, which makes it all the more clear to the Court that plaintiff's monopolization claim is premised upon inconsistent and ultimately irreconcilable assertions, [9] **[**28]** Stein insisted that "if [a soap opera viewer is] not **[**26]** going to read Soap Opera Digest, they are not going to read Soap Opera Now." Stein was then asked whether he considered SONOW "the same type of publication as Soap Opera Digest," to which he replied "yes and no." In describing the differences between the two publications, he said that SONOW's news is more current than that of the Digest since it is published every week, whereas the Digest takes six to eight weeks to publish. Prompted by this answer, the attorney for defendant then initiated the following key exchange:

> Q. Why wouldn't a viewer who is interested in what is going to happen next week on their soap, who is not interested in the six-week old news that you claim is published in the Digest read your newsletter instead?
>
> . . . .
>
> MR. OCCHIPINTI (counsel for plaintiff): Objection to the form of the question. I don't know that we have established that there aren't viewers who are or aren't interested in Soap Opera Now. I don't follow the question.
>
> MS. KATZ (counsel for defendant): Mr. Stein just testified that he is basing his conclusion that all the people who watch soap operas are not potential subscribers to soap opera magazines because if they were potential subscribers, **[**27]** they would subscribe to Digest.
>
> My question to him is -- and then he claims that his news is more current. So a viewer who is interested in the most current news and doesn't find that in Digest and doesn't read or subscribe to Digest could still be interested in your newsletter; is that correct?
>
> A. No.
>
> Q. Why not?
>
> A. Because current though it may be, it is only a couple of pages and it doesn't compare to 150 pages with color photographs. It just doesn't.

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[8] For example, a magazine devoted solely to articles and information of interest to golfers would presumably reach a consumer group consisting of golf enthusiasts. Products also bought by this group, such as golf clubs, balls, and tees, would clearly not be in the same relevant market notwithstanding their having an identical consumer. These products would not by any stretch of the imagination be reasonable substitutes for one another from the perspective of those consumers. Thus, even a monopolist golf magazine would be free to refuse to accept advertising from a golf ball producer without incurring *§ 2* liability for illegal monopolization.

[9] In support of its "essential facilities" theory, which underlies all of plaintiff's antitrust claims, plaintiff asserts that all of its readers and potential readers are also readers of the Digest. For this reason, advertisement in the Digest is obviously an extremely efficient method for SONOW to reach its targeted consumer market, and plaintiff asserts that such advertisement is in fact the only method for reaching these consumers that is not cost prohibitive for a small weekly publication such as itself. However, as noted previously, in stressing the effectiveness of the Digest in this manner, plaintiff has undermined any argument that it might have had that it is a competitor of the Digest in the sense contemplated by the Sherman Act.

Q. Is it your contention that nobody who does not read Digest reads your newsletter?

A. I believe that.

App. at 369-70. [10]

In effect, Stein thus testified that a person would not purchase SONOW *instead* of the Digest, but only *in addition* to it. Under these circumstances, it is clear that the two publications are not competitors as that term is understood in the context of the antitrust laws.

[*1347] Nor, drawing all inferences in favor of plaintiff, can SONOW reasonably be considered even a potential or future competitor of the Digest. [11] Both Stein and Michael Kape ("Kape"), Stein's partner and Secretary of plaintiff, have stated that their strategy in running plaintiff was to keep it small. Explaining the reasons for their rejection of certain marketing techniques successfully employed by other soap opera publications, such as supermarket check-out or newsstand sales, or utilization of Publishers' Clearinghouse ("PCH"), they stated that these marketing methods are not feasible for **[**29]** a small weekly newsletter, and that they did not desire that SONOW become a qualitatively different publication from what it was. [12] **[**30]** For example, Stein stated in an affidavit, filed May 21, 1990, that SONOW "must remain small to be physically able to serve our market [13] and therefore cannot be a risk to these large corporations" (i.e. "the Digest or Soap Opera Weekly"). *See, e.g.*, App. at 349-50 (Stein Dep.).

The Court's inquiry, however, does not end with its determination that the evidence in the record cannot fairly support an inference that SONOW is a competitor or potential competitor of the Digest in the market in which the Digest arguably is a monopolist -- a market consisting of soap opera magazines and products **[**31]** reasonably interchangeable with soap opera magazines. [14] A monopolist's refusal to deal with a non-competitor plaintiff in the

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[10] *See also* App. at 46 (letter of Michael Kape) (stating that SONOW fills a gap which Digest cannot, and that SONOW "obviously" does not compete against the Digest, but only against the few other weekly newsletters being published).

[11] In its Memorandum Decision granting plaintiff's motion for a preliminary injunction, the Court noted that SONOW had raised a substantial question as to whether the Digest could be said to constitute an essential facility in part because at that preliminary stage of the proceedings "it appear[ed] that . . . without advertising in [the Digest], SONOW is unable to make its own publication into an effective substitute." *Soap Opera Now, Inc. v. Network Publishing Corp*., 88 Civ. 984, at 8. Subsequent discovery, however, has failed to support the Court's initial view that SONOW could be a potential substitute for the Digest.

[12] The Court does not mean to suggest that a small company cannot compete in the same relevant market as a large one, or that it must have a reasonable possibility of growing large in order to have a claim under *§ 2*. Indeed, such a position would be ridiculous in light of the goals and policies of the Sherman Act. In the instant case, however, plaintiff is not a small company producing the same product as a larger monopolist. Instead, it consists of a qualitatively different product which is not a reasonable substitute for defendant's product. Under these circumstances, it is necessary to ask whether, in the market in which the Digest competes, small newsletter-type products may evolve (absent illegal use of monopoly power) into substitute products, and whether plaintiff is such a potential competitor. The evidence presented on this motion for summary judgment allows no reasonable inference that the answer to these inquiries is anything other than a negative one.

[13] In the previous paragraph, Stein had explained that accurate "sneak peeks," (coming attractions) "are only possible if done by a small concern like ours" because of the very small lag time between printing and delivery. He noted that the larger publications, such as defendant, necessarily take much longer to reach the consumer. He postulated that, because SONOW is thus able to "beat them every week" with respect to this future news, these publications desire to "crush [SONOW] out of business." Stein Aff. at 5. However, as noted above, Stein also insists that plaintiff's readers read SONOW in addition to, and not instead of, the Digest. In this context, use by Stein of the term "our market" makes clear that plaintiff and defendant's publications serve different, though related, markets.

[14] The Court has serious reservations about whether plaintiff has even raised a factual question on the issue of defendant's monopoly power in the market in which it as a magazine competes. Putting aside disputes over whether other sources of "the mass dissemination of soap opera news," such as the soap opera news service in the Prodigy computer software and the local and national soap opera telephone services, are in the same relevant market as the Digest, defendant has arguably rebutted any inference of monopoly power arising from its alleged market share with substantial evidence of low or nonexistent entry barriers. Plaintiff has failed to come forward with any tangible evidence of entry barriers in this market, beyond the assertion that soap opera magazines often go out of business or are published sporadically. However, in light of the large alleged market share

monopoly market may still violate *§ 2* if the monopolist competes with the plaintiff in a second market, *see* discussion of monopoly leveraging, *supra*, or if the refusal to deal is directed at influencing the plaintiff not **[*1348]** to deal with a competitor of the defendant in some market. *E.g. Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951)* (monopolist newspaper refused to deal with advertisers who also advertised on competing radio station). The latter situation is not at issue in this case, however the leveraging question must be addressed.

[32]** 2. monopoly leveraging --

Although only alluded to by plaintiff, SONOW's antitrust claims could conceivably be based upon a theory of "monopoly leveraging," that is, that defendant by refusing to deal with plaintiff was attempting to use its alleged monopoly power in one market to gain a competitive advantage in a second market. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. Plaintiff's president, Stein, opined as much in one of his several *ex parte* letters to the Court, in which he alleged that the Digest had begun a weekly publication, and had attempted to hire SONOW's editor to write for the new magazine. Like the solution to a Friday afternoon cliffhanger, the "reason for [defendant's] actions" was at last known to Stein.

Although there is some evidence in the record demonstrating that at one time several years ago the then publisher of the Digest considered starting a newsletter, no competing newsletter was ever started. On these undisputed facts, a claim of monopoly leveraging, even if it had been properly pleaded, would be far too speculative to survive a motion for summary judgment. **[**33]** There is clearly no question that a "dangerous probability" of monopolization of the second market has not been shown, since defendant never published any competing newsletter. *See Twin Laboratories, Inc. v. Weider Health & Fitness, supra, 900 F.2d at 570-571* (no dangerous probability as a matter of law where defendant's share of the secondary market in which it competed with plaintiff was at best 25%).

Further, even if, as discussed above, the "dangerous probability" element need not be shown in a leveraging case under *Berkey Photo*, plaintiff does need to demonstrate some "competitive advantage" gained by defendant in the second market. *Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F.2d at 284* (improper, absent justification, for firm with monopoly power in one market to gain a competitive advantage in a second market by refusing to deal). In light of the undisputed fact that defendant in this case never began any competing publication, [15] that showing cannot be made.

[34]** 3. essential facilities --

Even assuming that the Digest possesses monopoly power in its product market, plaintiff's monopolization and attempted monopolization claims premised upon an essential facilities theory must fail. As discussed above,

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of the Digest, the Court will assume for purposes of this Opinion that the Digest exercises monopoly power in the market including the product of soap opera magazines.

[15] During the pendency of the instant motion, the Digest was sold by defendant to News America Publishing Inc ("News America"). Subsequently, SONOW instituted an action against this new owner of the Digest, captioned *Soap Opera Now, Inc. v. News America Publishing Inc*., 90 Civ. 2631 (RJW). There is evidence in the record that the defendant in this latter action has begun a weekly soap opera magazine, which contains certain types of features, for example coming attractions, also contained in SONOW. Without the benefit of any argument or evidence on the issue, the Court is unable to determine whether there exists an issue of fact as to whether this new weekly publication competes in any relevant market with plaintiff, thus raising a possible claim of attempted monopolization under a leveraging theory. Plaintiff is, of course, free to pursue this issue in its lawsuit against News America. The Court notes in this connection, however, that in order to make out a successful leveraging claim, either under an attempt to monopolize theory or a distinct leveraging claim (if such a claim is available in this Circuit), a plaintiff must demonstrate both monopoly power in the first market, and a refusal to "sell a rival the *monopolized goods or services he needs to compete in the second market." Berkey Photo, Inc. v. Kodak Co., 603 F.2d at 284* (emphasis supplied). Therefore, plaintiff would be required to come forward with some evidence suggesting that News America monopolizes the service claimed by plaintiff to be essential for it to compete in the market.

plaintiff's attempt claim is deficient because SONOW and Digest do not compete in any market. For the same reason, any other possible claim under an **[*1349]** essential facilities theory must fail. ***HN10***[] In order to make out a claim under the essential facilities doctrine, a plaintiff must demonstrate "a *competitor's* inability practically or reasonably to duplicate the essential facility," and "the denial of the use of the facility *to a competitor." MCI Communications Corp. v. American Tel. & Tel.* *Co., supra, 708 F.2d at 1132-33* (cited in *Twin Laboratories, Inc. v. Weider Health & Fitness, supra, 900 F.2d at 568, 569* (emphasis added). Because plaintiff has not raised a factual issue as to whether the Digest denied its services "to a competitor," any claim based upon the denial of an essential facility must be dismissed.

Even if plaintiff had raised an issue as to whether it competes in the same market with the Digest, the Court would **[**35]** still find based upon the uncontroverted evidence submitted in connection with the instant motion that the advertising pages of the Digest cannot be considered an essential facility in the market for soap opera publications. In the first place, this is simply not a case in which the Digest is "effectively the only [facility] in town." *See* *Lorain Journal Co. v. United States, supra, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162*; *Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274 (1st Cir. 1982)*, *cert. denied*, *460 U.S. 1028, 75 L. Ed. 2d 500, 103 S. Ct. 1279 (1983)*. There are certainly a variety of advertising methods which could be used to reach a particular class of persons, and plaintiff has suggested no structural peculiarity of defendant which makes it a qualitatively different mode of advertisement than, for example, other magazines. *See, e.g.,* *Home Placement Service, Inc. v. Providence Journal Co., supra, 682 F.2d at 280* (other types of advertising shown not to be reasonable substitutes for daily newspaper rental advertising).

In addition, there is substantial uncontradicted evidence in the record that several smaller rivals exist in the market which do not advertise in the Digest. **[**36]** [16] Plaintiff's only response to this evidence is that a *newsletter* cannot promote itself by the same methods as other types of publications. However plaintiff has not addressed the evidence presented by defendant that other soap opera newsletters exist which apparently survive without advertising in the Digest.

[37]** In sum, plaintiff has not met its burden on this motion of coming forward with evidence sufficient to create a material factual dispute upon an issue on which it has the ultimate burden of proof at trial. ***HN12***[] Even assuming that defendant is a monopolist in its product market, unless plaintiff and defendant are in competition with one another, defendant has no duty to deal with plaintiff. *Official Airline Guides, Inc. v. F.T.C., 630 F.2d 920, 925-28 (2d Cir. 1980)* (monopolist publisher of airline flight schedules had no duty to deal on nondiscriminatory basis with various classes of air carriers because it did not compete with them in any market), *cert. denied*, *450 U.S. 917, 101 S. Ct. 1362, 67 L. Ed. 2d 343 (1981)*. *See also* *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. Accordingly, summary judgment is granted in favor of defendant on plaintiff's claims under *§ 2* of the Sherman Act. [17]

[38]** III. *The Contract Claim*.

In addition to its federal claims, plaintiff asserts that defendant by refusing **[*1350]** to run SONOW's ads breached an alleged contract between the parties. In light of the dismissal of the federal claims upon which plaintiff bases

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[16] Stein points out that many of these competitor publications either do not accept advertising, or are published less frequently than the Digest. These facts, while perhaps relevant to the question whether advertising in the Digest is essential to the plaintiff, are not at all relevant to the question whether advertising in the Digest is essential to effective competition in the market. ***HN11***[] As often stated but particularly pertinent here, the antitrust laws protect competition, not competitors. *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 344, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. Simply because a particular plaintiff with peculiar advertising needs decides that it cannot remain profitable without advertising in a certain publication, that publication does not automatically rise to the level of an "essential facility" in the general market unless some substantial number of market entrants or competitors would also be foreclosed.

[17] Because it finds that plaintiff has failed to raise a factual issue on any of its federal claims, the Court does not address defendant's argument that its refusal to deal is privileged under the *first amendment*.

jurisdiction in federal court, discretionary dismissal of the pendent state claim is appropriate. *See* *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*. No prejudice will accrue to plaintiff by such dismissal as New York Civil Practice Law and Rules § 205(a) allows plaintiff to recommence any action in state court within six months after it is dismissed by a federal court on jurisdictional grounds, if it was timely commenced in the first instance. *See* *Dunton v. County of Suffolk, 729 F.2d 903, 911 n. 8* (2d Cir.), *amended on other grounds*, *748 F.2d 69 (2d Cir. 1984)*. Therefore, the pendent state claim should be dismissed pursuant to *Rule 12(b)(1), Fed. R. Civ. P.*, for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment dismissing plaintiff's antitrust claims is granted, and the remaining state claim is dismissed for lack of jurisdiction. The preliminary **[**39]** injunction is hereby vacated. The parties are directed to attempt to reach an agreement with respect to the disposition of the funds contained in the escrow account, and if they are not able to agree, to submit proposed counter-orders to the Court on or before June 15, 1990.

It is so ordered.

Dated: New York, New York

May 30, 1990

End of Document

Beauford v. Helmsley

United States District Court for the Southern District of New York

June 5, 1990, Decided ; June 6, 1990, Filed

No. 86 Civ. 7115 (RWS)

Reporter

740 F. Supp. 201 *; 1990 U.S. Dist. LEXIS 7749 **; 1990-1 Trade Cas. (CCH) P69,051

ROSLYN O. BEAUFORD, LEONARD GROSSMAN, MARIA VALLE, JOSEPH DECESARE, JR., and ELSIE DECESARE, individually and on behalf of others similarly situated, Plaintiffs, v. HARRY B. HELMSLEY, LEONA M. HELMSLEY, JOSEPH V. LICARI, SUPERVISORY MANAGEMENT CORP., HELMSLEY ENTERPRISES, INC., AVENUE OF AMERICA REALTY CORP., BENENSON CAPITAL CO., SANFURD G. BLUESTEIN, FELICE EARLEY, ESTATE ASSOCIATES, JOAN KONNER, PETER L. MALKIN, JOHN J. REYNOLDS, INC., SAUL S. SILVERMAN, WILLIAM C. WARREN, WILLIAM C. BREED, III, RALPH W. FELSTEN, LILLIAN M. GELFMAN, ROBERT W. GELFMAN, DONALD L. JONAS, JEFFREY D. KLEIN, NORMAN R. KLEIN, ALVIN S. LANE, FRED LINDEN, GERTRUDE G. MALKIN, PETER L. MALKIN, CLAIRE W. MORSE, LESTER S. MORSE, JR., RICHARD P. MORSE, IVAN SHAPIRO, ALVIN SILVERMAN, HAROLD L. STRUDLER, PARKCHESTER MANAGEMENT CORP., BROWN HARRIS STEVENS, INC., and DECO PURCHASING AND DISTRIBUTING CO., INC., Defendants

Core Terms

condominium, Sponsor, purchaser, maintenance charges, allegations, funds, fraudulent, exemption, abatement, sales, consolidated, apartments, repairs, buyers, preliminary injunction, unit holder, particularity, replacements, conversion, hardship, tenants, interstate land sales, irreparable injury, amended complaint, non-purchasing, Disclosure, pleaded, reasons, merits, terms

LexisNexis® Headnotes

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Evidence > Burdens of Proof > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Grounds for Injunctions**

In the circuit in which the court is located, a party seeking a preliminary injunction must establish irreparable injury if the requested relief is not granted, and also demonstrate either that (a) it is likely to succeed on the merits or (b) the balance of hardships tip decidedly in its favor and there is a sufficiently serious question going to merits so as to make its claim a fair ground for litigation. "Irreparable injury" means injury for which a monetary award cannot be adequate compensation.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN2[] **Business & Corporate Law, Nonprofit Corporations & Organizations**

See *N.Y. Not-for-Profit Corporation Law § 515(c)* (McKinney 1970).

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN3[] **Business & Corporate Law, Nonprofit Corporations & Organizations**

N.Y. Not-for-Profit Corp. Law § 507 (McKinney 1970) permits corporations organized thereunder to levy fees, dues and assessment upon members, and nowhere provides, once such fees are set at a given level, that they may not subsequently be altered or eliminated, temporarily or permanently.

Real Property Law > Common Interest Communities > Cooperatives > General Overview

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN4[] **Common Interest Communities, Cooperatives**

See New York City, N.Y., Admin. Code ch. 51, § YYYY51-3.0(a).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Denial of Allegations

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

HN5[] **Defenses, Demurrers & Objections, Denial of Allegations**

A court should dismiss a complaint for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)* if it appears beyond doubt that the plaintiff can prove no set of facts supporting its claim that entitles it to relief. A court must construe the complaint's allegations in the light most favorable to the plaintiff and accept those allegations as true.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Real Property Law > Purchase & Sale > Interstate Land Sales Full Disclosure Act

Evidence > Burdens of Proof > General Overview

HN6[] **Regulated Practices, Private Actions**

To prevail in a private antitrust action, a plaintiff must show the plaintiff was damaged as a result of a violation of the antitrust laws. It is necessary at the pleading stage, therefore, to allege at least some such damage.

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Purchase & Sale > General Overview

Real Property Law > Purchase & Sale > Interstate Land Sales Full Disclosure Act

HN7[] **Common Interest Communities, Condominiums**

The Interstate Land Sales Full Disclosure Act, *15 U.S.C.S. §§ 1701-1720* exempts from its requirements sales of property upon which building development has been completed at the time of sale.

Administrative Law > Agency Rulemaking > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Real Property Law > Common Interest Communities > Condominiums > Management

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Real Property Law > Common Interest Communities > Cooperatives > General Overview

Real Property Law > Purchase & Sale > General Overview

Real Property Law > Purchase & Sale > Interstate Land Sales Full Disclosure Act

HN8[] **Administrative Law, Agency Rulemaking**

Congress, in passing the Interstate Land Sales Full Disclosure Act, *15 U.S.C.S. §§ 1701-1720* has desired to protect purchasers from unscrupulous sales of undeveloped home sites, frequently involving out-of-state sales of land purportedly suitable for development but actually under water or useful only for grazing. The Act prohibits fraud in land development enterprises. The protections afforded by the Act, which are to be construed broadly in accord with the remedial purposes of the legislation, apply to the sale or lease of any "lot" not otherwise exempted under *15 U.S.C.S. § 1702*. *15 U.S.C.S. §§ 1703(a)(1)*, *1702*. The administrative agency responsible for promulgating regulations under the Act and courts that have addressed the question agree that sales of realty in the condominium form are embraced by the term "lot."

Governments > Legislation > Interpretation

Real Property Law > Purchase & Sale > Interstate Land Sales Full Disclosure Act

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Real Property Law > Purchase & Sale > General Overview

HN9[] **Legislation, Interpretation**

The Interstate Land Sales Full Disclosure Act, *15 U.S.C.S. §§ 1701-1720* is intended to curb abuses accompanying interstate land sales. The Act accomplishes that goal by including within it all sales of lots and then exempting a number of transaction, including sales of fully improved property. It is reasonable to conclude that the term "lot" in the Act was used to refer generally to interests in realty. The legislative history supports this construction, employing the terms "lot," "land," and "real estate" in discussing the Act. This construction is also reasonable in terms of the purpose of the statute. A fraudulent out-of-state sale of land is not rendered any less fraudulent if the condominium form of ownership is utilized.

Governments > Legislation > Interpretation

Real Property Law > Purchase & Sale > Interstate Land Sales Full Disclosure Act

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Real Property Law > Purchase & Sale > General Overview

HN10[] **Legislation, Interpretation**

The Department of Housing and Urban Development and judicial interpretation of the Interstate Land Sales Full Disclosure Act, *15 U.S.C.S. §§ 1701-1720* to include condominium ownership within the meaning of "lot" does not serve, however, to extend the coverage of the Act to sales of improved, developed realty, whether or not of condominium form. *15 U.S.C.S. § 1702(a)(2)* expressly exempts sales of such improved land "on which there is a residential, commercial, condominium, or industrial building (or land upon which the seller has contracted to complete construction of such a structure within a period of two years), *15 U.S.C.S. § 1702(a)(2)*.

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Condominiums > Management

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Real Property Law > Purchase & Sale > General Overview

Real Property Law > Purchase & Sale > Contracts of Sale > General Overview

Real Property Law > Purchase & Sale > Interstate Land Sales Full Disclosure Act

HN11[] **Contracts of Sale, Formalities**

For a condominium unit sale to be exempted from the Interstate Land Sales Full Disclosure Act Claim, *15 U.S.C.S. §§ 1701-1720* either it must be completed before it is sold, or it must be sold under a contract obligating the seller to erect the unit within two years from the date the purchaser signs the contract of sale. Congress has acted to exempt condominium sales where the building is existing or must, by contract, be completed within two years.

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Condominiums > Management

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Real Property Law > Purchase & Sale > General Overview

Real Property Law > Purchase & Sale > Contracts of Sale > General Overview

Real Property Law > Purchase & Sale > Interstate Land Sales Full Disclosure Act

HN12[] **Contracts of Sale, Formalities**

If at the time a purchaser signs a contract of sale there exists a condominium building or the seller is obligated to erect such a building within two years, the sale is exempt from the Interstate Land Sales Full Disclosure Act, 15 U.S.C.S. §§ 170101720. If no building exists at the time of contracting and the contract does not contain a binding obligation to complete one within two years, compliance with the statute is required.

Business & Corporate Compliance > ... > Real Property Law > Securities Regulation > Public Offerings of Condominiums

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Securities Law > Blue Sky Laws > Offers & Sales

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN13[] **Securities Regulation, Public Offerings of Condominiums**

The sale of condominium units does not constitute a sale of securities. Even though the sponsor of an offering plan may influence the value of the units through its marketing efforts and its own buying and selling strategies, a piece of real estate, such as a condominium, has an inherent worth not solely dependent on the efforts of the promoter.

Securities Law > Initial Offerings of Securities > Securities Act Actions > General Overview

Securities Law > Civil Liability Considerations > General Overview

HN14[] **Initial Offerings of Securities, Securities Act Actions**

No private right of action has been held to exist under § 17(a) of the Securities Act of 1933.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Evidence > Burdens of Proof > General Overview

HN15[] **Racketeer Influenced & Corrupt Organizations, Claims**

A plaintiff can only recover to the extent that he has been injured in his business or property by the conduct constituting a violation of the civil Racketeer Influenced and Corrupt Organizations Act. A plaintiff must allege non-remote economic injury arising from predicate acts.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN16[] **Claims, Fraud**

Where multiple defendants are asked to respond to allegations of fraud, a complaint should inform each defendant of the nature of his alleged participation in the fraud. In civil Racketeer Influenced and Corrupt Organizations Act actions, the concerns that dictate that fraud be pleaded with particularity exist with even greater urgency.

Counsel: [1]** Edward S. Kanbar, Esq., Attorney for Plaintiffs, New York, New York.

Shea & Gould, Esqs., Attorney for Defendants, Harry B. Helmsley, Leona M. Helmsley, Supervisory Management Corp., Helmsley Enterprises, Inc., John J. Reynolds, Inc. Brown Harris Stevens, Inc. and Deco Purchasing and Distributing Co., Inc., New York, New York, by: Michael S. Feldberg, Esq., of counsel.

Wien, Malkin & Bettex, Esqs., Attorney for Defendants, Peter L. Malkin, Ralph W. Felsten and Alvin Silverman, New York, New York.

Judges: Robert W. Sweet, United States District Judge.

Opinion by: SWEET

Opinion

[*202] ROBERT W. SWEET, UNITED STATES DISTRICT JUDGE

This action is before the court on the motion of plaintiff Leonard Grossman ("Grossman") for a preliminary injunction and on cross-motions to dismiss brought by defendants Harry B. and Leona M. Helmsley ("Helmsley"), Supervisory Management Corp. ("SMC"), Helmsley Enterprises, Inc., **[*203]** John J. Reynolds, Inc., Brown, Harris, Stevens, Inc., Deco Purchasing and Distributing Co., Inc. (the "Helmsley defendants"), and by Peter L. Malkin, Ralph W. Felsten, and Alvin Silverman. For the reasons discussed below, the motion for a preliminary injunction is denied, the cross-motion of the Helmsley defendants is granted, and the complaint is dismissed.

[2]** *Nature of the Action, Parties, and Prior Proceedings*

Plaintiffs own or reside as tenants in units of a massive residential complex in the Bronx known as the Parkchester. They seek damages and injunctive relief in connection with alleged fraudulent misrepresentations made in connection with the conversion and management of the southern half of the residential complex. This 135-building structure, containing 8,286 apartments, is in its present condominium form formally termed The Parkchester South Condominium, Inc. (hereinafter "Parkchester South" or the "Condominium"). Claims under RICO, the federal antitrust laws, the federal securities laws, the Interstate Land Sales Full Disclosure Act, and several state laws are asserted against the thirty-five defendants.

The original complaint was filed in September 1986 and amended in October 1986. The parties to the first amended complaint and the essential allegations set forth therein were outlined in the court's opinion of December 12, 1986 dismissing the action after finding that the federal RICO and securities causes pleaded therein (and as sought to be further amended by plaintiffs) failed to state a claim upon which relief could **[**3]** be granted. Further elucidation of the complaint is contained in the *en banc* opinion of the Court of Appeals reversing the district court dismissal on the ground that the complaint adequately pleaded RICO elements of pattern and continuity. *See* *Beauford v. Helmsley, 650 F. Supp. 548 (S.D.N.Y. 1986)*, *aff'd*, *843 F.2d 103 (2d Cir. 1988)*, *reversed upon rehearing en banc*, *865 F.2d 1386 (2d Cir. 1989)*, *vacated*, *492 U.S. 914, 109 S. Ct. 3236, 106 L. Ed. 2d 584*, *adhered to upon further consideration*, *893 F.2d 1433*, *cert. denied*, *493 U.S. 992, 110 S. Ct. 539, 107 L. Ed. 2d 537 (1989)*.

In its *en banc* ruling, the Court of Appeals "suggested that the district court allow plaintiffs an additional opportunity to file a new pleading," *id*., *865 F.2d at 1392*, in view of the appellate court's expressed doubt that the amended complaint met the requirements of *Rule 9(b)* and *Rule 8(a) of the Federal Rules of Civil Procedure*. The mandate from the Court of Appeals followed the Supreme Court's consideration of the RICO issue (resulting in an order of vacatur), and the Second Circuit's determination, nevertheless, to adhere to its prior *en banc* decision.

Following the Court of Appeals' decision, counsel for **[**4]** plaintiffs did not seek leave to amend the *Beauford* complaint, but in February 1990 filed, as a related matter, an additional, separate complaint alleging several of the same causes against several of the same defendants but in the name of a new plaintiff, Grossman, a condominium owner in Parkchester who resided in the apartment complex prior to its conversion. By the accompanying order to show cause, Grossman also sought a preliminary injunction, *inter alia*, directing Parkchester Apartments Co., the sponsor of the conversion ("Sponsor"), to pay a sum in excess of a million dollars to the Condominium and use its votes on the Board of the Condominium (the "Board") to revoke a recent increase in maintenance charges imposed on Condominium owners of approximately 35%. It was alleged that the present increases would not have been necessary if two years prior, defendants had not caused the Board to vote to abate the monthly maintenance charges for a period of one and a half months in February and March of 1988.

At the hearing on the order to show cause on February 15, 1990, counsel for plaintiff agreed to serve an amended complaint consolidating the *Grossman* action with the **[**5]** *Beauford* action. Counsel for defendants opposed the motion for preliminary relief and sought by cross-motion dismissal of the actions in their entirety. Counsel for plaintiff disclaimed the need **[*204]** for an evidentiary hearing on the request for preliminary injunctive relief.

The consolidated complaint was filed thereafter on February 23, 1990, briefs on the motions were received prior to the oral argument on March 16, and the matter was taken on submission following receipt from plaintiff's counsel of a further submission dated March 23, 1990.

The Consolidated Complaint

The consolidated complaint substitutes Grossman, a Parkchester South unit-purchaser, for former plaintiff Mr. Palmento, now deceased, who was the only condominium purchaser (as opposed to non-purchasing tenant) named in the *Beauford* action as a plaintiff. The other four named plaintiffs, all of whom are tenants at the complex who did not elect to purchase their apartments at the time of the conversion, remain unchanged from the original action. As for defendants, these remain essentially the same as in the original *Beauford* action. [1]

[6]** As in *Beauford*, the new complaint alleges violations of RICO and federal securities laws, as well as the related state law common law claims of fraud, breach of fiduciary duty and contract. New federal causes of actions arising under the antitrust laws and the Interstate Land Sales Full Disclosure Act are added to the consolidated

[1] The Sponsor of the conversion (and former owner) of the Condominium -- Parkchester Apartments Co. -- is not named as a defendant in the consolidated complaint. The partners that compose the Sponsor, which is itself a New York partnership, are. The two alleged partners are defendant Supervisory Management Corp., a corporation owned by Harry Helmsley, and defendant Joseph V. Licari. In addition, other Helmsley-related entities are named defendants, as are numerous passive investors in the partnership.

complaint, notwithstanding that these claims which were not pleaded in either the *Beauford* or *Grossman* actions and that the filing of the consolidated complaint was authorized for no purpose other than to harmonize and particularize the pleading in those two actions.

I. *The Motion for Preliminary Injunctive Relief*

The request for preliminary relief, supported by the affidavit of counsel for plaintiff, who perforce is without personal knowledge of the facts averred, is predicated on the First Claim of the Consolidated Complaint, which alleges that an abatement of maintenance charges for a month and a half in 1988 (an action sought by the Sponsor and agreed to by the Board, upon which the Sponsor has a majority of representatives by virtue of its continuing to own more than fifty percent of the units) violated *Section 515 of New York's* **[**7]** *Not-for-Profit Corporation Law*, as well as Local Law No. 70 of the City of New York for 1982.

According to the complaint and counsel for Grossman, this Board-authorized six week moratorium on maintenance charges, which was made possible by a drop in the price of oil at the time, reduced maintenance funds by $ 2.4 million in 1988. In 1990, necessary roof repairs and other maintenance needs of the Parkchester have required the Board to raise maintenance fees by 35% for five months and perhaps further into the future, and the operating budget projects a loss for the year.

On that factual basis, plaintiffs seek an order preliminarily (a) directing the Sponsor (but not the other unit owners) to pay to the Condominium a sum representing its share of maintenance charges that were not assessed upon it and all other unit holders in February and March 1988; (b) directing the Sponsor to use its votes on the Condominium Board to revoke recent increases in maintenance charges to condominium owners of approximately 35% to finance needed maintenance work, and (c) enjoining the Sponsor from any further use of its majority control of Parkchester South Condominium.

HN1[] In this circuit, a party seeking **[**8]** a preliminary injunction must establish irreparable injury if the requested relief is not granted, and also demonstrate either that (a) it is likely to succeed on the merits or (b) the balance of hardships tip decidedly in its favor and there is a sufficiently serious question going to merits so as to make its **[*205]** claim a fair ground for litigation. *E.g., Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989)*. Grossman has not satisfied this standard.

A. *Irreparable injury*

"It is well established that 'irreparable injury means injury for which a monetary award cannot be adequate compensation.'" *Loveridge v. Pendleton Woolen Mills, Inc., 788 F.2d 914, 917-18 (2d Cir. 1986)*, *quoting Jackson Dairy, Inc. v. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)*. The demand that Parkchester immediately pay its share of $ 2.4 million in maintenance charges that Grossman contends ought to have been assessed against unit holders in six weeks of 1988 is a monetizable claim, as are the economic effects of a 35% increase in current maintenance charges. Despite counsel's contention that the harm to condominium owners "goes beyond dollar payments," no case has **[**9]** been made that denial of the requested emergency relief will cause irreparable harm to Grossman.

Although Grossman alleges that there is an urgent need now for the funds that might have been assessed in March 1988, the urgency is not demonstrated by any factual showing. Instead, Grossman's counsel simply states that the present effect of going without such funds is to cause present maintenance charges against unit holders to be assessed at a level higher than they would otherwise be. Assuming it is true that funds Grossman, the Sponsor and other unit holders might have been required to contribute in March 1988 would, if collected then, have supplanted a portion of the charges being collected now, the claim, itself expressed by Grossman in monetary terms, self-evidently is compensable (if at all) in dollars.

The allegation that the increased charges are in turn threatening to cause plaintiffs to default on their purchased units might require an assessment of irreparable injury had counsel offered or presented any evidence that Grossman (who alone seeks preliminary relief) -- or any other Parkchester unit purchaser -- faces such a difficulty. Equally devoid of factual support is counsel's **[**10]** assertion that the 35% increase in maintenance charges has disrupted sales of units and lowered unit sale prices -- claims which in any event demonstrate "mere economic injury" that ordinarily "is not sufficient to warrant granting of a preliminary injunction." *Patterson v. United Federation of Teachers, 480 F. Supp. 550, 553 (S.D.N.Y. 1979)*.

Grossman also argues that irreparable injury flows from the shortage of funds that allegedly has resulted from the 1988 six-week abatement (as distinguished from the above harms caused by present efforts of the Condominium to collect additional maintenance funds): "Lack of funds means lack of proper maintenance, with loss of quality of life within the condominium."

The preliminary relief requested -- an order rescinding the 35% increase in maintenance charges -- would, however, have the likely effect of exacerbating rather than mitigating the maintenance problems assertedly caused by lack of funds, since such order, relative to the status quo, would further reduce the funds available to finance necessary maintenance. Grossman apparently desires a source of financing for necessary maintenance other than the increased monthly assessment that **[**11]** has been implemented by his Board, but that preference -- even if it should later concretize into a legal right -- does not establish a need for emergency relief predicated on injuries that can be avoided without disturbance of the status quo.

Moreover, the alleged shortage of funds for maintenance, assuming it threatens irreparable harm, neither supports the peculiar form of disturbance of the status quo sought by Grossman nor its peculiar timing. Without commenting on the disparity, Grossman seeks an order that would force the Sponsor to pay its share of the abated maintenance charges (based on its ownership of approximately 65% of the units), without a parallel requirement that Grossman and other unit purchasers who owned at the time of the six week moratorium (and who received and retained, per unit, an identical financial benefit therefrom) **[*206]** contribute their respective shares. Grossman similarly does not explain or establish why, two years after he and others were aware of the abatement, there suddenly is an urgent need to collect the abated funds in place of other maintenance charges. [2] For each of these reasons, Grossman fails to show irreparable injury warranting the emergency **[**12]** relief sought against Parkchester Management Corp.

B. *Probability of Success on the Merits*

Grossman also fails to demonstrate a likelihood of success on the merits of his claim for a preliminary injunction. Only by strained textual reading of the local and state statutes does Grossman make those laws appear to relate to the maintenance charge question presented here. The state legislation in question is *Section 515* of the Not-for-Profit Corporation Law. That provision states in pertinent part that ***HN2***[] "a corporation shall not pay dividends **[**13]** or distribute any part of its income or profit to its members, directors or officers." *N.Y. Not-for-Profit Corp. Law § 515(c)* (McKinney's 1970).

Grossman's claim is that the abatement of the collection of maintenance charges from unit holders for six weeks was, in truth, a payment of dividends to unit holders. That contention ignores the distinction drawn in the statute between "fees, dues and assessments," on the one hand, *see* NPCL *§ 507*, and dividends and distributions, on the other. *See* NPCL *§ 515*; *In re Fosdick's Trust, 4 N.Y.2d 646, 653, 176 N.Y.S.2d 966, 971, 152 N.E.2d 228 (1958)* (defining term "dividend"). *Section 507* of the Not-for-Profit Corporation Law ***HN3***[] permits corporations organized thereunder to levy fees, dues and assessment upon members, and nowhere provides, once such fees are set at a given level, that they may not subsequently be altered or eliminated, temporarily or permanently. That appears to be what the Board did, for a limited period. This law therefore does not offer support for Grossman's characterization of the six week maintenance charge moratorium as an unlawful dividend.

[2] Grossman did not seek emergency relief from the abatement at the time it was implemented in March 1988, approximately two years before this application, although presumably Grossman's formula (funds = maintenance = quality of life) was as valid then as it is now. No explanation has been offered for this delay, nor any evidence suggestive that the "quality of life within the condominium" declined suddenly prior to the filing of this application, so as to warrant preliminary relief.

The other measure relied upon is Local Law No. 70 of the City of New York (1982). That **[**14]** ordinance provides that *HN4*[] " for the preservation and improvement of . . . housing accommodations" of the condominium or cooperative form, persons sponsoring conversions of apartments to such forms must

> establish and transfer to the cooperative corporation or condominium board of managers a reserve fund to be used exclusively for making capital repairs, replacements and improvements necessary for the health and safety of the residents of such buildings. Such reserve fund shall be exclusive of any other funds required to be reserved under the plan . . . except a fund for capital repairs, replacements and improvements substantially similar in purpose . . . [and] also shall be exclusive of any working capital fund . . . .

New York City Admin. Code ch. 51, § YYYY51-3.0(a). The ordinance specifies the minimum amount that must be placed in the reserve fund and imposes reporting requirements with respect to the fund. *Id*. at § YYYY51-3.0(b), § YYYY51-4.0.

Grossman does not contend that defendants failed to establish such a reserve fund -- in fact he states that such a fund was created by the Sponsor in the amount of $ 4,668,156. He does allege, on information and belief, that the Sponsor **[**15]** has caused such fund to be dissipated for purposes other than capital repairs, replacements and improvements. Neither evidence of such dissipation, nor the basis for his belief in its occurrence, is provided, making it untenable on this record to conclude there is a reasonable likelihood that Grossman will establish the merits of this claim. The only uncontested fact presented is of the **[*207]** six week abatement, and although that presumably reduced monies available for maintaining the Condominium, the abatement was not itself an expenditure of the $ 4 million in funds that Local Law 70 required the Sponsor to deposit in the reserve fund. For these reasons, Grossman has failed to establish a likelihood of prevailing on the merits of his claims under these cited state and local laws.

C. *Balance of Hardships*

Finally, Grossman has not demonstrated that the immediate harm that he is likely to sustain from paying maintenance charges in the amount instituted by the Board or from permitting the Sponsor freely to cast its apportioned votes on the Board outweighs the hardship that would result to the Sponsor were it required to vote to revoke such increases, pay additional maintenance fees **[**16]** in disproportion to other unit holders, and in all other respects refrain from employing its votes on the Board.

As noted, Grossman has adduced no evidence establishing any specific and immediate harm to his interests apart from the easily monetizable percentage increase in his monthly maintenance charge. Moreover, granting Grossman's request to force a reduction in the maintenance fees across-the-board would impose a hardship on the Condominium and himself, since, as Grossman concedes, the maintenance fees are essential to undertaking necessary repairs of the Condominium.

The additional relief requested -- an order that the Sponsor refrain from exercising its votes on the Board "for any purpose" -- would cause serious hardships to the Sponsor and to the governance of the Condominium. The By-Laws of the Condominium contain a quorum requirement that a majority of the directors of the Board be present to conduct business. Given Grossman's allegations of Sponsor majority control, an order enjoining the Sponsor from exercising its votes on the Board would prevent achievement of the quorum necessary to Board decisionmaking as to the operation of the Condominium, to the obvious detriment **[**17]** of the Sponsor and possible detriment of the building. Even were a receiver appointed by the court (something which Grossman does not address in his papers), which would permit business to continue as usual, the Sponsor would no longer have any say in the management of a building in which it is said to own 64% of the apartments. Grossman has not established that he will sustain any injury that outweighs the immediate hardship of disenfranchisement that the Sponsor assuredly would suffer were the requested relief ordered. *Cf. Amalgamated Consultants Ltd. v. DeSavary*, No. 85 Civ. 2759 (S.D.N.Y. Oct. 22, 1985) (investor in condominium denied emergency appointment of receiver to replace sponsor's stewardship of building given lack of demonstrable hardship or injury).

II. *The Motions to Dismiss*

Two cross-motions to dismiss are before the court. The first, brought on behalf of Harry Helmsley and numerous other defendants, seeks dismissal of the plaintiffs' claims, *seriatim*, principally for the alleged failure of each cause to state grounds upon which relief may be granted. The second motion, brought on behalf of three passive investors in the Sponsor, seeks simply the dismissal **[**18]** of these particular defendants from the action. In view of the disposition of the former motion, the latter motion is not addressed.

Standards Governing Motions under 12(b)(6)

HN5[] A court should dismiss a complaint for failure to state a claim under *Rule 12(b)(6), Fed. R. Civ. P.*, if it appears beyond doubt that the plaintiff can prove no set of facts supporting its claim that entitles it to relief. *See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S. Ct. 2893, 2906, 106 L. Ed. 2d 195 (1989)*; *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*; *Dahlberg v. Becker, 748 F.2d 85, 88 (2d Cir. 1984)*, *cert. denied*, *470 U.S. 1084, 85 L. Ed. 2d 144, 105 S. Ct. 1845 (1985)*. A court must construe the complaint's allegations in the light most favorable to the plaintiff and accept those allegations as true. *See* ***[*208]*** *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*; *Dacey v. New York County Lawyers' Ass'n., 423 F.2d 188, 191 (2d Cir. 1969)*, *cert. denied*, *398 U.S. 929, 90 S. Ct. 1819, 26 L. Ed. 2d 92 (1970)*.

1. *The Antitrust Claim*

Grossman alleges that the Sponsor, in conspiracy with all of the other defendants, used its control of the condominium association and Parkchester Management Corp. to restrain trade, by compelling Parkchester South **[**19]** to effect all of its purchases through Deco Purchasing and Distributing Co., Inc. ("Deco"). Deco allegedly assesses a handling charge ranging from 5 to 20 percent of sales price on all of such purchases made by it on behalf of Parkchester South. The complaint does not allege that any of the defendants own or control Deco, or that the purchasing services Deco provides are available elsewhere on more favorable terms. It does assert that if the Management Corp. did not control the Board, Deco would not serve as exclusive purchaser.

Although the complaint does not so explicate, the allegations appear to be an effort to state a tying claim. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. This circuit has thus far declined to adopt the requirement, prevalent elsewhere, that the unlawfulness of such agreements hinge upon a showing that the tying seller has an economic interest in the tied market. *See Gonzalez v. St. Margaret's House Housing Dev. Fund Corp., 880 F.2d 1514, 1517 (2d Cir. 1989)*. *Cf. Carl Sandburg* ***[**20]*** *Village Condominium Ass'n No. 1 v. First Condominium Dev. Co., 758 F.2d 203, 207-08 (7th Cir. 1985)*; *Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 456 (5th Cir. 1979)*; *Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309, 1317-18 (3rd Cir. 1975)* (each imposing this "economic interest" test). Thus, the absence of any allegation that Management Corp. stands to reap any economic gain from Deco's engagement as purchasing agent for Parkchester South may not condemn Grossman's anti-trust claim to dismissal.

The lack of any allegation that Parkchester South's use of Deco as a purchasing agent was, at the time of Grossman's acquisition of a unit in the Parkchester South building, made a condition of his purchase does, however, warrant dismissal. The complaint in effect pleads no preexisting "tie" between the alleged tying product (residential condominium units) and the alleged tied product (purchasing agent services), since Grossman does not contend that provision of the services of a particular purchasing agent, such as Deco, was even a contemplated subject of the offering (no less a condition of sale) when he bought his units. This lack of conditionality distinguishes **[**21]** this case from other tying cases involving purchase of real estate interests brought in this district. *See 305 East 24th Owners Corp. v. Parman Co., 714 F. Supp. 1296, 1302, 1305 (S.D.N.Y. 1989)* (requirement that purchasers of interests in cooperative also purchase leases of building's garage space and commercial space was set forth in offering plan governing conversion of building and plaintiffs testified that owner refused to sell the building without the leases); *Gonzalez v. St. Margaret's House Housing Dev. Fund Corp., 880 F.2d 1514, 1515 (2d Cir. 1989)* (all tenants in low-cost building were required by existing rule of management to subscribe to building's meal plan) (citing *Gonzalez v. St. Margaret's, 668 F. Supp. 187, 189 (S.D.N.Y. 1987))*; *Johnson v. Soundview Apts. Housing Dev. Fund Co., 588 F. Supp. 1381, 1382 (S.D.N.Y. 1984)* (same). *See generally* Hovenkamp, *Tying*

Arrangements in the Real Estate Market: Federal ***Antitrust Law*** *and Local Land Development Policy*, 33 Hast.L.J. 325 (1981) ("[a] tying arrangement is an offer or agreement to sell or lease a certain product only on the condition that the buyer agree to take a different product as well.").

Plaintiff **[**22]** with reasons cites *Mission Hills Condominium Ass'n M-1 v. Corley, 570 F. Supp. 453, 456, 460 (N.D.Ill. 1983)* as support **[*209]** for a different result. That decision, however, did not expressly consider the necessity of a conditional relationship between the purchases in the tied and tying markets, and itself relies upon a decision in which the plaintiffs *did* allege that they were required, "as a condition of purchase of their units, to 'ratify and approve' . . . a long-term management contract . . .," *Johnson v. Nationwide Industries, Inc., 450 F. Supp. 948, 950 (N.D.Ill. 1978)*. *Mission Hills* is thus less than persuasive authority for the proposition that an illegal tying arrangement exists when purchase of the allegedly tied product is not made a condition, but is only one possible consequences, of the purchase of the tying product.

In addition to the insufficiently alleged "tie," the antitrust claim does not plead that the asserted arrangement with Deco has caused Grossman any damage. Although Grossman alleges that Deco imposes a 5 to 20% charge for its purchasing services, he does not allege in the complaint that Deco's charges are excessive or that its competitors provide **[**23]** services of like quality for a lesser price. In the principal case Grossman's counsel relies on, the plaintiffs managed to do at least that much. *See* *Mission Hills, 570 F. Supp. at 456* ("they claim that but for the defendants' actions, the plaintiffs could purchase these services from various other independent and more competent concerns on more favorable terms.").

HN6[] "To prevail in a private antitrust action, a plaintiff must show . . . the plaintiff was damaged as a result" of a violation of the antitrust laws. *Volvo N.A. Corp. v. Men's Int'l Pro. Tennis Council, 687 F. Supp. 800, 806 (S.D.N.Y. 1988)* (citation omitted). It is necessary at the pleading stage, therefore, to allege at least some such damage. Grossman has not done so in his complaint and for that reason too, the antitrust claim must be dismissed.

2. *The Interstate Land Sales Full Disclosure Act Claim*

Grossman claims that the Sponsor violated the provisions of the Interstate Land Sales Full Disclosure Act ("ILSFDA" or the "Act"), *15 U.S.C. §§ 1701-1720 (1982)*, by omitting material facts concerning the condition of the condominium apartments in Parkchester South from the Sponsor-prepared property report and **[**24]** misrepresenting other facts in the report. The claims fails as a matter of law because ILSFDA ***HN7***[] exempts from its requirements sales of property upon which building development has been completed at the time of sale.

HN8[] "Congress, in passing the statute, desired to protect purchasers from unscrupulous sales of undeveloped home sites, frequently involving out-of-state sales of land purportedly suitable for development but actually under water or useful only for grazing." *Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444, 1447 (11th Cir. 1985)*. *See also* *McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975)* (act prohibits fraud in land development enterprises); Conf. Rep. No. 1785, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.Code Cong. & Ad.News 3053, 3066. The protections afforded by the Act, which are to be construed broadly in accord with the remedial purposes of the legislation, *Timmreck v. Munn, 433 F. Supp. 396 (N.D.Ill. 1977)*, apply to the sale or lease of any "lot" not otherwise exempted under *section 1702* of the Act. *See* *15 U.S.C. §§ 1703(a)(1)*, *1702*.

The absence of any definition of the term "lot" led to litigation over whether its ambit reached the condominium **[**25]** form of real estate ownership, as it clearly did cover land sold in the more conventional forms such as the subdivision plot. The administrative agency responsible for promulgating regulations under the Act and courts that have addressed the question agree that sales of realty in the condominium form are embraced by the term "lot":

> The ILSFDA ***HN9***[] was intended to curb abuses accompanying interstate land sales. The Act accomplishes that goal by including within it all sales of lots and then exempting a number of transaction, including sales of fully improved property. It is reasonable to conclude, as HUD did, that the term "lot" was used to refer **[*210]** generally to interests in realty. The legislative history supports this construction, employing the terms "lot," "land," and "real estate" in discussing the Act. This construction is also reasonable in terms of the purpose of

> the statute. A fraudulent out-of-state sale of land is not rendered any less fraudulent if the condominium form of ownership is utilized.

Winter v. Hollingsworth, 777 F.2d at 1448 (footnote omitted) (reversing *587 F. Supp. 1289 (S.D.Fla. 1984)*. *See also* *Schatz v. Jockey Club Phase III, Ltd., 604 F. Supp. 537, 540-41 (S.D.Fla.* **[**26]** *1985)*; *Nargiz v. Henlopen Developers, 380 A.2d 1361, 1364 (Del. 1977)*.

HN10[] The HUD and judicial interpretation of the Act to include condominium ownership within the meaning of "lot" does not serve, however, to extend the coverage of the Act to sales of improved, developed realty, whether or not of condominium form. *Section 1702(a)(2)* expressly exempts sales of such improved land "on which there is a residential, commercial, condominium, or industrial building . . ." (or land upon which the seller has contracted to complete construction of such a structure within a period of two years), *15 U.S.C. § 1702(a)(2)*, and plaintiff points to no case subjecting sales of *completed* condominiums to the Act's provisions. [3] *Schatz* (a Florida District court case decided before the Eleventh Circuit opinion in *Winter*) involved merely an application of the two-year, "to be built" exemption, which it found on the facts the sale's agreement did not satisfy. *604 F. Supp. at 542*.

[27]** The case in no way supports Grossman's novel proposition that ILSFDA governs sales of fully-developed condominia, such as compose the Parkchester complex. Reliance on it (and no additional authority, legislative history, or legal reasoning) for that point is particularly incredible in view of the crystal-clear pronouncement by the Eleventh Circuit in *Winter*, issued a matter of months following the district court opinion in *Schatz*:

> We decline to depart from the plain language of the statutory exemption. ***HN12***[] If at the time the purchaser signs the contract there exists a condominium building or the seller is obligated to erect such a building within two years, the sale is exempt from the Act. If, as in this case, no building exists at the time of contracting and the contract does not contain a binding obligation to complete one within two years, compliance with the statute is required.

Winter, 777 F.2d at 1450; *see also* *Markowitz v. NortheastLand Company, 1989 U.S. Dist. LEXIS 9433 (M.D.Pa. 1989)* (dismissing ILSFDA claim based upon *section 1702(a)(2)* exemption); *Nargiz v. Henlopen Developers, 380 A.2d 1361 (Del. 1977)* (where developer and purchaser contract for sale **[**28]** of condominium which did not exist at time, sale does not satisfy statutory language exempting sale of improved property on which there is a residential building).

For the reasons indicated, Grossman's theory is inconsistent with the legislative history of ILSFDA, its construction by HUD, and the meaning assigned to the *section 1702(a)(2)* exemption by courts that have found it necessary to consider the matter. Accordingly, the ILSFDA claim is dismissed.

3. *The Securities Claim*

The court's prior opinion in this action addressed and denied the contention that Section 10(b) of the Securities and Exchange Act of 1934, *15 U.S.C. § 78j(b) (1982)*, was violated when Parkchester was converted to condominium ownership, on grounds that the condominium sales are not within the scope of the federal securities **[*211]** laws. [4]

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[3] HUD explained the treatment of condominiums as follows: ***HN11***[] "For a condominium unit sale to be exempted from the Act, . . . either it must be completed before it is sold, or it must be sold under a contract obligating the seller to erect the unit within two years from the date the purchaser signs the contract of sale." *38 Fed.Reg. 23,866 (1973)*. *See also* 44 Fed.Reg. 24,012 (1979); *Winter v. Hollingsworth, 777 F.2d 1444, 1448-49 (11th Cir. 1985)* (Congress acted to exempt condominium sales "where the building is existing or must, by contract, be completed within two years.").

[4] Footnote One of the Opinion, in addressing the securities claim, stated:

> ***HN13***[] The sale of condominium units, even when "made in contemplation of appreciation solely through the efforts of defendants," as the complaint alleges, does not constitute a sale of securities. *See Bender [v. Continental Towers, Ltd., Partnership], supra*, *632 F. Supp. 497*. Even though the sponsor of an offering plan might influence the value of the units

That holding, which relied upon *Bender v. Continental Towers Ltd., Partnership, 632 F. Supp. 497 (S.D.N.Y. 1986)*, was not disturbed on appeal, and accordingly, is not subject to reexamination here.

[29]** Nevertheless, without seeking leave of court, counsel for plaintiffs has asserted an "investment contract" claim under Section 10(b) in the consolidated complaint. [5] Counsel's conduct in the *Bender* action, in which parties represented by the same lawyer likewise pursued a securities cause of action based on condominium sales, resulted in sanctions against him in the amount of $ 1,000 when, among other things, a claim was improperly realleged in an amended complaint. *See Bender v. Continental Towers Ltd*., No. 85 Civ. 5725 (S.D.N.Y. Aug 21, 1987). [*1987 U.S. Dist. LEXIS 7498]*. Without addressing the appropriateness of sanctions for counsel's conduct in the instant action, the securities claim herein is dismissed on the grounds previously stated, grounds which counsel failed to challenge on appeal.

The same conclusion applies to the extent the "new" claim is founded upon Section 17(a) of the Securities Act of 1933. ***HN14***[] No private right of action has been **[**30]** held to exist under that provision. *See, e.g., McCowan v. Dean Witter Reynolds, Inc*., [1989 Transfer Binder]Fed. Sec. L.Rep. (CCH) P 94, 423 at 92,724 (S.D.N.Y. Apr. 11, 1989); *The Limited Inc. v. McCrory Corp., 683 F. Supp. 387 (S.D.N.Y. 1988)*; *Ackerman v. Clinical Data, Inc*., Fed. Sec. L. Rep. (CCH) P 92,207 at 91,566 (S.D.N.Y. July 8, 1985). Accordingly, the securities cause of action is dismissed in its entirety.

4. *The RICO Claim*

Plaintiffs allege that the defendants, as a group, violated RICO by using the mails to send to tenants and other prospective purchasers Offering Plans containing deliberate misinformation concerning the conversion of Parkchester South. The Court of Appeals for the Second Circuit and the Supreme Court previously have considered the adequacy of the claim with respect to the RICO requirements that the alleged mail fraud acts constitute a "pattern" of "racketeering activity" revealing continuity. *See Beauford v. Helmsley*, 865 F.2d at 1392. Those elements are not placed again in question here.

i. Material Misrepresentations

Under *Rule 12(b)(6), Fed. R. Civ. P.*, defendants seek dismissal principally on the ground **[**31]** that Grossman's allegations of fraudulent representations in the Offering Plan are refuted by the Plan itself. *See Feinman v. Schulman Berlin & Davis, 677 F. Supp. 168, 170 n. 3 (S.D.N.Y. 1988)* (permitting consideration, on motion to dismiss, of contents of private placement memorandum which, although not attached to complaint, was mentioned therein as source of alleged misrepresentations); *see also Decker v. Massey-Ferguson Ltd., 681 F.2d 111, 113-18 (2d Cir. 1982)* (affirming dismissal of several alleged misrepresentations in company's annual report where document did not support allegations of complaint); *Crystal v. Foy, 562 F. Supp. 422 (S.D.N.Y. 1983)* (Weinfeld, J.) (dismissing complaint upon examining sources cited by plaintiff as containing misrepresentations and finding that "plaintiff's own source repels her claim . . ."); *O'Brien v. National Property Analysts Partners, 719 F. Supp. 222, 227-228 (S.D.N.Y 1989)* (same).

[*212] Although it is a close question, defendants have failed to establish that Grossman can prove no set of facts that might establish that material information was withheld from him and other purchasers of condominium units. To be sure, a facial examination **[**32]** of the offering plan indicates that it provided notice to prospective buyers that, among other things, (a) the plumbing system was aging and required repairs, (b) certain portions of the roofs had leaks and required repairs, and (c) the electrical wiring, although adequate for existing conditions, would not sustain installation of additional loads.

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through its marketing efforts and its own buying and selling strategies, a "piece of real estate, such as a condominium, has an inherent worth not solely dependent on the efforts of the promoter." *Bender, supra, 632 F. Supp. at 501*.

Beauford, 650 F. Supp. at 550 n. 1. *See also* *Grenader v. Spitz, 537 F.2d 612, 617* (2d Cir.), *cert. denied*, *429 U.S. 1009, 50 L. Ed. 2d 619, 97 S. Ct. 541 (1976)*.

[5] The complaint fails to specify on behalf of which of the plaintiffs this securities claim is brought.

The complaint alleges, however, that the disclosures in the Offering Plan were less than complete, and the substance of the allegedly omitted information cannot be said to be immaterial to a decision whether and at what price to purchase a Parkchester South unit. According to plaintiffs, Sponsor had received reports "from its own engineers that the plumbing system was so deteriorated that it had to be completely replaced," and knew or should have known that the roofs and wiring also were so deteriorated or inadequate that they required replacement. Nevertheless, they contend the Sponsor deliberately withheld that information from the Offering Plan in order to "deceive and defraud the buyers of condominium apartments by concealing serious problems in the physical plant of Parkchester South."

It may turn out, as defendants contend, that there **[**33]** exists merely a difference of opinion between the Sponsor, Grossman and certain tenants as to the proper scope of repairs and maintenance that Parkchester South requires, and therefore, nothing approaching fraudulent conduct on any defendant's part. *Cf.* *Bender v. Continental Towers Limited Partnership, No. 85 Civ. 5725 (S.D.N.Y. 1987) [1987 U.S. Dist. LEXIS 7498]*. However, given the apparent materiality of at least some of the information that the complaint alleges was not disclosed (such as the supposed necessity of wholesale replacement of the plumbing system at considerable expense), the allegation that such information was deliberately suppressed, and the requirement at this juncture that such allegations be assumed true, defendants' contention that this is nothing more than a disagreement as to the appropriate means of maintaining a building cannot sustain an order of dismissal of this cause of action, at least to the extent the claim is maintained by Grossman alone.

ii. Lack of Injury to Non-Purchasing Plaintiffs

More persuasive is defendants' plea for dismissal of the non-purchasing tenants from the RICO claim on ground that this claim alleges no injury to non-owning non-purchasers. That is **[**34]** true. Although the claim is nominally brought on behalf of both Grossman (the purchasing/owner plaintiff) and the other, non-purchasing, plaintiffs, the paragraphs of the RICO claim that describe, and ascribe causality and injury to, the fraudulent schemes that forms its basis speak only of these schemes' effects upon "buyers and owners." *See* para. 93 ("The fraud consists, in part, of deliberate misinformation to buyers, and to owners of condominium apartments, for the purpose of defrauding said buyers and owners"); para. 94 (". . . there is no foreseeable end to the scheme to defraud the condominium owners by the defendants"); para. 98 (referring generally to "the several schemes to defraud owners and buyers of condominiums"); para. 99 ("The schemes to defraud have resulted in damages to the owners of condominiums in the hundreds of millions of dollars.").

The complaint's failure to plead any injury to non-purchasing plaintiffs under the civil RICO claim requires dismissal of the claim as to these plaintiffs, since economic injury is a necessary element of liability under such a claim. *See* *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)* ***HN15***[] (plaintiff "can only recover **[**35]** to the extent that [] he has been injured in his business or property by the conduct constituting the violation."); *Burdick v. American Express Co., 865 F.2d 527, 529 (2d Cir. 1989)* (plaintiff must allege non-remote economic injury arising from predicate acts); *O'Malley v. O'Neill, 887 F.2d 1557, 1561 (11th Cir. 1989)* (same).

[*213] iii. Particularity of Pleading under *Rule 9(b)*

Moreover, defendants correctly point out that the RICO claim fails to particularize the roles of the individual defendants in perpetrating the allegedly fraudulent acts, as is required by *Rule 9(b), Fed. R. Civ. P.* "When a plaintiff sues sixteen defendants, he or she has an obligation to allege specifically the fraud perpetrated by each defendant." *Natowitz v. Mehlman, 542 F. Supp. 674, 676 (S.D.N.Y. 1982)*; *accord* *Di Vittorio v. Equidyne Extractive Industries, Inc., 822 F.2d 1242, 1247 (2d Cir. 1987)* ***HN16***[] ("where multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud."). In civil RICO actions, "the concerns that dictate that fraud be pleaded with particularity exist with even greater urgency. **[**36]** . . ." *Plount v. American Home Assur. Co., 668 F. Supp. 204, 206 (S.D.N.Y. 1987)*; *Rich-Taubman Associates v. Stamford Restaurant Operating Co., 587 F. Supp. 875, 878 (S.D.N.Y. 1984)*.

This RICO claim is brought against all of the defendants to this action but does not specify with particularity what any one of those numerous defendants did. The allegations in the complaint asserting fraudulent conduct repeatedly refer to the Sponsor as actor, yet plaintiffs do not sue the Sponsor. No specific action is attributed to any one of the thirty-five named defendants; indeed, none appears to merit mention in the paragraphs of the complaint composing the RICO cause, other than collectively, as "defendants." This sort of general pleading does not give each defendant "fair notice" of what he or she did to further the fraudulent scheme, as *Rule 9(b)* requires. *Di Vittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987)*; *see also* *Bingham v. Zolt, 683 F. Supp. 965, 973 (S.D.N.Y. 1988)*; *O'Connor & Associates v. Dean Witter Reynolds, Inc., 529 F. Supp. 1179, 1197 (S.D.N.Y. 1981)*.

Pursuant to *Rule 9(b)*, therefore, the plaintiffs' RICO claim must be dismissed. **[**37]** In view of the procedural history of this action, and, in particular, plaintiffs' failure to attend to the prior cautionary instruction delivered by the Second Circuit to them with respect to this issue, *see Beauford v. Helmsley*, 865 F.2d at 1393 ("we doubt that the complaint [meets] the requirements of *Fed. R. Civ. P. 9(b)*, which requires that fraud be pleaded with particularity"), leave is not given plaintiffs, once again, to replead with particularity the roles played by each of the individual defendants named in the complaint in the fraudulent schemes alleged therein. Should plaintiffs' counsel form a reasonable belief, after reviewing the relevant authorities and investigating the facts, that a RICO claim complying fully with *Rule 9(b)* can be executed, such a proposed amended complaint may be submitted on motion, supported by memorandum of law, within thirty days of this opinion.

5. *The State Law Claims*

In view of the absence of a valid remaining federal claim, further jurisdiction over the pendent state claims asserted by the plaintiffs is presently declined. *See* *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*; *Albany Ins. Co. v. Esses, 831 F.2d 41, 45* ***[**38]*** *(2d Cir. 1987)*.

Conclusion

For the reasons set forth above, the motion for a preliminary injunction is denied. Pursuant to *Rule 12(b)(6)*, the claims in the complaint arising under the federal antitrust laws, Interstate Land Sales Full Disclosure Act and federal securities laws are dismissed with prejudice. Grossman's RICO claim and the pendent state law claims set forth in the complaint are also dismissed, pursuant to *Rule 9(b)* and *Gibbs*, subject to reconsideration of dismissal upon the submission to the court, within thirty (30) days from the date of this opinion and order, of a motion seeking leave to file a proposed amended complaint containing a well-pleaded RICO claim.

It is so ordered.

DeSantis v. Wackenhut Corp.

Supreme Court of Texas

June 6, 1990, Delivered

No. C-6617

Reporter

793 S.W.2d 670 *; 1990 Tex. LEXIS 81 **; 33 Tex. Sup. J. 517; 5 I.E.R. Cas. (BNA) 739; 1990-2 Trade Cas. (CCH) P69,147

EDWARD DESANTIS, et al., Petitioners, v. WACKENHUT CORPORATION, Respondent

Prior History: [1]**

From Harris County, Fourteenth District.

This Opinion Substituted by Court for Withdrawn Opinion of July 13, 1988, Reported at 1988 Tex. LEXIS 97.

Core Terms

non competition agreement, compete, parties, injunction, damages, trial court, covenants, court of appeals, customers, fundamental policy, rule of reason, Antitrust, malicious prosecution, temporary injunction, unenforceable, principles, tortious interference, cause of action, no evidence, state law, Sherman Act, confidential, promisee, temporary restraining order, state ***antitrust law***, restraint of trade, business goodwill, post-employment, maliciously, terminated

LexisNexis® Headnotes

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Contracts Law > Contract Formation > Offers > General Overview

HN1[] **Federal & State Interrelationships, Choice of Law**

Parties' freedom to choose what jurisdiction's law will apply to their agreement cannot be unlimited. They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply. So limited, party autonomy furthers the basic policy of contract law. Limited party autonomy has grown to be the modern rule in contracts conflict of laws.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Contracts Law > Contract Formation > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN2[] **Federal & State Interrelationships, Choice of Law**

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which would be the state of the applicable law in the absence of an effective choice of law by the parties.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN3[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

An agreement not to compete is in restraint of trade and will not be enforced unless it is reasonable.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Defenses > Public Policy Violations

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN4[] **Types of Contracts, Covenants**

As a general rule, unreasonable restraints of trade, including unreasonable covenants not to compete, contravene public policy.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN5[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

Virtually every court that has addressed the question of whether enforcement of noncompetition agreements is a matter of fundamental or important state policy has answered affirmatively.

Contracts Law > Defenses > Public Policy Violations

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Labor & Employment Law > Employment Relationships > General Overview

HN6[] **Defenses, Public Policy Violations**

An agreement not to compete is in restraint of trade and therefore unenforceable on grounds of public policy unless it is reasonable. An agreement not to compete is not a reasonable restraint of trade unless it meets each of three criteria. First, the agreement not to compete must be ancillary to an otherwise valid transaction or relationship. Such a restraint on competition is unreasonable unless it is part of and subsidiary to an otherwise valid transaction or relationship which gives rise to an interest worthy of protection. Such transactions or relationships include the purchase and sale of a business, and employment relationships. Second, the restraint created by the agreement not to compete must not be greater than necessary to protect the promisee's legitimate interest. The extent of the agreement not to compete must accordingly be limited appropriately as to time, territory, and type of activity. An agreement not to compete which is not appropriately limited may be modified and enforced by a court of equity to the extent necessary to protect the promisee's legitimate interest, but may not be enforced by a court of law. Third, the promisee's need for the protection afforded by the agreement not to compete must not be outweighed by either the hardship to the promisor or any injury likely to the public.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN7[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

Before an agreement not to compete will be enforced, its benefits must be balanced against its burdens, both to the promisor and the public. Thus, such an agreement may, in a particular case, accomplish the salutary purpose of encouraging an employer to share confidential, proprietary information with an employee in furtherance of their common purpose, but must not also take unfair advantage of the disparity of bargaining power between them or too severely impair the employee's personal freedom and economic mobility.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN8[] **Trials, Judgment as Matter of Law**

Whether an agreement not to compete is a reasonable restraint of trade is a question of law for the court.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Remedies > Equitable Relief > Injunctions

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN9[] **Types of Contracts, Covenants**

An agreement not to compete, like any other contract, must be supported by consideration. Consideration may include special training or knowledge afforded the promisor, but it is not limited to such things. Also, performance of a covenant not to compete, like performance of other contractual obligations, may, in certain instances at least, be excused by the promisee's own breach. And enforcement of an agreement not to compete may not be by injunction if the party seeking enforcement is not entitled to such stable relief, as, for example, when that party has himself engaged in inequitable conduct, or when that party has failed to show that without injunctive relief he will suffer irreparable injury for which he has no adequate legal remedy.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN10[] Types of Contracts, Covenants

See *Tex. Bus. & Com. Code Ann. § 15.50*.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN11[] Types of Contracts, Covenants

See *Tex. Bus. & Com. Code Ann. § 15.51*.

Civil Procedure > Remedies > Bonds > Execution of Bonds

Torts > ... > Malicious Prosecution > Elements > General Overview

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN12[] Bonds, Execution of Bonds

A person who obtains an injunction wrongfully is liable for damages caused by issuance of the injunction. There are two separate causes of action for wrongful injunction, one upon the bond ordinarily filed to obtain the injunction, and the other for malicious prosecution. The two actions differ in the kind of wrong which must be shown to establish liability and in the amount of recovery.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

HN13[] Injunctions, Grounds for Injunctions

A cause of action upon an injunction bond is predicated upon a breach of the condition of the bond. That condition, as prescribed by *Tex. R. Civ. P. 684* is that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part. To prevail upon this cause of action, the claimant must prove that the temporary restraining order or temporary injunction was issued or perpetuated when it should not have been, and that it was later dissolved. The claimant need not prove that the temporary restraining order or temporary injunction was obtained maliciously or without probable cause.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Torts > ... > Malicious Prosecution > Elements > General Overview

HN14[] **Injunctions, Preliminary & Temporary Injunctions**

An injunction plaintiff need not establish the correctness of his claim to obtain temporary relief, but must show only a likelihood of success on the merits. Correspondingly, an injunction defendant has a lesser burden to establish his right to recover on an injunction bond than would be required in an ordinary action for malicious prosecution.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Torts > Remedies > Damages > General Overview

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Torts > Intentional Torts > Malicious Prosecution > General Overview

Torts > ... > Malicious Prosecution > Elements > General Overview

Torts > Intentional Torts > Malicious Prosecution > Remedies

HN15[] **Injunctions, Grounds for Injunctions**

The only other cause of action for wrongful injunction is for malicious prosecution. It is established by the weight of authority that in the absence of elements of an action for malicious prosecution no action will lie by the defendant in an injunction suit, independently of a bond or undertaking, for damages for the wrongful suing out of the injunction. To prevail upon this cause of action the claimant must prove that the injunction suit was prosecuted maliciously and without probable cause, and was terminated in his favor. Once the injunction plaintiff has prevailed after full hearing of all issues, damages to the defendant result not from the reduced showing required to obtain temporary relief but from the full proof necessary to succeed on the merits, and defendant cannot recover those damages without full proof of malicious prosecution.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Torts > ... > Malicious Prosecution > Elements > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN16[] **Injunctions, Permanent Injunctions**

The damages recoverable in an action on an injunction bond are, of course, limited to the amount of the bond. In an action for malicious prosecution, all actual damages may be recovered. Under either cause of action the claimant must prove that issuance of the injunction caused him damages. He cannot recover for having been prohibited from doing something which he had no right to do. Nor can he recover for having been prohibited from doing something which he agreed not to do, even if the agreement was unenforceable.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN17[] Public Enforcement, State Civil Actions

See *Tex. Bus. & Com. Code Ann. § 15.04*.

Antitrust & Trade Law > Sherman Act > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN18[] Antitrust & Trade Law, Sherman Act

An agreement not to compete is a restraint on trade. However, not every contract in restraint of trade is prohibited by the Sherman Antitrust Act, *15 U.S.C.S. § 1* but only those contracts which unreasonably restrain trade. The focus of this rule of reason test is upon whether the restraint promotes competition or suppresses or destroys competition. Some restraints, because of their inherently pernicious effect upon competition, are per se unreasonable, while others are not and must be analyzed under the rule of reason. The factors important to a rule of reason analysis vary from case to case.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] Per Se Rule & Rule of Reason, Per Se Violations

There can be little doubt that the Sherman Antitrust Act, *15 U.S.C.S. § 1*, applies to post-employment noncompetition agreements. Such agreements are not per se violations of the Sherman Act but must be analyzed under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN20[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To establish a violation under the rule of reason, one must prove that the agreement has an adverse effect on competition in the relevant market. This is distinguished from the effect a post-employment noncompetition agreement has on the particular employer and employee involved. Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law. Rule of reason analysis tests the effect of a restraint of trade on competition. By contrast, whether a noncompetition agreement is reasonable depends upon its effect on the parties, the competitors, as it were. The two standards are not directly related. An agreement may be reasonable as between the parties and nevertheless violate antitrust laws. Conversely, an agreement may be unreasonable as between the parties and yet not violate the rule of reason test under the antitrust laws.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Governments > Courts > Court Records

HN21[] **Summary Judgment, Supporting Materials**

Absent a complete record of the summary judgment evidence, an appellate court must assume that omitted documents support the judgment of the trial court.

Counsel: Mercer, Mr. Jon, Houston, Texas and Flick, Mr. Theodore C., Houston, Texas, for petitioner.

Bruckner, Mr. William H., Bruckner & Sykes, Houston, Texas, Cavazos, Ms. Roxella T., Chamberlain, Hrdlicka, White, Johnson & Williams, Houston, Texas, Sadler, Ms. Judith Batson, Bruckner & Sykes, Houston, Texas and Davidow, Ms. Sylvia, Bruckner & Sykes, Houston, Texas, for respondent.

Judges: Nathan L. Hecht, Justice. Concurring opinion by Justice Mauzy, joined by Justice Spears.

Opinion by: HECHT

Opinion

[*674] ON MOTION FOR REHEARING

HECHT, Justice.

On motions for rehearing, our opinion and judgment of July 13, 1988, are withdrawn, and the following is now the opinion of the Court.

This case involving a noncompetition agreement between an employer and employee presents three principal issues: first, whether the law of the state chosen by the parties to govern their agreement should be applied; second, whether the noncompetition agreement is enforceable; third, if the agreement is not enforceable, whether damages for **[**2]** its attempted enforcement are recoverable under the Texas Free Enterprise and Antitrust Act of 1983 or for wrongful injunction, fraud, or tortious interference with contract.

The trial court applied the law of the state of Florida, chosen by the parties to govern the noncompetition agreement, to hold the agreement valid but overly broad **[*675]** as to the geographical territory in which competition was restricted. Based upon a jury finding that the employee breached the agreement, the trial court enjoined any further violation of the agreement within a smaller territory, and denied the employee's claims for damages. The court of appeals affirmed. *732 S.W.2d 29*. We hold that Texas law, not Florida law, applies in this case, and that under Texas law, the noncompetition agreement is unenforceable. We further hold that the employee is not entitled to recover damages for his employer's wrongfully obtaining an injunction against him, and that the employee has failed to show fraud, tortious interference, or a violation of the Texas Free Enterprise and Antitrust Act entitling him to damages. We accordingly reverse the judgment of the court of appeals and render judgment in accordance **[**3]** with this opinion.

I

A

Edward DeSantis has been providing international and corporate security services, both in the CIA and the private sector for his entire career. In June 1981, while employed by R. J. Reynolds Industries in North Carolina, DeSantis interviewed for a position with Wackenhut Corporation. At that time, Wackenhut, which was chartered and headquartered in Florida, was the third largest company in the nation specializing in furnishing security guards for businesses throughout the country. DeSantis met with Wackenhut's president, founder, and majority stockholder, George Wackenhut, at the company's offices in Florida, and the two agreed that DeSantis would immediately assume the position of Wackenhut's Houston area manager. According to DeSantis, George Wackenhut promised him that the area manager's position was only temporary, and that he would soon be moved into a top executive position. George Wackenhut denies that he made any such promises to DeSantis, admitting only that he mentioned advancement to an executive position as a possible opportunity.

At Wackenhut's request, DeSantis signed a noncompetition agreement at the inception of his employment. The agreement **[**4]** recites that it was "made and entered into" on August 13, 1981, in Florida, although DeSantis signed it in Texas. It also recites consideration "including but not limited to the Employee's employment by the Employer". In the agreement DeSantis covenanted that as long as he was employed by Wackenhut and for two years thereafter, he would not compete in any way with Wackenhut in a forty-county area in south Texas. DeSantis expressly acknowledged that Wackenhut's client list "is a valuable, special and unique asset of [Wackenhut's] business" and agreed never to disclose it to anyone. DeSantis also agreed never to divulge any confidential or proprietary information acquired through his employment with Wackenhut. Finally, DeSantis and Wackenhut agreed "that any questions concerning interpretation or enforcement of this contract shall be governed by Florida law."

DeSantis remained manager of Wackenhut's Houston office for nearly three years, until March 1984, when he resigned under threat of termination. DeSantis contends that he was forced to quit because of disagreements with Wackenhut's senior management over the profitability of the Houston office. Wackenhut contends that DeSantis **[**5]** was asked to resign because of his unethical solicitation of business.

Following his resignation, DeSantis invested in a company which marketed security electronics. He also formed a new company, Risk Deterrence, Inc. ("RDI"), to provide security consulting services and security guards to a limited clientele. The month following termination of his employment with Wackenhut, DeSantis sent out letters announcing his new ventures to twenty or thirty businesses, about half of which were Wackenhut clients. He added a postscript to letters to Wackenhut clients in which he disclaimed any intent to interfere with their existing contracts with Wackenhut. Within six months, however, one of Wackenhut's clients, Marathon Oil Company, had terminated its contract with Wackenhut and signed a five-year contract **[*676]** with RDI, and a second Wackenhut client, TRW-Mission Drilling Products, was considering doing the same. Wackenhut claims that DeSantis was acquiring its clients in violation of the noncompetition agreement. DeSantis claims that these clients began considering other security service providers only after the quality of Wackenhut's services declined, following DeSantis' departure.

[6]** B

Wackenhut sued DeSantis and RDI in October 1984 to enjoin them from violating the noncompetition agreement, and to recover damages for breach of the agreement and for tortious interference with business relations. Wackenhut alleged that DeSantis and RDI were soliciting its clients' business using confidential client and pricing information which DeSantis obtained through his employment with Wackenhut. The trial court issued an ex parte temporary restraining order against DeSantis and RDI, and fixed the amount of the requisite bond which Wackenhut filed at $ 5,000. Following a hearing, the trial court issued a temporary injunction upon a $ 75,000 bond, which Wackenhut also filed. DeSantis and RDI counterclaimed against Wackenhut, alleging that Wackenhut had fraudulently induced DeSantis to sign the noncompetition agreement, that the agreement violated state antitrust laws, and that enforcement of the agreement by temporary injunction was wrongful and tortiously interfered with DeSantis and RDI's contract and business relationships. RDI claimed damages for loss of the Marathon contract, which Marathon terminated after the injunction issued, for loss of the TRW business, and for **[**7]** injury to its reputation. DeSantis claimed damages for lost salary, impaired reputation, and mental anguish. DeSantis and RDI both sought statutory damages under the Texas Free Enterprise and Antitrust Act, *Texas Business and Commerce Code Annotated sections 15.01-15.51* (Vernon 1987 and Supp. 1990), and exemplary damages.

The trial court granted Wackenhut's motion for summary judgment on DeSantis and RDI's claim for tortious interference, and directed a verdict against them on their fraud claim. At trial, Wackenhut withdrew its tortious interference claim. A jury found that DeSantis breached the noncompetition agreement by competing with Wackenhut, but failed to find that Wackenhut would be irreparably harmed if DeSantis were not prohibited from further breaching the agreement. [1] The jury also failed to find that Wackenhut had ever been unfair, unjust, misleading or deceptive to DeSantis so as to cause him any injury. The jury found that Wackenhut's enforcement of the noncompetition agreement had caused DeSantis no damages, but had caused RDI to lose profits from Marathon's and TRW's business in the amount of $ 9,000 in the past and a like amount in the future.

[8]** The trial court concluded that irreparable harm to Wackenhut was either presumed from DeSantis' breach of the agreement under Florida law, or established as a matter of law because of the absence of an adequate legal remedy for breach of the agreement under Texas law. Accordingly, the trial court permanently enjoined DeSantis from competing with Wackenhut, and RDI from employing DeSantis to compete with Wackenhut, for two years from the date DeSantis left Wackenhut in an area reduced by the trial court from the forty counties stated in the agreement to the thirteen counties found by the trial court to be reasonably necessary to protect Wackenhut's interest. The trial court also permanently enjoined DeSantis from divulging Wackenhut's client list or proprietary information, and RDI from using any proprietary information of Wackehhut's acquired through DeSantis. The trial court denied all relief requested by DeSantis and RDI, based upon the jury's finding that DeSantis had breached his agreement with Wackenhut. The trial court awarded Wackenhut attorney's fees and costs.

[*677] The court of appeals affirmed the judgment of the trial court in all respects.

II

We first consider **[**9]** what law is to be applied in determining whether the noncompetition agreement in this case is enforceable. Wackenhut contends that Florida law applies, as expressly agreed by the parties. DeSantis argues that Texas law applies, despite the parties' agreement.

A

This Court has not previously addressed what effect should be given to contractual choice of law provisions. We begin with what Chief Justice Marshall referred to as a principle of "universal law . . . that, in every forum, a contract is governed by the law with a view to which it was made." *Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48, 6 L.Ed. 253 (1825)*. This principle derives from the most basic policy of contract law, which is the protection of the justified expectations of the parties. *See* E. SCOLES & P. HAY, CONFLICT OF LAWS 632 (1984) ["SCOLES"]; Reese, *Choice of Law in Torts and Contracts and Directions for the Future,* 16 COLUM. J. TRANSNAT'L L. 1, 21 (1977). The parties' understanding of their respective contractual rights and obligations depends in part upon the certainty with which they may predict how the law will interpret and enforce their agreement. *Id.*

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[1] Whether a party has been or will be irreparably harmed is not a jury issue, although factual issues to be considered by the court in making that determination may be. *See*, *State v. Texas Pet Foods, Inc., 591 S.W.2d 800, 803-804 (Tex. 1979)*.

When parties to a contract reside **[**10]** or expect to perform their respective obligations in multiple jurisdictions, they may be uncertain as to what jurisdiction's law will govern construction and enforcement of the contract. To avoid this uncertainty, they may express in their agreement their own choice that the law of a specified jurisdiction apply to their agreement. Judicial respect for their choice advances the policy of protecting their expectations. This conflict of laws concept has come to be referred to as party autonomy. *See* R. WEINTTAUB, COMMENTARY ON THE CONFLICT OF LAWS 269-271 (1971) ["WEINTTAUB"]. However, the ***HN1***[] parties' freedom to choose what jurisdiction's law will apply to their agreement cannot be unlimited. They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply. So limited, party autonomy furthers the basic policy of contract law. With roots deep in two centuries of American jurisprudence, limited party autonomy has grown to be the modern rule in contracts conflict of laws. *See* SCOLES, *supra* **[**11]** at 632-652; WEINTRAUB, *supra* at 269-*275; RESTATEMENT (SECOND) OF CONFLICT OF LAWS* ["the RESTATEMENT"*] § 187* (1971).

The party autonomy rule has been recognized in this state. The Legislature has provided in the Uniform Commercial Code:

> [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

TEX. BUS. & CON. CODE ANN. § 1.105(a) (Vernon Supp. 1989). In a different context, one court of appeals has elaborated further:

> [A]n express agreement of the parties that the contract is to be governed by the laws of a particular state will be given effect if the contract bears a reasonable relation to the chosen state and no countervailing public policy of the forum demands otherwise.

First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806, 808-809 (Tex. Civ. App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.) (citing, *inter alia,* the *RESTATEMENT § 187*). We believe the rule is best formulated in *section 187 of the RESTATEMENT* and will therefore look to its provisions **[**12]** in our analysis of this case.

B

Section 187 states:

> Law of the State Chosen by the Parties
>
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular **[*678]** issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) ***HN2***[] The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of *§ 188*, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication **[**13]** of intention, the reference is to the local law of the state of the chosen law.

The issue before us -- whether the noncompetition agreement in this case is enforceable -- is not "one which the parties could have resolved by an explicit provision in their agreement". *See* *RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment d* (1971). We therefore apply *section 187(2)*.

The parties in this case chose the law of Florida to govern their contract. Florida has a substantial relationship to the parties and the transaction because Wackenhut's corporate offices are there, and some of the negotiations between DeSantis and George Wackenhut occurred there. Thus, under *section 187(2)* Florida law should apply in this case unless it falls within the exception stated in *section 187(2)(b)*. Whether that exception applies depends upon three determinations: first, whether there is a state the law of which would apply under *section 188 of the RESTATEMENT* absent an effective choice of law by the parties, or in other words, whether a state has a more significant relationship with the parties and their transaction than the state they chose; second, whether that state has a materially greater **[**14]** interest than the chosen state in deciding whether this noncompetition agreement should be enforced; and third, whether that state's fundamental policy would be contravened by the application of the law of the chosen state in this case. More particularly, we must determine: first, whether Texas has a more significant relationship to these parties and their transaction than Florida; second, whether Texas has a materially greater interest than Florida in deciding the enforceability of the noncompetition agreement in this case; and third, whether the application of Florida law in this case would be contrary to fundamental policy of Texas.

1

Section 188 of the RESTATEMENT provides that a contract is to be governed by the law of the state that "has the most significant relationship to the transaction and the parties", taking into account various contacts in light of the basic conflict of laws principles of section 6 of the RESTATEMENT. [2] **[**16]** In this case, that state is Texas.

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[2] Section 188 of the RESTATEMENT states in full:

Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

Section 6 of the RESTATEMENT states:

Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

[*679] Wackenhut hired DeSantis to manage its business in the Houston area. Although some of the negotiations between DeSantis and Wackenhut occurred in Florida, the noncompetition agreement was finally executed **[**15]** by DeSantis in Houston. [3] The place of performance for both parties was Texas, where the subject matter of the contract was located. Wackenhut may also be considered to have performed its obligations in part in Florida, from where it supervised its various operations, including its Houston office. Still, the gist of the agreement in this case was the performance of personal services in Texas. As a rule, that factor alone is conclusive in determining what state's law is to apply. *See* RESTATEMENT § 196 (1971); [4] *see also* *Schulke Radio Prod. Ltd. v. Midwestern Broadcasting Co., 6 Ohio St. 3d 436, 453 N.E.2d 683, 685-6 (1983)*; *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 198 Colo. 444, 601 P.2d 1369, 1373 (1979)*; *Graham v. Wilkins, 145 Conn. 34, 138 A.2d 705, 708 (1958)*. In this case, the relationship of the transaction and parties to Texas was clearly more significant than their relationship to Florida.

2

Texas has a materially greater interest than does Florida in determining whether the noncompetition agreement in this case is enforceable. At stake here is whether a Texas resident can leave one Texas job to start a competing Texas business. Thus, Texas is directly interested in DeSantis as an employee in this state, in Wackenhut as a national employer **[**17]** doing business in this state, in RDI as a new competitive business being formed in the state, and in consumers of the services furnished in Texas by Wackenhut and RDI and performed by DeSantis. Texas also shares with Florida a general interest in protecting the justifiable expectations of entities doing business in several states. Florida's direct interest in the enforcement of the noncompetition agreement in this case is limited to protecting a national business headquartered in that state. Although it is always problematic for one state to balance its own interests fairly against those of another state, the circumstances of this case leave little doubt, if any, that Texas has a materially greater interest than Florida in deciding whether the noncompetition agreement in this case should be enforced.

3

Having concluded that Texas law would control the issue of enforceability of the noncompetition agreement in this case but for the parties' choice of Florida law, and that Texas' interest in deciding this issue in this case is materially greater than Florida's, we must finally determine under *section 187(2)(b) of the RESTATEMENT* whether application of Florida law to decide this issue **[**18]** would be contrary to fundamental policy of Texas. The RESTATEMENT offers little guidance in making this determination. Comment g states only that a "fundamental" **[*680]** policy is a "substantial" one, and that "[t]he forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule. . . ."

Comment g to section 187 does suggest that application of the law of another state is not contrary to the fundamental policy of the forum merely because it leads to a different result than would obtain under the forum's law. We agree that the result in one case cannot determine whether the issue is a matter of fundamental state policy for purposes of resolving a conflict of laws. Moreover, the fact that the law of another state is materially

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(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

[3] The covenant itself states that it was executed in Florida, but testimony for both parties established that DeSantis signed it last in Houston.

[4] Section 196 states:

Contracts for the Rendition of Services

The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

different from the law of this state does not itself establish that application of the other state's law would offend the fundamental policy of Texas. In analyzing whether fundamental policy is offended under *section 187(2)(b)*, the focus is on whether the law in question is a part of state policy so fundamental that the courts of the state will refuse to enforce an agreement **[**19]** contrary to that law, despite the parties' original intentions, and even though the agreement would be enforceable in another state connected with the transaction. [5]

Neither the RESTATEMENT nor the cases which have followed *section 187* have undertaken a general definition of "fundamental policy", and we need not make the attempt in this case; for whatever its parameters, enforcement of noncompetition agreements falls well within them. This Court has held that ***HN3***[] "[a]n agreement not to compete is in restraint of trade and will not be enforced unless it is reasonable." *Frankiewicz v. National* ***[**20]*** *Comp Assoc., 633 S.W.2d 505, 507 (Tex. 1982)*; *accord* *Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 340 S.W.2d 950, 951 (1960)*. ***HN4***[] As a general rule, unreasonable restraints of trade, including unreasonable covenants not to compete, contravene public policy. *See* *Denny v. Roth, 296 S.W.2d 944, 947* (Tex. Civ. App.--Galveston 1956, writ ref'd); *RESTATEMENT (SECOND) OF CONTRACTS §§ 186-188* (1981); 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1633-1635 (3d ed. 1972). What noncompetition agreements are reasonable restraints upon employees in this state, therefore, is a matter of public policy. Moreover, that policy is fundamental in that it ensures a uniform rule for enforcement of noncompetition agreements in this state. *See* *RESTATEMENT § 187 comment g* (1971) ("a fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power"). Absent such a policy, agreements involving residents of other states would be controlled by the law and policy of those states. An employee of one out-of-state employer might take a competing job and escape **[**21]** enforcement of a covenant not to compete because of the law of another state, while a neighbor suffered enforcement of an identical covenant because of the law of a third state. The resulting disruption of orderly employer-employee relations, as well as competition in the marketplace, would be unacceptable. Employers would be encouraged to attempt to invoke the most favorable state law available to govern their relationship with their employees in Texas or other states.

These same considerations and others have led ***HN5***[] virtually every court that has addressed the question of whether enforcement of noncompetition agreements is a matter of fundamental or important state policy to answer affirmatively. Not many of these courts have considered the matter specifically in the context of *section 187 of the RESTATEMENT,* and yet, rather remarkably, many have nevertheless expressed similar conclusions. *See* *Dresser Indus., Inc. v. Sandvick, 732 F.2d 783, 787-788 (10th Cir. 1984)* ("the tendency of the courts [is] to apply the policy of the forum state when parties are litigating covenants not to compete"); **[*681]** *Nordson Corp. v. Plasschaert, 674 F.2d 1371, 1375 (11th Cir. 1982)*; **[**22]** *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham, 658 F.2d 1098, 1100 n.5 (5th Cir. 1981)*; *Davis v. Jointless Fire Brick Co., 300 F. 1, 3-4 (9th Cir. 1924)*; *Muma v. Financial Guardian, Inc., 551 F. Supp. 119, 121-123 (E.D. Mich. 1982)*; *Walling Chem. Co. v. Hart, 508 F. Supp. 338, 340 (D. Neb. 1981)*; *Fort Smith Paper Co. v. Sadler Paper Co., 482 F. Supp. 355, 357 (E.D. Ok. 1979)*; *Blalock v. Perfect Subscription Co., 458 F. Supp. 123, 127 (S.D. Ala. 1978)*, *aff'd per curiam, 599 F.2d 743 (5th Cir. 1979)*; *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc., 410 F. Supp. 967, 976-978 (D.S.C. 1976)*; *Fine v. Property Damage Appraisers, Inc., 393 F. Supp. 1304, 1310 (E.D. La. 1975)*; *Boyer v. Piper, Jaffray & Hopwood, Inc., 391 F. Supp. 471, 473 (D.S.D. 1975)*; *Forney Indus., Inc. v. Andre, 246 F. Supp. 333, 334-335 (D.N.D. 1965)*; *Nasco, Inc. v. Gimbert, 239 Ga. 675, 238 S.E.2d 368, 369 (1977)*; *Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533, 541-542 (1961)*; *Temporarily* *Yours-Temporary Help Services, Inc. v. Manpower, Inc., 377 So. 2d 825, 827 (Fla. Dist. Ct. App. 1979)*; *see also* *Barnes Group, Inc.* ***[**23]*** *v. C & C Products, Inc., 716 F.2d 1023, 1031-1032 (4th Cir. 1983)*; *Bush v. National School Studios, Inc., 139 Wis.2d 635, 407 N.W.2d 883, 886-888 (1987)* (suit for unfair termination).

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[5] The trial court apparently concluded that this noncompetition agreement is enforceable under both Texas and Florida law. The court of appeals concluded that the agreement is enforceable under Florida law and did not consider whether it is enforceable under Texas law. DeSantis appears to concede that the agreement is enforceable under Florida law. Wackenhut strongly argues that the agreement is enforceable under Texas law.

We likewise conclude that the law governing enforcement of noncompetition agreements is fundamental policy in Texas, and that to apply the law of another state to determine the enforceability of such an agreement in the circumstances of a case like this would be contrary to that policy. We therefore hold that the enforceability of the agreement in this case must be judged by Texas law, not Florida law.

III

We now consider whether the noncompetition agreement between DeSantis and Wackenhut is enforceable under Texas law. We must also consider the effect upon this case of certain legislation passed while this case has been pending before this Court.

A

The fundamental common law principles which govern the enforceability of covenants not to compete in Texas are relatively well established. ***HN6***[] An agreement not to compete is in restraint of trade and therefore unenforceable on grounds of public policy [6] unless it is reasonable. *Frankiewicz v. National Comp Assocs., 633 S.W.2d 505, 507* ***[**24]*** *(Tex. 1982)*; *Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 340 S.W.2d 950, 951 (1960)*; *RESTATEMENT (SECOND) OF CONTRACTS § 186* (1981). An agreement not to compete is not a reasonable restraint of trade unless it meets each of three criteria. First, the agreement not to compete must be ancillary to an otherwise valid transaction or relationship. *Justin Belt Co. v. Yost, 502 S.W.2d 681, 683-684* ***[*682]*** *(Tex. 1973)*; *Potomac Fire Ins. Co. v. State, 18 S.W.2d 929, 934-935* (Tex. Civ. App.--Austin 1929, writ ref'd); *RESTATEMENT (SECOND) OF CONTRACTS § 187* (1981). Such a restraint on competition is unreasonable unless it is part of and subsidiary to an otherwise valid transaction or relationship which gives rise to an interest worthy of protection. *RESTATEMENT (SECOND) OF CONTRACTS § 187 comment b* (1981). Such transactions or relationships include the purchase and sale of a business, and employment relationships. *Restatement (Second) of Contracts § 188(2)* (1981). Second, the restraint created by the agreement not to compete must not be greater than necessary to protect the promisee's legitimate interest. *Henshaw v. Kroenecke, 656 S.W.2d 416, 418 (Tex. 1983)*; **[**25]** *Weatherford, , 340 S.W.2d at 951*; *RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a)* (1981). Examples of legitimate, protectable interests include business goodwill, trade secrets, and other confidential or proprietary information. *Restatement (Second) of Contracts § 188 comments b*, g (1981). The extent of the agreement not to compete must accordingly be limited appropriately as to time, territory, and type of activity. *RESTATEMENT (SECOND) OF CONTRACTS § 188 comment d* (1981); *see* *Frankiewicz, 633 S.W.2d at 507*; *Justin Belt, 502 S.W.2d at 685*; *Weatherford, 340 S.W.2d at 951*. An agreement not to compete which is not appropriately limited may be modified and enforced by a court of equity to the extent necessary to protect the promisee's legitimate interest, but may not be enforced by a court of law. *Weatherford, 340 S.W.2d at 952-953*. Third, the promisee's need for the protection afforded by the agreement not to compete must not be outweighed by either the hardship to the promisor or any injury likely to the public. *RESTATEMENT (SECOND) OF CONTRACTS*

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[6] An agreement not to compete may be unenforceable for reasons other than public policy. For example, ***HN9***[] an agreement not to compete, like any other contract, must be supported by consideration. *See* *B. Cantrell Oil Co. v. Hino Gas Sales, 756 S.W.2d 781, 783* (Tex.--Corpus Christi 1988, no writ); *Travel Masters Inc. v. Star Tours, Inc., 742 S.W.2d 837, 841* (Tex. App.--Dallas 1987, writ dism'd w.o.j.); *Chenault v. Otis Eng'g Corp., 423 S.W.2d 377, 382* (Tex. Civ. App.--Corpus Christi 1967, writ ref'd n.r.e.). Consideration may include special training or knowledge afforded the promisor, but it is not limited to such things, and we specifically disapprove language to the contrary in *Bland v. Henry & Peters, 763 S.W.2d 5* (Tex. App.--Tyler 1988, writ denied). Also, performance of a covenant not to compete, like performance of other contractual obligations, may, in certain instances at least, be excused by the promisee's own breach. *See* *Langdon v. Progress Laundry & Cleaning Co., 105 S.W.2d 346, 347-348* (Tex. Civ. App.--Dallas 1937, writ ref'd); *Halbert v. Standley, 488 S.W.2d 887, 889* (Tex. Civ. App.--Waco 1972, writ ref'd n.r.e.); ***RESTATEMENT (SECOND) OF CONTRACTS §§ 237-249*** (1981). And enforcement of an agreement not to compete may not be by injunction if the party seeking enforcement is not entitled to such stable relief, as, for example, when that party has himself engaged in inequitable conduct, *see* *Vaughan v. Kizer, 400 S.W.2d 586, 589-590* (Tex. Civ. App.--Waco 1966, writ ref'd n.r.e.); *National Chemsearch Corp. v. Frazier, 488 S.W.2d 545, 548* (Tex. Civ. App.--Waco 1972, no writ); or when that party has failed to show that without injunctive relief he will suffer irreparable injury for which he has no adequate legal remedy, *see* *Parkem Indus. Services, Inc. v. Garton, 619 S.W.2d 428, 430-431* (Tex. Civ. App.--Amarillo 1981, no writ).

§ 188(1)(b) (1981); *see* *Henshaw, 656 S.W.2d at 418* (citing *Weatherford, 340 S.W.2d at 951* (agreement **[**26]** may not impose undue hardship on promisor)). ***HN7***[] Before an agreement not to compete will be enforced, its benefits must be balanced against its burdens, both to the promisor and the public. Thus, such an agreement may, in a particular case, accomplish the salutary purpose of encouraging an employer to share confidential, proprietary information with an employee in furtherance of their common purpose, but must not also take unfair advantage of the disparity of bargaining power between them or too severely impair the employee's personal freedom and economic mobility. *See RESTATEMENT (SECOND) OF CONTRACTS § 188 comments c*, g (1981). ***HN8***[] Whether an agreement not to compete is a reasonable restraint of trade is a question of law for the court. *Henshaw, 656 S.W.2d at 418*.

[27]** This Court referred to these principles in *Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168 (Tex. 1987)*. After holding the agreement not to compete in that case unreasonable and unenforceable, the Court added that agreements "which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable." *725 S.W.2d at 172*. The Court did not define "common calling" or elaborate upon the purpose to be served by this additional requirement. The Court again referred to "common calling" in *Bergman v. Norris of Houston, 734 S.W.2d 673 (Tex. 1987)*, but did not further elucidate the phrase except to say that "[w]hether an employee is engaged in a common calling is a question of law to be decided from the facts of each individual case." *Id. at 674*. Although the Court held the covenants not to compete in *Bergman* unenforceable because the promisees were engaged in a common calling, it is apparent from the recitation of the evidence that the covenants would have fared no better under the principles we have set out above.

The references to "common calling" in *Hill* and *Bergman* have proven confusing in determining whether **[**28]** to enforce agreements not to compete. Two courts of appeals have attempted to define "common calling". *Cukjati v. Burkett, 772 S.W.2d 215, 217* (Tex. App.--Dallas 1989, no writ); *B. Cantrell Oil Co. v. Hino Gas Sales, Inc., 756 S.W.2d 781, 783* (Tex. App.--Corpus Christi 1988, no writ); *Travel Masters, Inc. v. Star Tours, Inc., 742 S.W.2d 837, 840-841* (Tex. App.--Dallas 1987, writ **[*683]** dism'd w.o.j.). Another court of appeals has attempted to apply the standard without defining it. *Hoddeson v. Conroe Ear, Nose & Throat Assocs., 751 S.W.2d 289, 290* (Tex. App.--Beaumont 1988, no writ). Other courts have acknowledged this Court's reference to "common calling" but then reached decisions regarding the enforceability of agreements not to compete in their respective cases without attempting to apply that standard. *Posey v. Monier Resources, Inc., 768 S.W.2d 915, 918* (Tex. App.--San Antonio 1989, writ denied); *French v. Community Broadcasting of Coastal Bend, Inc., 766 S.W.2d 330, 333* (Tex. App.--Corpus Christi 1989, writ dism'd w.o.j.); *Bland v. Henry & Peters, 763 S.W.2d 5, 7-8* (Tex. App.--Tyler 1988, writ denied); *M.R.S. Datascope Inc. v. Exchange* ***[**29]*** *Data Corp., 745 S.W.2d 542, 546* (Tex. App.--Houston [1st Dist.] 1988, no writ). One court has held that veterinary medicine is not a common calling. *Cukjati, 772 S.W.2d at 217*. Another has held, over a vigorous dissent, that a medical doctor certified as an ear, nose and throat specialist is engaged in a common calling. *Hoddeson, 751 S.W.2d at 290*.

In deciding whether an ancillary agreement not to compete is reasonable, the court should focus on the need to protect a legitimate interest of the promisee and the hardship of such protection on the promisor and the public. The nature of the promisor's job -- whether it is a common calling -- may sometimes factor into the determination of reasonableness, but it is not the primary focus of inquiry. The results in *Hill* and *Bergman* would have been the same irrespective of whether the promisors in those cases had been engaged in common callings. Moreover, the Legislature has now rejected common calling as a test for the reasonableness of noncompetition agreements. *See* *TEX. BUS. & COM. CODE ANN. §§ 15.50-15.51* (Vernon Supp. 1990). Accordingly, we do not apply "common calling". We hold instead that the principles **[**30]** set out above are to be applied in determining whether an agreement not to compete is reasonable.

B

There is no dispute in this case that the agreement not to compete was ancillary to an otherwise valid relationship, *viz.,* Wackenhut's employment of DeSantis. The dispute is whether the agreement was necessary to protect some legitimate interest of Wackenhut, and whether that necessity was outweighed by the hardship of enforcement. As we have noted above, these are all questions for the court.

Wackenhut claims that the business goodwill developed for it by DeSantis was an interest protectable by an agreement not to compete. The evidence that DeSantis ever developed business goodwill for Wackenhut, however, is exceedingly slight on this record, little more than testimony that DeSantis occasionally entertained representatives of Wackenhut's clients. Indeed, Wackenhut's contention that DeSantis' unethical business solicitation led it to request his resignation tends, at least, to contradict its contention that DeSantis developed goodwill among its customers. Assuming, however, that DeSantis did develop business goodwill for Wackenhut, there is no showing that he did or even could **[**31]** divert that goodwill to himself for his own benefit after leaving Wackenhut. The jury found that DeSantis competed with Wackenhut after leaving its employ, and the evidence leaves little doubt that he did; but there is no finding and almost no evidence that DeSantis was able to appropriate for his own use any business goodwill that he developed for Wackenhut. Rather, the evidence is that after announcing his departure to some ten or fifteen of Wackenhut's customers, in the following six months DeSantis received business from only one of those customers and might have received business from another. There is evidence that both were considering moving their business to DeSantis' new company, RDI, because they were dissatisfied with Wackenhut's services. There is no evidence that either customer considered replacing Wackenhut with DeSantis because of the goodwill DeSantis had developed with those customers while at Wackenhut. There is simply no showing on this record that prohibiting DeSantis from competing with Wackenhut **[*684]** after he left its employ was necessary to keep DeSantis from trading on Wackenhut's business goodwill, much less any showing that the hardship of the agreement **[**32]** on DeSantis was outweighed by the need to protect any such interest.

Wackenhut also claims that it possessed confidential information protectable by an agreement not to compete. Specifically, Wackenhut contends that during his employ, DeSantis learned the identity of Wackenhut's customers, their special needs and requirements, and Wackenhut's pricing policies, cost factors and bidding strategies. Again, while confidential information may be protected by an agreement not to compete, Wackenhut has failed to show that it needed such protection in this case. Wackenhut failed to show that its customers could not readily be identified by someone outside its employ, that such knowledge carried some competitive advantage, or that its customers' needs could not be ascertained simply by inquiry addressed to those customers themselves. Also, Wackenhut failed to show that its pricing policies and bidding strategies were uniquely developed, or that information about its prices and bids could not, again, be obtained from the customers themselves. There is no evidence that DeSantis ever took advantage of any knowledge he had of Wackenhut's cost factors in trying to outbid Wackenhut or woo away **[**33]** its customers. Wackenhut simply has not demonstrated a need to protect any confidential information by limiting DeSantis' right to compete.

Having determined that Wackenhut has not shown that DeSantis' agreement not to compete is necessary to protect any legitimate business interest, or that the necessity of such protection outweighs the hardship of that agreement on DeSantis, we conclude that the agreement is unreasonable and therefore unenforceable.

C

While this case has been pending before this Court, the Legislature has added subchapter E to the Texas Business and Commerce Code and expressly made it applicable "to a covenant entered into before, on, or after the effective date of this Act." Act of June 16, 1989, ch. 1193, 1, 1989 Tex. Gen. Laws 4852 (effective Aug. 28, 1989). [7] Thus, this Act purports to apply to **[*685]** the agreement not to compete before us in this case.

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[7] New subchapter E added by this Act provides:

SUBCHAPTER E. COVENANTS NOT TO COMPETE

HN10[] *Sec. 15.50*. CRITERIA FOR ENFORCEABILITY OF COVENANTS NOT TO COMPETE. Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable to the extent that it:

> (1) is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration; and

[34]** The obvious threshold issue which this recent legislation presents is whether it may affect litigation regarding the rights of parties to an agreement not to compete which commenced before the statute was enacted. We find it unnecessary, however, to resolve this issue in this case because we conclude that the result in this case would not be affected by the statute. Under *section 15.50(2)*, "a covenant not to compete is enforceable to the extent that it . . . contains reasonable limitations . . . that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." *Section 15.51(b)* obliges the promisee, Wackenhut in this case, to establish a protectable business interest when the matter involves rendition of personal services, as this one does. Because we have held that Wackenhut has failed to make this required showing, we cannot reform the agreement to meet either the criteria of *section 15.50(2)*, or of *Weatherford* for that matter. The agreement not to compete in this case is no more enforceable under *sections 15.50* and *15.51* of the Texas Business and Commerce Code than it would be under the above-stated common law principles **[**35]** governing such agreements.

Accordingly, we leave for another day the issues of whether this recent legislation affects all covenants not to compete entered into before the effective date of the Act, and how it alters the common law principles governing such covenants.

IV

We now turn to DeSantis and RDI's contentions that they are entitled to recover on their claims against Wackenhut for wrongfully securing temporary injunctive relief, violating state antitrust laws, fraud, and tortiously interfering with contract and business relationships. We consider each of these claims in turn.

A

DeSantis and RDI claim that Wackenhut has prosecuted this action against them maliciously, that it procured the temporary restraining order and temporary injunction against them wrongfully, and that they have suffered damages as a result. DeSantis and RDI each alleged actual damages greatly in excess of the $ 5,000 temporary restraining order bond and the $ 75,000 temporary injunction bond which Wackenhut filed.

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(2) contains reasonable limitations as to time, geographical area, and scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

HN11[] *Sec. 15.51*. PROCEDURES AND REMEDIES IN ACTIONS TO ENFORCE COVENANTS NOT TO COMPETE. (a) Except as provided in Subsection (c) of this section, a court may award the promisee under a covenant not to compete damages, injunctive relief, or both damages and injunctive relief for a breach by the promisor of the covenant.

(b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisee has the burden of establishing that the covenant meets the criteria specified by *Subdivision (2) of Section 15.50* of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this subsection, the "burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(c) If the covenant meets the criteria specified by *Subdivision (1) of Section 15.50* of this code but does not meet the criteria specified by *Subdivision (2) of Section 15.50*, the court, at the request of the promisee, shall reform the covenant to the extent necessary to cause the covenant to meet the criteria specified by *Subdivision (2) of Section 15.50* and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not meet the criteria specified by *Subdivision (2) of Section 15.50* and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

HN12[] A person who obtains an injunction wrongfully is liable for damages caused by issuance of the injunction. *Parks v. O'Connor, 70 Tex. 377, 8 S.W. 104, 107 (1888)*. There are two separate **[**36]** causes of action for wrongful injunction, one upon the bond ordinarily filed to obtain the injunction, and the other for malicious prosecution. *See Annot., Liability Apart from Bond and in Absence of Elements of Malicious Prosecution for Wrongfully Suing Out Injunction,* 45 A.L.R. 1517 (1926); Annot., *Proceedings for Injunction or Restraining Order as Basis of Malicious Prosecution Action,* 70 A.L.R.3d 536 (1976). The two actions differ in the kind of wrong which must be shown to establish liability and in the amount of recovery. The few Texas cases which have addressed these differences have not been entirely clear or consistent.

HN13[] A cause of action upon an injunction bond is predicated upon a breach of the condition of the bond. That condition, as prescribed by *Rule 684, Texas Rules of Civil Procedure*, is "that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part." To prevail upon this cause of action, the claimant must prove that the temporary restraining order or temporary injunction was **[**37]** issued or perpetuated **[*686]** when it should not have been, and that it was later dissolved. *See* *Craddock v. Overstreet, 435 S.W.2d 607, 608-609* (Tex. Civ. App.--Tyler 1968, writ ref'd n.r.e.). The claimant need not prove that the temporary restraining order or temporary injunction was obtained maliciously or without probable cause. *See* *Johnson v. McMahan, 40 S.W.2d 920, 922* (Tex. Civ. App.--Amarillo 1931, writ ref'd). The purpose of the bond is to protect the defendant from the harm he may sustain as a result of temporary relief granted upon the reduced showing required of the injunction plaintiff, pending full consideration of all issues. ***HN14***[] An injunction plaintiff need not establish the correctness of his claim to obtain temporary relief, but must show only a likelihood of success on the merits. Correspondingly, an injunction defendant has a lesser burden to establish his right to recover on an injunction bond than would be required in an ordinary action for malicious prosecution.

HN15[] The only other cause of action for wrongful injunction is for malicious prosecution. "'It is established by the weight of authority that in the absence of elements of an action for malicious **[**38]** prosecution no action will lie by the defendant in an injunction suit, independently of a bond or undertaking, for damages for the wrongful suing out of the injunction.'" *Camp v. Atlantic Refining Co., 179 S.W.2d 326, 328* (Tex. Civ. App.--Texarkana 1944, writ ref'd). To prevail upon this cause of action the claimant must prove that the injunction suit was prosecuted maliciously and without probable cause, and was terminated in his favor. *See* *James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982)*. Once the injunction plaintiff has prevailed after full hearing of all issues, damages to the defendant result not from the reduced showing required to obtain temporary relief but from the full proof necessary to succeed on the merits, and defendant cannot recover those damages without full proof of malicious prosecution.

HN16[] The damages recoverable in an action on an injunction bond are, of course, limited to the amount of the bond. In an action for malicious prosecution, all actual damages may be recovered. Under either cause of action the claimant must prove that issuance of the injunction caused him damages. He cannot recover for having been prohibited from doing something which he had **[**39]** no right to do. *Parks, 8 S.W. at 107*. Nor can he recover for having been prohibited from doing something which he agreed not to do, even if the agreement was unenforceable. *Wissman v. Boucher, 150 Tex. 326, 240 S.W.2d 278, 281 (1951)*.

The temporary restraining order and temporary injunction against DeSantis and RDI were never dissolved. Consequently, under *Rule 684, Texas Rules of Civil Procedure*, DeSantis and RDI are not entitled to recover against the bond Wackenhut posted for each of these orders. DeSantis and RDI did not request jury findings on their malicious prosecution claim and therefore waived it. Moreover, there is no evidence in this record that Wackenhut acted maliciously and without probable cause in bringing suit, especially inasmuch as the trial court and court of appeals both found merit in Wackenhut's claim. Thus, DeSantis and RDI are not entitled to recover on their claim of malicious prosecution. Accordingly, DeSantis and RDI have failed to establish their right to recover damages against Wackenhut for wrongful injunction.

B

DeSantis and RDI claim that the noncompetition agreement between DeSantis and Wackenhut violates the Texas Free Enterprise and **[**40]** Antitrust Act of 1983, *Texas Business and Commerce Code Annotated sections 15.01-15.51* (Vernon 1987 and Supp. 1990), and that they are therefore entitled to recover treble damages against Wackenhut under that statute. More specifically, DeSantis and RDI assert that the noncompetition agreement is unlawful under section 15.05(a), which declares that "[e]very contract . . . in restraint of trade or commerce is unlawful." DeSantis and RDI contend that, under section 15.21(a), they are entitled to recover damages from **[*687]** Wackenhut as persons "whose business or property has been injured by reason of any conduct declared unlawful" in section 15.05(a), and that because Wackenhut's conduct was "willful or flagrant", they are entitled to have those damages trebled.

Although we have not previously had occasion to apply state antitrust statutes to noncompetition agreements between employers and employees, we do not write on a clean slate. *Section 15.04* instructs:

> ***HN17***[] The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. **[**41]** The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

Section 15.05(a) is comparable to, and indeed taken from, *section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1 (1988)*. [8] Accordingly, we look to federal judicial interpretations of *section 1* of the Sherman Act in applying section 15.05(a) of our state ***antitrust law***.

As we have noted above, ***HN18***[] an agreement not to compete is a restraint on trade. However, not every contract in restraint of trade is prohibited by *section 1* of the Sherman Act, but only those contracts which unreasonably restrain trade. *E.g., Standard Oil Co. v. United States, 221 U.S. 1, 60, 31 S. Ct. 502, 55 L.* ***[**42]*** *Ed. 619 (1911)*; *United States v. American Tobacco Co., 221 U.S. 106, 179, 31 S.Ct. 502, 55 L. Ed. 619 (1911)*. The focus of this "rule of reason" test is upon whether the restraint promotes competition or suppresses or destroys competition. *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*; *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L.Ed.2d 568 (1977)*; *National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688, 98 S. Ct. 1355, 55 L.Ed.2d 637 (1978)*. Some restraints, because of their inherently pernicious effect upon competition, are per se unreasonable, while others are not and must be analyzed under the rule of reason. *See* 2 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 3.02 [6] (1989). The factors important to a rule of reason analysis vary from case to case. *See Chicago Bd. of Trade, 246 U.S. at 238*; D. ASPELUND & C. ERIKSEN, EMPLOYEE NONCOMPETITION LAW § 7.01 (1987) ["ASPELUND"]; W. LIFLAND, STATE ***ANTITRUST LAW*** § 4.02 (1987) ["LIFLAND"]; E. ROCKEFELLER, ANTITRUST QUESTIONS AND ANSWERS 16-20 (1974).

Until recently, there were few attempts **[**43]** to apply ***antitrust law*** to post-employment noncompetition agreements. *See* ASPELUND, *supra* § 7.01, at 7-1 to 7-4; Blake, *Employee Agreements Not to Compete,* 73 HARV. L. REV. 625, 628 n.8 (1960) ["Blake"]; White, *"Common Callings" and the Enforcement of Postemployment Covenants in Texas,* 19 ST. MARY'S L.J. 589, 599 (1988); Note, *The Antitrust Implications of Employee Noncompete Agreements: A Labor Market Analysis,* 66 MINN. L. REV. 519, 520 (1982) ["Note"]. ***HN19***[] There can be little doubt that the Sherman Act applies to such agreements. *See Consultants & Designers, Inc. v. Butler Serv. Group, Inc., 720 F.2d 1553, 1564 (11th Cir. 1983)*; *Aydin Corp. v. Loral Corp., 718 F.2d 897, 901-903 (9th Cir. 1983)*; *Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977)*, *cert. denied, 434 U.S. 1035, 98 S. Ct. 769, 54 L.Ed.2d 782 (1978)*; *Golden v. Kentile Floors, Inc., 512 F.2d 838, 843-844 (5th Cir. 1975)*; *Bradford v. New York Times Co., 501 F.2d 51, 59 (2nd Cir. 1974)*; ASPELUND, *supra* § 7.01 at 7-8; A. VALIULUS, COVENANTS NOT TO COMPETE: FORMS, TACTICS, AND THE LAW 37 (1985) ["VALIULUS"]. However, it appears that no such noncompetition **[**44]** agreement has ever been held to violate the Sherman Act. *See* **[*688]** *United States*

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[8] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

v. Empire Gas Corp., 537 F.2d 296, 301 (8th Cir. 1976), *cert. denied, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977)*; *Bradford, 501 F.2d at 59 (2nd Cir. 1974)*; *Golden, 512 F.2d at 843-844 (5th Cir. 1975)*; *Frackowiak v. Farmers Ins. Co., 411 F. Supp. 1309, 1315-1316 (D. Kan. 1976)*; ASPELUND, *supra* § 7.01 at 7-4; Blake, *supra* 628 and n.8. One explanation for this absence of precedent may be the difficulty involved in proving that a post-employment noncompetition agreement violates the Sherman Act. Such agreements are not per se violations of the Sherman Act but must be analyzed under the rule of reason. *See* *Consultants, 720 F.2d at 1560-1562*; *Aydin, 718 F.2d at 960-901*; *Golden, 512 F.2d at 843-844*; *Bradford, 501 F.2d at 59-60*; ASPELUND, supra § 7.01 at 7-11 to 7-12; *cf.* *Newburger, 563 F.2d at 1082* (not ordinarily a per se violation, but might be if served no legitimate purpose when adopted). ***HN20***[] To establish a violation under the rule of reason, one must prove that the agreement has an adverse effect on competition in the relevant market. **[**45]** *See* *Consultants, 720 F.2d at 1562*; *Aydin, 718 F.2d at 902*. This is distinguished from the effect a post-employment noncompetition agreement has on the particular employer and employee involved. *See* *Bradford, 501 F.2d at 59-60*; ASPELUND, *supra* § 7.01 at 7-14 to 7-15; Note, *supra* at 524-525 n.10.

Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law. Rule of reason analysis tests the effect of a restraint of trade on *competition.* By contrast, whether a noncompetition agreement is reasonable depends upon its effect on the parties, the *competitors,* as it were. The two standards are not directly related. An agreement may be reasonable as between the parties and nevertheless violate antitrust laws. *See* *Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 97 S. Ct. 2881, 53 L.Ed.2d 1009 (1977)* (Stevens, J., dissenting). Conversely, an agreement may be unreasonable as between the parties and yet not violate the rule of reason test under the antitrust laws.

Construing section 15.05(a) of our state ***antitrust law*** in light of these federal judicial interpretations of *section 1* the Sherman Act, as we **[**46]** are instructed to do by statute, we hold that a post-employment noncompetition agreement does not violate section 15.05(a) unless it fails the same rule of reason analysis that would be applied under federal law. [9] The anticompetitive market effect necessary to show such a violation does not appear in this case. DeSantis and RDI offered no evidence of relevant market or anticompetitive effect, and requested no fact findings by the jury on these issues. Accordingly, DeSantis and RDI have failed to establish their right to recover for violations of state ***antitrust law***.

C

DeSantis and RDI claim that Wackenhut fraudulently induced DeSantis to sign the noncompetition agreement. More specifically, DeSantis claims that he signed the agreement only because George Wackenhut misrepresented to him that **[**47]** he was being considered for an executive position. The trial court granted a directed verdict for Wackenhut on DeSantis and RDI's fraud claims, which was proper if there was no evidence to support at least one element of the cause of action. The elements of fraud are a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of the truth, which was intended to be acted upon, which was relied upon, and which caused injury. *Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex. 1977)*. The only evidence of fraud at trial consisted of DeSantis' testimony that George Wackenhut told him that he wanted to surround his son with professionals to move the company into the future, that he had been told that DeSantis was one of those professionals, **[*689]** that DeSantis would be required to learn the "bread and butter" of the business and then would move to the next stage, and that DeSantis was basically being hired for an executive position. Assuming that George Wackenhut made the statements which DeSantis attributed to him, even though he denied DeSantis' account of their conversation, DeSantis produced no **[**48]** evidence that these statements were false when they were made, or that George Wackenhut knew that they were false when he made them, or that he intended by these statements to induce DeSantis to sign the noncompetition agreement. Inasmuch as DeSantis and RDI failed to produce evidence to support each element of their fraud claim, the court of appeals correctly affirmed the trial court's grant of a directed verdict on that claim.

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[9] In view of this holding, we are not required in this case to consider the effect of the recent additions of *sections 15.50* and *15.51* to the Texas Business and Commerce Code, see note 8, *supra,* and we do not do so.

D

DeSantis and RDI claim that Wackenhut's enforcement of the noncompetition agreement tortiously interfered with their contract and business relationships. Wackenhut moved for summary judgment on this claim, based upon an affidavit which was not included in the record on appeal. The trial court granted Wackenhut's motion. To appeal this ruling, DeSantis and RDI had the burden to bring forward the record of the summary judgment hearing to prove harmful error. *Escontrias v. Apodaca, 629 S.W.2d 697, 699 (Tex. 1982)*. ***HN21***[] Absent a complete record of the summary judgment evidence, an appellate court must assume that the omitted documents support the judgment of the trial court. *Alexander v. Bank of Am. Nat'l Trust & Sav. Ass'n, 401 S.W.2d 688, 689* (Tex. **[**49]** Civ. App.--Waco 1966, writ ref'd); *Hassell v. New England Mut. Life Ins. Co., 506 S.W.2d 727* (Tex. Civ. App.--Waco 1974, writ ref'd). Without the affidavit, we are unable to review whether Wackenhut conclusively proved that it was entitled to judgment on the tortious interference claim as a matter of law. The court of appeals, therefore, correctly affirmed the trial court's award of summary judgment for Wackenhut on the tortious interference claim.

V

Inasmuch as we have held the noncompetition agreement in this case to be unreasonable and unenforceable, we reverse the judgment of the court of appeals which affirmed the permanent injunction enforcing that agreement, and vacate that injunction ordered by the trial court. We also reverse the judgment of the court of appeals which affirmed the trial court's judgment awarding Wackenhut attorney fees against DeSantis and RDI. Because we have held that DeSantis and RDI failed to establish their right to recover any damages against Wackenhut, we affirm the judgment of the court of appeals which affirmed the trial court's judgment that DeSantis and RDI take nothing against Wackenhut. Costs in the trial court, the court of appeals, and **[**50]** this Court are taxed against the party which incurred them.

Mauzy, J., files concurring opinion in which Spears, J., joins.

Concur by: MAUZY

Concur

CONCURRING OPINION ON MOTION FOR REHEARING

OSCAR H. MAUZY, Justice, concurring.

The Court takes pains to avoid overruling *Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168 (Tex. 1987)*, and *Bergman v. Norris of Houston, 734 S.W.2d 673 (Tex. 1987)* and I am therefore able to concur in the Court's judgment. However, by even discussing these cases, the Court reaches too far.

In Hill and Bergman, "[w]e specifically rejected from being enforceable covenants restricting the right to engage in a common calling." *Bergman, 734 S.W.2d at 674*. In the instant case, however, the noncompetition agreement is unenforceable without regard to whether it restricts the right to engage in a common calling. Thus, the Court's discussion of the common calling doctrine is unnecessary, gratuitous and ill-advised. Is this not the very definition of "judicial activism"?

I disagree, too, with the Court's conclusion that "the Legislature has now rejected common calling as a test for the reasonableness of noncompetition agreements." S.W.2d **[**51]** at The statute in question, **[*690]** *Tex. Bus. & Com. Code § 15.50*, effective in 1989, provides in part that "a covenant not to compete is enforceable to the extent that it . . . contains reasonable limitations as to time, geographical area, and scope of activity to be restrained." The "scope of activity" language, in my view, leaves adequate room for the continued vitality of the common calling doctrine. In any case, this is not a question the Court needs to decide today.

Finally, I must make two comments regarding the Court's complaint that we have not previously provided a comprehensive definition of "common calling". First, reasonably precise definitions have been formulated. See e.g., C.L. Ray & M. McKelvey, Drafting Enforceable Noncompetition Agreements in Texas, 20 Tex. Tech L. Rev. 63, 68 (1989); W. White, Common Callings and the Enforcement of Postemployment Covenants in Texas, 19 St. Mary's L. J. 589, 611 (1988). Second, it is the genius of the common law that it evolves slowly in the light of reason and experience. I am content to allow the common calling concept to be worked out on a case-by-case basis.

Spears, Justice, joins in this concurring **[**52]** opinion.

IT & E Overseas, Inc. v. RCA Global Communications, Inc.

United States District Court for the District of Columbia

June 12, 1990 ; June 12, 1990, Filed

Civil Action No. 87-3089

Reporter

747 F. Supp. 6 *; 1990 U.S. Dist. LEXIS 10968 **; 1990-1 Trade Cas. (CCH) P69,058

IT & E OVERSEAS, INC., Plaintiff, v. RCA GLOBAL COMMUNICATIONS, INC., Defendant

Core Terms

instrumentality, Traffic, long distance, antitrust, interconnection, territories, anti trust law, telephone, switch, defense motion, telephone service, summary judgment, agencies, immunity, primary jurisdiction, federal government, amended complaint, governmental unit, local government, outgoing, referral, carrier, public corporation, correspondent, conspiracy, facilities, summary judgment motion, unlawful combination, antitrust liability, absolute immunity

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Governments > Federal Government > Claims By & Against

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

It is well-established that the antitrust laws do not extend to actions of agencies or instrumentalities of the federal government, even when those agencies operate in competition with and to the detriment of private enterprise. Moreover, private parties acting in compliance with clearly articulated government policies and programs are immunized from antitrust liability to the same extent as the government entity.

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Judges: **[**1]** Stanley Sporkin, United States District Judge.

Opinion by: SPORKIN

Opinion

[*6] MEMORANDUM OPINION

STANLEY SPORKIN, UNITED STATES DISTRICT JUDGE

In this private antitrust action plaintiff IT&E Overseas, Inc. ("IT & E") alleges that pursuant to a 1984 agreement defendant RCA Global Communications, Inc. **[*7]** ("Globcom") conspired with the Guam Telephone Authority ("GTA") to monopolize the Guam long distance telephone market. Plaintiff seeks damages for violations of *Sections 1*, *2*, and *3* of the Sherman Act. *15 U.S.C. §§ 1-3*. Currently pending before the Court are defendant's motion for summary judgment and defendant's motion for primary jurisdiction referral to the Federal Communications Commission ("FCC").

Background

Guam, an unincorporated territory of the United States, is under the general administrative supervision of the Secretary of Interior. *See* *48 U.S.C. §§ 1421-28e*. Under the Organic Act of Guam, enacted in 1950, Guam is self-governing. The government of Guam consists of a 21-member Legislature and a civilian governor charged with general supervision and control of "agencies, and other instrumentalities of the executive branch of the government of Guam." *48 U.S.C. §§ 1422*, *1423*. Laws enacted by the government of Guam must be reported to **[**2]** the Secretary of the Interior, or any other official designated by the President, and may be annulled by Congress. *48 U.S.C. § 1423i*

Prior to 1950, the United States Navy was responsible for providing public utilities on Guam, including telephone service. After the passage of the Organic Act, the Navy transferred its responsibilities for the civilian portions of the island to the Public Utility Agency of Guam, the predecessor of GTA. In 1973, the Guam Legislature created GTA, a not-for-profit public corporation, and granted it the franchise to "install, maintain, sell and supply to individuals, firms, corporations and governments, including the Government of Guam, telephone service." 12 Guam Code Ann. § 7104. GTA was also authorized to establish "reasonable rates" for telephone service and to enter "into contracts and execute all instruments necessary or convenient in the exercise of all its powers." 12 Guam Code Ann. § 7104.

The U.S. armed forces still maintain facilities on Guam and own approximately one-third of the land on the island. Telephone service in these areas is provided by the U.S. Navy Public Works Center ("PWC"). Thus, two separate local telephone systems exist on Guam: **[**3]** the GTA system serving civilian areas and the PWC system serving military areas. Neither GTA nor PWC provides long distance telephone service to residents of Guam. Rather, the residents of Guam must subscribe to a long distance carrier. However, because all Guam telephone subscribers are connected to either GTA or PWC, their facilities must be used in every long distance call to or from Guam. In effect, a long distance carrier must depend upon access to GTA's local telephone exchange in order to originate or terminate calls from civilian areas.

From 1951 to 1983, defendant Globcom was the sole provider of long distance telephone service on Guam. Globcom provided its long distance service pursuant to interconnection agreements with GTA and PWC. Under these interconnection agreements, GTA and PWC forwarded outgoing long distance calls to Globcom and completed incoming long distance calls received from Globcom for a percentage of revenues Globcom derived from the calls.

In December 1982, IT & E received authorization from the FCC to enter the long distance telephone market of Guam. In April 1983, IT & E began to offer long distance telephone service in competition with Globcom. However, **[**4]** unlike Globcom, IT & E offered "dial up" service rather than direct dial service. [1] Neither Globcom nor IT & E carries long distance calls all the way to or from their ultimate destination. Both companies have agreements with "correspondent" carriers, such as AT&T and MCI, to forward outgoing calls to and receive incoming calls from the correspondents. Globcom and IT & E compensate **[*8]** their correspondent carriers for handling outgoing calls and are paid by their correspondents for handling incoming calls.

Since January 1, 1979, Globcom has been provided with direct dial access to the local telephone exchange **[**5]** on Guam pursuant to a written traffic agreement between RCA and GTA ("Traffic Agreement"). This Traffic Agreement provided that Globcom would compensate GTA for providing local access on the basis of a division of revenues or a percentage of Globcom's Guam overseas long-distance telephone service revenues. Specifically, GTA received a percentage of Globcom's gross revenues for "paid-on-Guam" calls, increasing over the term of the Agreement from 34 to 35 percent. [2] The term of the original 1979 Traffic Agreement was for three and one-half years, until June 30, 1982, and was terminable upon 60 days notice by either party.

The 1979 Traffic Agreement has been amended three times. The *first amendment* was executed on May 23, 1979 and provided for Globcom to assume responsibility for its own billing and collection. The *second **[**6]** amendment* executed on July 1, 1981 after extensive negotiations provided, among other things, that: (1) the term of the Traffic Agreement be extended five years, until June 30, 1987; (2) termination be permitted only by mutual consent; (3) after June 30, 1984, GTA's compensation would be increased to 40 percent of Globcom's gross revenues for outgoing calls; and (4) Globcom pay GTA an "incentive fee" of $ 900,000 per year, provided GTA met certain minimal service obligations. It is the *third amendment* to the Traffic Agreement, executed on December 12, 1984, that is at the heart of the current dispute.

IT & E alleges that Globcom "secretly" [3] renegotiated its Traffic Agreement with GTA a third time in response to the initial success of IT & E following its market entry in April 1983 and to the competitive threat of GTA's prospective entry into the long distance market. [4] *See* Complaint at para. 35. This *third amendment* revised the Traffic Agreement in numerous ways. First, the amendment increased GTA's compensation to 50 percent of Globcom's revenues on outgoing and incoming calls, net of payments to correspondent. [5] **[**9]** *See* *Third Amendment* to Traffic Agreement ("Third Am.") at para. **[**7]** 1, attached as Exhibit to Defendant's Memorandum in Support of Motion for Summary Judgment ("Def. Mem."). Second, the term of the Traffic Agreement was extended seven years, until June 30, 1994. Third Am. para. 3. Third, the $ 900,00 per year incentive fee was eliminated. Third Am. para. 5. Fourth, Globcom was guaranteed "the right to interconnection services and facilities at least equal in type

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[1] On Guam, direct dialed long distance calls are placed using a 3-digit access code. Customers of "dial up" service, on the other hand, do not use an access code to place a long distance call, but instead place a local call to their long distance carrier and then dial a Personal Identification Number ("PIN") for purposes of billing identification. Once the PIN is verified, the customer then dials the long distance call.

[2] Under the Traffic Agreement, "paid-on-Guam" calls include both calls where a GTA subscriber placed and paid for the call and where a call from overseas was placed to and paid for by a GTA subscriber.

[3] IT & E contends that Globcom and GTA endeavored to conceal the 1984 amendment to the Traffic Agreement because, in a break with previous practice, Globcom did not file the 1984 amendment with the FCC.

[4] On November 18, 1983, GTA applied to the FCC for permission to acquire facilities from Hawaiian Telephone Company for the purpose of providing long distance service between the Territory of Guam and the State of Hawaii and points beyond. Both Globcom and IT & E filed petitions to deny GTA's initial application with the FCC.

[5] IT & E asserts that it could not afford to purchase interconnections from GTA under the 50% net-revenue formula incorporated in the *third amendment* because IT & E, unlike Globcom, had very little inbound traffic and virtually no categories of exempt revenue under the formula. According to IT & E, GTA and Globcom purposely chose a revenue formula that was suited only to Globcom's particular circumstances and methods of operation because such a formula would be excessive and prohibitive for any other carrier.

and quality to those which GTA provides to any other overseas message toll telephone carrier" and, if GTA entered the long distance market or outgoing GTA traffic on Globcom's system fell to less than 300,000 minutes per month for three consecutive months, Globcom has the right to interconnection at a price "no less favorable" than any other carrier. Third Am. paras. 7, 8. Fifth, if GTA entered the long distance **[*9]** business, it would route at least 300,000 minutes per month of outgoing traffic, including all traffic to destinations where GTA did not have a correspondent carrier, on Globcom's facilities. Third Am. para. 10. Finally, only long distance companies that "interconnect with GTA in such a manner as to provide the full range of overseas toll services that [Globcom] provides" would be **[**8]** listed in GTA's telephone directory instruction section. [6] Third Am. para. 15.

In a separate letter agreement executed concurrently with the *Third Amendment*, GTA and Globcom further agreed to jointly plan for the implementation of Automatic Number Identification ("ANI") [7] and to "consult and cooperate concerning customer service, marketing and advertising, to encourage use of the services available on Guam." *See* Letter Agreement dated December 12, 1984, attached as Exhibit to Def. Mem. The letter agreement also provided that "this letter shall not be construed to limit either party's discussions, agreements or freedom of action with respect to any other communications service provider."

[10]** During 1985, GTA and Globcom each proceeded with plans to replace their existing switching facilities to obtain increased switching capacity and permit deployment of ANI. Representatives from both companies met periodically to discuss how their new switches would interconnect. Although GTA originally specified that its new switch would use the "CAMA-ANI" signaling protocol, GTA's new switch could not operate the specified protocol. On July 11, 1987, GTA's new switch was placed in operation. This new switch permitted implementation of ANI on Guam for the first time. However, GTA's new switch adversely affected IT & E's ability to interconnect with GTA's system. For a period, PWC subscribers could not place calls on IT & E and IT & E lost answer/disconnect supervision signalling. These difficulties allegedly resulted in a loss of subscribers for IT & E.

On November 13, 1987, IT & E filed suit against Globcom in this Court for violations of the federal antitrust laws. [8] **[**13]** On May 16, 1988, this Court denied both Globcom's motion to dismiss and Globcom's motion to transfer. On May 20, 1988, IT & E filed an amended complaint. [9] In its amended complaint, IT & E identifies GTA as an unnamed co-conspirator. **[**11]** para. 6. The amended complaint alleges that GTA, in furtherance of its conspiracy with Globcom, discriminated against IT & E with respect to the provision of GTA's monopoly local exchange access services. The amended complaint further alleges that GTA engaged in other discriminatory conduct against IT & E, including, but not limited to the following:

(a) GTA refused to file an access tariff in compliance with FCC regulations;

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[6] Because IT & E did not offer operator-assisted calling as did Globcom, GTA refused to list IT & E in the instruction section or "pink pages" of the GTA telephone directory. However, after negotiations, GTA agreed to place IT & E's advertisement on the inside front cover of its directory and to refer to the advertisement in Globcom's listing in the "pink pages."

[7] In order to bill a long distance call, a carrier must identify the subscriber to be charged. ANI is a procedure that enables the local service provider's switching equipment to automatically forward the telephone number of the party to be charged to the long distance carrier. There are two other methods to identify the subscriber to be charged: Operator Number Identification ("ONI") and Personal Identification Number ("PIN"). ONI requires an operator to come on the line and request the billing information from the parties. With PIN, the billing information is recorded when a caller dials in the number of his or her personal account with the carrier. Prior to GTA's implementation of ANI, Globcom used the more cumbersome ONI procedure to identify the party to be charged.

[8] Although GTA was originally named as a defendant in the first complaint, IT & E voluntarily dismissed the complaint as to GTA without prejudice pursuant to *Rule 41(a) of the Federal Rules of Civil Procedure*.

[9] Globcom sought appellate review of the Court's denial of its motion to dismiss. On June 3, 1988, Globcom filed a petition for mandamus with the United States Court of Appeals for the District of Columbia which was denied. Globcom also filed a motion with this Court seeking certification for an interlocutory appeal pursuant to *28 U.S.C. § 1292(b)*. On July 28, 1988, this Court denied Globcom's motion for certification.

[*10] (b) GTA provided Globcom with preferable access by allowing Globcom a single three-digit access number "001" for direct-dialed calls and a single three-digit access number "002" for operator-assisted calls and refused IT & E's requests for similar three-digit access numbers unless IT & E capitulated to a 50% net revenue contribution;
(c) IT & E's requests for direct trunking between IT & E's switch and particular local exchanges were denied by GTA, notwithstanding the fact that such "premium" direct trunking was provided to Globcom, thereby resulting in the rerouting and diversion of traffic intended for IT & E to Globcom;
(d) GTA refused to provide IT & E with ANI capability as it did for Globcom, unless IT & E capitulated to a 50% net-revenue contribution;

(e) GTA **[**12]** refused to provide IT & E with "Answer/Disconnect supervision" ("ADS") capability as it did for Globcom, unless IT & E capitulated to a 50% net-revenue contribution;
(f) GTA and Globcom, pursuant to the terms of their "secret" 1984 Traffic Agreement, jointly designed and implemented new access technology, facilities, methods of interconnection, signalling, access codes, access features and equipment in a manner specifically intended to satisfy Globcom's particular requirements to the exclusion and detriment of IT & E whose interconnection requirements were purposefully impeded and frustrated in Globcom's and GTA's joint design of GTA's new exchange switches;
(g) GTA, pursuant to the terms of the "secret" 1984 Traffic Agreement, denied IT & E's requests to have an advertisement included in the "pink pages" of GTA's telephone directory;
(h) GTA deliberately engaged in a policy and practice of imposing delays on the processing and handling of IT & E's service requests.

Complaint at 21-22.

The amended complaint consists of five counts of alleged violations of *Sections 1*, *2*, and *3* of the Sherman Act, 15 U.S.C. § 1-3: (1) an unlawful combination, contract and/or conspiracy in unreasonable restraint of trade in violation of *Section 1* (Count I); (2) unlawful monopolization by Globcom in violation of *Section 2* (Count II); (3) an unlawful attempt to monopolize in violation of *Section 2* (Count III); (4) an unlawful conspiracy to monopolize in violation of *Section 2* (Count IV); and (5) an unlawful combination, contract and/or conspiracy in unreasonable restraint of trade in violation of *Section 3* (Count V).

On September 29, 1989, the Court heard argument on Globcom's motion **[**14]** for summary judgment. At the Court's request, an additional hearing on Globcom's summary judgment motion was held from November 20 to November 22, 1989. Subsequently, on November 29, 1989, Globcom filed a motion for primary jurisdiction referral to the FCC. Globcom contends that if the Court were to deny its summary judgment motion, a primary jurisdiction referral would be appropriate because the reasonableness of the *third amendment* to the Traffic Agreement -- an issue within the jurisdiction of the FCC -- would be a prerequisite to a trial on IT & E's claims. On February 1, 1990, the Court heard argument on this additional motion.

Discussion

The Court first turns to defendant's motion for summary judgment. Globcom asserts three grounds in support of its motion for summary judgment: (1) under *Sakamoto v. Duty Free Shoppers, Ltd., 613 F. Supp. 381 (D.Guam 1983)*, *aff'd*, *764 F.2d 1285 (9th Cir. 1985)*, *cert. denied*, *475 U.S. 1081, 89 L. Ed. 2d 715, 106 S. Ct. 1457 (1986)*, agreements with instrumentalities of the government of Guam are absolutely immune from federal antitrust attack; (2) Globcom's alleged efforts to persuade GTA to take the actions complained of by IT & E are protected under the *Noerr-Pennington* **[**15]** doctrine; and (3) IT & E has failed to present admissible evidence as required by *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, *cert. denied*, *481 U.S. 1029, 95 L. Ed. 2d 527, 107 S. Ct. 1955 (1987)*, to demonstrate that the alleged actions by **[*11]** GTA caused antitrust injury to IT & E and were committed in concert with Globcom. Because the Court concludes that Globcom is entitled to summary judgment on the basis of the federal instrumentality doctrine, the latter two grounds for summary judgment will not be addressed.

Federal Instrumentality Doctrine

HN1[] It is well-established that the antitrust laws do not extend to actions of agencies or instrumentalities of the federal government, even when those agencies operate in competition with and to the detriment of private enterprise. *Sea-Land Service, Inc. v. Alaska R.R., 212 U.S. App. D.C. 197, 659 F.2d 243, 247 (D.C. Cir. 1981)*, *cert. denied*, *455 U.S. 919, 71 L. Ed. 2d 459, 102 S. Ct. 1274 (1982)*. Moreover, private parties acting in compliance with clearly articulated government policies and programs are immunized from antitrust liability to the same extent as the government entity. *Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 56-57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*. *See also Caribe Trailers Sys.* ***[**16]*** *v. Puerto Rico Maritime Shipping Author., 475 F. Supp. 711, 724 (D.D.C. 1979)* (when government agency is privileged to enter into agreement that might otherwise violate antitrust laws, those with whom it contracts are similarly entitled to antitrust immunity). Thus, in order for Globcom to prevail on its theory of absolute immunity, GTA must be considered a federal instrumentality for antitrust purposes.

The federal instrumentality doctrine has its genesis in the Supreme Court's decision in *United States v. Cooper, 312 U.S. 600, 606, 85 L. Ed. 1071, 61 S. Ct. 742 (1941)*, in which the Court held that the United States did not qualify as a "person" under the Sherman Act and, therefore, could not bring an action for monetary damages. [10] The Court noted that if the United States qualified as a "person" entitled to maintain a treble damage action, it would also qualify as a "person" subject to Sherman Act liability. *Id*. Congress responded to the *Cooper* decision in 1955 by amending the Clayton Act to specifically authorize the United States to sue alleged ***antitrust law*** violators for actual, but not treble, damages. *See 15 U.S.C. § 15a*. Congress did not address whether the United States would be liable **[**17]** as a defendant under the antitrust laws. However, relying on *Cooper* and the Congressional silence concerning the United States' status as a "person" for antitrust liability, courts have subsequently held that the United States and its agencies and instrumentalities are not "persons" who may be held liable under the antitrust laws. *See e.g. Sea-Land Service, Inc. v. Alaska R.R., supra*; *Jet Courier Ser. v. Federal Reserve Bank, 713 F.2d 1221, 1228 (6th Cir. 1983)*.

Globcom contends that the Ninth Circuit's decision in *Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285 (9th Cir. 1985)*, compels the conclusion that GTA is a federal instrumentality. *Sakamoto* involved a challenge to the legality of an exclusive concession agreement awarded by the Guam Airport Authority. **[**18]** In that case, the plaintiffs, a business competitor of Duty Free Shoppers, Ltd., the company which won the concession, sued the parties to the concession agreement: Duty Free, the Government of Guam, the Guam Airport Authority ("GAA"), and the executive manager of GAA. The Ninth Circuit, affirming the district court's dismissal of the antitrust claims, held that "the government of Guam is an instrumentality of the federal government over which the federal government exercises plenary control . . . . There is no reason why Guam should enjoy less immunity than the federal government itself." *Id. at 1289*.

After much thought, the Court concludes that GTA must also be considered a federal instrumentality. Were this a case of first impression, the Court may well have determined that because Guam is more closely analogous to a state, GTA is not entitled to absolute immunity under the antitrust laws as Globcom contends, but rather to the qualified immunity afforded to state and **[*12]** local governments. However, this is not a case of first impression; *Sakamoto* is squarely on point. Under *Sakamoto* the actions of GTA, like those of GAA, cannot give rise to antitrust liability. GTA is indistinguishable **[**19]** from GAA: both are public corporations created by the Guam legislature and run by a Board of Directors whose members are appointed by the Governor with the advice and consent of the Legislature.

The Court is not persuaded by the arguments made by IT & E to avoid the reach of *Sakamoto*. As IT & E notes, the antitrust implications of actions undertaken by local government instrumentalities of the District of Columbia and Puerto Rico, both U.S. territories, have not been treated as actions of federal instrumentalities. [11] Nevertheless,

[10] *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, prohibit contracts, combinations, or conspiracies in restraint of trade or commerce and monopolization or attempts or conspiracies to monopolize trade or commerce by any "persons."

both the District of Columbia and Puerto Rico have different relationships with the federal government than the government of Guam.

[20]** The status of Guam and Puerto Rico cannot be equated: Puerto Rico is an incorporated territory while Guam is not. In 1952, "Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution . . . . The government of Puerto Rico is no longer a federal government agency exercising delegated power." *United States v. Quinones, 758 F.2d 40, 42 (1st Cir. 1985)*. Rather, Puerto Rico has "the degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 594, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976)*. Thus, *Sakamoto* expressly -- and quite correctly -- distinguished Guam from incorporated territories like Puerto Rico "which are thought of as future states." *Id. at 1287*.

IT & E's attempt to analogize Guam and the District of Columbia also fails. IT & E relies heavily on the D.C. Circuit's opinion in *Hecht v. Pro Football, Inc., 144 U.S. App. D.C. 56, 444 F.2d 931 (D.C. Cir. 1971)*, *cert. denied*, *404 U.S. 1047, 92 S. Ct. 701, 30 L. Ed. 2d 736 (1972)*. *Hecht* involved an antitrust challenge to a provision of the D.C. Armory Board's thirty-year lease of Robert F. Kennedy Stadium to the Washington **[**21]** Redskins. Pursuant to its authority to legislate for the District of Columbia, Congress had provided for the construction of the stadium and created the D.C. Armory Board to operate the facility. After reviewing the history of the Armory Board's enabling legislation, which indicated that the Armory Board was meant to be treated like any private venture, the Court held that the lease was subject to the same antitrust constraints as those applied to private parties. *Id. at 939, 942-946*. Analogizing GTA to the D.C. Armory Board, IT & E argues that its antitrust immunity should be determined as if Guam were a municipality. Yet, subsequent cases in this Circuit have limited the holding of *Hecht*, demonstrating that its rationale does not apply to the circumstances of the instant case.

For example, in *Sea-Land Service, Inc. v. Alaska R.R., supra*, the D.C. Circuit applied the federal instrumentality doctrine in a suit alleging that a private corporation had conspired to monopolize Alaskan trade with the Alaska Railroad, an entity wholly owned and operated by the United States. The Court distinguished the Alaska Railroad, which it determined was a federal instrumentality, from the **[**22]** D.C. Armory Board, concluding that "while *Hecht* stands as this court's precedent regarding District of Columbia agencies such as the Armory Board, we hold that *Hecht* does not supply analysis appropriate in a case in which the activities of a United States instrumentality are at issue." *Id. at 246-47*. Similarly, in *Feldman v. Gardner, 213 U.S. App. D.C. 119, 661 F.2d 1295, 1307 (D.C. Cir. 1981)*, *vacated on other grounds*, *460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983)*, which involved an unsuccessful antitrust challenge to the **[*13]** bar admission rules of the District of Columbia Court of Appeals, the Court distinguished *Hecht*, noting that the Armory Board "was commissioned to operate that facility as a private venture." In contrast, the instant case involves the conduct of a not-for-profit public corporation.

Equally important, the Ninth Circuit -- the Circuit that has jurisdiction over Guam -- has consistently chosen to treat Guam as a federal entity. As the Court stated in *Ngiraingas v. Sanchez, 858 F.2d 1368 (9th Cir. 1988)*, *aff'd*, *495 U.S. 182, 109 L. Ed. 2d 163, 110 S. Ct. 1737 (1990)*:

> Admittedly, the analogy between Guam and an administrative agency such as the Federal Trade Commission is counterintuitive. Guam seems more **[**23]** like a state or a municipality than a run-of-the-mill federal agency. After all, Guam elects government officials, its citizens participate politically and the territory enjoys many of the trappings of a sovereign governmental entity. *See* *48 U.S.C. §§ 1421-1424b*. But there are also very significant differences, differences we deem conclusive for the purposes of the question presented to us. Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and, unlike the states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute.

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[11] *See* *Hecht v. Pro Football, Inc., 144 U.S. App. D.C. 56, 444 F.2d 931 (D.C. Cir. 1971)*, *cert. denied*, ***404 U.S. 1047, 92 S. Ct. 701, 30 L. Ed. 2d 736 (1972)***; *Caribe Trailer Systems v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. 711, 723-35 (D.D.C. 1979)*; *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority, 451 F. Supp. 157 (S.D.N.Y. 1978)*; *Zapata Gulf Marine Corp. v. Puerto Rico Shipping Authority, 682 F. Supp. 1345 (E.D. La. 1988)*.

Id. at 1371.

The Local Government Antitrust Act of 1984

Nor is the Court persuaded by IT & E's assertion that the force of *Sakamoto* has been eviscerated by the Local Government Antitrust Act of 1984, *15 U.S.C. §§ 34-36* ("LGAA"). The LGAA eliminated the damage remedy against local governments and private persons acting at local governmental direction. H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4603. Under the LGAA, local governments are defined as a "general function governmental **[**24]** unit" or a "special function governmental unit" established by "State" law, *15 U.S.C. § 34(1)(A-B)*, and includes U.S. territories within the definition of "State," *15 U.S.C. § 34(3)*. According to IT & E, therefore, the LGAA evinces a Congressional intent to treat U.S. territories, including Guam, as "states" for the purposes of the antitrust laws.

Yet in deciding *Sakamoto*, the Ninth Circuit expressly noted enactment of the LGAA, which because it had only recently been enacted was not applicable to that case, and did not suggest that it would have compelled a different result. *764 F.2d at 1288-89*. Indeed, the Ninth Circuit has subsequently reaffirmed that *Sakamoto* remains good law. *See* *Ngiraingas v. Sanchez, 858 F.2d at 1371-72*. Furthermore, the LGAA was not intended to alter substantive ***antitrust law***. Its sole purpose was to eliminate damages as an antitrust remedy against municipalities. *See* 1984 U.S. Code Cong. & Admin. News at 4603.

GTA clearly does not fall within the definition of either a "general function governmental unit" or a "special function governmental unit." [12] GTA is not a general function governmental unit because it provides only specialized telecommunication **[**25]** services rather than the broad range of services provided by cities and other examples of general function governmental units used in the statute. *See* *15 U.S.C. § 34(1) (A)*. Nor is GTA a special function governmental unit, because such units have only limited geographic jurisdiction within states; the definition of "local government" under the LGAA "does not include States or their agencies with State-wide jurisdiction." House Report at 19, 1984 U.S.Code Cong. **[*14]** & Admin. News at 4620; *see* *15 U.S.C. § 34(1)(B)*.

[26]** Requirement of Valid Governmental Action

In a final effort to distinguish this case from *Sakamoto*, IT & E asserts that GTA is entitled to immunity as a federal instrumentality only if the challenged conduct constitutes valid governmental action. In support of its position, IT & E cites the district court's opinion in *Sakamoto. See* *Sakamoto v. Duty Free Shoppers, Ltd., 613 F. Supp. 381* (D.Guam). There, the district court noted that the federal instrumentality in question, the GAA, was acting "in accordance with the mandate of the Government of Guam when it entered into the exclusive airport merchandise concession agreement." *Id. at 387*. Accordingly, IT & E contends that GTA would not qualify for antitrust immunity under the federal instrumentality doctrine if its conduct was *ultra vires* or beyond the scope of authority conferred in its enabling legislation.

The simple answer to this argument is that the federal instrumentality doctrine provides *absolute* immunity. Thus, in *Sea-Land*, the seminal case which established the doctrine, the Court of Appeals held that "the United States, its agencies and officials, *remain outside the reach of the Sherman Act."* *Id.* **[**27]** *at 246*. *See also* *Howes Leather Co. v. Golden, 681 F. Supp. 6, 15 (D.D.C. 1987)* ("the government, its agencies, and officials, are absolutely immune from antitrust liability per se"). Furthermore, IT & E has not succeeded in demonstrating that GTA's adoption of the *third amendment* to the Traffic Agreement exceeded the scope of its legal authority. GTA's enabling legislation authorizes it to provide interconnection services, establish rates for those services, and enter into contracts. *See* 12 Guam Code Ann. § 7104. Indeed, recent legislation on Guam demonstrates that GTA has the

[12] Despite IT & E's arguments to the contrary, *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth., 682 F. Supp. 1345 (E.D. La. 1988)* is inapposite. In *Zapata*, the Court held that the Puerto Rico Maritime Shipping authority was a "special function governmental unit" for the purposes of the LGAA and was therefore immune from antitrust damage liability. *Id. at 1352*. The federal instrumentality defense was not raised, however, and as the Court noted, "there is no dispute that Puerto Rico is a state for purposes of applying the state action doctrine." *Id. at 1348 n. 3*.

authority to enter into private agreements. [13] *See* Guam Public Law No. 20-146, § 6 (1990), attached as Exhibit C to Defendant's Supplemental Memorandum in Further Support of Summary Judgment.

[28]** The Definition of "Person" under *15 U.S.C. § 7*

Finally, the Court rejects IT & E's argument that GTA is not entitled to immunity as a federal instrumentality because as a public corporation incorporated under territorial law it is a "person" under *15 U.S.C. § 7*. [14] This argument does not survive scrutiny. In *Sakamoto*, the GAA was held to be a federal instrumentality despite the fact that it too is a public corporation incorporated under territorial law. Similarly, the Federal Reserve Bank, a public corporation with private shareholders, has also been held immune as a federal instrumentality. *Jet Courier Serv. v. Federal Reserve Bank, 713 F.2d 1221, 1228 (6th Cir. 1983)*. *See also* *City of Loudon v. TVA, 585 F. Supp. 83, 87* (E.D. Tenn.), *aff'd*, *754 F.2d 372 (6th Cir. 1984)* (TVA exempt from antitrust laws).

[29]** * * * *

The thrust of IT & E's complaint is that it was victimized by GTA actions pursuant to a conspiracy with Globcom. *See* Complaint at 21-22. But, as discussed above, the actions of GTA, a federal instrumentality, cannot give rise to antitrust liability. Therefore, Globcom is entitled to summary judgment on all claims based on the alleged combination or conspiracy between it and GTA. Accordingly, the Court finds that Globcom is entitled to judgment as a matter of law on Counts I (unlawful combination in violation of *15 U.S.C. § 1*), IV (unlawful combination in violation of *15 U.S.C. § 2*), and V (unlawful combination in violation of *15 U.S.C. § 3*) of the amended complaint.

[*15] As a final matter, the Court turns to Globcom's motion for a primary jurisdiction referral to the FCC. [15] Because the Court has determined that GTA is a federal instrumentality and that its conduct is within the scope of its territorial enabling legislation, the Court need not consider the applicability to Guam of the FCC interconnection rules. As the Court has no need to refer this issue to the FCC, the motion for primary jurisdiction referral will be denied.

[30]** A separate order accompanies this opinion.

ORDER -- June 12, 1990, Filed

Upon consideration of defendant's motion for summary judgment and defendant's motion for a primary jurisdiction referral to the Federal Communications Commission, the opposition thereto, the arguments of counsel, the entire record herein, and in accordance with the Court's opinion of this date it is hereby

ORDERED that defendant's motion for summary judgment be and hereby is granted in part; and it is further

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[13] Section 6 of Public Law No. 20-146, enacted by the Guam Legislature in March 1990 states:

> GTA shall establish, subject to approval of the Public Utility Commission ("PUC") standard terms and conditions applicable to all agreements between GTA and companies providing long distance telecommunication services between Guam and overseas destinations.

[14] *Section 7* of the Sherman Act defines "person" to include "corporations and associations existing under or authorized by the laws of any State, or the laws of any foreign country." *15 U.S.C. § 7*.

[15] Globcom seeks to have the following two questions submitted to the FCC:

> (1) whether, in light of the D.C. Circuit's decision in *All America Cables & Radio*, the Commission's interconnection policies in Docket 88-72, in particular its interconnection charge rules, have been extended to Guam; and
>
> (2) if the FCC's interconnection rules have been extended to Guam, what price and other terms and conditions should the Guam Telephone Authority ("GTA") have established for both plaintiff IT & E Overseas, Inc. ("IT & E") and Globcom to obtain interconnections to GTA's local telephone network.

See Defendant's Motion for a Primary Jurisdiction Referral to the Federal Communications Commission.

ORDERED that judgment be and hereby is entered on behalf of the defendant on Counts I, IV, and V of the amended complaint; and it is further

ORDERED that defendant's motion for a primary jurisdiction referral to the Federal Communications Commission be and hereby is denied.

ORDER -- June 12, 1990, Filed

Upon consideration of defendant's Motion to Strike Plaintiff's Affidavits, the opposition thereto, and the entire record herein it is hereby

ORDERED that defendant's motion to strike plaintiff's affidavits be and hereby is denied.

Alpert v. Boise Water Corp.

Supreme Court of Idaho

June 14, 1990 ; June 14, 1990, Filed

Nos. 17625, 17629

Reporter

118 Idaho 136 *; 795 P.2d 298 **; 1990 Ida. LEXIS 92 ***; 1990-2 Trade Cas. (CCH) P69,109

Kenneth ALPERT and Flying H Trailer Ranch, Inc., for and on behalf of themselves and as representatives of all others similarly situated, Plaintiffs-Appellants, Cross-Respondents, v. BOISE WATER CORPORATION; Capital Securities Water Corporation, Intermountain Gas Company; City of Boise, Idaho; City of Meridian, Idaho; City of Eagle, Idaho; City of Kuna, Idaho; and City of Garden City, Idaho, Defendants-Respondents, Cross-Appellants. ADA COUNTY HIGHWAY DISTRICT, a body politic, Plaintiff in Intervention, v. BOISE WATER CORPORATION; Capital Securities Water Corporation; Intermountain Gas Company; City of Boise, Idaho; City of Meridian, Idaho; City of Eagle, Idaho; City of Kuna, Idaho; and City of Garden City, Idaho, Defendants in Intervention-Respondents, Cross-Appellants. Kenneth ALPERT and Flying H Trailer Ranch, Inc., for and on behalf of themselves and as representatives of all others similarly situated, Plaintiffs, v. BOISE WATER CORPORATION; Capital Securities Water Corporation, Intermountain Gas Company; City of Boise, Idaho; City of Meridian, Idaho; City of Eagle, Idaho; City of Kuna, Idaho; and City of Garden City, Idaho, Defendants-Respondents, Cross-Appellants. ADA COUNTY HIGHWAY DISTRICT, a body politic, Plaintiff in Intervention, Appellant, Cross-Respondent, v. BOISE WATER CORPORATION; Capital Securities Water Corporation; Intermountain Gas Company; City of Boise, Idaho; City of Meridian, Idaho; City of Eagle, Idaho; City of Kuna, Idaho; and City of Garden City, Idaho, Defendants in Intervention-Respondents, Cross-Appellants

Notice: [*1]** Released for Publication July 6, 1990.

Prior History: Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Honorable Deborah A. Bail, District Judge.

A consolidated appeal from a district court decision and order on summary judgment upholding the legality of franchise agreements between cities and utilities.

Disposition: Affirmed.

Core Terms

franchise, municipalities, franchise fee, franchise agreement, district court, regulation, grant a franchise, streets, attorney's fees, residents, costs, public utilities commission, municipal corporation, highway district, utility services, antitrust, Highway, ratepayers, ordinance, surcharge, provisions, parties, powers, public service, photocopying, authorities, customers, percent, limits, public street

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

HN1[] Justiciability, Standing

When the impact of legislation is not felt by the entire populace, but only by a selected class of citizens, the standing doctrine should not be evoked to usurp the right to challenge the alleged denial of constitutional rights in a judicial forum.

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN2[] Separation of Powers, Jurisdiction

The Idaho Public Utilities Commission exercises limited jurisdiction and has no authority other than that expressly granted to it by the legislature.

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

HN3[] Separation of Powers, Jurisdiction

Administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and compliance is not had with the statutes, no jurisdiction exists.

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN4[] Separation of Powers, Jurisdiction

Administrative authorities are tribunals of limited jurisdiction. Their jurisdiction is dependent entirely upon the provisions of the statutes reposing power in them; they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and complied with, they have no jurisdiction.

Antitrust & Trade Law > Regulated Industries > General Overview

Governments > Local Governments > Claims By & Against

Governments > Public Improvements > General Overview

HN5[] Antitrust & Trade Law, Regulated Industries

Municipalities, unlike the state, are not necessarily shielded from liability under the antitrust laws unless the municipality acts pursuant to an affirmatively expressed state policy to displace competition with regulation or monopoly public service.

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > General Overview

HN6[] Local Governments, Duties & Powers

The state of Idaho has specifically delegated and authorized its cities to provide utility services directly to its residents or to contract with other entities to provide the necessary utility services.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > General Overview

HN7[] Energy & Utilities, State Regulation

There is nothing in the Idaho Constitution that prohibits the legislature from enacting laws prohibiting competition between public utility corporations, and the legislature of this state no doubt concluded that a business like that of transmitting electricity to the streets of the city and furnishing light and power to the people must be transacted by a regulated monopoly, and that free competition between as many companies or as many persons as might desire to put up wires in the streets is impractical and not for the best interest of the people.

Governments > Local Governments > Duties & Powers

HN8[] Local Governments, Duties & Powers

Municipal corporations in Idaho may exercise only those powers granted to them by the Idaho Constitution or the legislature.

Governments > Local Governments > Duties & Powers

HN9[] Local Governments, Duties & Powers

The Idaho legislature has specifically granted franchise authority to municipal corporations.

Governments > Local Governments > Duties & Powers

Public Contracts Law > Types of Contracts > Local Government Contracts

HN10[] Local Governments, Duties & Powers

See *Idaho Code § 50-329*.

Governments > Public Improvements > General Overview

Real Property Law > Ownership & Transfer > Public Entities

HN11[] Governments, Public Improvements

Idaho Code § 50-328, which expressly addresses the regulation of utility transmission systems, gives the city the authority over all lands, not solely the public streets, which are owned or under control of such city.

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > General Overview

HN12[] Local Governments, Duties & Powers

Although highway districts have broad powers and authority over streets and highways, it must be held in balance with the statutory responsibilities of other entities.

Governments > Public Improvements > General Overview

HN13[] Governments, Public Improvements

A highway districts' authority does not extend to control the granting of utility franchises which have been vested in the cities.

Public Contracts Law > Types of Contracts > General Overview

HN14[] Public Contracts Law, Types of Contracts

A franchise is a contract.

Governments > Local Governments > Ordinances & Regulations

HN15[] Local Governments, Ordinances & Regulations

Idaho Code § 50-329 articulates the method by which a city may pass an ordinance granting a franchise and the franchise ordinances are presumed valid with the burden on those challenging the ordinance to prove its invalidity.

Governments > Public Improvements > General Overview

Public Contracts Law > Types of Contracts > General Overview

HN16[] Governments, Public Improvements

A franchise ordinance represents a contract between the city and its grantee.

Governments > Public Improvements > General Overview

HN17[] Governments, Public Improvements

Since a franchise is a contract between a government body and a private entity, it is binding upon the parties, enforceable and entitled to the respect a court must give all valid contracts.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Fees

Governments > Public Improvements > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

HN18[] Franchise Relationships, Franchise Fees

Idaho cities have the right to own and operate utilities and provide those services to their residents.

Governments > Public Improvements > General Overview

Tax Law > State & Local Taxes > Public Utility Taxes > General Overview

Tax Law > State & Local Taxes > Franchise Taxes > General Overview

HN19[] Governments, Public Improvements

The charging of a fee for the utility franchise is reasonable compensation and consideration to the cities as expressly allowed by *Idaho Const. art. XV, § 2* and *Idaho Code. § 40-2308*.

Governments > Public Improvements > General Overview

Tax Law > State & Local Taxes > Public Utility Taxes > Imposition of Tax

Tax Law > ... > Alcohol & Tobacco Products > Alcohol Taxes > Imposition of Tax

Tax Law > State & Local Taxes > Public Utility Taxes > General Overview

HN20 [] **Governments, Public Improvements**

The providing of sewer, water, electrical and other utility services to residents based on consumption of the commodity is a charge for a direct public service as compared to a tax which is a forced contribution by the public-at-large for revenue raising purposes.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN21 [] **Remedies, Costs & Attorney Fees**

Idaho law provides for an award of attorney fees when the court finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. *Idaho Code § 12-121*; *Idaho R. Civ. P. 54(e)(1)*; *Idaho R. Civ. P. 54(e)(2)*.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Appeals > Standards of Review

HN22 [] **Remedies, Costs & Attorney Fees**

The award of attorney fees is within the discretion of the district court and in absence of an abuse of discretion such an award, or lack thereof, will not be disturbed on appeal.

Civil Procedure > Appeals > Frivolous Appeals

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN23 [] **Appeals, Frivolous Appeals**

Attorney fees on appeal will not be awarded where the appeal was not brought frivolously, unreasonably and without foundation.

Counsel: Evans, Keane, Koontz, Boyd, Simko & Ripley, Boise, for plaintiffs-appellants, cross-respondents Alpert and Flying H. Larry D. Ripley, argued.

Holland & Hart, Langroise, Sullivan, Boise, for plaintiff-appellant, cross-respondent Ada County Highway Dist. J. Frederick Mack, argued.

Kenneth Bergquist, Boise, for defendants-respondents, cross-appellants Boise Water Corp. and Capital Securities Water Corp.

Moffatt Thomas Barrett Rock & Fields, Boise, for defendant-respondent, cross-appellant Intermountain Gas Co. Morgan W. Richards, Jr., argued.

Clemons Cosho & Humphrey P.A., Boise, for defendant-respondent, cross-appellant Cities of Boise, Eagle, Kuna and Garden City. David M. Penny, argued.

Ambrose, Fitzgerald & Crookston, Meridian, for defendant-respondent, cross-appellant City of Meridian. Wayne Crookston, argued.

Judges: Boyle, Justice. **[***2]** Bakes, C.J., and Doolittle, District Judge Pro Tem., concur. Bistline, Justice, specially concurring. Johnson, Justice, concurring and dissenting.

Opinion by: BOYLE

Opinion

[*138] [300]** In this utility franchise case we are called upon to determine the authority of cities to enter into utility franchise agreements and also to determine the validity of franchise fees paid to the cities by the utilities which are eventually passed on to the consumers and ratepayers.

The cities of Boise, Meridian, Eagle, Kuna and Garden Valley (hereafter Cities) entered into various gas and water utility franchise agreements with the Boise Water Corporation, Capital Securities Water Corporation and Intermountain Gas Company (hereafter Utilities). While only the City of Boise has franchise agreements with Boise Water Corporation and Capitol Securities Water Corporation, each of the cities of Boise, Eagle, Meridian, Kuna and Garden City have franchise agreements with Intermountain Gas Company. Each of the franchise agreements is embodied in a city ordinance adopted by the respective city governments. The franchise agreements provide that as consideration the cities will not engage in the business of the utility or enter **[***3]** into competition with the utilities. The franchise agreements provide a grant of authority giving the utilities the right and authority for a specific term of years to maintain a transmission and distribution system within the public areas of the city limits. Section 1 in the franchise agreement existing between the city of Boise and Intermountain Gas Company is illustrative of grants contained in all of the franchise agreements.

> It is hereby granted to Intermountain Gas Company, a corporation, its successors (hereafter collectively referred to as "Grantee") a twenty (20) year extension to the right and authority to construct, install, maintain and operate the gas transmission and distributing system, including mains, pipes, conduits, services and other necessary structures and appliances appertaining in, under, upon, over, across and along the streets, alleys, bridges and public places within the present and future corporate limits of the City of Boise, Idaho (hereafter referred to as "City") for the furnishing, transmission, distribution and sales of gas, whether artificial, natural, mixed or otherwise, for heating, domestic, industrial and other purposes and for transmitting **[***4]** gas into, through and beyond said City.

Each of the franchise agreements provides that the utility shall pay to the city three percent of the gross annual receipts from all sales in the corporate limits as consideration for the franchise contract. The Idaho Public Utilities Commission allowed the utilities to meet their respective obligations to the cities by surcharging the utilities customers' accounts.

On March 12, 1987, appellants Kenneth Alpert and Flying H Trailer Ranch, Inc. filed a complaint in district court against the cities and also named as parties the utilities supplying gas and water service within the city boundaries. The complaint primarily alleged that the cities lacked authority to grant the franchises and impose the franchise fees. Ada County Highway District (ACHD) was allowed to intervene by order of the court. All parties subsequently **[*139] [**301]** filed motions for summary judgment. The district court heard arguments, issued a memorandum decision upholding the franchise agreements as valid and issued an order denying the motions for summary judgment by Alpert and Flying H and ACHD. The court also denied the request by Alpert and Flying H that it certify **[***5]** a class action.

ISSUES ON APPEAL

The following issues are presented: 1) whether the plaintiffs have standing to bring this action; 2) whether this action was properly brought before the district court; 3) whether an antitrust action is presented; 4) whether the cities have the power and authority to contract with utilities; 5) whether the contracts awarding franchises between the utilities and the cities are valid and whether the franchise fee is proper consideration; and, 6) whether attorney fees should be awarded on appeal.

I.

Standing

The first issue presented is whether the plaintiffs Alpert and Flying H have standing to challenge the validity of the franchise fee. We answer this question in the affirmative and hold that these plaintiffs have standing to bring this action.

In *Miles v. Idaho Power Co., 116 Idaho 635, 778 P.2d 757 (1989)*, we considered whether or not an individual ratepayer had standing to challenge an agreement entered into between the State of Idaho and Idaho Power Company. In *Miles*, the plaintiff was found to have standing as a customer and ratepayer to challenge the constitutionality of the legislation. In *Miles* **[***6]** we stated:

> *The parties allegedly injured by the agreement are the ratepayers and customers of Idaho Power*, and not the general populace of the state of Idaho. *This is more than a generalized grievance. It is a specialized and peculiar injury*, although it may affect a large class of individuals. The political process obviously will be more unkind to injured ratepayers seeking to change legislation affecting the whole state of Idaho than to injured citizens and taxpayers. ***HN1***[] When the impact of legislation is not felt by the entire populace, but only by a selected class of citizens, the standing doctrine should not be evoked to usurp the right to challenge the alleged denial of constitutional rights in a judicial forum.
>
> Nevertheless, the respondents urge us to invoke the doctrine because of the large class of Idaho Power ratepayers. They argue that Miles, as only one of thousands of customers, suffered a generalized injury, which, when compared to the benefits the compromise afforded to all of the people of Idaho is de minimis and insubstantial. This may be true, but we fail to see how this factor requires a dismissal upon lack of standing. "To deny standing to persons **[***7]** who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *United States v. SCRAP, 412 U.S. 669, 687-88, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973)*. This statement is particularly true here. *There is no question that the agreement impacts Idaho Power ratepayers*. The State and Idaho Power, as part of their agreement, have pledged "actively and in good faith" to recommend and support the implementing legislation. Idaho Power ratepayers are therefore the group most adverse to the agreement, not Idaho Power or the State. Because of that fact, and *the fact that Miles challenges the implementing legislation as a ratepayer, and not as a taxpayer, we hold that Miles has standing to pursue his remedy in the courts*. (Emphasis added.)

Id., 116 Idaho at 642, 778 P.2d at 764.

In the present case the plaintiffs Alpert and Flying H challenge the validity of the franchise fee characterizing it as a tax. It is undisputed that the franchise fees are ultimately paid by these plaintiffs and the other **[***8]** residents of the municipality using the utility. Although the plaintiffs are not parties to the franchise agreement, they **[*140]** **[**302]** are directly affected by the agreement imposing the three percent fee and clearly have standing to bring this action. *Miles v. Idaho Power Co., 116 Idaho 635, 778 P.2d 757 (1989)*.

II.

Jurisdiction

Several of the parties assert that only the Idaho Public Utilities Commission has jurisdiction to review and resolve the issues presented. We disagree and hold that the issues presented are best resolved by the courts rather than by an administrative agency.

HN2[] The Idaho Public Utilities Commission exercises limited jurisdiction and has no authority other than that expressly granted to it by the legislature. *Washington Water Power Co. v. Kootenai, 99 Idaho 875, 591 P.2d 122 (1979)*.

> The Idaho Public Utilities Commission has no authority other than that given to it by the legislature. It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction. ***HN3***[] *United States v. Utah Power & Light Co., 98 Idaho 665, 570 P.2d 1353 (1977)*; *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co., 98 Idaho 692, 571 P.2d 753 (1977)*; **[***9]** *Arrow Transp. Co. v. Idaho Pub. Utils. Comm'n, 85 Idaho 307, 379 P.2d 422 (1963)*. As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and compliance is not had with the statutes, no jurisdiction exists.

Id., 99 Idaho at 879, 591 P.2d at 126.

The public utilities law (Chapters 1-7 of Title 61, Idaho Code) establishes a comprehensive scheme for the regulation of investor-owned public utilities by the Idaho Public Utilities Commission. Idaho Code, tit. 61, chap. 5. [1]

> ***HN4***[] Administrative authorities are tribunals of limited jurisdiction. Their jurisdiction is dependent entirely upon the provisions of the statutes reposing power in them; they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and complied with, they have no jurisdiction.

Arrow Transp. Co. v. Idaho Pub. Utils. Comm'n, 85 Idaho 307, 313, 379 P.2d 422, 425 (1963), **[***10]** *quoting* 42 *Am.Jur.* 440, § 109.

As this Court stated in *Washington Water Power Co. v. Kootenai Environmental Alliance*:

> There is no question that much of the work of the Commission, particularly in the **[***11]** areas of ratemaking, requires expertise, technical skill and constant attention. . . . Such was held to be a strong argument for the delegation of the legislative authority to a commission under statutes established by the legislature.

Id., 99 Idaho at 882, 591 P.2d at 129.

In the complaint filed by plaintiffs the district court was requested to determine the validity of the franchise contracts between the utilities and the cities. The district court was also requested to determine the authority of the cities to grant a utility franchise, the validity of the franchise fee and the authority of the city to impose a franchise fee.

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[1] More specifically, the authority granted the IPUC includes the power to investigate and fix rates and regulations, *I.C. § 61-503*; determine the reasonableness of rates, *I.C. § 61-502*; investigate proposed interstate rates, *I.C. § 61-506*; determine rules and regulations affecting the performance of public utilities, *I.C. § 61-507*; order improvements to utility facilities, *I.C. § 61-508*; investigate accidents occurring on public utility property arising from its maintenance or operation, *I.C. § 61-517*; determine standards and practices for the measurement of quantity, quality or other conditions pertaining to the supply of a public utility product or service, *I.C. § 61-520*; ascertain the value of public utility property, *I.C. § 61-523*; and issue certificates of convenience and necessity, *I.C. § 61-526*.

The subject matter of the complaint filed in district court clearly raises legal issues to be resolved by the courts rather than an administrative agency. The action filed in district court does not deal with the subject **[*141]** **[**303]** matter traditionally regulated by public utility commissions and does not fall into a category of regulation which requires the technical expertise of a public utility commission. *Id.* Thus, we hold that this action was properly before the district court rather than the Idaho Public Utilities **[***12]** Commission.

III.

Antitrust Action

Appellants Alpert and Flying H argue that the agreements between the cities and the utilities constitute an unlawful and unreasonable restraint of trade and that the district court erred in dismissing the antitrust claims.

In *Denman v. Idaho Falls, 51 Idaho 118, 4 P.2d 361 (1931)*, this Court held that the Idaho antitrust laws do not apply to municipal corporations. In *Denman*, the Court was directly presented with the antitrust issue [2] and expressly held that the ***antitrust law*** did not apply to a municipal corporation. The Court stated:

> A careful examination of the act discloses that it was clearly the intention of the legislature that the use of the word "corporation" therein was to be limited to private corporations and not to include municipal corporations and numerous provisions contained therein negative the contention of appellant that it has application to and includes municipal corporations . . . . While such a statute may be applicable and enforceable against private corporations generally we know of no logical reason that could be urged sustaining the application of such a provision to a municipal **[***13]** corporation.

Id., 51 Idaho at 121-22, 4 P.2d at 362; *see also* *Wilcox v. Idaho Falls, 23 F.Supp. 626 (Idaho 1938)*.

Appellants Alpert and ACHD contend that there is no clearly expressed state policy which allows the defendant utilities and cities to engage in anticompetitive conduct. ***HN5***[] It is true that municipalities, unlike the state, are not necessarily shielded from liability under the antitrust laws unless the municipality acts pursuant to an affirmatively expressed "state policy to displace competition with regulation or monopoly public **[***14]** service." *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38, 105 S.Ct. 1713, 1716, 85 L.Ed.2d 24 (1985)* *quoting* *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 98 S.Ct. 1123, 1137, 55 L.Ed.2d 364 (1978)*; *see also* McQuillin, *Municipal Corporations* § 34.23.05. ***HN6***[] However, the state of Idaho has specifically delegated and authorized its cities to provide utility services directly to its residents or to contract with other entities to provide the necessary utility services. *Idaho Code § 50-344* grants to the cities the power to maintain and operate solid waste collection systems; *I.C. § 50-322* empowers the cities to establish, create, develop, maintain and operate domestic water systems; and *I.C. § 50-325* authorizes the cities to acquire, own, maintain and operate electric power plants. Furthermore, *I.C. §§ 50-329* and -330 confer on the cities the authority to grant franchises to provide these services and thereafter regulate the franchise holders should the cities choose not to provide their own utility services.

These Idaho statutes clearly contemplate that a city or municipality **[***15]** may engage in activities such as those under consideration in the present action. Such activity is a foreseeable result of empowering the cities to engage in the operation of their own utilities and these activities do not constitute unfair competition nor antitrust violations. The clear state policy is to displace competition in the providing of utility service with regulation of a monopoly

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[2] In framing the antitrust question presented, the *Denman* Court stated the issue as follows:

> The chief question raised touching the insufficiency of the fifth amended complaint is: Are municipal corporations amenable to the Anti-trust Law (C.S., chap. 116, sec. 2531 et seq.) and was it the intention of the legislature to include municipal corporations therein.

51 Idaho at 120, 4 P.2d at 362.

public service. Moreover, in *Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914)*, this Court held:

> ***HN7***[] There is nothing in the Constitution that prohibits the legislature from enacting **[*142]** **[**304]** laws prohibiting competition between public utility corporations, and the legislature of this state no doubt concluded that a business like that of transmitting electricity to the streets of the city and furnishing light and power to the people must be transacted by a regulated monopoly, and that free competition between as many companies or as many persons as might desire to put up wires in the streets is impractical and not for the best interest of the people.

Id., 26 Idaho at 241, 141 P. at 1088. In *Town of* **[***16]** *Hallie v. City of Eau Claire*, the United States Supreme Court held that active state supervision is not a prerequisite to exemption from the anti-trust laws where the actor is a municipality rather than a private party. Further, private public utilities in this state are heavily regulated by the Idaho Public Utilities Commission, thus showing the intent of the legislature to replace competition by regulation. *Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914)*. We hold that the district court did not err in dismissing plaintiffs' antitrust claims.

IV.

Authority To Grant Franchises

A fundamental issue before this Court is what entity, *i.e.*, the municipalities or the highway district, has the power and authority to contract with and grant franchises to the various utilities. We hold that the proper party to grant franchises under the circumstances presented are the municipalities.

HN8[] Municipal corporations in Idaho may exercise only those powers granted to them by the state Constitution or the legislature. ***HN9***[] *Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980)*; *Washington Water Power Co. v. Kootenai, 99 Idaho 875, 591 P.2d 122 (1979)*; **[***17]** *Arrow Transp. Co. v. Idaho Pub. Utils. Comm'n, 85 Idaho 307, 379 P.2d 422 (1963)*; *Sandpoint Water & Light Co. v. City of Sandpoint, 31 Idaho 498, 173 P. 972 (1918)*.

The Idaho legislature has specifically granted franchise authority to municipal corporations. ***HN10***[] *I.C. § 50-329* states in pertinent part:

> No franchise shall be created or granted by the city council otherwise than by ordinance, and the passage of any such ordinance shall require the affirmative vote of one-half (1/2) plus one (1) of the members of the full council.

The historical legal basis of utilities receiving franchises from the municipalities has its origin in *I.C. § 40-2308* which provides:

> **40-2308. Corporations may lay tracks and water mains. --** Every gas, water, or railroad corporation has the power to lay conductors and tracks through the public ways and squares in any city with the consent of the city authorities, and under reasonable regulations and for just compensation, as the city authorities and the law prescribe.

In addition to requiring that the utilities obtain consent from the cities to operate a service utility, *I.C. § 40-2308*, **[***18]** this section allows imposition of reasonable regulations upon the utility by the cities and provides for just compensation to be paid by the utility as prescribed by the city authorities.

The right to charge a fee for a water franchise is expressly approved in *art. 15 § 2 of the Idaho Constitution* which provides:

> **Right to collect rates a franchise. --** The right to collect rates or compensation for the use of water supplied to any county, city, or town or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law.

City franchising authority was recognized by this Court in *Jack v. Village of Grangeville, 9 Idaho 291, 74 P. 969 (1903)* wherein the Court stated:

> It is the duty of the municipality to light its public streets and to furnish its inhabitants with the means of obtaining gas at their own expense, and having the power by legislative grant to erect and maintain gasworks for that purpose, it necessarily follows that it had the implied power to **[*143]** **[**305]** contract with others to furnish it in like manner, ...

Id., 9 Idaho at 316, 74 P. at 974. **[***19]**

In *Sandpoint Water & Light Co. v. City of Sandpoint* this Court further recognized city franchising authority wherein the Court held that in granting a franchise, a municipal corporation is not exercising its own powers but is exercising only such powers as have been conferred upon it by the state.

In 1971 the Ada County Highway District (ACHD) was created and the legislature granted county-wide highway districts general supervisory control over all highways and roadways within the respective district. The legislature also conveyed ACHD title to all the streets, highways and related rights-of-way in Ada County on behalf of the public. The highway district contends that this conveyance by the legislature resulted in granting it authority to grant to utilities a franchise. The highway district contends that as *I.C. § 40-1406* states "[w]herever any provisions of the existing laws of the state of Idaho are in conflict with the provisions of this chapter, the provisions of this chapter shall control and supersede all such laws," that the authority of the cities to grant utility franchises has been superseded. We disagree and expressly hold that the highway district legislation contained **[***20]** in Title 40, chapters 13 and 14, does not supercede the well-established law vesting power to grant franchises to utilities in the cities. *Idaho Const. art. 15, § 2*; *I.C. §§ 40-2308*, *50-329*. The highway district's reliance upon *I.C. § 40-1406* as the basis for asserting that it supercedes the law controlling utility franchises is misplaced. The language of *I.C. § 40-1406* is primarily in reference to imposition of ad valorem taxes and cannot be extended to replace the constitutional and statutory provisions controlling utility franchises.

The term "franchise" has been interpreted to mean a grant of a right to use property over which the granting authority has control. 36 *Am.Jur.2d Franchises* § 1. ***HN11***[] *Idaho Code § 50-328*, which expressly addresses the regulation of utility transmission systems, gives the "city" the authority over all lands, not solely the public streets, which are owned or under control of such city. This power was recognized in *Village of Lapwai v. Alligier, 78 Idaho 124, 299 P.2d 475 (1956)* wherein the Court stated:

> [T]he legislature, in providing for the use of streets and alleys by utilities, expressly required the consent **[***21]** of the municipal authorities, and authorized the municipal authorities to impose reasonable regulations upon such use.
>
> Thus, the legislature . . . has preserved to the municipality the power to deny their use to a utility, or to impose reasonable regulations thereon, when necessary to the use of such streets and alleys by the public in the usual manner.

Id., 78 Idaho at 129, 299 P.2d at 478.

Idaho Code § 40-1406 cannot be construed to suggest that the legislature bestowed authority on the highway district to grant franchises to public utilities. Such an interpretation is clearly contrary to the grant of powers given to the highway districts by the legislature. *Idaho Code § 40-1310* expressly sets forth the specific powers and jurisdiction vested in highway commissions. The authority to grant utility franchises is certainly not among the powers enumerated as being vested in a highway district and we agree with the district court that this power belongs to the cities.

HN12[] Although highway districts have broad powers and authority over streets and highways, it must be held in balance with the statutory responsibilities of other entities. ***HN13***[] *Worley Highway Dist. v. Kootenai County, 104 Idaho 833, 663 P.2d 1135 (Ct.App.1983)*. **[***22]** The highway districts' authority does not extend to control the granting of utility franchises which have been vested in the cities.

It is undisputed that municipal corporations in Idaho have the power to operate their own utility systems and provide water, power, light, gas and other utility services within the city limits. *I.C. § 50-323*; *§ 50-325*. The constitutional and statutory grant of franchise authority to the cities in **[*144]** **[**306]** this respect is not nullified or altered by *I.C. § 40-1406*. To give the power to award franchises to ACHD would extend the powers of the highway district well beyond those intended by the legislature and would infringe upon the express authority delegated to the cities to contract with utility companies and grant franchises for utility services. We affirm the district court's ruling in this regard and hold that the power to grant franchises rests in the municipalities rather than the Ada County Highway District.

V.

Franchises Are Valid Legal Agreements

A. ***HN14***[] *Franchise is a* ***HN15***[] *Contract*. *Idaho Code § 50-329* articulates the method by which a city may pass an ordinance granting a franchise and the franchise ordinances are presumed valid with the **[***23]** burden on those challenging the ordinance to prove its invalidity. ***HN16***[] *Continental Oil Co. v. Twin Falls, 49 Idaho 89, 286 P. 353 (1930)*.

The Idaho Court of Appeals has correctly held that "[a] franchise ordinance represents a contract between the city and its grantee." ***HN17***[] *City of Hayden v. Washington Water Power, 108 Idaho 467, 468, 700 P.2d 89, 90 (Ct.App.1985)*. Courts have repeatedly recognized that since a franchise is a contract between a government body and a private entity, it is binding upon the parties, enforceable and entitled to the respect a court must give all valid contracts. *Appalachian Power Co. v. City of Huntington, 158 W.Va. 240, 210 S.E.2d 471 (1974)*; *City of W. Palm Beach v. Florida Pub. Serv. Comm'n, 224 So.2d 322 (Fla.1969)*. The franchise agreements existing in the present appeal are reasonable and necessary for the needs and convenience of the residents of the various communities and are legally binding and enforceable contracts between the parties.

B. *Franchise Fee*. The practice of charging franchise fees as consideration for the granting of **[***24]** a franchise was first noted in *Boise City v. Idaho Power Co., 37 Idaho 798, 220 P. 483 (1923)*, which involved the issue of cancellation of a franchise contract where Idaho Power had purchased two competing power plants and sought to consolidate the franchises. As consideration for the granting of the franchise, Boise City had charged a percentage of the utility's gross revenue collected from its Boise patrons. The Court held that the Commission had no authority to invalidate the franchise cancellation agreement entered into between Boise City and Idaho Power, and further held that payments from the utility to the city constituted valid consideration for a valuable property right which the city surrendered.

HN18[] It is well established that Idaho cities have the right to own and operate utilities and provide those services to their residents. The cities contend that their surrender of this right is valid consideration for the franchise fee charged to the utilities. We agree. The franchise agreements in the present case are contracts and the franchise fees are simply payments or consideration for the rights granted by the cities to the utilities. *Idaho **[***25]** Const. art. 15, § 2*; *I.C. § 40-2308*.

C. *Franchise Fee is Not a Tax*. Appellants Alpert and ACHD contend that the franchise fee is in reality a tax, and cannot legally be imposed upon the utilities' customers. The district court correctly held that the charge imposed was not a tax but was contract consideration for the franchise granted. We agree. The three percent charge is valid consideration for the cities granting the franchises and agreeing not to compete with the utilities. The incorrect reference to the franchise fee as a tax by the Idaho Public Utilities Commission does not change its legal nature. The three percent surcharge is simply a payment in consideration for the franchise to operate the utilities by the various municipalities. ***HN19***[] The charging of a fee for the utility franchise is reasonable compensation and consideration to the cities as expressly allowed by *art. 15, § 2 of the Idaho Constitution* and *I.C. § 40-2308*.

Appellants Alpert and Flying H cite *Brewster v. Pocatello, 115 Idaho 502, 768 P.2d 765 (1988)*, in support of their assertion that the franchise fee in this action is a **[*145]** **[**307]** tax. The tax imposed in *Brewster* **[***26]** is certainly distinguishable from the franchise fee being charged by the utilities and cities in this action. Although a different statute was involved in *Brewster*, the case is instructive to analyze the distinction between a fee and a tax.

> In the instant case it is clear that the revenue to be collected from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but rather is to generate funds for the non-regulatory function of repairing and maintaining streets. The maintenance and repair of streets is a non-regulatory function as the terms apply to the facts of the instant case. We view the essence of the charge at issue here as imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of Pocatello. The privilege of having the usage of city streets which abuts one's property, is in no respect different from the privilege shared by the general public in the usage of public streets.
>
> We agree with appellants that municipalities at times provide sewer, water and **[***27]** electrical services to its residents. However, those services, in one way or another, are based on user's consumption of the particular commodity, as are fees imposed for public services such as the recording of wills or filing legal actions. In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs.
>
> While otherwise argued, we see it clear that the municipal ordinance in question is not designed for the regulation of traffic under the police power, but rather clearly a revenue raising measure.

Id., 115 Idaho at 504, 768 P.2d at 767-68.

In the instant case the legislature has given to the cities the authority to either provide the utility services directly or allow a franchisee to provide those services to its residents. Likewise, the cases, statutes and the Idaho Constitution cited herein clearly allow the charging of a reasonable fee for granting a franchise to a utility. In addition, the franchise agreements in this case provide that the municipalities or cities will not compete with the utilities in providing these **[***28]** services. The three percent franchise fee is not imposed on the residents directly by the cities, but is paid by the utilities to the cities and as a cost of business is then passed on to the consumers by the utilities. Although the users of the utility services eventually pay the three percent fee it is not a tax on the general public. *Brewster v. Pocatello, 115 Idaho 502, 768 P.2d 765 (1988)*. The water and gas services provided by the utilities in this case are based on consumption and use by the resident. ***HN20***[] As noted in *Brewster*, the providing of sewer, water, electrical and other utility services to residents based on consumption of the commodity is a charge for a direct public service as compared to a tax which is a forced contribution by the public-at-large for revenue raising purposes. As such the tax imposed in *Brewster* is clearly distinguishable from the fee charged on the accounts of the consumers of the utility service presented in this case. We hold that the three percent fee charged to the customers of the various gas and water utilities is a valid franchise fee and not a prohibited tax.

VI.

Denial Of Attorney Fees By Trial **[***29]** *Court*

Subsequent to dismissal of the plaintiffs' amended complaint and the Ada County Highway District's complaint in intervention, the district court awarded certain costs to defendant cities and utilities. The district court concluded that although plaintiffs' theories were novel and not well-founded, the action did not fall within *I.C. § 12-121* and declined to award attorney fees. ***HN21***[] Idaho law provides for an award of attorney fees when the court finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. *Idaho Code § 12-121*; *I.R.C.P.* ***[*146]*** ***[**308]*** *54(e)(1)* or *54(e)(2)*. ***HN22***[] The award of attorney fees is within the discretion of the district court and in absence of an abuse of discretion such an award, or lack thereof, will not be disturbed on appeal. *Anderson v. Ethington, 103 Idaho 658, 651 P.2d 923 (1982)*.

Upon review of the district court's award of costs and denial of attorney fees we find no abuse of discretion.

VII.

Attorney Fees On Appeal

Respondents have requested that we award attorney fees on appeal pursuant to *I.A.R. 41*. ***HN23***[] It is well established that attorney fees on appeal will not be awarded where **[***30]** the appeal was not brought frivolously, unreasonably and without foundation. *Keller v. Rogstad, 112 Idaho 484, 733 P.2d 705 (1987)*. In the present appeal we have reviewed the record and determined that legitimate issues have been presented precluding an award of attorney fees on appeal.

We affirm the decision of the trial court. Costs to respondent cities and utilities. No fees allowed.

Concur by: BISTLINE; JOHNSON (In Part)

Concur

BISTLINE, Justice, specially concurring.

I applaud the majority's decision not to award attorneys' fees in this matter, and I concur with almost all of the majority opinion. As to part V. C., 118 Idaho at 144-145, 795 P.2d at 306-307, however, I concur only in the result.

The majority's title for this section of its opinion, "Franchise Fee is Not a Tax," is misleading, and the majority has totally misunderstood the issue raised by the plaintiffs concerning the fee. The assertion that "the charge imposed was not a tax but was contract consideration for the franchise granted" is fine as far as it goes. However, the question here is not whether the municipalities and the utilities can legitimately contract for payment by **[***31]** the utilities to the cities "in consideration for the franchise to operate the utilities by the various municipalities." Rather, the question is whether that payment can legitimately be passed through to the residents of the municipalities in the form of a utility surcharge.

In response to *that* question, the recent case of *Brewster v. City of Pocatello, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988)*, is informative, although it supports a conclusion exactly opposite to that for which it is cited by the majority. *Brewster* states the following:

> We view the essence of the charge at issue here as imposed on occupants or owners of property for *the privilege of having a public street abut their property*. In that respect it is not dissimilar from a tax imposed for *the privilege* of owning property within the municipal limits of Pocatello. The privilege of having the usage of city streets which abuts (sic) one's property, is in no respect different from *the privilege shared by the general public in the usage of public streets*.
>
> We agree with appellants that municipalities at times *provide* sewer, water and electrical services to [their] **[***32]** residents. However, those services, in one way or another, are based on *user's consumption of the particular commodity*, as are fees imposed for public services such as the recording of wills or filing legal actions. In a general sense *a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs*.
>
> While otherwise argued, we see it clear that the municipal ordinance in question is not designed for the regulation of traffic under the police power, but rather clearly a *revenue raising measure*.

Id., 115 Idaho at 504, 768 P.2d at 767 (emphasis added).

The surcharge here at issue has far more of the characteristics of a tax than of a fee. While it is technically collected by the utilities, it passes directly through their accounts as payment to the municipalities of **[*147]** **[**309]** the franchise fee. Yet the municipalities furnish neither a service nor a commodity to the consumer who pays the surcharge. The surcharge, in essence, is imposed on residents of the municipalities for the privilege of being utility users within the city limits. Since **[***33]** the municipality furnishes no service or commodity, the surcharge is clearly a revenue raising measure.

Thus, according to the standard set forth in *Brewster*, this surcharge is a tax in sheep's clothing. Why, then, a special concurrence rather than a dissent? Simply, because the plaintiffs took action against the wrong parties on this issue. Presently it appears to me that the Public Utility Commission allowed the utilities to impose this "surcharge" on their customers. It is therefore the decision of the Commission which should have been appealed. As the plaintiffs did not take that action (at least such an action is not before us on review), I concur in the majority's affirmance of the summary judgment in favor of the utilities and the municipalities.

Dissent by: JOHNSON (In Part)

Dissent

JOHNSON, Justice, concurring and dissenting.

I concur in all of the opinion of the Court, except the portion that affirms the trial court's denial of costs to the City of Garden City for photocopying charges.

The respondent cities filed memoranda of costs with the trial court within fourteen days after entry of judgment as required by *I.R.C.P. 54(d)(5)*. The memoranda of costs listed photocopying charges **[***34]** in the following amounts:

City of Kuna	$53.46
City of Meridian	$ 421.25
City of Garden City	$ 439.90

The trial court's Order Settling Costs and Attorney Fees awarded photocopying costs to the City of Kuna and the City of Meridian. The court failed to award photocopying costs to the City of Garden City, but gave no explanation for the omission.

This issue should be remanded to the trial court which should do one of three things: (1) award photocopying costs to all three cities, (2) explain the rationale for denying Garden City its photocopying costs, or (3) deny photocopying costs to all three cities.

Northwest Medical Laboratories, Inc. v. Blue Cross & Blue Shield, Inc.

Supreme Court of Oregon

December 12, 1989, Argued and submitted; April 30, 1990, Reassigned ; June 14, 1990

SC No. S36303

Reporter
310 Ore. 72 *; 794 P.2d 428 **; 1990 Ore. LEXIS 144 ***; 1990-2 Trade Cas. (CCH) P69,118

NORTHWEST MEDICAL LABORATORIES, INC., and East Portland X-Ray Clinic, P.C., Petitioners on Review, v. BLUE CROSS AND BLUE SHIELD OF OREGON, INC., Oregon Preferred Care Network, Inc., Good Samaritan Hospital and Medical Center, Inc., and Northwest Physicians Association, Inc., Respondents on Review

Prior History: **[***1]** On review from the Court of Appeals. * CC No. A8604-01953; CA No. A46938.

Disposition: The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Core Terms

providers, Network, laboratory, cooperative, anticompetitive, effective, radiology, per se rule, subscriber, compete, markets, plans, expulsion, percent, antitrust, referrals, threshold, patients, Clinic, joint venture, market power, participating, predominantly, contracts, cases, healthcare services, rule of reason, possesses, wholesale, insured

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN1[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

See *Or. Rev. Stat. § 646.725*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN2[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Or. Rev. Stat. § 646.715(2) provides that the decisions of federal courts in construction of federal law relating to the same subject shall be persuasive authority in the construction of *Or. Rev. Stat. § 646.725*.

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* Appeal from *Multnomah County Circuit Court, Richard L. Unis, Judge. 97 Or App 74, 775 P2d 863 (1989)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN3[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Read literally, *Or. Rev. Stat. § 646.725* and § 1 of the Sherman Act, *15 U.S.C.S. § 1* prohibit every agreement in restraint of trade. The Supreme Court of the United States has construed the Sherman Act to prohibit only contracts in unreasonable restraint of trade. Under the rule of reason, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the per se rule of illegality adopted by the United States Supreme Court in cases under the Sherman Act, a practice that facially has the likelihood of predominantly anticompetitive effects (that is, would always or almost always restrict competition without any offsetting market efficiencies) is illegal per se.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A challenged practice violates *Or. Rev. Stat. § 646.725* only if the practice constitutes an unreasonable restraint of trade. The rule of reason is the appropriate analysis unless the practice is illegal per se. A per se violation is unreasonable as a matter of law. In a refusal-to-deal context, a plaintiff seeking application of the per se rule must present a threshold case that a defendant who possesses market power or unique access to a business element necessary for effective competition has refused to deal. If the plaintiff meets this threshold showing, the defendant can avoid judgment under the per se rule by establishing that the practice is justified by plausible arguments that it was intended to enhance overall efficiency and make markets more competitive.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

HN6[] **Types of Contracts, Joint Contracts**

A joint venture is not automatically free from scrutiny under the antitrust laws. In determining whether defendants' actions have violated *Or. Rev. Stat. § 646.725*, the court looks at substance, not form.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A plaintiff seeking application of the per se rule to an alleged concerted refusal to deal must present a threshold case that a defendant who possesses market power or unique access to a business element necessary for effective competition has refused to deal. If the plaintiff meets this threshold showing, the defendant must establish that the practice is justified by plausible arguments that it was intended to enhance overall efficiency and make markets more competitive.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

There is often no bright line separating per se from Rule of Reason analysis. These two approaches, however, may be distinguished by the depth of inquiry.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In applying the rule of reason, the basic inquiry is whether the restraint in question is one that promotes competition or one that suppresses competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under a rule of reason analysis pursuant to *Or. Rev. Stat. § 646.725*, it is a plaintiff's burden to prove that a defendant's conduct was anticompetitive.

Counsel: Michael J. Morris, of Bennett, Hartman, Tauman & Reynolds, P.C., Portland, argued the cause and filed the petition for petitioners on review.

E. Walter Van Valkenburg, of Stoel Rives Boley Jones & Grey, Portland, argued the cause and filed the response to the petition for respondents on review.

Roger Tilbury and Roch Steinbach, Portland, filed a brief on behalf of *amicus curiae* Portland Retail Druggists Association.

Judges: Peterson, Chief Justice, and Linde, Carson, Jones, Gillette, Van Hoomissen and Fadeley, Justices. **

Opinion by: PETERSON

** Linde, J., retired January 31, 1990; Jones, J., resigned April 30, 1990.

Opinion

[*74] [429]** Plaintiffs appealed to the Court of Appeals from the trial court's denial of their request for an injunction and other equitable relief under Oregon's "Little Sherman Act," *ORS 646.725*. [1] Plaintiffs alleged that defendants conspired to refuse to deal with them, thereby denying **[***2]** them access to a market necessary for effective competition.

Defendants are Blue Cross and Blue Shield of Oregon, Inc. (BCBSO); Oregon Preferred Care Network, Inc. (OPCN); Good Samaritan Hospital and Medical Center, Inc. (Good Samaritan); and Northwest Physicians Association, Inc. (NPA). Plaintiffs are Northwest Medical Laboratories, Inc., an independent laboratory that provides testing and similar services, and East Portland X-Ray Clinic, P.C., an independent clinic that provides radiology services. After *de novo* review in equity, *ORS 19.125(3)*, *see* **[***3]** *ORS 646.770*, the Court of Appeals affirmed the judgment of the trial court. *NW Medical Lab. v. Blue Cross and Blue Shield, 97 Or App 74, 775 P2d 863 (1989)*. We in turn review *de novo, see* *ORS 19.125(4)*, and affirm the decision of the Court of Appeals.

I. FACTS

The parties "accept the statement of facts contained in the Court of Appeals' opinion." We adopt those findings on *de novo* review and begin with those facts:

> **[**430]** "The health care financing industry has changed significantly in recent decades. Under traditional 'indemnity' health insurance plans, the subscriber pays a premium to the insurer, and the insurer then indemnifies the subscriber for payments made for health care services. The subscriber is able to select any doctor or hospital that the subscriber wishes. Until recently, the only other type of medical service financing available in the Portland area was Kaiser Permanente, a **[*75]** 'closed panel' health maintenance organization (HMO), originally organized by Kaiser Industries during World War II to provide health care services to Kaiser employes. An individual covered by Kaiser usually must have medical services performed **[***4]** by the physicians of Northwest Permanente, P.C., or pay the cost himself.
> "The cost of providing health care services has risen in recent years, and so have the premiums for traditional indemnity type insurance plans. In an effort to reduce the cost of premiums to the subscriber, to reduce the cost of services and to compete with Kaiser and traditional indemnity programs, competitors have developed new concepts for the financing of health care. There are now six HMOs competing in the Portland metropolitan area, including Network Health Plan, the HMO organized by defendant OPCN.
>
> "HMOs charge a fixed sum and provide full health care services to subscribers for that fee. Typically, the HMO limits the hospitals and physicians whose services are covered by the plan. A 'staff model' HMO owns its own facilities and employs physicians on salary. A 'group model' HMO, like Kaiser, does not employ physicians, but contracts with a single group practice for medical services. A 'network model' HMO contracts with groups of doctors in multi-speciality [*sic*] groups. The most common HMO is the independent practice model, which, like OPCN, contracts with independent practice medical associations **[***5]** that, in turn, contract with independent

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[1] ***HN1***[] *ORS 646.725* provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal."

Section 1 of the Sherman Antitrust Act, 26 Stat 209, *15 USC § 1 (1890)*, in part provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

health care providers practicing in their own facilities. A plan that limits the providers whose services are covered is a 'closed panel' plan. [2]

"The competitive strategy of an HMO is to provide complete medical services at less cost than traditional indemnity insurance by controlling unnecessary use of services and promoting preventive medicine. HMOs do this by placing the participating providers at financial risk with respect to the overall performance of the plan, thereby providing an incentive to the providers to reduce costs and unnecessary medical services.

"In early 1984, representatives of three Portland hospitals, including defendant Good Samaritan, met with defendant BCBSO to discuss the possibility of forming an HMO to provide a plan that would compete with the existing Portland area HMOs and other health care plans. [3] **[***6]** Each hospital obtained the participation of a segment of the physicians on its staff. The physicians, in turn, organized separate independent practice associations, one of which is defendant Northwest Physicians Association, Inc.

[*76] "In June, 1984, BCBSO, the three hospitals and three independent practice associations joined together to form a new corporation, defendant OPCN. BCBSO contracted with OPCN to obtain the necessary health care services. OPCN then contracted with the individual provider members to the extent necessary to provide complete services. Each of the seven separate corporations was a member of OPCN, had a representative on its board of directors and contributed $ 15,000 toward the initial capitalization of the corporation. Later, each contributed another $ 15,000.

"OPCN developed Network Health Plan (Network). Subscribers to the plan pay a fixed fee for full health care services to be provided by the hospitals, physicians and other service providers designated as Network providers. The Network providers continued **[***7]** to sell health care services to patients not enrolled in Network. The plan is marketed by BCBSO in the Portland area only. [4]

[431]** "All Network providers are required to participate in a utilization review and quality assurance program, designed to monitor the quality of service and to eliminate the use of needless services, and thereby to control costs and to reduce the price of medical care to consumers. Providers must also accept a discounted fee for the services they render, in order to create a 'risk pool,' [5] and must agree to refer patients covered by the plan only to Network providers.

[*8]**

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[2] "In 1973, Congress enacted the Health Maintenance Organization Act, *42 USC § 300(e)*, to facilitate the formation and operation of HMOs by making federal financial assistance available and preempting state laws that interfered with their operation. Congress specifically authorized 'closed panel' HMOs.

[3] "Plaintiffs concede that the HMO was formed in an effort to reduce premiums for prepaid health insurance and to compete with Kaiser.

[4] "In early 1986, in order to satisfy federal requirements, the owners of OPCN other than BCBSO, including Good Samaritan and Northwest Physicians Association, formed a new joint venture called Northwest Health, Inc. Defendants concede that, if Good Samaritan and Northwest Physicians Association are enjoined from participating in a closed panel HMO, they would also be barred from participation in Northwest Health, Inc.

[5] "The providers accept 80 percent of their normal fee as payment at the time of the service. The remaining 20 percent is placed in the risk pool. If the providers are successful in controlling excess utilization, all or part of the risk pool is distributed to them at the end of the fiscal year. If they are not successful, distribution is minimal or nonexistent. Under the Administrative Services Agreement between OPCN and BCBSO, BCBSO provides 'stop loss' coverage to OPCN, which is triggered when claims exceed an agreed percentage of collected premiums. For the segment of services that the stop loss covers, coverage is unlimited. Losses that the stop loss does not cover become OPCN's operating deficit. We find that, through their contribution of capital and participation in the risk pool, the providers were genuinely 'at risk.'" *97 Or App at 76-81*. (Some footnotes omitted.)

"Dr. John Santa, Medical Director of Network, testified that OPCN is a 'closed panel' HMO. Subscribers must seek services from providers in the plan, except in the case of an emergency. Agreements between physician providers and the three independent practice associations provide:

> 'If Physician determines that a Beneficiary requires services not customarily provided by Physician, including without limitation physician services, services of other health care professionals, in-patient hospital services, ancillary hospital services, and laboratory services, Physician will, to the extent possible consistent with good medical practice and patient care, refer, admit or direct the beneficiary to other Program Participants in order to maintain the integrity of the Program and further the interests of NETWORK and the Beneficiary in securing health care services for the Beneficiary in a cost-effective manner. Physician will obtain the consent of the Medical director of NETWORK prior to making any non-emergency referrals to non-Program Participants.'

"Santa testified that the reasons for limiting the number of **[*77]** providers available under the plan are to enable the HMO to control **[***9]** the quality of service, to keep the plan manageable in size and to ensure that all providers are at risk, but not at too much risk. OPCN chose to use the laboratory and radiology services of plan members Good Samaritan and Portland Adventist Hospitals. It also 'locked-in' the services of one radiologist, several anesthesiologists, mental health services, vision services and a durable medical equipment supplier.

"Clinical laboratories are regulated by ORS ch 438 and may accept referrals only from a licensed physician or other persons authorized by law. There are many independent laboratories and hospitals in the Portland metropolitan area competing for physicians' laboratory referrals. Plaintiff Northwest Medical Laboratories is located two blocks from Good Samaritan Hospital.

"Radiologists also depend on physician referrals. Clinics compete on the basis of quality of service. Local hospitals also market radiology services to physicians' offices. Plaintiff East Portland X-Ray Clinic is located six blocks from Portland Adventist Medical Center.

"Both Northwest Medical Laboratories and East Portland X-Ray sought to become providers for the plan, but OPCN rejected them because **[***10]** of its decision to rely on member hospitals for those services. Until January 1, 1986, however, OPCN reimbursed plaintiffs for services provided to Network subscribers on referrals from member doctors. After that date, it refused to reimburse them. Plaintiffs claim that they have lost significant revenue as a result of this 'lock-in' of radiological and laboratory services.

"The plan competes in at least three market categories in the Portland metropolitan area. Network physician providers make up approximately 16.5 to 18.5 percent of all physicians practicing. The hospital providers represent approximately 24 percent of the hospital market. * * * Subscribers to the plan comprise approximately 2.1 percent of the insured population of Portland and 5 percent of those participating in HMOs in that area. * * *

"Plaintiffs contend that OPCN's 'lock-in' of laboratory and radiology services violates Oregon's ***antitrust law***, specifically *ORS 646.725*, which prohibits all contracts or combinations 'in restraint of trade or commerce * * *.' Their only argument on appeal and, therefore, the **[**432]** only one that we consider, is that the arrangement constitutes a refusal to deal that falls within **[***11]** the statutory prohibition. That refusal is in restraint of trade, plaintiffs contend, because it disturbs the **[*78]** 'normal dynamics of the market' by requiring doctors who would ordinarily refer their patients to plaintiffs to refer them to plan providers only. Plaintiffs claim that they have been damaged by the loss of revenue.

"Theodore Tosterud, the president and primary shareholder of Northwest Medical Laboratories, testified:

> 'Q: * * * Can you explain to the court how your business has been threatened with injury as a result of the lock-in?
>
> 'A: If physicians in the Northwest area that we're doing business with are physicians that are involved in the Network Health Plan, and before Network Health Plan we were receiving all the physicians' work from these doctors, now we do not receive all their work. They must split it up. The portion that is Network patients goes to the Network provider and the other part of their work goes to Northwest Medical Laboratories.

'Q: All right. Now, so it's clear, you aren't claiming that all the doctors who signed up for Network were formerly your accounts?

'A: Not all of them, no.

'Q: But of the ones that were your accounts and signed **[***12]** up for Network, you have lost that portion of your business?

'A: I have lost that portion of that business that they drew with the Network Health Plan.

'Q: And those same doctors continue to send you business on your other non-Network people?

'A: That's correct.'

"Tosterud testified, additionally, that Northwest Medical Laboratories continues to receive a large number of referrals of clients insured by BCBSO under other plans, accounting for approximately 10 percent of its gross revenue. It also continues to receive a significant number of referrals of non-Network patients from doctors who are Network providers.

"Gerald Warnock testified on behalf of plaintiff East Portland X-Ray Clinic. He is on the staff of both Portland Adventist Hospital and Good Samaritan Hospital. His clinic participates in every pre-paid health care plan available to it. It applied to become a provider for Network, but OPCN rejected it. Warnock estimates that East Portland X-Ray lost gross revenue of $ 100,000 in 1986 as a result of being locked **[*79]** out of Network. That clinic's gross revenue in 1986 was approximately $ 4,000,000. It continues to receive significant revenues from BCBSO under **[***13]** its non-Network plans and participates in other closed-panel plans in which it is 'locked-in' as the provider of radiology services.

" *2 In 1973*, Congress enacted the Health Maintenance Organization Act, *42 U.S.C. § 300(e)*, to facilitate the formation and operation of HMOs by making federal financial assistance available and preempting state laws that interfered with their operation. Congress specifically authorized 'closed panel' HMOs.

"3 Plaintiffs concede that the HMO was formed in an effort to reduce premiums for prepaid health insurance and to compete with Kaiser.

"4 In early 1986, in order to satisfy federal requirements, the owners of OPCN other than BCBSO, including Good Samaritan and Northwest Physicians Association, formed a new joint venture called Northwest Health, Inc. Defendants condede that, if Good Samaritan and Northwest Physicians Association are enjoined from participating in a closed panel HMO, they would be barred from participation in Northwest Health, Inc.

"5 The providers accept 80 percent of their normal fee as payment at the time of the service. The remaining 20 percent is placed in the risl pool. If the providers are successful in controlling excess utilization, all or part of the risk pool is distributed to them at the end of the fiscal year. If they are not successful, distribution is minimal or nonexistent. Under the Administrative Services Agreement between OPCN and BCBSO, BCBSO provides 'stop loss' coverage to OPCN, which is triggered when claims exceed an agreed percentage of collected premiums. For the segment of services that the stop loss covers, coverage is unlimited. Losses that the stop loss does not cover become OPCN's operating deficit. We find that, through their contribution of capital and participation in the **[**433]** risk pool, the providers were genuinely 'at risk.'"

97 Or. App. at 76-81. (Some footnotes omitted.)

II. THE APPLICABLE RULES

In this section of the opinion we will briefly discuss the development of what has come to be known as two rules of Sherman Act antitrust federal law, the "rule of reason" and the "*per se* rule." We will then state our interpretation of the **[*80]** *per se* rule under *ORS 646.725* in a refusal-to-deal context. In parts B and C of section III, *post,* we will apply the *per se* rule and the rule of reason to the facts of this case.

There are no reported Oregon cases applying *ORS 646.725* in a context similar to the facts at issue. The reported Oregon cases interpreting *ORS 646.725* are *King City Realty v. Sunpace, 291 Or 573, 633 P2d 784 (1981)*, and *Golden West Insulation v. Stardust Investment Co., 47 Or App 493, 615 P2d 1048 (1980)*. Both cases concern "tying" arrangements.

HN2[] *ORS 646.715(2)* provides in part:

> "The decisions of federal courts in construction of federal law relating to the same subject shall be persuasive authority in the construction **[***14]** of ORS [646.725]."

HN3[] Read literally, *ORS 646.725* and section 1 of the Sherman Act prohibit every agreement in "restraint of trade." The Supreme Court of the United States recognized early that such an interpretation would overly fetter freedom of contract without resulting in more active competition in the market involved. In *Standard Oil Co. v. United States, 221 U.S. 1, 60, 31 S Ct 502, 55 L Ed 619 (1911)*, the Supreme Court advanced the rule-of-reason standard by construing the Act to prohibit only contracts in *unreasonable* restraint of trade. Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S Ct 2549, 53 L Ed 2d 568 (1977)*.

In order to simplify the process of determining whether certain practices unreasonably restrain trade, the Supreme Court developed ***HN4***[] a *per se* rule of illegality. Under this rule, a practice that facially has the likelihood of predominantly anticompetitive **[***15]** effects (that is, would always or almost always restrict competition without any offsetting market efficiencies) is illegal *per se. See Northwest Stationers v. Pacific Stationery, 472 U.S. 284, 289-90, 105 S Ct 2613, 86 L Ed 2d 202 (1985)*. The "*per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive. Courts can thereby avoid the 'significant costs' in 'business certainty and litigation efficiency' that a full-fledged rule-of-reason inquiry **[*81]** entails." *Id., 472 U.S. at 289* (quoting *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343-44, 102 S Ct 2466, 73 L Ed 2d 48 (1982))*.

In *Northwest Stationers,* the Supreme Court refined the *per se* rule as applied to a refusal to deal where the defendant expelled plaintiff from a joint buying cooperative. In that case the Court held that a plaintiff, who asserted that expulsion from a joint buying cooperative is illegal *per se,* must present a threshold case that the cooperative possesses market **[***16]** power or unique access to a business element necessary for effective competition. *472 U.S. at 298*.

In light of *ORS 646.715(2)* -- which requires that we look to federal case law -- and after reviewing federal case law, we interpret *ORS 646.725* as follows: ***HN5***[] A challenged practice violates *ORS 646.725* only if the practice constitutes an *unreasonable* restraint of trade. The rule of reason is the appropriate analysis unless the practice is illegal *per se.* A *per se* violation is unreasonable as a matter of law. In a refusal-to-deal context, a plaintiff seeking application of the *per se* rule must present a threshold case that a defendant who possesses market power or unique access to a business element necessary for effective competition has refused to deal. If the **[**434]** plaintiff meets this threshold showing, the defendant can avoid judgment under the *per se* rule by establishing that the practice is justified by plausible arguments that it was intended to enhance overall efficiency and make markets more competitive. [2]

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[2] Then Professor and later Judge Robert Bork has commented on the procedural implications of the *per se* rule:

> "Suppose that the government brings suit charging defendants with agreeing to an illegal division of markets. The first step is to determine whether the facts and contentions of the parties properly bring the case within the ambit of the per se rule. If a per se violation seems proven either by the pleadings or at any stage during the trial, the court should announce that fact.

[*17] [*82] III. ANALYSIS**

A. The Joint Venture Issue

We first dispose of a preliminary issue. Relying on language from *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S Ct 2466, 73 L Ed 2d 48 (1982)*, defendants argue that we need not engage in any antitrust analysis because they have formed a "true joint venture." They maintain that they are a single firm competing with others in the market and have complete freedom to choose those with whom they will deal.

In *Maricopa,* the State of Arizona brought an antitrust action against two foundations that had established schedules of maximum fees that participating doctors would accept as payment in full for services performed for patients insured under plans approved by the foundations. The Court held that the maximum-fee agreements were *per se* unlawful under section 1 of the Sherman Act. Defendants here rely on the following statement:

> "The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint **[***18]** ventures, the partnership is regarded as a single firm competing with other sellers in the market. The agreement under attack is an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers." *457 U.S. at 356-57*.

Even if defendants have formed ***HN6***[] a "true joint venture," they do not automatically escape antitrust laws. We do not read *Maricopa* to hold that a true "joint venture is *ipso facto* free from antitrust scrutiny." [3] **[***19]** Some of the most significant **[*83]** antitrust **[**435]** cases have held joint ventures to be culpable. [4] In determining whether defendants' actions have violated *ORS 646.725*, we look at substance, not form. We turn, therefore, to a discussion of plaintiffs' claims.

> At this point the defendants could avoid judgment against themselves and obtain an opportunity to go on with the trial only by making an acceptable offer to prove that the market division was ancillary. This would require an offer to prove a contract integration (unless that were conceded) and, in any case, the statement of an economically plausible theory which, if borne out by the evidence the defendants offer to adduce, would show their agreement to have a substantial capacity for increasing the efficiency of the integration. * * * [T]he economics involved in judging the plausibility of defendants' theory, and thus the acceptability of their offer of proof, are not overly complex and are suitable for judicial use in the litigation process. Many trials will end at this point with a decision that defendants have not offered a plausible theory of efficiency." Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (Part II), 75 Yale L J 373, 388-89 (1966).

[3] In context, the Court of Appeals correctly reasoned:

> "The language quoted from *Arizona v. Maricopa County Medical Society, supra,* addresses the question of why the Court considered the arrangement there to involve more than 'literal price fixing.' Here, there is no contention that price fixing is involved. The only claimed violation is a refusal to deal. The Court's discussion in *Maricopa,* therefore, is not directly applicable. Additionally, read in the context of the Supreme Court's entire opinion, the quoted language only suggests that, if the arrangement in *Maricopa* had involved some greater level of integration between the foundations and the insurance providers, it could have been saved from *per se* illegality. It does not suggest, and we do not read it to hold, that an arrangement that constitutes a joint venture is *ipso facto* free from antitrust scrutiny. Firms that are genuinely joined together for the accomplishment of some business purpose are capable of acting concertedly and anti-competitively through a refusal to deal. We hold that, as a general proposition, although the extent of integration among firms engaged in a common enterprise may be relevant to the question of whether the arrangement should be treated as an illegal combination *per se,* characterizing an agreement as a 'joint venture' says nothing about the effect of the arrangement on competition and does not mean that the entity is free from antitrust scrutiny." *97 Or App at 85*. (Some citations omitted.)

[4] *See, e.g., United States v. Sealy, Inc., 388 U.S. 350, 87 S Ct 1847, 18 L Ed 2d 1238 (1967)*.

B. *Per se* Analysis

Plaintiffs argue that the agreements between the Network providers to not refer laboratory and radiology services to plaintiffs constitute a group boycott (a refusal to deal) and on their face are a *per se* violation of *ORS 646.725*.

Northwest Stationers v. Pacific Stationery, 472 U.S. 284, 105 S Ct 2613, 86 L Ed 2d 202 (1985), is instructive concerning the application of the *per se* rule in a refusal-to-deal context. In that case, the defendant was a wholesale purchasing cooperative whose membership consisted of office supply retailers. The defendant expelled the plaintiff from membership. Thereafter, the plaintiff brought suit alleging that the expulsion without procedural protection was a group boycott that limited its ability to compete and should be considered *per se* violative of section 1 of the Sherman Act.

The Court stated that "'[g]roup boycotts' are often listed among **[***20]** the classes of economic activity that merit *per se* invalidation under § 1[, but] [e]xactly what types of activity fall within the forbidden category is * * * far from certain." *472 U.S. at 293-94*. (Citations omitted.) Accordingly, the Court took "[s]ome care * * * in defining the category of concerted refusals to deal that mandate *per se* condemnation." *472 U.S. at 294*. The Court summarized its treatment of refusal-to-deal cases under the *per se* rule:

> "Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to **[*84]** disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance **[***21]** overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.
>
> "Although a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment, not every cooperative activity involving a restraint or exclusion will share with the *per se* forbidden boycotts the likelihood of predominantly anticompetitive consequences." *472 U.S. at 294-95*. (Citations omitted.)

Turning to the facts of that case, the Court identified several efficiency-enhancing characteristics of wholesale purchasing cooperatives in general and found efficiencies more directly related to the defendant's expulsion of the plaintiff from the cooperative:

> "Wholesale purchasing cooperatives such as [defendant] are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be 'designed to increase economic efficiency and render markets more, rather than less, competitive.' *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., [441 U.S. 1, 20, 99 S Ct 1551, 60 L Ed 2d 1 (1979)]*. **[***22]** The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise **[**436]** be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.
>
> "[Plaintiff], of course does not object to the existence of the cooperative arrangement, but rather raises an antitrust challenge to [defendant's] decision to bar [plaintiff] from continued membership. It is therefore the action of expulsion that must be evaluated to determine whether *per se* treatment **[*85]** is appropriate. The act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* [*supra,* 441 U.S.] at 9. Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function efficiently. Disclosure rules, such as the **[***23]** one on which [defendant] relies, may well provide the cooperative with a needed means for monitoring the creditworthiness of its members. Nor would the expulsion characteristically be likely to result in predominantly anticompetitive effects, at least in the type of

> situation this case presents. Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." *Northwest Stationers v. Pacific Stationery, supra, 472 U.S. at 295-96*. (Footnotes and some citations omitted.)

In holding that the defendant's expulsion of the plaintiff did not fall within the category of activity that is, as a matter of law, anticompetitive so as to mandate *per se* invalidation under section 1 of the Sherman Act, the Court stated:

> "A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because **[***24]** not all concerted refusals to deal are predominantly anticompetitive. When the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition." *472 U.S. at 298*.

We interpret *Northwest Stationers* to stand for the proposition that ***HN7***[] a plaintiff seeking application of the *per se* rule to an alleged concerted refusal to deal must present a threshold case that a defendant who possesses market power or unique access to a business element necessary for effective competition has refused to deal. The logical extension of *Northwest Stationers* is that if the plaintiff meets this threshold showing, the defendant must establish that the practice is justified by plausible arguments that it was intended to enhance overall efficiency and make markets more competitive.

[*86] We realize that the above approach may blur the distinction between the *per se* and rule-of-reason approaches. The Supreme Court of the United States, however, has recognized that "***HN8***[] there is often no bright line separating **[***25]** *per se* from Rule of Reason analysis." *NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104 n 26, 104 S Ct 2948, 82 L Ed 2d 70 (1984)*. These two approaches, however, may be distinguished by the depth of inquiry. *See Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F2d 185, 189 (7th Cir 1985)*.

Turning to the facts at bar, we must first identify the relevant market. In this case, it is the laboratory and radiology markets. The relevant geographic market is the Portland metropolitan area, the only area in which BCBSO offers Network.

Plaintiffs have failed to present a threshold case that defendants possess -- through the arrangements between Network and other providers -- market power or unique access to a business element necessary for effective competition in the medical laboratory and radiology markets. **[**437]** With respect to market power, there is no evidence concerning the percentage of laboratory and radiology markets that defendants occupy. There is also no evidence by direct inference. The only available evidence is that subscribers to Network comprise only approximately 2.1 percent of the total **[***26]** market for health insurance in Portland.

Concerning unique access to a business element necessary for effective competition, the facts show that plaintiffs are effectively competing in the laboratory and radiology markets. We find that Northwest Medical Laboratories receives a large number of referrals of clients insured by BCBSO under other plans, which accounts for approximately 10 percent of its gross revenue. Furthermore, doctors who are Network providers continue to refer a significant number of non-Network patients to that laboratory. We also find that East Portland X-Ray's 1986 gross revenue was approximately $ 4,000,000, reflecting a Network lock-out loss of $ 100,000. East Portland also continues to receive significant revenues from BCBSO under non-Network plans. Additionally, East Portland is the "locked-in" provider of radiology services in other closed-panel plans. Under these facts, it is clear that plaintiffs' ability to compete is not dependent upon their ability to become Network providers.

[*87] In sum, plaintiffs have failed to make the required threshold showing that defendants' actions are illegal *per se.* We therefore turn to the generally applicable **[***27]** rule of reason.

C. Rule-of-Reason Analysis

HN9[] Application of the rule of reason to the instant facts is not a difficult task. The basic inquiry is whether the restraint in question "is one that promotes competition or one that suppresses competition." *National Soc. of Professional Engineers v. U.S., 435 U.S. 679, 691, 98 S Ct 1355, 55 L Ed 2d 637 (1978)*. Plaintiffs have failed to show that the refusal to deal has injured competition in any way. The fact that these particular plaintiffs may have lost business does not demonstrate any injury to competition.

In contrast to the absence of anticompetitive impact, there was evidence of the procompetitive impact of defendants' conduct. The evidence shows that one of the central concepts behind the formation of Network was the use of a limited panel of providers in order to control utilization while ensuring that quality remained high. As stated in the abovementioned facts, "[a]ll Network providers are required to participate in a utilization review and quality assurance program, designed to monitor the quality of service and to eliminate the use of needless services, and thereby to control **[***28]** costs and to reduce the price of medical care to consumers." Dr. John Santa, Medical Director for Network, testified about the efficiencies that result from a health plan's use of a limited panel of providers in conjunction with a risk-pool feature. Dr. Santa also testified that it was important to limit the number of providers on the panel in order to make utilization controls work. He contrasted Network with an earlier plan that had "basically taken * * * virtually all providers in the Portland Metro area and they had some very significant problems." We accept this testimony as a portrayal of accurate historical fact.

In addition, defendants' share of the health insurance market is so small that any overall anticompetitive effect is questionable.

In short, defendants have employed procompetitive concepts to create an entity that competes in the laboratory and radiology markets. *HN10*[] It was plaintiffs' burden to prove that defendants' conduct was anticompetitive, and plaintiffs have **[*88]** not done so. Accordingly, plaintiffs have failed to establish a rule-of-reason claim under *ORS 646.725*. *Cf.* *Seaboard Supply Co. v. Congoleum Corp., 770 F2d 367, 375 (3d Cir 1985)*. **[***29]** [5]

[*30]** **[**438]** The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

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[5] In that case, plaintiff Seaboard, a long-standing wholesale distributor of Congoleum products, brought suit against Congoleum and a new commissioned sales agent alleging, *inter alia,* that defendants had conspired to boycott Seaboard. The court stated:

> "The district court also found that Seaboard had failed to present evidence which would establish anti-competitive effect and therefore could not prevail on a rule of reason analysis. Plaintiff produced evidence only of its own decrease in sales of Congoleum products. The defendants' evidence showed, however, that intrabrand competition increased and, by using a sales agent, Congoleum was able to reduce its market prices and compete more effectively with other manufacturers. In this situation we must not overlook the Supreme Court's admonition in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S Ct 690, 50 L Ed 2d 701 (1977)*, 'The antitrust laws, however, were enacted for "the protection of *competition, not competitors*."' We noted earlier the absence of evidence tending to show an anti-competitive effect. On this record, the district court did not err in finding that plaintiff had failed to present a rule of reason claim under section 1 of the Sherman Act." (Emphasis in original; footnote omitted.)

LexisNexis®

Texaco, Inc. v. Hasbrouck

Supreme Court of the United States

December 5, 1989, Argued ; June 14, 1990, Decided

No. 87-2048

Reporter

496 U.S. 543 *; 110 S. Ct. 2535 **; 110 L. Ed. 2d 492 ***; 1990 U.S. LEXIS 3142 ****; 58 U.S.L.W. 4807; 1990-1 Trade Cas. (CCH) P69,056

TEXACO INC., PETITIONER v. RICKY HASBROUCK, DBA RICK'S TEXACO, ET AL.

Prior History: **[****1]** On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Disposition: *842 F.2d 1034*, affirmed.

Core Terms

discount, retail, customers, prices, stations, distributor, wholesalers, price discrimination, supplier, damages, purchasers, gasoline, differential, marketing, respondents', functions, seller, sales, commerce, buyer, antitrust, compete, supplied, lower price, reimbursement, Robinson-Patman Act, integrated, rigorous, savings, injure

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Contracts Law > Personal Property > Bona Fide Purchasers

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN1[] **Defenses, Meeting Competition Defense**

See *15 U.S.C.S. § 13(b)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN2[] **Robinson-Patman Act, Claims**

There may be a Robinson-Patman Act (Act), 15 U.S.C.S. § 13, violation even if favored and disfavored buyers do not compete, so long as the customers of a favored buyer compete with a disfavored buyer or its customers. A § 13(a) violation may occur if (1) a discount received is not cost-based and (2) all or a portion of it is passed on by them to customers of theirs. To hold that price discrimination between a wholesaler and a retailer could never violate the Act would leave immune from antitrust scrutiny a discriminatory pricing procedure that can effectively serve to harm competition. Such a result would be contrary to the objectives of the Act.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN3[] Antitrust & Trade Law, Robinson-Patman Act

See 15 U.S.C.S. § 13(a).

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN4[] Defenses, Cost Justification Defense

The Robinson-Patman Act, 15 U.S.C.S. § 13, contains no express reference to functional discounts. It does contain two affirmative defenses that provide protection for two categories of discounts, those that are justified by savings in a seller's cost of manufacture, delivery or sale, and those that represent a good faith response to equally low prices of a competitor.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN5[] Robinson-Patman Act, Claims

In order to establish a violation of the Robinson-Patman Act, respondents have the burden of proving four facts: (1) that the seller's sales were made in interstate commerce; (2) that the product or commodity sold was of the same grade and quality as that sold to respondents; (3) that seller discriminated in price as between the purchasers; and (4) that the discrimination had a prohibited effect on competition. 15 U.S.C.S. § 13(a).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN6[] **Robinson-Patman Act, Claims**

To recover damages under the Robinson-Patman Act, *15 U.S.C.S. § 13*, a party has the burden of proving the extent of his actual injuries.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN7[] **Price Discrimination, Defenses**

A discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If two are competing in the resale of the goods concerned, that relationship exists. Where, also, a price to one is so low as to involve a sacrifice of some part of a seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. Where no such relationship exists, where goods are sold in different markets and the conditions affecting those markets set different price levels for them, a sale to different customers at those different prices would not constitute a discrimination within the meaning of *15 U.S.C.S. § 13*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN8[] **Robinson-Patman Act, Claims**

A price discrimination within the meaning of *15 U.S.C.S. § 13* is merely a price difference. *Section 13* itself spells out the conditions which make a price difference illegal or legal, Were a court to read other conditions into the law by means of the nondirective phrase "discriminate in price," it would derange the integrated statutory scheme. Not only would such action be contrary to the meaning of the statute, but, perhaps because of this, it would be thoroughly undesirable. Inevitably every legal controversy over any price difference would shift from the detailed governing provisions, "injury," cost justification, and "meeting competition," over into the "discrimination" concept of ad hoc resolution divorced from specifically pertinent statutory text.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN9[] **Price Discrimination, Competitive Injuries**

An injury to competition under *15 U.S.C.S. § 13* may be inferred from evidence that some purchasers had to pay their supplier substantially more for their goods than their competitors had to pay.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN10[] **Price Discrimination, Defenses**

Suppliers granting functional discounts either to single-function or to integrated buyers should not be held responsible for any consequences of their customers' pricing tactics. Price cutting at the resale level is not in fact, and should not be held in law, "the effect of" a differential that merely accords due recognition and reimbursement for actual marketing functions. The price cutting of a customer who receives this type of differential results from his own independent decision to lower price and operate at a lower profit margin per unit. The legality or illegality of this price cutting must be judged by the usual legal tests. In any event, consequent injury or lack of injury should not be a supplier's legal concern. On the other hand, the law should tolerate no subterfuge. A distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it under *15 U.S.C.S. § 13*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN11[] **Robinson-Patman Act, Claims**

A supplier need not satisfy the rigorous requirements of a cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and a supplier's direct customers. To establish the defense a seller must show that the price reductions given did not exceed actual cost savings and this requirement of exactitude is ill-suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors. Discounters will therefore likely find it more useful to defend against claims under the Robinson-Patman Act, *15 U.S.C.S. § 13*, by negating the causation element in a case against them: a legitimate functional discount will not cause any substantial lessening of competition.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Criminal Law & Procedure > Defenses > Burdens of Proof

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

HN12[] **Defenses, Cost Justification Defense**

Conceived as a vehicle for allowing differential pricing to reward distributive efficiencies among customers operating at the same level, a cost justification defense focuses on narrowly defined savings to a seller derived from the different method or quantities in which goods are sold or delivered to different buyers. Moreover, the burden of proof as to a cost justification defense is on a seller charged with violating the Robinson-Patman Act, *15 U.S.C.S. § 13*, whereas the burden of proof remains with an enforcement agency or plaintiff in circumstances involving functional discounts since functional pricing negates the probability of competitive injury, an element of a prima facie case of violation.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN13[] **Price Discrimination, Defenses**

A price differential that merely accords due recognition and reimbursement for actual marketing functions is not illegal under the Robinson-Patman Act, *15 U.S.C.S. § 13*.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN14[] **Price Discrimination, Defenses**

Functional discounts provide no safe harbor from the Robinson-Patman Act, *15 U.S.C.S. § 13*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN15[] **Robinson-Patman Act, Claims**

Courts will not construe the Robinson-Patman Act (Act), *15 U.S.C.S. § 13*, in a way that would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN16[] **Price Discrimination, Buyer Liability**

The competitive injury component of a Robinson-Patman Act (Act), *15 U.S.C.S. § 13*, violation is not limited to an injury to competition between a favored and a disfavored purchaser; it also encompasses an injury to competition between their customers. Act language, which specifically encompasses not only the adverse effect of price discrimination on persons who either grant or knowingly receive the benefit of such discrimination, but also on customers of either of them. Such indirect competitive effects surely may not be presumed automatically in every functional discount setting, and, indeed, one would expect that most functional discounts will be legitimate discounts which do not cause harm to competition. At the least, a functional discount that constitutes a reasonable reimbursement for purchasers' actual marketing functions will not violate the Act.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN17[] **Robinson-Patman Act, Claims**

A plaintiff may not recover damages merely by showing a violation of the Robinson-Patman Act, *15 U.S.C.S. § 13*; rather, a plaintiff must also make some showing of actual injury attributable to something the antitrust laws were designed to prevent. However, antitrust plaintiffs are excused from an unduly rigorous standard of proving antitrust injury.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN18[] **Robinson-Patman Act, Claims**

Damage issues in Robinson-Patman, *15 U.S.C.S. § 13*, cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

Lawyers' Edition Display

Decision

Gasoline supplier's discounts to two distributors held not legitimate functional discounts, and thus held to violate 2(a) of Clayton Act, as amended by Robinson-Patman Act (*15 USCS 13(a)*).

Summary

In general, a supplier's functional discount is said to be a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier. A particular supplier (1) sold gasoline directly to independent retailers in Spokane, Washington at the supplier's retail tank wagon prices, and (2) granted substantial discounts to two distributors which (a) engaged in retail operations as well, and (b) increased their sales volume. Several independent retailers whose sales had suffered a decline filed an action against the supplier in the United States District Court for the Eastern District of Washington and alleged that the supplier's distributor discounts violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), which makes it unlawful to discriminate in price between different purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. The supplier, however, contended that it had granted the distributors legitimate functional discounts, which did not violate the Act. After the case had been remanded once for a new trial, the jury in the second trial returned a verdict in favor of the independent retailers. The District Court denied the supplier's motion for judgment notwithstanding the verdict and, in an opinion supplementing the court's oral ruling denying the supplier's motion for a directed verdict, expressed the view that any presumed legality of functional discounts had been rebutted by evidence that the amount of the discounts to the distributors was not related to the cost of any function that the distributors performed (*634 F Supp 34*). On appeal, the United States Court of Appeals for the Ninth Circuit, in affirming, expressed the view that the independent retailers had presented ample evidence to demonstrate that the services performed by the distributors were insubstantial and did not justify the functional discounts (initial opinion at *830 F2d 1513*, amended opinion at *842 F2d 1034*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., joined by Rehnquist, Ch. J., and Brennan, Marshall, Blackmun, and O'Connor, JJ., it was held that, although a legitimate functional discount constituting a reasonable reimbursement for a purchaser's actual marketing functions does not violate 2(a), the record in the case at hand adequately supported a finding that the supplier's distributor discounts were not legitimate functional discounts, and thus violated 2(a), where there was evidence that (1) one distributor was separately compensated for its hauling function; (2) neither distributor maintained any significant storage facilities;

(3) both distributors received the full discount on all their purchases even though most of their volume was resold directly to consumers; (4) the extra margin on such sales enabled the distributors to price aggressively in both their retail and wholesale marketing; (5) the supplier was fully informed about the persistent and marketwide consequences of its own pricing activity; (6) the supplier's own executives recognized that the dramatic impact on the market was almost entirely attributable to the magnitude of the distributor discounts and the hauling allowance; and (7) at the same time that the supplier was affirmatively encouraging one distributor to expand its retail business and integrate downward, and was providing the distributor with a generous discount useful to such integration, the supplier was inhibiting upward integration by the independent retailers by refusing permission to two of the independent retailers to haul their own fuel using their own tank wagons.

White, J., concurring in the result, expressed the view that (1) in the absence of congressional attention to the longstanding issue as to whether legitimate functional discounts violated 2(a), he would await a case challenging a functional discount ruling by the Federal Trade Commission (FTC), at which time the Supreme Court would be reviewing a construction of the Act by the FTC and the FTC's explanation of legitimate functional discount pricing; but (2) the case at hand was a private action for treble damages in which the Supreme Court ruled against the seller-discounter, since under no definition of a legitimate functional discount did the discounts extended in the case at hand qualify as a defense to a charge of price discrimination.

Scalia, J., joined by Kennedy, J., concurring in the judgment, expressed the view that (1) while he agreed with the court that none of the arguments pressed by the supplier for removing the supplier's conduct from the coverage of the Robinson-Patman Act was persuasive, he could not adopt the court's reasoning, which seemed to create an exemption for functional discounts that are "reasonable" even though prohibited by the text of the Act; and (2) although there might be a plausible argument that a functional basis for differential pricing would negate the possibility of competitive injury in a market that was really functionally divided, the merits of that argument ought not to be decided by the Supreme Court in the first instance, as the argument (a) had not been not raised by the parties before the court or below, and (b) called forth a number of issues that would benefit from briefing and factual development.

Headnotes

EVIDENCE §979 > sufficiency -- Robinson-Patman Act violation -- functional discounts -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]***LEdHN[1G]***[] [1G]

In a suit by several independent retailers against a supplier which sold gasoline both to the independent retailers and to two distributors which engaged in retail operations as well, the record adequately supports the finding that the supplier's discounts to the distributors were not legitimate functional discounts, and thus violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*)--which makes it unlawful to discriminate in price between purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them--where there is evidence that (1) one distributor was separately compensated for its hauling function; (2) neither distributor maintained any significant storage facilities; (3) both distributors received the full discount on all their purchases even though most of their volume was resold directly to consumers; (4) the extra margin on such sales enabled the distributors to price aggressively in both their retail and wholesale marketing; (5) the supplier was fully informed about the persistent and marketwide consequences of its own pricing activity; (6) the supplier's own executives recognized that the dramatic impact on the market was almost entirely attributable to the magnitude of the distributor discounts and the hauling allowance; and (7) at the same time that the supplier was affirmatively encouraging one distributor to expand its retail business and integrate downward, and was providing the distributor with a generous discount useful to such integration, the supplier was inhibiting upward integration by the independent retailers by refusing permission to two of the independent retailers to haul their own fuel using their own tank wagons.

APPEAL §1326 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > discounts -- price discrimination -- defenses -- what reviewable -- denial of motion for judgment notwithstanding verdict -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]

With respect to 2 of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13*), even though the price-discrimination prohibition in 2(a) (*15 USCS 13(a)*) contains no express reference to functional discounts, two affirmative defenses provide protection for two categories of discounts--those discounts that (1) under 2(a), are justified by savings in the supplier's cost of manufacture, delivery, or sale, or (2) under 2(b) (*15 USCS 13(b)*), represent a good-faith response to the equally low prices of a competitor; with respect to a claim by several independent retailers in a Federal District Court suit that a gasoline supplier's discounts to two distributors violated 2(a), however, neither of those two defenses is available to the supplier as the case comes to the United States Supreme Court on certiorari--even though the supplier contended in the District Court that the special prices to the distributors were justified by cost savings, were a good-faith effort to meet competition, and were "legitimate functional discounts"--where (1) the District Court withheld the cost-justification defense from the jury on the ground that the cost-justification defense was not supported by the evidence, (2) the jury rejected the other defenses, (3) the supplier's motion for a judgment notwithstanding the verdict, which motion was denied by the District Court, claimed that, as a matter of law, the supplier's functional discounts did not violate 2, and (4) the Supreme Court granted certiorari to consider the supplier's contention that legitimate functional discounts do not violate 2.

APPEAL §1457 > review of jury verdict -- conflicting evidence -- > Headnote:
LEdHN[3][] [3]

On certiorari to review a gasoline supplier's liability to several independent retailers for an alleged violation of 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), the United States Supreme Court, given the jury's general verdict in favor of the independent retailers, will resolve disputed questions of fact in the independent retailers' favor.

DAMAGES §159 > injury to business -- Robinson-Patman Act -- > Headnote:
LEdHN[4][] [4]

In a suit by several independent retailers against a gasoline supplier, which suit is based upon a claim that the supplier's discounts to two distributors constituted price discrimination in violation of 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), it is improper to award damages measured by the difference between (1) the retail tank wagon price at which the supplier sold gasoline directly to the independent retailers, and (2) the price paid by one of the distributors.

EVIDENCE §167 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > STATUTES §82 > price discrimination -- functional discounts -- assumption of legislative intent -- > Headnote:

LEdHN[5A][] [5A]**LEdHN[5B]**[] [5B]**LEdHN[5C]**[] [5C]**LEdHN[5D]**[] [5D]**LEdHN[5E]**[] [5E]**LEdHN[5F]**[] [5F]

Under a definition of a supplier's functional discount as a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier, there is no blanket exemption for such functional discounts from 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), which makes it unlawful in certain circumstances to "discriminate in price," where the claimed exemption would be based upon the comment by a sponsor of the Act--to the effect that 2(a) price discrimination requires some relationship's existing between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other--because such an exemption is foreclosed by the text of 2(a) itself, under which price discrimination is merely a price difference; it is anomalous to assume that Congress intended the term "discriminate" to have such a limited meaning, in the context of a statute that (1) reveals a concern with competitive consequences at different levels of distribution, and (2) carefully defines specific affirmative defenses; there are no overtones of business buccaneering in the 2(a) phrase "discriminate in price"; the statute itself spells out the conditions which make a price difference legal or illegal, and it would derange the statutory scheme to read other conditions into the law by means of the nondirective phrase "discriminate in price," for such action would not only be contrary to the meaning of the statute, but also have undesirable consequences.

EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > STATUTES §158.8 > price discrimination -- functional discounts -- presumptions -- > Headnote:
LEdHN[6A][] [6A]**LEdHN[6B]**[] [6B]**LEdHN[6C]**[] [6C]**LEdHN[6D]**[] [6D]**LEdHN[6E]**[] [6E]**LEdHN[6F]**[] [6F]**LEdHN[6G]**[] [6G]**LEdHN[6H]**[] [6H]**LEdHN[6I]**[] [6I]**LEdHN[6J]**[] [6J]**LEdHN[6K]**[] [6K]**LEdHN[6L]**[] [6L]**LEdHN[6M]**[] [6M]**LEdHN[6N]**[] [6N]

At the least--under a definition of a supplier's functional discount as a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--a functional discount that constitutes a reasonable reimbursement for the purchaser's actual marketing functions does not violate 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), which makes it unlawful to discriminate in price between purchasers where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; indirect competitive-injury effects may not be presumed automatically in a functional discount setting, and, when a functional discount is legitimate, an inference of injury to competition--which may otherwise be established by evidence that some purchasers had to pay their supplier substantially more for their goods than their competitors had to pay--will not arise; thus, a legitimate functional discount negates the causation element in the case against a discounter, for such a discount will not cause any substantial lessening of competition; not every functional discount is entitled to a judgment of legitimacy, however, and it will sometimes be possible to produce evidence showing that a particular functional discount caused price discrimination of the sort that 2(a) prohibits; thus, a functional discount that merely accords due recognition and reimbursement for actual marketing functions is not illegal, but 2(a) does not countenance a functional discount completely untethered to either the supplier's savings or the wholesaler's costs; such a construction of 2(a) is supported by (1) the practice of the Federal Trade Commission, which, while permitting legitimate functional discounts, has proceeded against those discounts which have appeared to be subterfuges to avoid 2(a)'s restrictions, and (2) the remarks of commentators who, while disagreeing as to the extent to which functional discounts are allowable, have agreed that, in exceptional cases, what is nominally a functional discount may be unjustifiable 2(a) price discrimination; while many cases may involve discounts made questionable because offered to complex types of distributors whose functions have become scrambled, such a general tendency does not preclude the possibility that a supplier might pursue a price-discrimination strategy despite the absence of any discrete mechanism for allocating favorable price discrepancy between secondary recipients (that is, favored and disfavored buyers) and tertiary recipients (that is, the customers of either of them). (White, Scalia, and Kennedy, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > STATUTES §145.6 > price discrimination -- functional discounts -- legislative history -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]***LEdHN[7C]***[] [7C]***LEdHN[7D]***[] [7D]

With respect to a functional discount--that is, a discount given by a supplier to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--it is appropriate to begin consideration of the legal status of such a discount, under the price-discrimination prohibition in 2 of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13*), by examining the language of 2; while 2(a) of the Act (*15 USCS 13(a)*) contains no express reference to functional discounts, and while the legislative history indicates that earlier drafts to 2 did include a proviso excepting functional discounts, the deletion of the exception (1) has ambiguous significance, and (2) in any event, in no way detracts from the blunt direction of 2(a)'s statutory text, which indicates that any price discrimination substantially lessening competition will expose the discriminator to liability, regardless of whether the discriminator attempts to characterize the pricing scheme as a functional discount.

EVIDENCE §343.5 > burden of proof -- Robinson-Patman Act -- violation -- damages -- > Headnote:
LEdHN[8A][] [8A]***LEdHN[8B]***[] [8B]***LEdHN[8C]***[] [8C]

In an action by several independent retailers against a gasoline supplier, which action is based upon the independent retailers' claim that the supplier's discounts to two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), the independent retailers, in order to establish a violation of 2(a), have the burden of proving four facts--that (1) the supplier's sales to the distributors were made in interstate commerce, (2) the gasoline sold to the distributors was of the same grade and quantity of that sold to the independent retailers, (3) the supplier discriminated in price as between the distributors on the one hand and the independent retailers on the other, and (4) the discrimination had a prohibited effect on competition; moreover, for each such independent retailer to recover damages, the retailer has the burden of proving the extent of the retailer's actual damages; the independent retailers, however, do not need to show any benefit to the supplier from the price-discrimination scheme in order to establish a violation of 2(a).

EVIDENCE §211.3 > Robinson-Patman Act violation -- functional discounts -- burden of proof -- causation -- > Headnote:
LEdHN[9A][] [9A]***LEdHN[9B]***[] [9B]***LEdHN[9C]***[] [9C]***LEdHN[9D]***[] [9D]***LEdHN[9E]***[] [9E]

With respect to the legal status of a functional discount--that is, a discount given by a supplier to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--under the price-discrimination prohibition in 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), while a supplier, in theory, could try to defend an allegedly legitimate functional discount by invoking 2(a)'s cost-justification defense, (1) the burden of proof with respect to the defense is on the supplier, and (2) a supplier, in order to establish the defense, must show that the price reductions given did not exceed the actual cost savings--a requirement of exactitude which is ill-suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors; however, a supplier need not satisfy the rigorous requirements of 2(a)'s cost-justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of the competition between a wholesaler's customers and the supplier's direct customers, for the concept of substantiality (1) permits the causation inquiry to accommodate a notion of economic reasonableness with respect to the pass-through effects of functional discounts, and (2) provides a latitude denied by the cost-justification defense. (White, Scalia, and Kennedy, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > STATUTES §158.8 > price discrimination -- administrative construction -- functional discounts -- control of resale price -- > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]***LEdHN[10C]***[] [10C]***LEdHN[10D]***[] [10D]***LEdHN[10E]***[] [10E]

Although the United States Supreme Court will cite from Federal Trade Commission (FTC) practice to support the Supreme Court's holding that--under a definition of a supplier's functional discount as a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--legitimate functional discounts do not violate 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), nothing in the Supreme Court's holding is to be read to condone or approve a result which rests upon a view that, under one FTC case, a supplier is charged with legal responsibility for the middlemen's pricing tactics, and hence (1) must control their resale prices lest they undercut the supplier to the unlawful detriment of the supplier's directly purchasing retailers, or (2) alternatively, may forego operational freedom by matching the supplier's quotations to retailers with the middlemen's; similarly, nothing in the Supreme Court's holding endorses a 2(a) theory so broad as the theory drawn by a commentator from that FTC case, where the theory is based on a flawed analysis which assumed that (1) seller liability for tertiary (that is, customer) implications of wholesaler discounts must follow the logic of the FTC's complaint in the case, and (2) such logic exposed to liability any seller who fails to monitor the resale prices of its wholesaler; also, the Supreme Court will reject the 2(a) requirement of exactitude which might otherwise be inferred from the dictum in another FTC case, which dictum is to the effect that the functional discount offered to a buyer should not exceed the cost of that part of the function that the buyer actually performs on that part of the goods for which the buyer performs the function. (White, Scalia, and Kennedy, JJ., dissented in part from this holding).

APPEAL §1331.5 > what reviewable -- discounts -- > Headnote:
LEdHN[11A][] [11A]***LEdHN[11B]***[] [11B]***LEdHN[11C]***[] [11C]

On certiorari to review a verdict in favor of several independent retailers whose suit was based on a claim that a gasoline supplier's discounts to two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), the United States Supreme Court need not address the relative merits of two Federal Trade Commission (FTC) decisions in order to resolve the case before the Supreme Court, where the FTC, in the second case, (1) expressly disavowed any dicta from the first case, which dicta suggested that functional discounts were per se legal if justified by the buyer's costs, and (2) held that such discounts were controlled instead by reasoning which referred to the value of the services to the supplier giving the discounts.

APPEAL §1662 > effect of decision on other grounds -- > Headnote:
LEdHN[12A][] [12A]***LEdHN[12B]***[] [12B]

On certiorari to review a Federal Court of Appeals' decision as to liability under 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), the United States Supreme Court need not decide whether the

Federal Government's interpretation, in an amicus brief, of the Court of Appeals' opinion is correct, where the Supreme Court affirms the Court of Appeals' judgment for reasons that do not entail the principles criticized by the Federal Government.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > price discrimination -- distribution links -- discounts -- > Headnote:
LEdHN[13A][] [13A]***LEdHN[13B]***[] [13B]

The United States Supreme Court will not construe 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*)--which makes it unlawful to discriminate in price between purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them--in a way that would allow price discriminators to avoid the sanctions of 2(a) by the simple expedient of adding an additional link to the distribution chain; thus, for the purposes of determining, in a suit by several independent retailers against a supplier which sold gasoline both to the independent retailers and to two distributors which engaged in retail operations as well, whether the supplier's discounts to the distributors violated 2(a), the additional link in the distribution chain does not insulate the supplier from liability if the supplier's excessive discounts otherwise violated 2(a).

COURTS §93 > STATUTES §91 > faithfulness to intent -- rewriting -- > Headnote:
LEdHN[14A][] [14A]***LEdHN[14B]***[] [14B]

Unlike scholarly commentators, the United States Supreme Court has a duty to be faithful to congressional intent when interpreting a statute, and is not free to consider whether, or how, the statute should be rewritten.

COURTS §141 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > price discrimination -- functional discounts -- > Headnote:
LEdHN[15A][] [15A]***LEdHN[15B]***[] [15B]

With respect to a supplier's functional discount--that is, a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--although a scholarly commentator describes the status of functional discounts under 2 of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13*), with dissatisfaction, the commentator's observations about the merits of the statute and about prosecutorial discretion are irrelevant to the United States Supreme Court's inquiry as to the legal status of such functional discounts under 2.

EVIDENCE §343.5 > presumptions -- rebuttal -- Robinson-Patman Act violation -- > Headnote:
LEdHN[16][] [16]

For the purposes of determining, in a suit by several independent retailers against a supplier which sold gasoline both to the independent retailers and to two distributors which engaged in retail operations as well, whether the supplier's allegedly legitimate functional discounts to the distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*)--which makes it unlawful to discriminate in price between purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them--a presumption of an adverse effect on competition becomes all the more appropriate to the extent that the two distributors competed with the independent retailers in the retail market; the distributors' competitive advantage in the retail market constitutes evidence tending to rebut any presumption of legality that would otherwise apply to their wholesale sales.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > STATUTES §164 > price discrimination -- > Headnote:
LEdHN[17][] [17]

The competitive-injury component of a price discrimination violation of 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), is not limited to the injury to competition between the favored and the disfavored purchaser, but also encompasses the injury to competition between their customers; such a conclusion is compelled by the statutory language, which specifically encompasses the adverse effect of price discrimination on not only persons who either grant or knowingly receive the benefit of such discrimination, but also customers of either of them.

APPEAL §1092 > what reviewable -- issue not raised -- > Headnote:
LEdHN[18A][] [18A]***LEdHN[18B]***[] [18B]

On certiorari to review several independent retailers' suit against a gasoline supplier, which suit is based on a claim that the supplier's discounts to two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*), the United States Supreme Court need not address the question whether, under 2(a), an inference of injury to competition might be negated by evidence that disfavored buyers could make purchases at a reasonable discount from favored buyers, where the parties do not raise the question.

DAMAGES §159 > JUDGMENT §314.5 > Robinson-Patman Act violation -- excessiveness of damages -- time for which awarded -- judgment notwithstanding verdict -- > Headnote:
LEdHN[19][] [19]

With respect to the amount of damages awarded for the period 1972-1981 to several independent retailers in their suit against a supplier which sold gasoline both to the plaintiff retailers and to two distributors which engaged in retail operations as well--which suit is based upon a claim that the supplier's discounts to the two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*)--even if one of the distributors, on whose activities the plaintiffs relied in proving damages, was not also a retailer prior to 1974, a possible flaw in the jury's calculation of the amount of damages awarded is not an appropriate basis for granting the supplier's motion for a judgment notwithstanding the verdict on the theory that the award is allegedly excessive as a matter of law, where (1) the supplier's theory improperly blurs the distinction between the liability and damages issues; (2) the plaintiffs' proof established a continuing violation of 2(a) throughout the damages period; (3) the plaintiffs' proof of the specific amount of damages, although necessarily less precise, provided a sufficient basis for an acceptable estimate of the amount of damages; and (4) the supplier did not object to the instructions to the jury on the damages issue.

EVIDENCE §652 > sufficiency -- expert testimony -- Robinson-Patman Act -- injury to business -- damages -- > Headnote: ***LEdHN[20]***[] [20]

In a suit by several independent retailers against a gasoline supplier which sold gasoline both to the independent retailers and to two distributors which engaged in retail operations as well--which suit is based upon a claim that the supplier's discounts to the two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (*15 USCS 13(a)*)--the plaintiff retailers' proof of a continuing violation of 2(a) throughout the 9-year period of 1972-1981 is sufficient, where the plaintiffs' proof establishes that (1) the supplier's lower prices to both distributors were discriminatory throughout the entire 9-year period, (2) at least one distributor, and apparently the second distributor as well, was selling at retail during that entire period, (3) the discounts substantially affected competition throughout the entire market, and (4) the discounts injured each of the plaintiffs; under such circumstances, the plaintiffs' proof of the specific amount of their damages is necessarily less precise, and--even if the second distributor was not also a retailer prior to 1974, and even if some portion of the plaintiffs' injuries might therefore be attributable to the conduct of other independent retailers--the plaintiffs' expert testimony provides a sufficient basis, under the traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury, for an acceptable estimate of the amount of damages awarded for the period 1972-1981, where (1) the plaintiffs offered no direct testimony of any diversion by the first distributor and testified that they, the plaintiffs, did not even know that the first distributor was being supplied by the supplier, (2) the plaintiffs introduced evidence describing a diversion of their customers to specific stations supplied by the second distributor, and (3) the plaintiffs' expert testimony on damages (a) focused on the diversion of trade to specific stations supplied by the second distributor, and (b) analyzed the entire damages period, including the period prior to 1974 when the second distributor was arguably not a retailer.

Syllabus

Between 1972 and 1981, petitioner Texaco sold gasoline at its retail tank wagon prices to respondent independent Texaco retailers but granted substantial discounts to distributors Gull and Dompier. Gull resold the gas under its own name; the fact that it was being supplied by Texaco was unknown to respondents. Dompier paid a higher price than Gull, and supplied its gas under the Texaco brand name to retail stations. With the encouragement of Texaco, Dompier entered the retail market directly. Both distributors picked up gas at the Texaco plant and delivered it directly to their retail outlets, and neither maintained any significant storage facilities. Unlike Gull, Dompier received an additional **[****2]** discount from Texaco for the deliveries. Texaco executives were well aware of Dompier's dramatic growth and attributed it to the magnitude of the discounts. During the relevant period, the stations supplied by the distributors increased their sales volume dramatically, while respondents' sales suffered a corresponding decline. In 1976, respondents filed suit against Texaco under the Robinson-Patman Amendments to the Clayton Act (Act), alleging that the distributor discounts violated § 2(a) of the Act, which, among other things, forbids any person to "discriminate in price" between different purchasers of commodities, where the effect of such discrimination is substantially to "injure . . . competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The jury awarded respondents actual damages. The District Court denied Texaco's motion for judgment notwithstanding the verdict. Texaco had claimed that, as a matter of law, its "functional discounts" -- *i. e.,* discounts that are given to a purchaser based on its role in the supplier's distributive system and reflect, at least in a generalized sense, the **[****3]** services performed by the purchaser for the supplier -- did not adversely affect competition within the meaning of the Act. The District Court rejected Texaco's argument, reasoning that the "presumed legality of functional discounts" had been rebutted by evidence that the amount of Gull's and Dompier's discounts was not reasonably related to the cost of any function they performed. The Court of Appeals affirmed.

Held:

1. Respondents have satisfied their burden of proving that Texaco violated the Act. Pp. 9-26.

(a) Texaco's argument that it did not "discriminate in price" within the meaning of § 2(a) by charging different prices is rejected in light of this Court's holding in *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549*, that "a price discrimination within the meaning of [§ 2(a)] is merely a price difference." Texaco's argument, which would create a blanket exemption for all functional discounts, has some support in the legislative history of the Act, but is foreclosed by the text of the Act itself, which plainly reveals a concern with competitive consequences at different levels of distribution and carefully defines two specific affirmative defenses **[****4]** that are unavailable. Pp. 11-13.

(b) Also rejected is Texaco's argument that, at least to the extent that Gull and Dompier acted as wholesalers, the price differentials did not "injure . . . competition" within the meaning of the Act. It is true that a legitimate functional discount that constitutes a reasonable reimbursement for the purchaser's actual marketing functions does not violate the Act. Thus, such a discount raises no inference of injury to competition under *FTC v. Morton Salt Co., 334 U.S. 37, 46-47*. However, the Act does not tolerate a functional discount that is completely untethered either to the supplier's savings or the wholesaler's costs. This conclusion is consistent with Federal Trade Commission (FTC) practice, with *Perkins v. Standard Oil Co. of California, 395 U.S. 642*, and with the analysis of antitrust commentators. The record here adequately supports the finding that Texaco violated the Act. There was an extraordinary absence of evidence to connect Gull's and Dompier's discounts to any savings enjoyed by Texaco. Both Gull and Dompier received the full discount on all purchases even though most of their volume was resold **[****5]** directly to consumers, and the extra margin on those sales obviously enabled them to price aggressively in both their retail and wholesale marketing. The *Morton Salt* presumption of adverse effect becomes all the more appropriate to the extent they competed with respondents in the retail market. Furthermore, the evidence indicates that Texaco was encouraging Dompier to integrate downward and was fully informed about the dramatic impact of the Dompier discount on the retail market at the same time that Texaco was inhibiting upward integration by respondents. Pp. 13-26.

2. There is no merit to Texaco's contention that the damages award must be judged excessive as a matter of law. Texaco's theory improperly blurs the distinction between the liability and damages issues. There is no doubt that respondents' proof of a continuing violation as to the discounts to both distributors throughout the 9-year damages period was sufficient. Proof of the specific amount of their damages necessarily was less precise, but the expert testimony provided a sufficient basis for an acceptable estimate of the amount of damages. Cf., *e. g., J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565-566.* **[****6]** Pp. 26-28.

Judges: STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the result. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY, J., joined.

Opinion by: STEVENS

Opinion

[*546] [*506] [**2538]** ***LEdHN[1A]***[] [1A] ***LEdHN[2A]***[] [2A]Petitioner (Texaco) sold gasoline directly to respondents and several other retailers in Spokane, Washington, at its retail **[*547]** tank wagon prices (RTW) while it granted substantial discounts to two distributors. During the period between 1972 and 1981, the stations supplied by the two distributors increased their sales volume dramatically, while respondents' sales suffered a corresponding decline. Respondents filed an action against Texaco under the Robinson-Patman Amendment to the Clayton Act (Act), 38 Stat. 730, as amended, 49 Stat. 1526, *15 U.S.C. § 13*, alleging that the distributor discounts violated § 2(a) of the Act, *15 U.S.C. § 13* **[****7]** *(a)*. Respondents recovered treble damages, and the Court of Appeals for the Ninth Circuit affirmed the judgment. We granted certiorari, 490 U.S. (1989), to consider Texaco's contention that legitimate functional discounts do not violate the Act because a seller is not responsible for its customers' independent resale pricing decisions. While we agree with the basic thrust of Texaco's argument, we conclude that in this case it is foreclosed by the facts of record.

I

LEdHN[3][] [3]Given the jury's general verdict in favor of respondents, disputed questions of fact have been resolved in their favor. There seems, moreover, to be no serious doubt about the character of the market, Texaco's pricing practices, or the relative importance of Texaco's direct sales to retailers **[*548]** ("through put" business) and its sales to distributors. The principal disputes at trial related to questions of causation and damages.

Respondents are 12 independent Texaco retailers. They displayed the Texaco trademark, accepted Texaco credit cards, and bought their gasoline products directly from Texaco. Texaco delivered the gasoline **[****8]** to respondents' stations.

The retail gasoline market in Spokane was highly competitive throughout the damages period, which ran from 1972 to 1981. Stations marketing the nationally advertised Texaco gasoline competed with other major brands as well as with stations featuring independent brands. Moreover, although discounted prices at a nearby Texaco station would have the most obvious impact on a respondent's trade, the cross-city traffic patterns and relatively small size of Spokane produced a city-wide competitive market. See, e. g., App. 244, 283-291. Texaco's **[**2539]** through put sales in the Spokane market declined from a monthly volume of 569,269 gallons in 1970 to 389,557 gallons in 1975. Id., at 487-488. Texaco's independent retailers' share of the market for Texaco gas declined from 76% to 49%. [1] Ibid. Seven of the respondents' stations were out of business by the end of 1978. Id., at 22-23, R. 501.

[**9] [***507]** The respondents tried unsuccessfully to increase their ability to compete with lower priced stations. Some tried converting from full service to self-service stations. See, e. g., App. 55-56. Two of the respondents sought to buy their own tank trucks and haul their gasoline from Texaco's supply point, but Texaco vetoed that proposal. *Id., at 38-41, 59*.

[*549] While the independent retailers struggled, two Spokane gasoline distributors supplied by Texaco prospered. Gull Oil Company (Gull) had its headquarters in Seattle and distributed petroleum products in four western States under its own name. *Id., at 94-95*. In Spokane it purchased its gas from Texaco at prices that ranged from six to four cents below Texaco's RTW price. Id., at 31-32. Gull resold that product under its own name; the fact that it was being supplied by Texaco was not known by either the public or the respondents. See, e. g., id., at 256. In Spokane, Gull supplied about 15 stations; some were "consignment stations" and some were "commission stations." In both situations Gull retained title to the gasoline until it was pumped into a motorist's tank. In the consignment stations, the station operator **[****10]** set the retail prices, but in the commission stations Gull set the prices and paid the operator a commission. Its policy was to price its gasoline at a penny less than the prevailing price for major brands. Gull employed two truck drivers in Spokane who picked up product at Texaco's bulk plant and delivered it to the Gull stations. It also employed one supervisor in Spokane. Apart from its trucks and investment in retail facilities, Gull apparently owned no assets in that market. App. 96-109, 504-512. At least with respect to the commission stations, Gull is fairly characterized as a retailer of gasoline throughout the relevant period.

The Dompier Oil Company (Dompier) started business in 1954 selling Quaker State Motor Oil. In 1960 it became a full line distributor of Texaco products, and by the mid-1970's its sales of gasoline represented over three-quarters of its business. App. 114-115. Dompier purchased Texaco gasoline at prices of 3.95 cents to 3.65 cents below the RTW price. Dompier thus paid a higher price than Gull, but Dompier, unlike Gull, resold its gas under the Texaco brand names. Id., at 24, 29-30. It supplied about eight to ten Spokane retail stations. In the period **[****11]** prior to

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[1] The independent retailers' share includes not only the market share for the 12 respondents, who operated a total of 13 stations, but also the share of some independent Texaco retailers who are not parties to this action. Texaco had 27 independent dealers in the Spokane market in 1970, and 19 in 1975. App. 22, 487-488.

October 1974, two of those stations were owned by the president of Dompier but the others were independently **[*550]** operated. See, e. g., *id., at 119-121, 147-148*. In the early 1970's, Texaco representatives encouraged Dompier to enter the retail business directly, and in 1974 and 1975 it acquired four stations. [2] *Id., at 114-135, 483-503*. Dompier's president estimated at trial that the share of its total gasoline sales made **[***508]** at retail during **[**2540]** the middle 1970's was "probably 84 to 90 percent." *Id., at 115*.

[**12]** Like Gull, Dompier picked up Texaco's product at the Texaco bulk plant and delivered directly to retail outlets. Unlike Gull, Dompier owned a bulk storage facility, but it was seldom used because its capacity was less than that of many retail stations. Again unlike Gull, Dompier received from Texaco the equivalent of the common carrier rate for delivering the gasoline product to the retail outlets. Thus, in addition to its discount from the RTW price, Dompier made a profit on its hauling function. [3] App. 123-131, 186-192, 411-413.

The stations supplied by Dompier regularly sold at retail at lower prices than respondents'. **[****13]** Even before Dompier directly entered the retail business in 1974, its customers were **[*551]** selling to consumers at prices barely above the RTW price. Id., at 329-338; Record 315, 1250-1251. Dompier's sales volume increased continuously and substantially throughout the relevant period. Between 1970 and 1975 its monthly sales volume increased from 155,152 gallons to 462,956 gallons; this represented an increase from 20.7% to almost 50% of Texaco's sales in Spokane. App. 487-488.

There was ample evidence that Texaco executives were well aware of Dompier's dramatic growth and believed that it was attributable to "the magnitude of the distributor discount and the hauling allowance." [4] See also, e. g., App. 213-223, 407-413. In response to complaints from individual respondents about Dompier's aggressive pricing, however, Texaco representatives professed that they "couldn't understand it." Record 401-404.

[**14]** II

LEdHN[4][] [4]Respondents filed suit against Texaco in July 1976. After a four week trial, the jury awarded damages measured by the difference between the RTW price and the price paid by Dompier. As we subsequently decided in *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981)*, this measure of damages was improper. Accordingly, although it rejected Texaco's defenses on the issue of liability, [5] the Court of Appeals for the

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[2] "Q. Did you have any conversations with Texaco during this period of time encouraging you to -- Dompier Oil Company to change its emphasis and to move into the retail business? A. Yes, we did.

"Q. Would you tell the jury about that? [A.] Well, at various times Texaco encouraged us to begin supplying retail service stations. In the early Seventies they did that, and then as time went on, they encouraged us to own the stations that we were supplying; in other words, to try to control our own retail business. And beginning about 1974 -- we did purchase a station in '74 and some more in '75 and we began operating those as company operations with salaried company employees." App. 116-117.

[3] "Q. That would have been a rate -- that if you had hired a common carrier to haul the product for you, you would have paid them to haul it? A. That's right.

"Q. And do you understand -- to your understanding does that common carrier rate have a built-in-profit? A. I am sure it does.

"Q. Did you find it to be an advantage to you to be hauling your own product? A. Yes." *Id., at 126*.

[4] At trial one of Texaco's defenses was based on its obligation to comply with certain federal regulations during periods of shortage. In one of its communications to the Federal Government, a Texaco vice president wrote, in part:

"We believe that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance." App. 413.

[5] Texaco had argued that its pricing practices were mandated by federal regulations and that its sales in the Spokane market were not "in commerce" within the meaning of the Act.

Ninth Circuit remanded the case for **[*552]** a new trial. *Hasbrouck v. Texaco, Inc., 663 F.2d 930 (1981)*, cert. denied, *459 U.S. 828 (1982)*.

[*509]** ***LEdHN[2B]***[] [2B]At the second trial, Texaco contended that the special **[****15]** prices to Gull and Dompier were justified by cost savings, [6] were the product of a good faith attempt to meet competition, [7] **[****16]** and were lawful "functional discounts." The District Court withheld the cost justification **[**2541]** defense from the jury because it was not supported by the evidence and the jury rejected the other defenses. It awarded respondents actual damages of $ 449,900. [8] The jury apparently credited the testimony of respondents' expert witness who had estimated what the respondents' profits would have been if they had paid the same prices as the four stations owned by Dompier. See *634 F. Supp. 34, 43*;*842 F.2d, at 1043-1044*.

In Texaco's motion for judgment notwithstanding the verdict, it claimed as a matter of law that its functional discounts did not adversely affect competition within the meaning of the Act because any injury to respondents was attributable to decisions made independently by Dompier. The District Court denied the motion. In an opinion supplementing its oral ruling denying Texaco's motion for a directed verdict, the Court assumed, arguendo, that Dompier was entitled to a **[*553]** functional discount, even on the gas that was sold at retail, [9] **[****17]** but nevertheless concluded that the "presumed legality of functional discounts" had been rebutted by evidence that the amount of the discounts to Gull and Dompier was not reasonably related to the cost of any function that they performed. [10] *634 F. Supp., at 37-38*, and n. 4.

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[6] Section 2(a) of the Act provides, in part:

"That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

[7] Section 2(b) of the Act provides, in part:

HN1[] "Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

[8] The award to each particular respondent of course differed. The awards represented an average of $ 5,486.59 per year for each of the respondents.

[9] "While there is a serious question as to whether Dompier was entitled to a 'functional discount' on the gas it resold at retail, compare *Mueller Co., 60 F.T.C. 120 (1962)*, aff'd, *323 F.2d 44 (7th Cir. 1963)*, cert. denied, ***377 U.S. 923*** . . . (1964) (entitlement to functional discount based on resale level) with *Doubleday and Co., 52 F.T.C. 169 (1955)* (entitlement to functional discount based on level of purchase), the court assumes, arguendo, that the mere fact that Dompier retailed the gas does not preclude a 'functional discount.'" *634 F. Supp. 34, 37, n. 4 (ED Wash. 1985)* (emphasis in original).

[10] "Secondly, the functional discounts negatively affected competition because they were, in part, reflected in the favored purchasers' (or their customers') retail prices. In other words, the discount was not consumed or absorbed at the level of the favored buyers; rather, the amount of the discount (or a significant portion) appeared in the favored purchasers' retail price, or in the favored purchasers' price to their customers and in their customers' retail prices. Under such circumstances, the otherwise innocuous nature and presumed legality of functional discounts is rebutted, for it is universally recognized that a functional discount remains legal only to the extent it acts as compensation for the functions performed by the favored buyer. See 3 Kintner & Bauer, Federal ***Antitrust Law*** 309-10 (1983); Rill, Availability and Functional Discounts Justifying Discriminatory Pricing, 53 Antitrust L. J. 929, 939-41 (1985). The discount must 'be reasonably related to the expenses assumed by the [favored] buyer' and the discount 'should not exceed the cost of . . . the function [the favored buyer] actually performs . . .' *Doubleday and Company, 52 F.T.C. at 209*, cited in Boise Cascade Corp., Docket No. 9133, slip op. at 117 (Feb. 14, 1984) (initial decision). If the discount exceeds such costs, it cannot be justified as a functional discount, particularly where, as here, the excess has a negative effect on competition.

[**18]**

[*510]** The Court of Appeals affirmed. It reasoned:

[*554] "As the Supreme Court long ago made clear, and recently reaffirmed, ***HN2***[] there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers. *Morton Salt, 334 U.S. at 43-44* . . .; *Perkins v. Standard Oil Co., 395 U.S. 642, 646-47* . . . (1969); *Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434-35 (1983)*. Despite the fact that Dompier and Gull, at least in their capacities as wholesalers, did not compete directly with Hasbrouck, a section 2(a) violation may **[**2542]** occur if (1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with Hasbrouck. Morton Salt, 384 U.S. at 43-44, . . . ; *Perkins v. Standard Oil, 395 U.S. at 648-49*, . . . ; see 3 E. Kintner & J. Bauer, supra, § 22.14.

"Hasbrouck presented ample evidence to demonstrate **[****19]** that . . . . the services performed by Gull and Dompier were insubstantial and did not justify the functional discount." *842 F.2d, at 1039*.

The Court of Appeals concluded its analysis by observing:

"To hold that price discrimination between a wholesaler and a retailer could never violate the Robinson-Patman Act would leave immune from antitrust scrutiny a discriminatory pricing procedure that can effectively serve to harm competition. We think such a result would be contrary to the objectives of the Robinson-Patman Act." *Id., at 1040* (emphasis in original).

III

LEdHN[5A][] [5A] ***LEdHN[6A]***[] [6A] ***LEdHN[7A]***[] [7A]It is appropriate to begin our consideration of the legal status of functional discounts [11] by examining the language of the Act. Section 2(a) provides in part:

[*555] ***HN3***[] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, **[****20]** either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either **[***511]** or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." *15 U.S.C. § 13(a)*.

LEdHN[5B][] [5B] ***LEdHN[6B]***[] [6B] ***LEdHN[7B]***[] [7B]

"In this case Texaco made no serious attempt to quantitatively justify its functional discounts. While a precise accounting of the value of the performed functions is not mandated, merely identifying some of the functions is not sufficient. There is no substantial evidence to support Texaco's position that the discounts were justified." *634 F. Supp., at 38* (footnote omitted).

[11] In their brief as amici curiae, the United States and the Federal Trade Commission suggest the following definition of "functional discount," which is adequate for our discussion: " A functional discount is one given to a purchaser based on its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier." Brief for United States et al. as Amici Curiae 10 (filed Aug. 3, 1989).

[**21]** ***LEdHN[2C]***[] [2C]***LEdHN[7C]***[] [7C]***HN4***[] The Act contains no express reference to functional discounts. [12] **[****22]** It does contain two affirmative defenses that provide protection for two categories of discounts -- those that **[*556]** are justified by savings in the seller's cost of manufacture, delivery or sale, [13] and those that represent a good faith response to the equally low prices of a competitor. *Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951)*.As the case comes to us, neither of those defenses is available to Texaco.

LEdHN[7D][] [7D]

LEdHN[8A][] [8A]***HN5***[] In order to establish a violation of the Act, respondents had the burden of proving **[**2543]** four facts: (1) that Texaco's sales to Gull and Dompier were made in interstate commerce; (2) that the gasoline sold to them was of the same grade and quality as that sold to respondents; (3) that Texaco discriminated in price as between Gull and Dompier on the one hand and respondents on the other; and (4) that the discrimination had a prohibited effect on competition. *15 U.S.C. § 13(a)*. Moreover, for each respondent ***HN6***[] to recover damages, he had the burden of proving the extent of his actual injuries. *J. Truett Payne, 451 U.S., at 562*.

LEdHN[1B][] [1B]***LEdHN[5C]***[] [5C]The first two elements of respondents' case are not disputed in this Court, [14] **[****23]** and we do not understand Texaco to be challenging the sufficiency of respondents' proof of damages. Texaco does argue, however, that although it charged different prices, it did not "discriminate in price" within the meaning of the Act, and that, at least to the extent that Gull and Dompier acted as wholesalers, the price differentials **[***512]** did not injure competition. We consider the two arguments separately.

IV

LEdHN[5D][] [5D]Texaco's first argument would create a blanket exemption for all functional discounts. Indeed, carried to its logical conclusion, it would exempt all price differentials **[****24]** except those given to competing purchasers. The primary basis for **[*557]** Texaco's argument is the following comment by Congressman Utterback, an active sponsor of the Act.

"In its meaning as simple English, ***HN7***[] a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale

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[12] The legislative history indicates that earlier drafts of the Act did include such a proviso. See, e.g., Shniderman, "The Tyranny of Labels" -- A Study of Functional Discounts Under the Robinson-Patman Act, 60 Harv. L. Rev. 571, 583-586, and nn. 40-57 (1947). The deletion of this exception for functional discounts has ambiguous significance. It may be, as one commentator has suggested, that the circumstances of the Act's passage "must have conveyed to the congressional mind the realization that the judiciary and the FTC would view what had occurred as a narrowing of the gates through which the functional classification plan of a seller had to pass to come within the law." Id., at 588. In any event, the deletion in no way detracts from the blunt direction of the statutory text, which indicates that any price discrimination substantially lessening competition will expose the discriminator to liability, regardless of whether the discriminator attempts to characterize the pricing scheme as a functional discount.

[13] See n. 6, supra.

[14] Texaco has not contested here the proposition that branded gas and unbranded gas are of like grade and quality. See *FTC v. Borden Co., 383 U.S. 637, 645-646 (1966)* ("the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test").

to different **[****25]** customers at those different prices would not constitute a discrimination within the meaning of this bill." 80 Cong. Rec. 9416 (1936).

LEdHN[5E][] [5E]***LEdHN[6C]***[] [6C]We have previously considered this excerpt from the legislative history, and have refused to draw from it the conclusion which Texaco proposes. *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 547-551 (1960)*.Although the excerpt does support Texaco's argument, we remain persuaded that the argument is foreclosed by the text of the Act itself. In the context of a statute that plainly reveals a concern with competitive consequences at different levels of distribution, and carefully defines specific affirmative defenses, it would be anomalous to assume that the Congress intended the term "discriminate" to have such a limited meaning. In Anheuser-Busch we rejected an argument identical to Texaco's in the context of a claim that a seller's price differential had injured **[*558]** its own competitors -- a so called "primary line" claim. [15] The reasons we gave for our decision in **[**2544]** **[****26]** Anheuser-Busch apply here as well. After quoting Congressman Utterback's statement in full, we wrote:

"The trouble with respondent's arguments is not that they are necessarily irrelevant in a § 2(a) proceeding, but that they are misdirected when the issue under consideration is solely whether there has been a price discrimination. We are convinced that, whatever may be said with respect to the rest of §§ 2(a) and 2(b) -- and we **[***513]** say nothing here -- there are no overtones of business buccaneering in the § 2(a) phrase 'discriminate in price.' Rather, ***HN8***[] a price discrimination within the meaning of that provision is merely a price difference." *363 U.S., at 549*.

After noting that this view was consistent with our precedents, we added:

"the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the nondirective phrase, 'discriminate in price.' Not only would such action be contrary to what we conceive to be the meaning **[****27]** of the statute, but, perhaps because of this, it would be thoroughly undesirable. As one commentator has succinctly put it, "Inevitably every legal controversy over any price difference would shift from the detailed governing provisions -- "injury," cost justification, "meeting competition," etc. -- over into the "discrimination" concept of ad hoc resolution divorced from specifically pertinent statutory text." Rowe, Price Differentials **[*559]** and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L. J. 1, 38." *363 U.S., at 550-551*.

LEdHN[6D][] [6D]

[**28]** ***LEdHN[5F]***[] [5F]Since we have already decided that a price discrimination within the meaning of § 2(a) "is merely a price difference," we must reject Texaco's first argument.

V

LEdHN[6E][] [6E]In *FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948)*, we held that ***HN9***[] a injury to competition may be inferred from evidence that some purchasers had to pay their supplier "substantially more for their goods than their competitors had to pay." See also *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435-436 (1983)*. Texaco, supported by the United States and the Federal Trade Commission as amici curiae, (the Government), argues that this presumption should not apply to differences between prices charged to wholesalers and these charged to retailers. Moreover, they argue that it would be inconsistent with fundamental antitrust policies to construe the Act as requiring a seller to control his customers' resale prices. The seller **[****29]** should not be held liable for the independent pricing decisions of his customers. As the Government correctly notes, Brief for United States et. al. as Amici Curiae 21-22 (filed Aug. 3, 1989), this argument endorses the position

[15] It has proven useful in Robinson-Patman Act cases to distinguish among "the probable impact of the [price] discrimination on competitors of the seller (primary-line injury), on the favored and disfavored buyers (second-line injury), or on the customers of either of them (third-line injury)." See 3 E. Kintner & J. Bauer, Federal ***Antitrust Law*** § 20.9 p. 127 (1983).

advocated 35 years ago in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).

After observing that suppliers ought not to be held liable for the independent pricing decisions of their buyers, [16] **[****31]** and **[*560]** that without **[***514]** functional discounts distributors might go **[**2545]** uncompensated for services they performed, [17] the Committee wrote:

"The Committee recommends, therefore, that ***HN10***[] suppliers granting functional discounts either to single-function or to integrated buyers should not be held responsible for any consequences of their customers' pricing tactics. Price cutting at the resale level is not in fact, and should not be held in law, 'the effect of' a differential that merely accords due recognition and reimbursement for actual marketing functions. The price cutting of a customer who receives this type **[****30]** of differential results from his own independent decision to lower price and operate at a lower profit margin per unit. The legality or illegality of this price cutting must be judged by the usual legal tests. In any event, consequent injury or lack of injury should not be the supplier's legal concern.

"On the other hand, the law should tolerate no subterfuge. For instance, where a wholesaler-retailer buys only part of his goods as a wholesaler, he must not claim a functional discount on all. Only to the extent that a buyer actually performs certain functions, assuming all the risk, investment, and costs involved, should he legally **[*561]** qualify for a functional discount. Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it." *Id., at 208*.

LEdHN[1C][] [1C] ***LEdHN[6F]***[] [6F] ***LEdHN[9A]***[] [9A]We generally agree with this description of the legal status of functional discounts. **[****32]** ***HN11***[] A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers. [18] The record in this case, **[***515]** however, adequately supports the finding that Texaco violated the Act.

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[16] "In the Committee's view, imposing on any dual supplier a legal responsibility for the resale policies and prices of his independent distributors contradicts basic antitrust policies. Resale-price fixing is incompatible with the tenets of a free and competitive economy. What is more, the arrangements necessary for policing, detecting, and reporting price cutters may be illegal even apart from the resale-price agreement itself. And even short of such arrangements, a conscious adherence in a supplier's sales to retail customers to the price quotations by independent competing distributors is hardly feasible as a matter of business operation, or safe as a matter of law." Report of the Attorney General's National Committee to Study the Antitrust Laws 206-207 (1955) (footnotes omitted).

[17] "In our view, to relate discounts or prices solely to the purchaser's resale activities without recognition of his buying functions thwarts competition and efficiency in marketing. It compels affirmative discrimination against a substantial class of distributors, and hence serves as a penalty on integration. If a businessman actually fulfills the wholesale function by relieving his suppliers of risk, storage, transportation, administration, etc., his performance, his capital investment, and the saving to his suppliers, are unaffected by whether he also performs the retailing function, or any number of other functions. A legal rule disqualifying him from discounts recognizing wholesaling functions actually performed compels him to render these functions free of charge." *Id., at 207*.

[18] In theory, a supplier could try to defend a functional discount by invoking the Act's cost justification defense, but the burden of proof with respect to the defense is upon the supplier, and interposing the defense "has proven difficult, expensive, and often unsuccessful." 3 E. Kintner & J. Bauer, Federal ***Antitrust Law***, § 23.19, pp. 366-367 (1983). Moreover, to establish the defense a "seller must show that the price reductions given did not exceed the actual cost savings," id., § 23.10, p. 345, and this requirement of exactitude is ill-suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors. Cf. Calvani, Functional Discounts Under the Robinson-Patman Act, 17 B. C. Ind. & Com. L. Rev. 543, 546, n. 16 (1976) (distinguishing functional discounts from cost-justified price differences); Report of the Attorney General's National Committee on the Antitrust Laws, at 171 ("the cost defense has proved largely illusory in practice").

Discounters will therefore likely find it more useful to defend against claims under the Act by negating the causation element in the case against them: a legitimate functional discount will not cause any substantial lessening of competition. The concept of

LEdHN[9B][] [9B] LEdHN[6G][] [6G] LEdHN[9C][] [9C]

[**33]**

[*562] LEdHN[1D][] [1D]LEdHN[6H][] [6H]The hypothetical predicate for the Committee's entire discussion of functional **[**2546]** discounts is HN13[] a price differential "that merely accords due recognition and reimbursement for actual marketing functons." Such a discount is not illegal. In this case, however, both the District Court and the Court of Appeals concluded that even without viewing the evidence in the light most favorable to the respondents, there was no substantial evidence indicating that the discounts to Gull and Dompier constituted a reasonable reimbursement for the value to Texaco of their actual marketing functions. 842 F.2d, at 1039;634 F. Supp., at 37, 38. Indeed, Dompier was separately compensated for its hauling function, and neither Gull and Dompier maintained any significant storage facilities.

Despite this extraordinary absence of evidence to connect the discount to any savings enjoyed by Texaco, Texaco contends **[****34]** that the decision of the Court of Appeals cannot be affirmed without departing "from established precedent, from practicality, and from Congressional intent." Brief for Petitioner 14. [19] This argument assumes that holding suppliers liable for a gratuitous functional discount is somehow a novel practice. That assumption is flawed.

LEdHN[6I][] [6I]LEdHN[9D][] [9D]LEdHN[10A][] [10A]LEdHN[11A][] [11A] **[****35]** LEdHN[12A][] [12A]As we have already observed, the "due recognition and reimbursement" concept endorsed in the Attorney General's **[*563]** Committee's study would not countenance a functional discount completely untethered to either the supplier's savings or the wholesaler's costs. The longstanding principle that HN14[] functional discounts provide no safe harbor from the Act is likewise evident from the practice of the Federal Trade Commission, which has, while permitting legitimate functional discounts, proceeded against those discounts which appeared to be subterfuges to avoid the Act's restrictions. See, e. g., In re Sherwin **[***516]** Williams Co., 36 F.T.C. 25, 70-71 (1943) (finding a violation of the Act by paint manufacturers who granted "functional or special discounts to some of their dealer-distributors on the purchases of such dealer-distributors which are resold by such dealer-distributors directly to the consumer through their retail departments or branch stores wholly owned by them"); In re the Ruberoid Co., 46 F.T.C. 379, 386, para. 5 (1950) **[****36]** (liability appropriate when functional designations do not always indicate accurately "the functions actually performed by such purchasers"), aff'd, 189 F.2d 893 (CA2 1951), rev'd on rehearing, 191 F.2d 294, aff'd, 343 U.S. 470 (1952). [20] **[****38]** See also, e. g., In re Doubleday & **[*564]**

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substantiality permits the causation inquiry to accommodate a notion of economic reasonableness with respect to the pass-through effects of functional discounts, and so provides a latitude denied by the cost-justification defense. Cf. Shniderman, 60 Harv. L. Rev., at 603-604 (substantiality defense in functional discount cases). We thus find ourselves in substantial agreement with the view that:

HN12[] "Conceived as a vehicle for allowing differential pricing to reward distributive efficiencies among customers operating at the same level, the cost justification defense focuses on narrowly defined savings to the seller derived from the different method or quantities in which goods are sold or delivered to different buyers. . . . Moreover, the burden of proof as to the cost justification defense is on the seller charged with violating the Act, whereas the burden of proof remains with the enforcement agency or plaintiff in circumstances involving functional discounts since functional pricing negates the probability of competitive injury, an element of a prima facie case of violation." Rill, Availability and Functional Discounts Justifying Discriminatory Pricing, 53 Antitrust L. J. 929, 935 (1985) (footnotes omitted).

[19] Texaco continues the argument by summoning a parade of horribles whose march Texaco believes is at issue in this case; according to Texaco, the Court of Appeals' rule "would multiply distribution costs, rigidify and increase consumer prices, encourage resale price maintenance in violation of the Sherman Act, . . . , and jeopardize the businesses of wholesalers." Brief for Petitioner 14.

Co., 52 F.T.C. 169, 209 (1955) ("the Commission should tolerate no subterfuge. Only to the extent that a buyer **[**2547]** actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer"); *In re General Foods Corp., 52 F.T.C. 798, 824-825 (1956)* ("a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result," but "to hold that the rendering of special services ipso facto [creates] a separate functional classification would be to read Section 2 (d) out of the Act"); *In re Boise Cascade Corp., 107 F.T.C. 76, 212, 214-215 (1986)* **[****37]** (regardless of whether the FTC has judged functional discounts by reference to the supplier's savings or the buyer's costs, the FTC has recognized that "functional discounts may usually be granted to customers who operate at different levels of trade, and thus do not compete with each other, without risk of secondary line competitive injury under the Act"), rev'd on other grounds, *267 U.S. App. D.C. 124, 837 F.2d 1127 (1988)*. [21] **[****39]** **[*565]** Cf. *FLM Collision* ***[***517]*** *Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1027 (CA2 1976)* ("We do not suggest or imply that, if a manufacturer grants a price discount or allowance to its wholesalers (whether or not labelled 'incentive'), which has the purpose or effect of defeating the objectives of the Act, § 2(a)'s language may not be construed to defeat it"); C. Edwards, Price Discrimination Law 286-348 (1959) (analyzing cases). [22]

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[20] See also, e. g., In re Whiting, 26 F.T.C. 312, 316, para. 3 (1938) (functional classification of customers involved unlawful price discrimination because of functional overlap); In re Standard Oil Co., 41 F.T.C. 263 (1945), modified and aff'd, *173 F.2d 210, 217 (CA7 1949)* ("The petitioner should be liable if it sells to a wholesaler it knows or ought to have known . . . is using or intends to use [the wholesaler's] price advantage to undersell the petitioner in its prices made to its retailers"), rev'd and remanded on other grounds, *340 U.S. 231 (1951)*.

LEdHN[10B][] [10B]

In the Standard Oil case, the FTC itself on remand dropped the part of its order prohibiting Standard Oil from giving functional discounts. See C. Edwards, Price Discrimination Law 309 (1959). The FTC's pre-remand theory in the Standard Oil case has of course been the subject of harsh criticism. See, e. g., Report of the Attorney General's National Committee to Study the Antitrust Laws, at 206. Much, if not all, of this criticism rests upon the view that, under the FTC's Standard Oil ruling, a "supplier is charged with legal responsibility for the middlemen's pricing tactics, and hence must control their resale prices lest they undercut him to the unlawful detriment of his directly purchasing retailers. Alternatively, the seller may forego his operational freedom by matching his quotations to retailers with theirs." Ibid. Nothing in our opinion today should be read to condone or approve such a result.

[21] ***LEdHN[11B]***[] [11B]

See also *In re Mueller Co., 60 F.T.C. 120, 127-128 (1962)* (refusing to make allowance for functional discounts in any way that would "add a defense to a prima facie violation of Section 2(a) which is not included in either Section 2(a) or Section 2(b)"), aff'd, *323 F.2d 44 (CA7 1963)*, cert. denied, ***377 U.S. 923 (1964)***. The FTC in Mueller expressly disavowed dicta from Doubleday suggesting that functional discounts are per se legal if justified by the buyer's costs. Mueller held that the discounts were controlled instead by the reasoning propounded in General Foods, which refers to the value of the services to the supplier giving the discount. *60 F.T.C., at 127-128*.

LEdHN[9E][] [9E] ***LEdHN[10C]***[] [10C] ***LEdHN[11C]***[] [11C]

We need not address the relative merits of Mueller and Doubleday in order to resolve the case before us. We do, however, reject the requirement of exactitude which might be inferred from Doubleday's dictum that a functional discount offered to a buyer "should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it." *52 F.T.C., at 209*. As already noted, a causation defense in a functional discount case does not demand the rigorous accounting associated with a cost justification defense.

[22] ***LEdHN[12B]***[] [12B]

The Government's position in this case does not contradict this course of decision. The Government's amicus brief on Texaco's behalf criticizes the Court of Appeals opinion on the theory that it "would require a supplier to show that a functional discount is

[**40]** ***LEdHN[6J]***[] [6J]***LEdHN[8B]***[] [8B]Most of these cases involve discounts made questionable because offered to **[**2548]** "complex types of distributors" whose "functions became scrambled." *Doubleday & Co., 52 F.T.C., at 208*. This fact is predictable: manufacturers will more likely be able to effectuate tertiary line price discrimination through functional discounts to a secondary line buyer when **[*566]** the favored distributor is vertically integrated. Nevertheless, this general tendency does not preclude the possibility that a seller may pursue a price discrimination strategy despite the absence of any discrete mechanism for allocating the favorable price discrepancy between secondary and tertiary line recipients. [23]

[**41]**

[*518]** ***LEdHN[13A]***[] [13A]Indeed, far from constituting a novel basis for liability under the Act, the fact pattern here reflects conduct similar to that which gave rise to *Perkins v. Standard Oil Co of California, 395 U.S. 642 (1969)*. Perkins purchased gas from Standard, and was both a distributor and a retailer. He asserted that his retail business had been damaged through two violations of the Act by Standard: first, Standard had sold directly to its own retailers at a price below that charged to Perkins; and, second, Standard had sold to another distributor, Signal, which sold gas to Western Hyway, which in turn **[*567]** sold gas to Regal, a retailer in competition with Perkins. [24] **[****43]** The question presented was whether the Act -- which refers to discriminators, purchasers, and their customers -- covered injuries to competition between purchasers and the customers of customers of purchasers. *Id., at 646-647*. We held that a limitation excluding such "fourth level" competition would be "wholly an artificial one." *Id., at 647*. We reasoned that from "Perkins' point of **[****42]** view, the competitive harm done him by Standard is certainly no less because of the presence of an additional link in this particular distribution chain from

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justified by the wholesaler's costs," and that it imposed "liability for downstream competitive effects of legitimate functional discounts." Brief for United States et al. as Amici Curiae 16, 6 (filed Aug. 3, 1989). Cf. *Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1141-1143 (267 U.S. App. D.C. 124 (1988)* (summarizing debate about relevance of buyer's costs to defense of functional discounts). If the Court of Appeals were indeed to have endorsed either of these rules, it would have departed perceptibly from the mainstream of the FTC's reading of the Act. We need not decide whether the Government's interpretation of the Court of Appeals opinion is correct, for we affirm its judgment for reasons that do not entail the principles criticized by the Government.

[23] ***LEdHN[8C]***[] [8C]

The seller may be willing to accept any division of the price difference so long as some significant part is passed on to the distributor's customers. Although respondents here did not need to show any benefit to Texaco from the price discrimination scheme in order to establish a violation of the Act, one possibility is indicated by the brief filed amicus curiae by the Service Station Dealers of America (SSDA), an organization representing both stations supplied by independent jobbers and stations supplied directly by sellers. See Brief for SSDA as Amicus Curiae 1-2. SSDA suggests that an indirect price discount to competitors may be used to force directly supplied franchisees out of the market, and so to circumvent federal restrictions upon the termination of franchise agreements. See 92 Stat. 324-332, *15 U.S.C. §§ 2801-2806*.

One would expect that -- absent a safe harbor rule making functional discounts a useful means to engage in otherwise unlawful price discrimination -- excessive functional discounts of the sort in evidence here would be rare. As the Government correctly observes, "this case appears to reflect rather anomalous behavior on the part of the supplier." Brief for United States et al. as Amici Curiae 17, n. 15 (filed Aug. 3, 1989). See also Brief for United States as Amicus Curiae 15 (filed May 16, 1989) ("market forces should tend to discourage a supplier from offering independent wholesalers discounts that would allow them to undercut the supplier's own retail customers").

[24] Much of Perkins's case parallels that of respondents. "There was evidence that Signal received a lower price from Standard than did Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Futhermore there was evidence that Perkins repeatedly complained to Standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard Officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act." *395 U.S., at 649*.

the producer to the retailer." [25] The same may justly be said in this case. The additional link in the distribution chain does not **[**2549]** insulate Texaco from liability if Texaco's excessive discount otherwise violated the Act. [26]

[**44]**

[*568] ***LEdHN[6K]***[] [6K] ***LEdHN[10D]***[] [10D] ***LEdHN[14A]***[] [14A] ***LEdHN[15A]***[] [15A]Nor should any reader of the commentary on functional discounts be much surprised by today's result. Commentators have disagreed about the extent to **[***519]** which functional discounts are generally or presumptively allowable under the Robinson-Patman Act. They nevertheless tend to agree that in exceptional cases what is nominally a functional discount may be an unjustifiable price discrimination entirely within the coverage of the Act. [27] **[****46]** Others, like Frederick **[*569]** Rowe, have asserted the legitimacy of function discounts in more sweeping terms, [28] but even

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[25] We added: "Here Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act." *395 U.S., at 648*.

[26] ***LEdHN[13B]***[] [13B]

In fact, the principles applied in Perkins -- that we ***HN15***[] will not construe the Robinson-Patman Act in a way that "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain," *395 U.S., at 647* -- seems capable of governing this case as well. It might be possible to view Perkins as standing for a narrower proposition, either because Signal apparently exercised majority control over the intermediary, Western Hyway, and its retailer, Regal, see *id., at 651* (MARSHALL, J., concurring in part and dissenting in part), or because Standard did not assert that its price to Signal reflected a "functional discount." However, as the Perkins dissent pointed out, ibid., the Perkins majority did not put any such limits on the principle it declared.

[27] See, *e.g.,* Celnicker & Seaman, Functional Discounts, Trade Discounts, Economic Price Discrimination and the Robinson-Patman Act, 1989 Utah L. Rev. 813, 857 (1989) (concluding that "trade discounts often are manifestations of economic price discrimination. . . . If a trade discount violates the normal competitive disadvantage criteria used under the Act, no special devices should be employed to protect it"); Rill, 53 Antitrust L.J., at 940-941 ("Although it is entirely appropriate for the FTC and the courts to insist that some substantial services be performed in order for a buyer to earn a functional discount, a requirement of precise mathematical equivalency makes no sense"); 3 E. Kintner & J. Bauer, Federal ***Antitrust Law*** 318-320, and n. 305 (1983) "Functional discounts . . . are usually deemed lawful," but this usual rule is subject to exception in cases, "arising in unusual circumstances," when the seller's "discrimination *caused"* the tertiary line injury); Calvani, 17 B. C. Ind. & Com. L. Rev., at 549, and n. 26 (1976) (discounts to wholesalers are generally held not to injure competition, but this rule is subject to qualifications, and "perhaps the most important caveat focuses on the situation where the seller sells to both resellers and the consumers and the resellers pass on to consumers all or part of the wholesaling functional discount"); C. Edwards, Price Discrimination Law 312-313 (1959) ("It is not surprising that from time to time the Commission has been unable to avoid finding injurious discrimination between direct and indirect customers nor to avoid corrective orders that sought to define the gap between prices at successive levels of distribution"); Kelley, Functional Discounts Under the Robinson-Patman Act, 40 Cal. L. Rev. 526, 556 (1952) (concluding that the "characterization of a price differential between two purchasers as a functional or trade discount accords it no cloak of immunity from the prohibitions of the Robinson-Patman Act"); Shniderman, 60 Harv. L. Rev., at 599-600 (Commission's approach to functional discounts "may have been influenced by the possibility of subtle price discriminating techniques through the employment of wholesalers receiving more than ample discount differentials").

Professor Edwards, among others, describes the status of functional discounts under the Robinson-Patman Act with clear dissatisfaction. He complains that "The failure of the Congress to cope with the problem . . . has left the Commission an impossible job in this type of case." Price Discrimination Law, at 313. He adds that the Commission's "occasional proceedings" have been attributed to the "Commission's wrong-headedness." *Id., at 312*. Professor Edward's observations about the merits of the statute and about prosecutorial discretion are obviously irrelevant to our own inquiry. Unlike scholarly commentators, we have a duty to be faithful to congressional intent when interpreting statutes, and are not free to consider whether, or how, the statute should be rewritten.

Rowe concedes the existence of an "exception to the general rule." F. Rowe, Price Discrimination Under the Robinson-Patman Act 174, n. 7 (1962); *id., at 195-205*. [29]

LEdHN[14B][] [14B] ***LEdHN[15B]***[] [15B] **[****45]**

LEdHN[6L][] [6L] ***LEdHN[10E]***[] [10E]

[**47]**

[*520] [**2550]** ***LEdHN[1E]***[] [1E] ***LEdHN[6M]***[] [6M] ***LEdHN[16]***[] [16]We conclude that the commentators' analysis, like the reasoning in Perkins and like the Federal Trade Commission's practice, renders implausible Texaco's contention that holding it liable here involves some departure from established understandings. Perhaps respondents' case against Texaco **[*570]** rests more squarely than do most functional discount cases upon direct evidence of the seller's intent to pass a price advantage through an intermediary. This difference, however, hardly cuts in Texaco's favor. In any event, the evidence produced by respondents also shows the scrambled functions which have more frequently signaled the illegitimacy under the Act of what is alleged to be a permissible functional discount. Both Gull and Dompier received the full discount on all their purchases even though most of their volume was resold directly to consumers. The extra margin on those sales obviously enabled them to price aggressively **[****48]** in both their retail and their wholesale marketing. To the extent that Dompier and Gull competed with respondents in the retail market, the presumption of adverse effect on competition recognized in the Morton Salt case becomes all the more appropriate. Their competitive advantage in that market also constitutes evidence tending to rebut any presumption of legality that would otherwise apply to their wholesale sales.

LEdHN[1F][] [1F]The evidence indicates, moreover, that Texaco affirmatively encouraged Dompier to expand its retail business and that Texaco was fully informed about the persistent and marketwide consequences of its own pricing policies. Indeed, its own executives recognized that the dramatic impact on the market was almost entirely attributable to the magnitude of the distributor discount and the hauling allowance. Yet at the same time that Texaco was encouraging Dompier to integrate downward, and supplying Dompier with a generous discount useful to such integration, Texaco was inhibiting upward integration by the respondents: two of the respondents sought permission from Texaco to haul their own fuel **[****49]** using their own tankwagons, but Texaco refused. The special facts of this case thus make it peculiarly difficult for Texaco to claim that it is being held liable for the independent pricing decisions of Gull or Dompier.

[*571] ***LEdHN[1G]***[] [1G]***LEdHN[6N]***[] [6N]***LEdHN[17]***[] [17]***LEdHN[18A]***[] [18A]As we recognized in Falls City Industries, ***HN16***[] "the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers." *460 U.S., at 436*. This conclusion is compelled by the statutory language,

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[28] "In practice, the competitive effects requirement permits a supplier to quote different prices between different distributor classes -- so long as those who are higher up (nearer the supplier) on the distribution ladder pay *less* than those who are further down (nearer the consumer)." F. Rowe, Price Discrimination Under the Robinson-Patman Act 174 (1962) (footnote omitted); see also *id., at 178*.

[29] Rowe, writing prior to this Court's Perkins decision, describes the exception, which he identifies with the *Standard Oil* cases, as "of dubious validity today." *Id., at 196*. Rowe's analysis is flawed because he assumes that seller liability for tertiary line implications of wholesaler discounts must follow the logic of the *Standard Oil* complaint, and likewise assumes that this logic exposes to liability any seller who fails to monitor the resale prices of its wholesaler. *Id., at 204*. Indeed, Rowe's own discussion suggests one defect in his argument: legitimate wholesaler discounts will usually be insulated from liability by an absence of evidence on the causation issue. *Id., at 203-204*. In any event, nothing in our opinion today endorses a theory of liability under the Robinson-Patman Act for functional discounts so broad as the theory Rowe draws from *Standard Oil*.

which specifically encompasses not only the adverse effect of price discrimination on persons who either grant or knowingly receive the benefit of such discrimination, but also on "customers **[****50]** of either of them." Such indirect competitive effects surely may not be presumed automatically in every functional discount setting, and, indeed, **[***521]** one would expect that most functional discounts will be legitimate discounts which do not cause harm to competition. At the least, a functional discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions will not violate the Act. When a functional discount is legitimate, the inference of injury to competition recognized in the Morton Salt case will simply not arise. Yet it is also true that not every functional discount is entitled to a judgment of legitimacy, and that it will sometimes be possible to produce evidence showing that a particular functional discount caused a price discrimination of the **[**2551]** sort the Act prohibits. When such anti-competitive effects are proved -- as we believe they were in this case -- they are covered by the Act. [30]

LEdHN[18B][] [18B]

[**51]** VI

LEdHN[19][] [19] ***LEdHN[20]***[] [20]At the trial respondents introduced evidence describing the diversion of their customers to specific stations supplied by Dompier. Respondents' expert testimony on damages also focused on the diversion of trade to specific Dompier-supplied stations. The expert testimony analyzed the entire **[*572]** damages period, which ran from 1972 and 1981 and included a period prior to 1974 when Dompier did not own any retail stations (although the jury might reasonably have found that Dompier controlled the Red Carpet station from the outset of the damages period). Moreover, respondents offered no direct testimony of any diversion to Gull and testified that they did not even know that Gull was being supplied by Texaco. Texaco contends that by basing the damages award upon an extrapolation from data applicable to Dompier-supplied stations, respondents necessarily based the award upon the consequences of pricing decisions made by independent customers of Dompier. Texaco argues that the damages award must therefore be judged excessive **[****52]** as a matter of law.

Even if we were to agree with Texaco that Dompier was not a retailer throughout the damages period, we could not accept Texaco's argument. Texaco's theory improperly blurs the distinction between the liability and the damages issues. The proof established that Texaco's lower prices to Gull and Dompier were discriminatory throughout the entire nine-year period; that at least Gull, and apparently Dompier as well, was selling at retail during that entire period; that the discounts substantially affected competition throughout the entire market; and that they injured each of the respondents. There is no doubt that respondents' proof of a continuing violation of the Act throughout the nine-year period was sufficient. Proof of the specific amount of their damages was necessarily less precise. Even if some portion of some of respondents' injuries may be attributable to the conduct of independent retailers, the expert testimony nevertheless provided a sufficient basis for an acceptable estimate of the amount of damages. We have held that ***HN17***[] a plaintiff may not recover damages merely **[****53]** by showing a violation of the Act; rather, the plaintiff must also "make **[***522]** some showing of actual injury attributable to something the antitrust laws were designed to prevent. *Perkins v. Standard Oil Co., 395 U.S. 642, 648 **[*573]** (1969)* (plaintiff 'must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered')." *J. Turett Payne v. Chrysler Motors Corp., 451 U.S., at 562*. At the same time, however, we reaffirmed our "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." *Id., at 565*. See also *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-124 (1969)*; *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-265 (1946)*. [31] Moreover, as we have noted, Texaco did not **[**2552]**

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[30] The parties do not raise, and we therefore need not address, the question whether the inference of injury to competition might also be negated by evidence that disfavored buyers could make purchases at a reasonable discount from favored buyers.

[31] In J. Truett Payne, 451 U.S., at 465-566, we quoted with approval the following passage:

HN18[] "Damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that object to the instructions to the jury on the damages issue. A possible flaw in the jury's calculation of the amount of damages would not be an appropriate basis for granting Texaco's motion for a judgment notwithstanding the verdict.

[**54]** The judgment is affirmed.

It is so ordered.

Concur by: WHITE; SCALIA

Concur

JUSTICE WHITE, concurring in the result.

Texaco's first submission urging a blanket exemption for all functional discounts is rejected by the Court on the ground stated in *FTC v. Anheuser Busch, Inc., 363 U.S. 536, 550 (1960)*, that the "statute itself spells out the conditions which make a price difference illegal or legal, and we would derange **[*574]** this integrated statutory scheme" by providing a defense not contained in the statute. In the next section of its opinion, however, the Court not only declares that a price differential that merely accords due recognition and reimbursement for actual marketing functions not only does not trigger the presumption of an injury to competition, see *FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948)*, but also announces that "such a discount is not illegal." Ante, at 16. There is nothing in the Act to suggest such a defense to a charge of price discrimination that "may . . . substantially . . . lessen competition . . . in any line of commerce, or to injure, destroy, or prevent competition with any person **[****55]** who either **[***523]** grants or knowingly receives the benefit of such discrimination, or with customers of either of them." *15 U.S.C. § 13(a)*. Nor is there any indication in prior cases that the Act should be so construed. The Court relies heavily on the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) and also suggests that the Federal Trade Commission permits "legitimate functional discounts" but will not countenance subterfuges. Ante, at 17.

Thus, a Texaco retailer charged a higher price than a distributor who is given what the Court would call a legitimate discount is entirely foreclosed, even though he offers to prove, and could prove, that the distributor sells to his customers at a price lower than the plaintiff retailer pays Texaco and that those customers of the distributor undersell the plaintiff and have caused plaintiff's business to fail. This kind of injury to the Texaco retailer's ability to compete is squarely covered by the language of *§ 13(a)*, which reaches not only injury to competition but injury to Texaco retail customers' ability to compete with the distributor's customers. The Court neither explains **[****56]** why this is not the case nor justifies its departure from the provisions of the Act other than by suggesting that when there is a legitimate discount, it is the distributor's decision, not the discount given by Texaco, that causes the injury, even though the latter makes possible the **[*575]** distributor's discount. Perhaps this is the case if the concept of a legitimate price discrimination other than those legitimated by the Act's provisions is to be implied. But that poses the question whether the Act is open to such a construction.

The Attorney General's Committee noted the difficulty. Under the construction of the Act that the FTC was then espousing and applying, see *Standard Oil Co. v. FTC, 173 F.2d 210 (CA7 1949)*, rev'd on other grounds, *340 U.S. 231 (1951)*, the Committee said, "[a] supplier according functional discounts to a wholesaler and other middleman while at the same time marketing directly to retailers encounters serious legal risks." Report of Attorney **[**2553]** General's National Committee, at 206. The Committee clearly differed with the FTC and called for an authoritative construction of the Act that would accommodate "functional **[****57]** discounts to the broader purposes of the Act and of antitrust policy." *Id., at 208*. At a later stage in the Standard Oil case, the FTC disavowed any purpose to

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defendants' wrongful acts had caused damage to the plaintiffs.' Bigelow v. RKO Pictures, Inc., [327 U.S.], at 264. See also *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377-379 (1927)*; *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-566 (1931)*." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S., at 123-124*.

eliminate legitimate functional pricing or to make sellers responsible for the pricing practices of its wholesalers. The reversal of its position, which the Court of Appeals for the Seventh Circuit had affirmed, was explained on the ground of "broader antitrust policies." Reply Brief for Petitioner in FTC v. Standard Oil Co., O. T. 1957, No. 24, p. 32. The FTC has also appeared as an amicus in this case urging us to recognize and define legitimate functional discounts. Its brief, however, does not spell out the types of functional discounts that the Commission considers defensible. Nor does the FTC cite any case since the filing of its reply brief in 1957 in which it has purported to describe the contours of legitimate functional pricing. Furthermore, the FTC's argument apparently does not persuade the **[***524]** Court, for the Commission recommends reversal and remand, while the Court affirms the judgment.

[*576] In the absence of Congressional attention to this long-standing issue involving antitrust policy, I doubt **[****58]** that at this late date we should attempt to set the matter right, at least not in a case that does not require us to define what a legitimate functional discount is. If the FTC now recognizes that functional discounts given by a producer who sells both to distributors and retailers are legitimate if they reflect only proper factors and are not subterfuges, I would await a case challenging such a ruling by the FTC. We would then be reviewing a construction of the Act by the FTC and its explanation of legitimate functional discount pricing.

This is obviously not such a case. This is a private action for treble damages, and the Court rules against the seller-discounter since under no definition of a legitimate functional discount do the discounts extended here qualify as a defense to a charge of price discrimination. We need do no more than the Court did in *Perkins v. Standard Oil Co. of California, 395 U.S. 642 (1969)*. This the Court plainly recognizes, and it should stop there. Hence, I concur in the result.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring in the judgment.

I agree with the Court that none of the arguments pressed by petitioner for removing **[****59]** its conduct from the coverage of the Robinson-Patman Act is persuasive. I cannot, however, adopt the Court's reasoning, which seems to create an exemption for functional discounts that are "reasonable" even though prohibited by the text of the Act.

The Act provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent **[*577]** competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." *15 U.S.C. § 13(a)*.

As the Court notes, ante, at 10, sales of like goods in interstate **[****60]** commerce violate this provision if three conditions are met: (1) the seller discriminates in price between purchasers, (2) the effect of such discrimination **[**2554]** may be to injure competition between the victim and beneficiaries of the discrimination or their customers, and (3) the discrimination is not cost-based. Petitioner makes three arguments, one related to each of these conditions. First, petitioner argues that a price differential between purchasers at different **[***525]** levels of distribution is not discrimination in price. As the Court correctly concludes, that cannot be so. As long ago as *FTC v. Morton Salt Co., 334 U.S. 37 (1948)*, we held that the Act prohibits differentials in the prices offered to wholesalers and retailers. True, in Morton Salt the retailers were being favored over the wholesalers, the reverse of the situation here. But if that factor could make any difference, it would bear not upon whether price discrimination occurred, but upon whether it affected competition, the point I address next.

Second, petitioner argues that its practice of giving wholesalers Gull and Dompier discounts unavailable to retailer Hasbrouck could not have **[****61]** injured Hasbrouck's competition with retailers who purchased from Gull and Dompier. Any competitive advantage enjoyed by the competing retailers, petitioner asserts, was the product of independent decisions by Gull and Dompier to pass on the discounts to those retailers. This also is unpersuasive. The Act forbids price discrimination whose effect may be "to injure, destroy, or **[*578]** prevent competition with any person who . . . knowingly receives the benefit of such discrimination, or with customers of [that person]." *15 U.S.C. § 13(a)* (emphasis added). Obviously, that effect upon "competition with customers" occurs whether or not the beneficiary's choice to pass on the discount is his own. The existence of an implied "proximate cause" requirement that would cut off liability by reason of the voluntary act of pass-on is simply implausible. This field is laden with "voluntary acts" of third persons that do not relieve the violator of liability -- beginning with the act of the ultimate purchaser, who in the last analysis causes the injury to competition by "voluntarily" choosing to buy from the seller who offers the lower price that the price discrimination **[****62]** has made possible. The Act focuses not upon free will, but upon predictable commercial motivation; and it is just as predictable that a wholesaler will ordinarily increase sales (and thus profits) by passing on at least some of a price advantage, as it is that a retailer will ordinarily buy at the lower price. To say that when the Act refers to injury of competition "with customers" of the beneficiary it has in mind only those customers to whom the beneficiary is compelled to sell at the lower price is to assume that Congress focused upon the damage caused by the rare exception rather than the damage caused by the almost universal rule. The Court rightly rejects that interpretation. The independence of the pass-on decision is beside the point.

Petitioner's third point relates to the third condition of liability (i. e., lack of a cost justification for the discrimination), but does not assert that such a justification is present here. Rather, joined by the United States as amicus curiae, petitioner argues at length that even if petitioner's discounts to Gull and Dompier cannot be shown to be cost-based they should be exempted, because the "functional discount" is an efficient and legitimate **[****63]** commercial practice that is ordinarily cost-based, though it is all but impossible to establish **[*579]** cost justification in a particular case. The short answer to this argument is that it should be addressed to Congress.

The Court does not, however, provide **[***526]** that response, but accepts this last argument in somewhat modified form. Petitioner has violated the Act, it says, only because the discount it gave to Gull and Dompier was not a "reasonable reimbursement for the value to [petitioner] of their actual marketing functions." Ante, at 16; see also ante, at 25. Relying on a mass of extratextual materials, the Court concludes that the Act permits such "reasonable" functional discounts even if the supplier cannot satisfy the "rigorous **[**2555]** requirements of the cost justification defense." Id., at 15. I find this conclusion quite puzzling. The language of the Act is straightforward: any price discrimination whose effect "may be substantially . . . to injure, destroy, or prevent completion" is prohibited, unless it is immunized by the "cost justification" defense, i. e., unless it "makes only due allowance for differences in the cost of manufacture, sale, or delivery **[****64]** resulting from the differing methods or quantities in which [the] commodities are . . . sold or delivered." *15 U.S.C. § 13(a)*. There is no exception for "reasonable" functional discounts that do not meet this requirement. Indeed, I am at a loss to understand what makes a functional discount "reasonable" unless it meets this requirement. It does not have to meet it penny-for-penny, of course: The "rigorous requirements of the cost justification defense" to which the Court refers, ante, at 15, are not the rigors of mathematical precision, but the rigors of proof that the amount of the discount and the amount of the cost saving are close enough that the difference cannot produce any substantial lessening of competition. See ante, at 15, n. 18. How is one to determine that a functional discount is "reasonable" except by proving (through the normally, alas, "rigorous" means) that it meets this test? Shall we use a nationwide average?

I suppose a functional discount can be "reasonable" (in the relevant sense of being unlikely to subvert the purposes of **[*580]** the Act) if it is not commensurate with the supplier's costs saved (as the cost-justification defense **[****65]** requires), but is commensurate with the wholesaler's costs incurred in performing services for the supplier. Such a discount would not produce the proscribed effect upon competition, since if it constitutes only reimbursement for the wholesaler one would not expect him to pass it on. The relevant measure of the discount in order to determine "reasonableness" on that basis, however, is not the measure the Court applies to Texaco ("value to [the supplier] of [the distributor's] actual marketing functions," ante, at 16), but rather "cost to the distributor of the distributor's actual marketing functions" -- which is of course not necessarily the same thing. I am therefore quite unable to understand what the Court has in mind by its "reasonable" functional discount that is not cost justified.

To my mind, there is one plausible argument for the proposition that a functional basis for differential pricing ipso facto -- cost justification or not -- negates the probability of competitive injury, thus destroying an element of the plaintiff's prima facie case, see *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434* ***[***527]*** *(1983)*: In a market that is **[****66]** really functionally divided, retailers are in competition with one another, not with wholesalers. That competition among retailers cannot be injured by the supplier's giving lower prices to wholesalers -- because if the price differential is passed on, all retailers will simply purchase from wholesalers instead of from the supplier. Or, to put it differently, when the market is functionally divided all competing retailers have the opportunity of obtaining the same price from wholesalers, and the supplier's functional price discrimination alone does not cause any injury to competition. Therefore (the argument goes), if functional division of the market is established, it should be up to the complaining retailer to show that some special factor (e. g., an agreement between the supplier and the wholesaler that the latter will not sell to the former's retailer-customers) prevents this normal market **[*581]** mechanism from operating. As the Court notes, ante, at 26, this argument was not raised by the parties here or below, and it calls forth a number of issues that would benefit from briefing and factual development. I agree that we should not decide the merit of this argument in the **[****67]** first instance.

For the foregoing reasons, I concur in the judgment.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 149, *151*, *153*, *154*, *341*, *342*, *344*, *358*

24 Federal Procedure, L Ed, Restraints of Trade and Monopolies 54:337, 54:340, 54:341

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 13(a)

US L Ed Digest, Evidence 979; Restraints of Trade, Monopolies, and Unfair Trade Practices 38

Index to Annotations, Dealers and Distributors; Discounts and Rebates; Gas and Oil; Prices and Pricing; Restraints of Trade and Monopolies; Retail Businesses and Stores; Robinson-Patman Act

Annotation References:

Construction and application of "good faith meeting competition defense" of Clayton Act, as amended by Robinson-Patman Act (*15 USCS 13*(b)). *59 L Ed 2d 810*.

What issues will the Supreme Court consider ,though not, or not properly, raised by the parties. *42 L Ed 2d 946*.

Supreme Court's views as to weight and effect to be given, on subsequent judicial construction, **[****68]** to prior administrative construction of statute. *39 L Ed 2d 942*.

Construction of the cost-justification proviso of the *Robinson-Patman Act. 8 L Ed 2d 1033*.

Robinson-Patman Act as construed by Supreme Court. *2 L Ed 2d 1737*.

Proof of injury to competition as jurisdictional requirement under 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*). 47 ALR Fed 846.

Measure and elements of damages for violation of Robinson-Patman Act. 9 ALR Fed 279.

Discounts permissible under Robinson-Patman Amendment to Clayton Act. 1 ALR2d 276.

[In re Bulk Popcorn Antitrust Litig.]

United States District Court for the District of Minnesota, Third Division

June 16, 1990, Decided

Master File No. 3-89-710

Reporter

1990 U.S. Dist. LEXIS 16333 *; 1990-2 Trade Cas. (CCH) P69,126

In re Bulk Popcorn Antitrust Litigation

Core Terms

purchaser, motion to dismiss, contacts, Popcorn, indirect, conspiracy, personal jurisdiction, Defendants', microwave, fraudulent concealment, federal court, antitrust, price-fixing, allegations, limitations, plaintiffs', complaints, pleaded, bulk

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN1[] **Purchasers, Indirect Purchasers**

Indirect purchaser actions are not available under federal ***antitrust law***. Federal law does not permit such actions because they will add whole new dimensions of complexity to treble-damages lawsuits and seriously undermine their effectiveness.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN2[] **Private Actions, Purchasers**

State law indirect purchaser actions are not preempted by federal law but such actions complicate direct purchaser actions and the state law indirect actions might best be handled separately.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN3[] Private Actions, Purchasers

Federal courts have the discretion to decline to exercise pendent jurisdiction over state indirect purchaser claims, even if those claims are brought in the first instance in federal court.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN4[] Jurisdiction, Jurisdictional Sources

Personal jurisdiction decisions require a two-step analysis. First, a court must consider whether the facts satisfy the statutory requirements of the Minnesota long-arm statute, *Minn. Stat. § 543.19* (1988). Second, a court must determine whether the defendant has sufficient "minimum contacts" with the forum state so that the court's exercise of jurisdiction will be fair and in accordance with due process. Once jurisdiction has been challenged, the plaintiff bears the burden of proving the existence of jurisdiction. The court views the facts in the light most favorable to the plaintiff, but to avoid dismissal the plaintiff must make a prima facie showing of jurisdiction.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Torts > Procedural Matters > Commencement & Prosecution > In Personam Jurisdiction

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN5[] Jurisdiction, Subject Matter Jurisdiction

Minn. Stat. § 543.19, subd. 1(b) allows for personal jurisdiction if the defendant transacts any business within Minnesota, and *Minn. Stat. § 543.19, subd. 1(d)* allows for personal jurisdiction where the defendant commits any act outside Minnesota that causes injury or property damage in Minnesota. The Minnesota long-arm statute, *Minn. Stat. § 543.19* (1988) has been construed to extend to the limits of due process.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN6[] In Rem & Personal Jurisdiction, Constitutional Limits

A court must examine five factors to determine whether the requirements of due process are satisfied for personal jurisdiction, i.e. the nature and availability of the contacts with the forum state, the quantity of contacts with the forum state, the relation of the cause of action to the contacts, the interest of the forum state in providing a forum for its residents, and the convenience of the parties.The last two factors are of lesser importance.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN7[] Jurisdiction, Jurisdictional Sources

The mere presence of an association's members within Minnesota does not confer personal jurisdiction on the association.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN8[] In Rem & Personal Jurisdiction, In Personam Actions

Communications, such as telephone calls and promotional material mailings, alone do not confer personal jurisdiction.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN9[] Complaints, Requirements for Complaint

A court's standard of review on a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* is limited and matters outside the pleadings will not be considered. Under *Rule 12(b)(6)*, a court will not grant a dismissal unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that will entitle him to relief. Notice pleading is all that is required for a valid antitrust complaint. Conclusory allegations that a defendant has violated the antitrust laws and that plaintiff is injured thereby will not survive a motion to dismiss if it is not supported by facts that constitute a legitimate claim for relief. However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent. An antitrust complaint should not be dismissed unless it is found to be wholly frivolous.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN10[] Statute of Limitations, Time Limitations

The "fraudulent concealment" doctrine is adopted in the Eighth Circuit. Under this doctrine, the limitation period begins to run from the time that the plaintiff, by the exercise of reasonable diligence, discovers or should discover his cause of action. Fraudulent concealment consists of two elements, i.e. the use of fraudulent means by the defendant, and successful concealment from the injured party. "Due diligence" need not be pleaded, rather, it is an affirmative defense.

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Judges: Paul A. Magnuson, United States District Judge.

Opinion by: MAGNUSON

Opinion

ORDER

This matter is before the court upon the following four motions:

1. Defendants' joint motion to dismiss the *Ogren* and *McPherson* cases;

2. Defendant The Popcorn Institute's motion to dismiss for lack of personal jurisdiction;

3. Defendant Golden Valley Microwave Foods' motion to dismiss pursuant to *Rule 12(b)(6)* or, alternatively, Rule 56; and

4. Certain defendants' motions to dismiss plaintiffs' complaints to the extent they seek relief outside the applicable statute of limitations.

For the reasons set forth below, the first two motions are granted and the second two are denied.

I. The *Ogren* and *McPherson* Complaints

The matter before the court is, for the bulk of the complaints, a putative class action brought on behalf of direct purchasers of bulk popcorn. The *Ogren* and *McPherson* complaints, however, are indirect purchaser claims brought **[*3]** pursuant to state law.

HN1[] Indirect purchaser actions are not available under federal ***antitrust law***. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 738 (1977)*. Federal law does not permit such actions because they "would add whole new dimensions of complexity to treble-damages suites and seriously undermine their effectiveness." *Id.* Such complexity arises because "potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund -- the amount of the alleged overcharge -- by contending that the entire overcharge was absorbed at that particular level in the chain." *Id.*

In *California v. ARC America Corp., __ U.S. __ 109 S.Ct. 1661 (1989)*, the court held that ***HN2***[] state law indirect purchaser actions are not preempted by federal law but specifically noted that such actions complicate direct purchaser actions and that such actions might best be handled separately:

State indirect purchaser actions will not necessarily be brought in federal court. 817 F.2d, at 1445. Unlike the federal indirect purchaser claims asserted in *Illinois Brick,* which would have been exclusively within the jurisdiction of the federal courts, **[*4]** *15 U.S.C. §§ 15(a)*, *26*, claims under state indirect purchaser statutes could be brought in state court, separately from federal actions brought by direct purchasers. Moreover, ***HN3***[] federal courts have the discretion to decline to exercise pendent jurisdiction over state indirect purchaser claims, even if those claims are brought in the first instances in federal court. *See* *United Mine Workers of America v. Gibbs, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966)*. Since many state indirect purchaser actions would be heard in state courts, at least when the federal courts determined that hearing those claims would be overly burdensome, any complications of federal direct purchaser actions in federal court would be minimal.

109 S.Ct at 1666.

Here the court is faced with state indirect purchaser claims pendent to federal injunctive claims made under the Clayton Act, *15 U.S.C. § 26*. The pendent state law claims for damages dwarf the injunctive claims in significance and complexity. Allowing the indirect purchaser claims to remain in this action will, assuming class certification is even appropriate for such claims, require the appointment of subclasses with competing **[*5]** interests in the defendants' funds and greatly complicate the computation of damages. The court would also have to make first impression interpretations of the various state statutes involved. The court concludes that the pending indirect purchaser will be overly burdensome and thus declines to exercise pendent jurisdiction over them.

II. The Popcorn Institute's Motion to Dismiss

Defendant The Popcorn Institute, a non-profit corporation, is organized under the laws of the state of Illinois, with its principal place of business in Chicago. It is a trade organization for the bulk popcorn industry.

The Popcorn Institute's contacts with Minnesota include two Minnesota members and a foundation in Minnesota formed to promote the sale of microwave popcorn with four Minnesota members. The Institute's president solicited the four foundation members by telephone, mail, and several personal visits to Minnesota. The Institute also paid a Minnesota researcher to study certain microwave popcorn technology. Finally, the Institute mails promotional materials to members and non-members in Minnesota both as part of national promotional campaigns and of less comprehensive promotional efforts.

The Institute **[*6]** challenges plaintiffs' assertion of personal jurisdiction in this forum, arguing that it has insufficient contacts with Minnesota. Plaintiffs contend that they have made a *prima facie* showing of personal jurisdiction by alleging that the Institute is a participant in a conspiracy which has caused damage in Minnesota and substantial contacts with Minnesota.

HN4[] Personal jurisdiction decisions require a two-step analysis. First, the court must consider whether the facts satisfy the statutory requirements of the Minnesota long-arm statute, *Minn. Stat. § 543.19* (1988). Second, the court must determine whether the defendant has sufficient "minimum contacts" with the forum state so that the court's exercise of jurisdiction would be fair and in accordance with due process. *Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 42 (8th Cir. 1988)*; *Tonka Corp. v. TMS Entertainment, Inc., 638 F. Supp. 386, 388 (D. Minn. 1985)*. "Once jurisdiction has been challenged, the plaintiff bears the burden of proving the existence of jurisdiction." *Wines, 846 F.2d at 42*. The court views the facts in the light most favorable to the plaintiff, but to avoid dismissal the plaintiff must make **[*7]** a *prima facie* showing of jurisdiction. *Aaron Ferer and Sons Co. v. Diversified Metals*

Corp., 564 F.2d 1211, 1215 (8th Cir. 1977); *Watlow Electric Mfg. Co. v. Patch Rubber Co., 838 F.2d 999, 1000 (8th Cir. 1988)*.

Under the Minnesota long-arm statute, two provisions potentially apply here: ***HN5***[] *Minn. Stat. § 543.19, subd. 1(b)*, allowing for jurisdiction if the defendant "transacts any business within the state," or subd. 1(d) where the defendant "commits any act outside Minnesota causing injury or property damage in Minnesota." The Minnesota long-arm statute has been construed to extend to the limits of due process. *Wines, 846 F.2d at 42*; *Vikes v. Flaby, 316 N.W.2d 276, 281 (Minn. 1982)*. [1]

HN6[] The court must examine five factors **[*8]** in determining whether the requirements of due process have been satisfied:

1. the nature and availability of the contacts with the forum state;

2. the quantity of contacts with the forum state;

3. the relation of the cause of action to the contacts;

4. the interest of the forum state in providing a forum for its residents; and

5. the convenience of the parties.

The last two factors are of lesser importance. *Aftanase v. Economy Baler Co., 343 F.2d 187, 197* (8th Cir. 1965.

In the instant case the court concludes that it cannot constitutionally exercise personal jurisdiction over The Popcorn Institute. First, ***HN7***[] the mere presence of Institute members does not confer jurisdiction on the trade association. *See* *Midwest Fur Producers Ass'n v. Mutation Mink Bar Ass'n, 102 F. Supp. 649 (D. Minn. 1952)*; *Donatelli v. Nat'l Hockey League, 893 F.2d 459, 469 (1st Cir. 1990)* (due process requirements not satisfied over defendant association where its only contacts with the forum were Boston Bruins advertisements and ticket sales over which defendant had no control and which were unrelated to plaintiffs' cause of action). Second, much of the connections with Minnesota concern **[*9]** telephone calls to Minnesota and the mailing of promotional material. Such ***HN8***[] communications alone do not confer jurisdiction either. *See* *Scullin Steel v. National Railway Utilization Corp., 676 F.2d 309, 312-14 (8th Cir. 1982)*; *Larson v. Association of Apartment Owners of Lahaina Shores, 606 F. Supp. 579, 583 (D. Minn. 1985)*. The president of the Institute, additionally, traveled to Minnesota to solicit membership, but such contacts were not frequent. The same can be said for the formation of the microwave popcorn and microwave technology research.

Given the relatively limited contacts the Institute has with Minnesota, a relationship ("nexus") between these contacts must exist. Plaintiffs rely on their allegation that the Institute is a member of the price-fixing conspiracy. Since the Institute's function as a trade association is related to the bulk popcorn market, according to plaintiffs, the Minnesota contacts necessarily relate to the alleged price-fixing conspiracy. The court finds this bare assertion insufficient to make a *prima facie* showing of relatedness. Plaintiffs have provided no specific assertions with resect to any of the alleged contacts -- including the **[*10]** Education Foundation -- which might allow an inference that the contacts relate to the price-fixing conspiracy. The lack of a nexus between the contacts and the litigation defeats personal jurisdiction here. *See* *Land-o-Nod v. Basset Furniture Ind., 708 F.2d 1338, 1341 (8th Cir. 1983)* (dismissing trademark infringement case where defendant regularly sold goods in Minnesota but none of the allegedly infringing goods were sold in Minnesota).

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[1] The court does not address the issue of whether the long-arm statute allows for "general" jurisdiction as set forth in *Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)*, because such a decision need not be made on the facts plaintiffs allege.

Plaintiffs' similar argument that antitrust co-conspirators such as the Institute are subject to personal jurisdiction wherever the antitrust violation has effect also fails. The due process contact requirements still apply. *See* *I.S. Joseph Co., Inc. v. Mannesmann Pipe and Steel Corp., 408 F. Supp. 1023 (D. Minn. 1976)*; *State of West Virginia v. Morton Int'l, Inc., 264 F. Supp. 689 (D. Minn. 1967)*. This court lacks personal jurisdiction over The Popcorn Institute.

III. Golden Valley Microwave Foods's ("GVMF") Motion to Dismiss

Plaintiff alleges that defendant GVMF was a participant in the price-fixing conspiracy. GVMF has submitted an affidavit claiming that such allegations are without merit because GVMF was never a *seller* of bulk **[*11]** popcorn and because it did not assume the liabilities of Vogel merely by purchasing its stock.

Plaintiffs respond by claiming that GVMF was a "late joiner" to the conspiracy by acquiring Vogel and that the corporate veil can be pierced to hold GVMF liable for Vogel's anti-competitive conduct.

Initially, the court determines that it will treat this motion as a motion for dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)* and not a summary judgment motion as GVMF desires. [2] ***HN9***[] The court's standard of review, consequently, is limited and matters outside the pleadings will not be considered. Under *Fed. R. Civ. P. 12(b)(6)* the court will not grant dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46 (1957)*. "It is now well accepted that notice pleading is all that is required for a valid antitrust complaint." *Quality Foods de Centro Am. v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 995 (11th Cir. 1983)*. "Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported **[*12]** by facts constituting a legitimate claim for relief . . . . However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent." *Id.* (citations omitted) "[An antitrust] complaint should not be dismissed unless it is found to be 'wholly frivolous.'" *Id.*

Under this limited standard of review, the court concludes that plaintiffs have adequately pleaded their case against GVMF. The complaint contains a general description of the price-fixing conspiracy and specifically identifies GVMF as a participant in the conspiracy. The complaint includes specific charges against defendant Vogel's employee and draws a connection to GVMF due to its acquisition of Vogel. Such allegations sufficiently put GVMF on notice that it might potentially be held liable under the various theories plaintiffs advance in response to the dismissal motion. GVMF's dismissal motion must fail.

IV. Defendants' Statute of Limitations Motion

[*13] Finally, the court addresses defendants' joint motion to dismiss the complaint to the extent it seeks relief outside the applicable statute of limitations. Defendants maintain that plaintiffs have failed to plead the "fraudulent concealment" doctrine. The complaint alleges that plaintiffs failed to discovery the conspiracy due to the following acts of fraudulent concealment: first, secret means of communication including clandestine telephone communications and informal meetings; second, the use of "rigged bids" to give the illusion of competition; and third, meeting through a "legitimate trade association" to "cloak" their conspiracy.

HN10[] The "fraudulent concealment" doctrine was adopted in the Eighth Circuit in *Kansas City. Mo. v. Federal Pacific Electrical Co., 310 F.2d 271 (8th Cir. 1962)*, *cert. denied*, *83 S.Ct. 356 (1962)*. Under the *Federal Pacific* doctrine, the limitation period begins to run from the time that the plaintiff, by the exercise of reasonable diligence, discovers or should have discovered his cause of action. *Id.* Fraudulent concealment consists of two elements: 1) the use of fraudulent means by the defendant, and 2) successful concealment form **[*14]** the injured party. *Bruno v. United States, 547 F.2d 71, 74 (8th Cir. 1976)* (citing *Federal Pacific, supra*). "Due diligence" need not be pleaded; rather, it is an affirmative defense. *Id.*

Here plaintiffs have adequately pleaded fraudulent concealment. Plaintiffs set forth various affirmative means by which defendants kept the conspiracy secret. *See* *In re Wirebound Boxes Antitrust Litigation, 128 F.R.D. 262, 1989*

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[2] Plaintiffs' Rule 56(f) affidavit establishes that summary judgment is premature.

U.S. Dist. LEXIS 12935, No. MDL-793 (D. Minn. May 22, 1989) (holding that plaintiffs adequately pleaded fraudulent concealment by alleging secret means of communication, rigged bids, and the use of purportedly legitimate trade association meetings). Defendants' motion to dismiss fails for this reason.

Accordingly, IT IS ORDERED That:

1. Defendants' motion to dismiss the *Ogren* and *McPherson* complaints is GRANTED in part. The indirect purchaser actions, with the exception of the federal injunctive claims, are DISMISSED.

2. The Popcorn Institute's Motion to dismiss for lack of personal jurisdiction is GRANTED and The Popcorn Institute is DISMISSED;

3. Golden Valley Microwave Foods' motion to dismiss is DENIED; and

4. Defendants' motion to dismiss plaintiffs' complaint to the extent it seeks **[*15]** relief outside the statute of limitations is DENIED.

International Travel Arrangers v. NWA, Inc.

United States District Court for the District of Minnesota, Third Division

June 16, 1990, Decided

Civil File No. 3-86-0391 Consolidated with Civil File No. 3-87-534

Reporter

1990 U.S. Dist. LEXIS 11723 *; 1990-2 Trade Cas. (CCH) P69,112

International Travel Arrangers, a corporation, Plaintiff, v. NWA, Inc.; Northwest Airlines, Inc., Republic Airlines, Inc., Mainline Travel, Inc., Defendants

Core Terms

Sherman Act, divestiture, Clayton Act, acquisition, antitrust, injunctive relief, merger, violations, challenging, parties

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN1[] **Civil Actions, Divestiture**

Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of section 7 of the Clayton Act has been found.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Private Actions, Standing**

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. *15 U.S.C.S. § 26*.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Remedies, Injunctions**

The "antitrust laws" referred to in § 16 of the Clayton Act include provisions of the Sherman Act. *15 U.S.C.S. § 12*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Private Actions, Standing**

Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Private Actions, Remedies**

Whether divestiture is proper or not in any particular case is a matter which must depend upon a balancing of the equities in each instance.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] **Private Actions, Remedies**

Divestiture is a severe remedy that is to be avoided when other forms of injunctive relief can adequately protect against further anticompetitive conduct without the same degree of economic dislocation.

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Ronald D. Eastman, Esq., David F. Williams, Esq., Michael B. Quigley, Esq., Cadwalader, Wickersham & Taft, Washington, D.C.; Peter S. Hendrixson, Esq., Mark B. Rotenberg, Esq., Michael A. Lindsay, Esq., Dorsey & Whitney, Minneapolis, Minnesota, for the defendants.

Judges: Paul A. Magnuson, United States District Judge.

Opinion by: MAGNUSON

Opinion

MEMORANDUM AND ORDER

This matter is before the court upon the motion of plaintiff International Travel Arrangers (ITA) for reconsideration of a portion of the court's Memorandum and Order dated October 5, 1989. Based on a recent Supreme Court case, *California v. American Stores Co., 110 S. Ct. 1853* (April 30, 1990), plaintiff seeks a determination that divestiture is an available remedy in this case. The court grants plaintiff's motion insofar as it applies to the Sherman Act claims in this case and to plaintiff's challenge to the acquisition of Mainline Travel, Inc. (MLT) under § 7 of the Clayton Act, but the court will not resurrect plaintiff's § 7 claim contesting the **[*2]** acquisition of Republic Airlines, Inc. (Republic), which was dismissed in the court's prior Memorandum and Order.

The October 5, 1990 Memorandum and Order set forth in detail the factual background to this litigation, and it will not be repeated here. In summary, ITA's supplemental complaint asserts seven claims for relief based on actions relating to or occurring after the acquisitions of MLT and Republic by Northwest Airlines, Inc. (Northwest). Of those seven claims, three are rooted in ***antitrust law***. First, ITA challenges the acquisition of MLT under § 7 of the Clayton Act. Second, ITA alleges that Northwest's acquisition of Republic also violated § 7 of the Clayton Act. Third, ITA contends that the defendants combined and conspired to monopolize, attempted to monopolize, and did in fact monopolize one or more lines of trade or commerce in violation of § 1 and § 2 of the Sherman Act.

On cross motions for summary judgment the court ruled, *inter alia,* that ITA's Clayton Act § 7 claim challenging the Republic acquisition was barred under the doctrine of collateral estoppel, and the court therefore dismissed plaintiff's second claim. The Memorandum and Order states:

The availability **[*3]** of remedies for post-merger anticompetitive activities insures that the parties involved will not be able to misbehave with impunity. On the other hand, the parties should not be subject to fear that DOT approval will be overturned and the acquisition undone. Out of respect for the administrative procedure described in the Federal Aviation Act and the exclusive review provisions set forth therein, this court must uphold the finality of the July 31, 1986 order.

At the same time, the court refused to dismiss ITA's other antitrust claims and did not restrict the type of remedies available should plaintiff prevail on them.

More than five months later the Supreme Court decided *American Stores.* The case stemmed from a proposed merger between two large supermarket chains in California: The Federal Trade Commission (FTC) worked out a negotiated settlement between the merger candidates, and prior to the merger the parties agreed to abide by a consent order. After the FTC approved the merger the State of California filed an antitrust action challenging the merger under § 1 of the Sherman Act and §§ 7 and 16 of the Clayton Act. In its prayer for relief, California sought, among other things, **[*4]** a preliminary injunction requiring the merging parties to hold and operate the supermarket chains separately from one another pending final adjudication and a permanent injunction ordering divestiture.

The district court granted California's motion for a temporary restraining order and later entered a preliminary injunction. On appeal the Ninth Circuit reversed, finding that the preliminary injunction had the same effect as an order of divestiture and that "divestiture is not an available remedy in private actions under § 16 of the Clayton Act." *California v. American Stores Co., 872 F.2d 837, 844 (9th Cir. 1989)*, *reversed*, *110 S. Ct. 1853 (1990)*. The Supreme Court granted certiorari to resolve a split among the circuits on this issue and, after an analysis of the text and legislative history of the Clayton Act, determined that in a private antitrust action divestiture may be an appropriate remedy. The Court drew a comparison between private actions under § 16 and government prosecutions under § 15 of the Clayton Act, in which divestiture is an accepted remedy, and found no reason to prohibit the remedy of divestiture in private actions. ***HN1***[] "Divestiture has been called the most **[*5]** important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *American Stores, 110 S. Ct. at 1859* (quoting *United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 329-31 (1961)* (footnotes omitted)).

The Court in *American Stores* did not address the issue of whether divestiture is available in a private action in which violations of § 1 and § 2 of the Sherman Act are alleged. The Court had no need to do so because the district court found that California had proved a prima facie violation of § 7 of the Clayton Act. This court's prior Memorandum and Order also stated no conclusions about possible remedies for Sherman Act violations. The court ruled only that plaintiff had established issues for trial regarding defendants' alleged Sherman Act violations and, on the other hand, that ITA's challenge to the Republic acquisition itself under § 7 of the Clayton Act was barred by collateral estoppel. The question remains whether ITA may seek divestiture of Republic as a remedy for any Sherman Act violations that it may prove.

ITA's claims for injunctive **[*6]** relief are rooted in § 16 of the Clayton Act, which states in part:

HN2[] Any person, firm, corporation, or association Shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . .

15 U.S.C. § 26. ***HN3***[] The "antitrust laws" referred to in § 16 include provisions of the Sherman Act. *See* *15 U.S.C. § 12*. The language of § 16 makes no distinction between actions alleging violations of the Sherman Act and actions challenging a merger under § 7 of the Clayton Act. Nor does § 16 place limitations on the types of injunctive relief available.

In *American Stores* the Supreme Court explained that § 16 "should be construed generously and flexibly pursuant to principles of equity." *110 S. Ct. 1866*. The Court also stated a canon of statutory construction that conforms to this perspective: ***HN4***[] "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's **[*7]** jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* (quoting *Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)* and *Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946))*. Considering the absence of limiting language in § 16, the court concludes that divestiture of Republic is available as a remedy for plaintiff's Sherman Act claims.

This conclusion is supported by the history of the Sherman Act. In the two most famous antitrust cases prior to enactment of the Clayton Act the government sought to break up the oil trust and the tobacco trust. In *Standard Oil v. United States, 221 U.S. 1 (1911)*, the Supreme Court affirmed the trial court's finding of a Sherman Act violation and approved the injunctive relief granted by the district court, essentially ordering divestiture by Standard Oil of New Jersey of the stock that it held in a number of other Standard Oil companies. In a similar case against the American Tobacco Company the Supreme Court reversed the lower court for not granting a broad enough remedy and directed the trial court to dissolve the monopolistic combination of tobacco companies. *United States v. American* ***[*8]*** *Tobacco Co., 221 U.S. 106 (1911)*. These cases were prosecuted by the government before the

Clayton Act established a private cause of action for injunctive relief. Nevertheless, they illustrate the broad remedial power possessed by federal courts in antitrust cases.

Defendants' opposition to this motion does not address the availability of divestiture as a remedy for Sherman Act violations. Instead, defendants contend that plaintiff should not be allowed to undo a merger that was approved by the Department of Transportation. In a sense defendants are correct because plaintiff's claim challenging the Republic acquisition has been dismissed and will not be resurrected. A distinction must be made, however, between the § 7 claim precluded by collateral estoppel and the Sherman Act claims which remain. Collateral estoppel may not be used to prevent ITA from obtaining relief to which it may be entitled if ITA prevails on a valid Sherman Act claim.

Obviously, any discussion about proper remedies in this case is premature. ITA must first prove its claims. Then the court will decide the appropriate remedy using equitable principles. ***HN5***[] "Whether divesture is proper or not in any particular case **[*9]** is a matter which must depend upon a balancing of the equities in each instance." *Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 797 (S.D. Tex. 1971)*, *aff'd*, *476 F.2d 989 (5th Cir. 1973)*. Notwithstanding the teaching of *American Stores,* ***HN6***[] divestiture is a severe remedy that is to be avoided when other forms of injunctive relief can adequately protect against further anticompetitive conduct without the same degree of economic dislocation. *Id.*

Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for reconsideration is GRANTED insofar as it seeks a determination that divestiture is an available remedy for plaintiff's remaining antitrust claims but DENIED to the extent that it seeks to resurrect plaintiff's challenge to the Republic acquisition under § 7 of the Clayton Act.

Dated: June 16, 1990.

Kansas v. Utilicorp United, Inc.

Supreme Court of the United States

April 16, 1990, Argued ; June 21, 1990, Decided

No. 88-2109

Reporter

497 U.S. 199 *; 110 S. Ct. 2807 **; 111 L. Ed. 2d 169 ***; 1990 U.S. LEXIS 3293 ****; 58 U.S.L.W. 4898; 1990-1 Trade Cas. (CCH) P69,064

KANSAS ET AL. v. UTILICORP UNITED INC.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Disposition: *866 F. 2d 1286*, affirmed.

Core Terms

overcharge, purchasers, indirect, customers, consumers, antitrust, regulators, Shoe, cases, costs, rates, anti trust law, parens patriae, damages, district court, apportionment, natural gas, passthrough, pass-on, prices, suits, public utility, cost-plus, suppliers, complicate, provable, multiple recoveries, Clayton Act, inflated, pipeline

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN2[] **Private Actions, Purchasers**

The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN3[] **Private Actions, Purchasers**

The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN4[] **Private Actions, Purchasers**

The task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN5[] **Private Actions, Purchasers**

The Illinois Brick rule serves to eliminate multiple recoveries.

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] **Antitrust & Trade Law, Clayton Act**

Interpretation of § 4 of the Clayton Act, *15 U.S.C.S. § 15*, must promote the vigorous enforcement of the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN7[] **Private Actions, Purchasers**

A court should not carve out exceptions to the direct purchaser rule for particular types of markets. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN8[] **Private Actions, Purchasers**

The process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the Hanover Shoe rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same massive evidence and complicated theories into treble-damages proceedings, albeit at a somewhat higher level of generality.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN9[] **Private Actions, Purchasers**

In a cost-plus contract situation, the direct purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10[] **Public Enforcement, State Civil Actions**

See *15 U.S.C.S. § 15c(a)(1)*.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN11[] **Clayton Act, Remedies**

Section 4C of the Clayton Act, *15 U.S.C.S. § 15*, did not establish any new substantive liability. Instead, it simply created a new procedural device -- parens patriae actions by states on behalf of their citizens -- to enforce existing rights of recovery under § 4 of the Clayton Act. Section 4 affords relief only to a person injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15(a)*. State attorneys general may bring actions on behalf of consumers who have such an injury.

Lawyers' Edition Display

Decision

Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under 4 of Clayton Act against natural gas suppliers allegedly overcharging utility.

Summary

Section 4 of the Clayton Act (*15 USCS 15*) authorizes "any person who shall be injured" by an antitrust violation to sue for treble damages, costs, and attorneys' fees; 4C(a)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (*15 USCS 15c(a)(1)*) authorizes state attorneys general to bring parens patriae actions on behalf of natural persons residing in their states to secure monetary relief for injury sustained by such persons as a result of antitrust violations. Alleging that certain natural gas producers and a gas pipeline company had conspired to inflate gas prices in violation of the federal antitrust laws, various plaintiffs--including public utility companies which purchased gas from the pipeline company in order to service customers in Kansas and Missouri, and the states of Kansas and Missouri, acting in part as parens patriae on behalf of residential consumers who purchased gas from the utilities--brought actions under 4 against the producers and the pipeline company in the United States District Court for the District of Kansas. The producers and the pipeline company asserted that the utilities lacked standing to bring such an action under 4, because they had passed all of the allegedly illegal price increase on to their customers and thus had suffered no antitrust "injury." The District Court, however, (1) interpreted United States Supreme Court precedents as holding that direct purchasers from antitrust violators suffer injury for purposes of 4 to the full extent of an alleged overcharge even if all or part of that overcharge is passed on to customers, whereas those customers, as indirect purchasers, suffer no such injury; (2) granted the plaintiff utilities' motion for partial summary judgment disallowing the "pass-on" defense; and (3) treating the utilities' motion as a motion to dismiss the states' parens patriae claims, granted that motion (*695 F Supp 1109*). On the states' interlocutory appeal, the United States Court of Appeals for the Tenth Circuit affirmed the dismissals (*866 F2d 1286*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Kennedy, J., joined by Rehnquist, Ch. J., and Stevens, O'Connor, and Scalia, JJ., it was held that (1) when suppliers overcharge a regulated public utility for natural gas, in violation of the federal antitrust laws, and the utility passes on the overcharge to its customers, only the utility has a cause of action under 4, because only the utility, as a direct purchaser, has suffered injury within the meaning of 4; (2) the direct-purchaser rule's purpose of avoiding the complications of apportioning damages is applicable in a case involving a regulated utility, even though such utilities allegedly can pass on all of an overcharge to their customers, because the utility remains an injured party and must remain in the suit, given that the utility might have been able to raise its rates in the absence of increased costs and also that the pass-on process may take time; (3) an exception to the rule may be unnecessary, as state regulators might require utilities to pass on at least some of the recovery obtained in a 4 suit; (4) even though bringing all classes of purchasers together in a single lawsuit may reduce the risk of multiple recovery which the rule was intended to eliminate, this reduction comes at too great a cost in complexity of litigation; (5) an exception to the rule in utility cases would not better secure the goal of vigorous antitrust enforcement, as (a) utilities do not lack incentive to prosecute 4 actions and in fact have a record of vigorous antitrust enforcement, whereas (b) consumers may lack the ability to detect improper pricing by suppliers, and (c) state attorneys general can bring parens patriae actions on behalf of only resident natural persons and may hesitate to bring suit in cases involving smaller and speculative harm to consumers; (6) although a possible exception to the rule has been suggested if an indirect purchaser buys under a pre-existing cost-plus contract, such an exception would not apply in the case at hand, where the utility customers made no commitment to purchase any particular quantity and the utility had no guarantee of a particular profit, and the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception; and (7) 4C(a)(1) does not authorize a parens patriae action in such a case, because the utility is the injured party.

White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissented, expressing the view that the case at hand raises none of the concerns which underlie the direct-purchaser rule, and that the rule should not be applied so as to deny the states standing to sue, because (1) the courts below assumed that there had been a perfect and provable pass-on of the allegedly illegal overcharge, and the issue should be decided on that basis; (2) where it is clear that the entire overcharge is passed through, the extent of the injury to indirect purchasers can easily be determined by examining their utility bills; (3) the problem of separating the price increase attributable to anticompetitive conduct from the price increase attributable to legitimate factors is not peculiar to indirect-purchaser suits; (4) granting standing in the case at hand would enhance enforcement of the antitrust laws, as, given that the pass-through of the overcharge is complete and easily demonstrated, the indirect purchasers--and the states in their parens patriae capacity--can readily discover their injury, whereas, though the utility could sue to recover lost profits, it has no incentive to seek a recovery of the overcharge which it has passed on; and (5) where there is a perfect and provable pass-through, there is no danger of multiple recovery of damages for the same anticompetitive conduct.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- direct-purchaser rule -- public utilities -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

When suppliers overcharge a regulated public utility for natural gas, in violation of the federal antitrust laws, and the utility passes on the overcharge to its customers, only the utility has a cause of action under 4 of the Clayton Act (*15 USCS 15*)--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--because only the utility, as a direct purchaser, has suffered injury within the meaning of 4; thus, a state may not, as parens patriae, maintain an action against the suppliers on behalf of the utility's customers, who as indirect purchasers have not suffered injury for purposes of 4. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- apportionment of costs -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]

No exception to the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of 4 of the Clayton Act (*15 USCS 15*)--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--is warranted in cases where the direct purchasers are regulated public utilities, as the rule's purpose of avoiding the need to apportion overcharges between direct and indirect purchasers is applicable in such cases, despite the argument that a utility which passes on its costs pursuant to state regulation allegedly passes on the entire overcharge and thus allegedly obviates litigation over the apportionment of the overcharge, because (1) an overcharge may injure a utility, apart from lost business, even if the utility raises its rates to offset the increased costs, since the utility might have been able to raise its rates in the absence of increased costs but will not enjoy the benefit of a raise because of those costs; (2) the existence of state regulation does not simplify the problem of proving what the direct purchaser could have done in the absence of the overcharges, but instead adds another level of complexity, as a court examining such a question will have to determine what state regulators would allow, a case-by-case inquiry turning on the intricacies of state law; (3) the existence of such potential injury requires that the utility remain in the case, so that the addition of indirect purchasers would require the development of an apportionment formula; (4) apportionment may also be necessary because, even if a utility can pass on 100 percent of its costs at some point, the regulatory process and other factors may delay the passing-on process and force the utility to pay some of the increased costs in the interim; and (5) the regulation of utilities may make an exception to the direct-purchaser rule unnecessary, as state regulators might require utilities to pass on at least some of the recovery obtained in a 4 suit. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- multiple recovery -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]***LEdHN[3C]***[] [3C]

No exception to the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of 4 of the Clayton Act (*15 USCS 15*)--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--is warranted in cases where the direct purchasers are regulated public utilities, even though bringing all classes of direct and indirect purchasers together in a single lawsuit may reduce the risk of multiple recovery which the rule is intended to eliminate, because (1) that reduction comes at too great a cost, as expansion of the case to bring all of the potential plaintiffs together risks the confusion, cost, and error inherent in complex litigation, and (2) such expansion would serve little purpose, as state regulatory law may provide appropriate relief to consumers even if they cannot sue under 4. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- enforcement incentives -- > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]***LEdHN[4C]***[] [4C]

Although the argument for an exception, in cases involving antitrust violations against regulated public utilities, to the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of 4 of the Clayton Act (*15 USCS 15*)--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--might be stronger if it were shown that interpreting 4 so as to allow such an exception would better secure the goal of vigorous enforcement of the antitrust laws, no such exception is warranted by such utilities' supposed lack of incentive to prosecute 4 actions, even though utilities allegedly can pass on their excess costs to customers and allegedly may be required to pass on damages recovered in a 4 action, since (1) utilities may bring 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges onto their customers; (2) no authority has been cited to the effect that a utility winning a 4 action would have to pay the entire exemplary portion of its treble damages award to its customers; and (3) utilities have an established record of diligent antitrust enforcement, whereas (a) consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers, and (b) state attorneys general, though possessing greater expertise, may hesitate to bring parens patriae actions in cases involving smaller and more speculative harm to consumers and, in any event, can bring such actions on behalf of only resident natural persons. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- exceptions to direct-purchaser rule -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]***LEdHN[5C]***[] [5C]

Although the rationales underlying the rule that only a direct purchaser from an alleged antitrust violator suffers an injury within the meaning of 4 of the Clayton Act (*15 USCS 15*)--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--will not apply with equal force in all cases, no exceptions to the rule should be carved out for particular types of markets, since the possibility of allowing exceptions, even in meritorious cases, would undermine the rule.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- cost-plus contracts -- > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

Although a departure from the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of 4 of the Clayton Act (*15 USCS 15*)--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--may be necessary with regard to a case in which an indirect purchaser buys under a pre-existing cost-plus contract, where the direct purchaser will bear no portion of an overcharge and otherwise suffer no injury, such a departure does not justify an exception to the rule in a particular case where suppliers have allegedly overcharged a regulated public utility for natural gas and states seek to bring parens patriae actions on behalf of the utility's customers, since (1) the utility customers in question made no commitment to purchase any particular quantity of gas, and the utility itself had no guarantee of any particular profit; (2) even though the utility raised its prices to cover its costs, its precise injury cannot be ascertained, because it is not known what might have happened in the absence of an overcharge; and

(3) even if the utility customers have a highly inelastic demand for gas, the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- parens patriae -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]***LEdHN[7C]***[] [7C]

State attorneys general may not maintain an action under 4 of the Clayton Act (*15 USCS 15*)--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--on behalf of public utility customers who have allegedly borne the burden of inflated natural gas prices imposed on a utility by its suppliers, even though state attorneys general are authorized under 4C(a)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (*15 USCS 15c(a)(1)*) to bring actions as parens patriae on behalf of natural persons residing in their states who have suffered antitrust injuries, and even though state attorneys general may thus bring actions on behalf of consumers who have suffered injuries within the meaning of 4, because in such a case, it is the utility that is the injured party under the antitrust laws, and the predicate for a parens patriae action has not been established. (White, Brennan, Marshall, and Blackmun, JJ., dissented in part from this holding.)

Syllabus

The respondent -- an investor-owned public utility operating in the petitioner States -- and other utilities and natural gas purchasers filed suit in the District Court against a pipeline company and five gas producers under § 4 of the Clayton Act, which authorizes any person injured by a violation of the antitrust laws to sue for treble damages. The utilities alleged that the defendants had unlawfully conspired to inflate the price of gas that they supplied to the utilities, and sought treble damages for both the amount overcharged and the decrease in sales to customers caused by the overcharge. The petitioner States filed separate § 4 actions in the District Court against the same defendants for the alleged antitrust violation, asserting, *inter alia, parens* **[****2]** *patriae* claims on behalf of all natural persons residing in the States who had purchased gas from any utility at inflated prices. The court consolidated all of the actions and granted the utilities partial summary judgment with respect to the defendants' defense that, since the utilities had passed through all of the alleged overcharge to their customers, the utilities lacked standing because they had suffered no antitrust injury as required by § 4. In light of its conclusion that, under *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224*, and *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061*, the utilities had suffered antitrust injury as direct purchasers but their customers, as indirect purchasers, had not, the court dismissed the States' *parens patriae* claims. The Court of Appeals affirmed the dismissals.

Held: When suppliers violate antitrust laws by overcharging a public utility for natural gas, and the utility passes on the overcharge to its customers, only the utility has a cause of action under § 4 because it alone has suffered antitrust **[****3]** injury. Pp. 206-219.

1. Three rationales underlie the indirect purchaser rule adopted in *Hanover Shoe* and *Illinois Brick:* (1) establishing the amount of an overcharge shifted to indirect purchasers would normally prove insurmountable in light of the wide range of considerations influencing a company's pricing decisions; (2) a pass-on defense would reduce the effectiveness of § 4 actions by diminishing the recovery available to any potential plaintiff; and (3) allowing suits by indirect purchasers would risk multiple liability because the alleged antitrust violators could not use a pass-on defense in an action by the direct purchasers. Pp. 206-208.

2. The aforesaid rationales compel the conclusion that no exception to the indirect purchaser rule should be made for suits involving regulated public utilities that pass on all of their costs to their customers. Pp. 208-217.

(a) Allowing indirect suits in such cases might necessitate complex cost apportionment calculations, since a utility bears at least some portion of a passed-on overcharge to the extent that it could have sought and gained state permission to raise its rates in the absence of the overcharge, cf. **[****4]** *Hanover Shoe, supra, at 493*, and n.9, and since various factors, such as the need to seek regulatory approval, may delay the passing-on process and thereby require the utility, in the interim, to bear some of the overcharge's costs in the form of lower earnings. Here, the certified question leaves unclear whether the respondent could have raised its prices prior to the overcharge, whether it had passed on "most or all" of its costs at the time of its suit, and even the means by which the pass through occurred. Proof of these preliminary issues, which are irrelevant to the defendants' liability, would turn upon the intricacies of state law, and, if it were determined that respondent had borne some of the costs, would require the adoption of an apportionment formula, the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid. Moreover, creating an exception in such cases would make little sense when, in light of all its difficulty, its practical significance is diminished by the fact that some States require utilities to pass on at least some of the recovery obtained in a § 4 suit to their customers. Pp. 208-212.

(b) Even if the risk of **[****5]** multiple recoveries would be eliminated by allowing the petitioners to recover only the amount of the overcharge and the respondent to recover only damages for its lost sales in a single lawsuit, the additional complexity thereby introduced into a case that already has become quite complicated argues strongly for retaining the indirect purchaser rule. See *Illinois Brick, 431 U.S. at 731, n.11*. Pp. 212-213.

(c) Allowing indirect suits by utility customers would not better promote the goal of vigorous enforcement of the antitrust laws. The petitioners' argument that utilities lack incentives to sue overcharging suppliers is unpersuasive, since utilities may bring § 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges on to their customers; since there is no authority indicating that utilities, which may have to pass on § 4 damages recovered, would also have to pay the entire exemplary portion of these damages to customers; and since utilities, in fact, have an established record of diligent and successful antitrust enforcement. On the other hand, indirect purchaser actions might be ineffective because **[****6]** consumers may lack the expertise and experience necessary to detect improper pricing by a utility's suppliers, while state attorneys general may hesitate to exercise the *parens patriae* device in cases involving smaller, more speculative harm to consumers, and, in any event, may sue only on behalf of resident natural persons, leaving nonresidents and small businesses to fend for themselves. Pp. 214-216.

(d) Although the rationales of *Hanover Shoe* and *Illinois Brick* may not apply with equal force in all instances, ample justifications exist for the Court's stated decision not to carve out exceptions to the indirect purchaser rule for particular types of markets. *Illinois Brick, 431 U.S. at 744-745*. Even assuming that any economic assumptions underlying the rule might be disproved in a specific case, it would be an unwarranted and counterproductive exercise to litigate a series of exceptions. Pp. 216-217.

3. The suggestion in *Hanover Shoe, supra, at 494*, and *Illinois Brick, supra, at 736*, that a departure from the indirect purchaser rule may be necessary when such a purchaser buys under a pre-existing cost-plus **[****7]** contract does not justify an exception in this case, since the respondent did not sell gas to its customers under such a contract. Even if an exception could be created for situations that merely resemble those governed by such contracts, that exception could not be applied here, since there is no certainty that the respondent has borne no portion of the overcharge and otherwise suffered no injury. Pp. 217-218.

4. Section 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 -- which authorizes States to bring *parens patriae* actions on behalf of resident natural persons to secure monetary relief for property injury sustained by reason of certain antitrust violations -- does not authorize the petitioners to sue on behalf of consumers notwithstanding the consumers' status as indirect purchasers. Section 4C did not establish any new substantive liability, but simply created a new procedural device to enforce existing rights of recovery under § 4 of the Clayton Act, *Illinois Brick, 431 U.S. at 734, n.14*, which rights belong to the respondent in this case. Pp. 218-219.

Counsel: Thomas J. Greenan argued the cause for petitioners. With him on the briefs **[****8]** were Robert T. Stephan, Attorney General of Kansas, James E. Hurt, William L. Webster, Attorney General of Missouri, Donald D. Barry, William E. Quirk, Russell S. Jones, Jr., and Thomas A. Sheehan.

Floyd R. Finch, Jr., argued the cause for respondent. With him on the brief was Sally R. Burger.

Lawrence S. Robbins argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General Starr, Assistant Attorney General Rill, Deputy Solicitor General Roberts, Deputy Assistant Attorney General Boudin, Stephen J. Marzen, Catherine G. O'Sullivan, and Jay C. Shaffer. *

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* Briefs of amici curiae urging reversal were filed for the State of Illinois by Neil F. Hartigan, Attorney General, Michael J. Hayes, Deputy Attorney General, Robert Ruiz, Solicitor General, and John W. McCaffrey and Christine Rosso, Senior Assistant Attorneys General, Bernard Nash, George Kaufmann, and Peter J. Kadzik; for the State of Maryland et al. by J. Joseph Curran, Jr., Attorney General of Maryland, and Michael F. Brockmeyer, Ellen S. Cooper, and Alan M. Barr, Assistant Attorneys General, Don Siegelman, Attorney General of Alabama, Douglas B. Baily, Attorney General of Alaska, and Thomas E. Wagner, Assistant Attorney General, Robert K. Corbin, Attorney General of Arizona, Alison J. Butterfield, John Steven Clark, Attorney General of Arkansas, John K. Van de Kamp, Attorney General of California, Andrea Sheridan Ordin, Chief Assistant Attorney General, and Sanford N. Gruskin, Assistant Attorney General, Duane Woodard, Attorney General of Colorado, Clarine Nardi Riddle, Attorney General of Connecticut, and Robert M. Langer and Steven M. Rutstein, Assistant Attorneys General, Charles M. Oberly III, Attorney General of Delaware, Robert A. Butterworth, Attorney General of Florida, Michael J. Bowers, Attorney General of Georgia, and George P. Shingler, Senior Assistant Attorney General, Warren Price III, Attorney General of Hawaii, and Robert A. Marks and Ted Gamble Clause, Deputy Attorneys General, James T. Jones, Attorney General of Idaho, Linley E. Pearson, Attorney General of Indiana, and Donna S. Nichols, Deputy Attorney General, Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Frederic J. Cowan, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and Jesse James Marks and Anne F. Benoit, Assistant Attorneys General, James E. Tierney, Attorney General of Maine, and Stephen L. Wessler, Deputy Attorney General, James M. Shannon, Attorney General of Massachusetts, and George K. Weber and Thomas M. Alpert, Assistant Attorneys General, Frank Kelly, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Stephen P. Kilgriff, Deputy Attorney General, and Thomas F. Pursell, Assistant Attorney General, Mike Moore, Attorney General of Mississippi, Marc Racicot, Attorney General of Montana, Robert M. Spire, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, Brian McKay, Attorney General of Nevada, John P. Arnold, Attorney General of New Hampshire, and Terry L. Robertson, Senior Assistant Attorney General, Robert J. Del Tufo, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Lloyd A. Constantine, Assistant Attorney General, Lacy H. Thornburg, Attorney General of North Carolina, James C. Gulick, Special Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, Nicholas J. Spaeth, Attorney General of North Dakota, and David W. Huey, Assistant Attorney General, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Eugene F. Waye, Chief Deputy Attorney General, and Carl S. Hisiro, Senior Deputy Attorney General, James E. O'Neil, Attorney General of Rhode Island, T. Travis Medlock, Attorney General of South Carolina, Roger A. Tellinghuisen, Attorney General of South Dakota, and Jeffrey P. Hallem, Assistant Attorney General, Charles W. Burson, Attorney General of Tennessee, and Barry Turner, Assistant Attorney General, Jim Mattox, Attorney General of Texas, Mary F. Keller, First Assistant Attorney General, and Allene D. Evans and Donna L. Nelson, Assistant Attorneys General, R. Paul Van Dam, Attorney General of Utah, Jeffrey L. Amestoy, Attorney General of Vermont, and Julie Brill, Assistant Attorney General, Mary Sue Terry, Attorney General of Virginia, and Frank Seales, Assistant Attorney General, Kenneth O. Eikenberry, Attorney General of Washington, and Carol A. Smith, Assistant Attorney General, Roger W. Thompkins, Attorney General of West Virginia, and Dan Huck, Deputy Attorney General, Donald J. Hanaway, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General, Joseph B. Meyer, Attorney General of Wyoming, and Robert H. Henry, Attorney General of Oklahoma; for the National Conference of State Legislatures et al. by Benna Ruth Solomon, Beate Bloch, Robert L. Wald, and Richard M. Rindler; and for Nancy Allevato et al. by Richard E. Zuckerman, David B. Jaffe, Robert S. Harrison, and David N. Zacks.

Jeffrey I. Zuckerman, Daniel J. Popeo, Paul D. Kamenar, and John C. Scully filed a brief for the Washingon Legal Foundation as amicus curiae urging affirmance.

Judges: KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, post, p. 219.

Opinion by: KENNEDY

Opinion

[*203] **[***178]** **[**2810]** JUSTICE KENNEDY delivered the opinion of the Court.

LEdHN[1A][] [1A]Section 4 of the Clayton Act, 38 Stat. 731, as amended, *15 U. S. C. § 15*, authorizes any person injured by a violation of **[*204]** the antitrust laws to sue for treble damages, costs, and an attorney's fee. We must decide who may sue under § 4 when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers. Consistent with *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, and *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, we hold that only the utility has the cause of action because it alone has suffered injury **[****10]** within the meaning of § 4.

I

The respondent, UtiliCorp United Inc., an investor-owned public utility operating in Kansas and western Missouri, purchased natural gas from a pipeline company for its own use and for resale to its commercial and **[**2811]** residential customers. Together with a second utility and several other gas purchasers, the respondent sued the pipeline company and five gas production companies in the United States District Court for the District of Kansas. The utilities alleged that the defendants had conspired to inflate the price of their gas in violation of the antitrust laws. They sought treble damages, pursuant to § 4 of the Clayton Act, for both the amount overcharged by the pipeline company and the decrease in sales to their customers caused by the overcharge.

The petitioners, the States of Kansas and Missouri, initiated separate § 4 actions in the District Court against the same defendants for the alleged antitrust violation. Acting as *parens patriae*, the petitioners asserted the claims of all natural persons residing within Kansas and Missouri who had purchased gas from any utility at inflated prices. They also **[*205]** asserted claims as **[****11]** representatives of state agencies, municipalities, and other political subdivisions that had purchased gas from the defendants. The District Court consolidated all of the actions.

The defendants, in their answer, asserted that the utilities lacked standing under § 4. They alleged that, pursuant to state and municipal regulations and tariffs filed with **[***179]** state regulatory agencies, the utilities had passed through the entire wholesale cost of the natural gas to their customers. As a result, the defendants contended, the utility customers had paid 100 percent of the alleged overcharge, and the utilities had suffered no antitrust injury as required by § 4.

The utilities moved for partial summary judgment with respect to this defense, and the District Court granted their motion. The court ruled that our decisions in *Hanover Shoe* and *Illinois Brick* controlled its interpretation of § 4. It read these cases to hold that a direct purchaser from an antitrust violator suffers injury to the full extent of an illegal overcharge even if it passes on some or all of the overcharge to its customers. The District Court concluded that utilities, as direct purchasers, had suffered **[****12]** antitrust injury, but that their customers, as indirect purchasers, had not.

In light of its ruling, the District Court chose to treat the partial summary judgment motion as a motion to dismiss the petitioners' *parens patriae* claims. It then granted this motion but allowed the petitioners to take an interlocutory appeal under *28 U. S. C. § 1292(b)*. It certified the following question to the Court of Appeals:

> "In a private antitrust action under *15 U. S. C. § 15* involving claims of price fixing against the producers of natural gas, is a State a proper plaintiff as *parens patriae* for its citizens who paid inflated prices for natural gas,

> when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens **[*206]** of the State?" *In re Wyoming Tight Sands Antitrust Cases, 695 F. Supp. 1109, 1120 (Kan. 1988)*.

The Court of Appeals answered the question in the negative. It agreed with the District Court that *Hanover Shoe* and *Illinois Brick* **[****13]** required dismissal of the *parens patriae* claims. See *In re Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286, 1294 (CA10 1989)*. We granted certiorari to resolve a conflict between this decision and *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., 852 F.2d 891 (CA7 1988)* (en banc). *493 U.S. 1041 (1990)*. We now affirm.

II

Section 4 of the Clayton Act provides in full:

> ***HN1***[] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, **[**2812]** and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U. S. C. § 15(a)*.

As noted by the District Court and the Court of Appeals, we have applied this section in two cases involving allegations that a direct purchaser had passed on an overcharge **[****14]** to its customers.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra*, Hanover **[***180]** alleged that United had monopolized the shoe manufacturing machinery industry in violation of *§ 2* of the Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. § 2*. It sought treble damages under § 4 of the Clayton Act for overcharges paid in leasing certain machinery from United. United defended, in part, on the ground that Hanover had passed on the overcharge to its customers and, as a result, had suffered no injury. We rejected the defense for two reasons. First, noting that a wide range of considerations may influence a company's pricing decisions, we concluded that **[*207]** establishing the amount of an overcharge shifted to indirect purchasers "would normally prove insurmountable." *392 U.S. at 493*. Second, we reasoned that a pass-on defense would reduce the effectiveness of § 4 actions by diminishing the recovery available to any potential plaintiff. See *id., at 494*.

In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, we applied these considerations **[****15]** to reach a similar result. The State of Illinois sued Illinois Brick and other concrete block manufacturers for conspiring to raise the cost of concrete blocks in violation of *§ 1* of the Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. § 1*. We ruled that the State had suffered no injury within the meaning of § 4 because Illinois Brick had not sold any concrete blocks to it. The company, instead, had sold the blocks to masonry subcontractors, who in turn had sold them to the State's general contractors. We decided that, because Illinois Brick could not use a pass-on defense in an action by direct purchasers, it would risk multiple liability to allow suits by indirect purchasers. See *431 U.S. at 730-731*. We declined to overrule *Hanover Shoe* or to create exceptions for any particular industries. See *431 U.S. at 735-736, 744-745*.

LEdHN[1B][] [1B]Like the State of Illinois in *Illinois Brick*, the consumers in this case have the status of indirect purchasers. In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They **[****16]** bought their gas from the utilities, not from the suppliers said to have conspired to fix the price of the gas. Unless we create an exception to the direct purchaser rule established in *Hanover Shoe* and *Illinois Brick*, any antitrust claim against the defendants is not for them, but for the utilities to assert.

LEdHN[2A][] [2A] ***LEdHN[3A]***[] [3A] ***LEdHN[4A]***[] [4A] ***LEdHN[5A]***[] [5A] ***LEdHN[6A]***[] [6A] ***LEdHN[7A]***[] [7A]The petitioners ask us to allow them to press the consumers' claims for three reasons. First, they assert that none of the rationales underlying *Hanover Shoe* or *Illinois Brick* exist in cases involving regulated public utilities. Second, they argue that we should apply an exception, suggested in **[*208]** *Illinois Brick*, for actions based upon cost-plus contracts. Third, they maintain that § 4C **[****17]** of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, as amended, *15 U. S. C. § 15c*, authorizes them to assert claims on behalf of utility customers even if the customers could not assert any claims themselves. Affirming the Court of Appeals, we reject each of these contentions in turn.

III

LEdHN[2B][] [2B] ***LEdHN[3B]***[] [3B] ***LEdHN[4B]***[] [4B] ***LEdHN[5B]***[] [5B]The petitioners assert **[***181]** that we should allow indirect purchaser suits in cases involving regulated public utilities that pass on 100 percent of their costs to their customers. They maintain that our concerns in *Hanover Shoe* and *Illinois Brick* about the difficulties of apportionment, the risk of multiple recovery, and the diminution of incentives for private antitrust enforcement would not exist in such cases. We disagree. Although the rationales **[**2813]** of *Hanover Shoe* and *Illinois Brick* may not apply with equal **[****18]** force in all instances, we find it inconsistent with precedent and imprudent in any event to create an exception for regulated public utilities.

A

LEdHN[2C][] [2C]***HN2***[] The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers. See *Hanover Shoe, 392 U.S. at 493*;*Illinois Brick, 431 U.S. at 740-742*;*Blue Shield of Va. v. McCready, 457 U.S. 465, 475, n.11, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. The petitioners find the rule unnecessary, in this respect, when a utility passes on its costs to its customers pursuant to state regulations or tariffs filed with a utility commission. In such cases, they assert, the customers pay the entire overcharge, obviating litigation over its apportionment. They maintain that they can prove the exact injury to the residential customers whom they represent because the respondent made periodic public filings showing the volume and price of gas that it sold to these **[****19]** consumers. They ask us to allow them to sue for **[*209]** the entire amount of the overcharge and to limit the respondent's recovery to damages for its lost business.

The petitioners have oversimplified the apportionment problem in two respects. First, an overcharge may injure a utility, apart from the question of lost business, even if the utility raises its rates to offset its increased costs. As we explained in *Hanover Shoe:*

> ***HN3***[] "The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not **[****20]** he was previously exercising it." *392 U.S. at 493, n.9*.

In other words, to show that a direct purchaser has borne no portion of an overcharge, the indirect purchaser would have to prove, among other things, that the direct purchaser could not have raised its rates prior to the overcharge.

In *Hanover Shoe*, however, we decided not to allow proof of what the direct purchaser might have done because of the "nearly insuperable difficulty" of the issue. *Id., at 493*. The petitioners assume that the presence **[***182]** of state regulation would make the proof less difficult here. We disagree. The state regulation does not simplify the problem but instead imports an additional level of complexity. To decide whether a utility has borne an overcharge, a court would have to consider not only the extent to which market conditions would have allowed the utility to raise its rates prior to the overcharge, as in the case of an unregulated business, but also what the state regulators would have allowed. In particular, **[*210]** to decide that an overcharge did not injure a utility, a court would have to determine that the State's regulatory schemes **[****21]** would have barred any rate increase except for the amount reflected by cost increases. Proof of this complex preliminary issue, one irrelevant to the liability of the defendant, would proceed on a case-by-case basis and would turn upon the intricacies of state law.

From the certified question in this case, we do not know whether the respondent could have raised its prices prior to the overcharge. Its customers may have been willing to pay a greater price, and the Kansas and Missouri regulators may have allowed a rate increase based on factors other than strict costs. See **[**2814]** *Midwest Gas Users Assn. v. State Corporation Comm'n, 5 Kan. App. 2d 653, 661, 623 P.2d 924, 931 (1981)*; *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n, 706 S.W.2d 870, 879-880 (Mo. App. 1985)*. To the extent that the respondent could have sought and gained permission to raise its rates in the absence of an overcharge, at least some portion of the overcharge is being borne by it; whether by overcharge or by increased rates, consumers would have been paying more for natural gas than they had been paying in the past. Because of this potential **[****22]** injury, the respondent must remain in the suit. If we were to add indirect purchasers to the action, we would have to devise an apportionment formula. This is the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid.

Second, difficult questions of timing might necessitate apportioning overcharges if we allowed indirect suits by utility customers. Even if, at some point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process. Some utilities must seek approval from the governing regulators prior to raising their rates. Other utilities, pursuant to purchase gas adjustment clauses (PGA's) filed with state regulators, may adjust their rates to reflect changes in their wholesale costs according to prearranged formulas without seeking regulatory approval in **[*211]** each instance. Yet, even utilities that use PGA's often encounter some delay. See Brief for State of Illinois as *Amicus Curiae* 9, n.11 (describing the various time lags under a typical PGA between the increase in a utility's wholesale costs and the rise in consumer rates). During any period in which a utility's costs rise before it may **[****23]** adjust its rates, the utility will bear the costs in the form of lower earnings. See S. Breyer, Regulation and its Reform 48-49 (1982). Even after the utility raises its rates, moreover, the pass-through process may take time to complete. During this time, the utility and its customers each would pay for some of the increased costs.

In this case, we could not deprive the respondent of its § 4 action without first determining that the passing-on **[***183]** process in fact had allowed it to shift the entire overcharge to its customers. The certified question, however, leaves unclear whether the respondent had passed on "most or all" of its costs at the time of the suit. In addition, even the means by which the passthrough occurred remain unsettled. The petitioners allege that, pursuant to formulas in PGA's filed with the Kansas Corporation Commission and the Missouri Public Service Commission, the respondent "automatically" adjusted some of its rates to reflect increases in the wholesale cost of gas. Brief for Petitioners 5, n.5. The respondent, however, maintains that PGA's did not govern all of its sales. See Brief for Respondent 17. The difficulties posed by issues of this sort **[****24]** led us to adopt the direct purchaser rule, and we must decline to create an exception that would require their litigation. As we have stated before: ***HN4***[] "The task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system." *McCready, 457 U.S. at 475, n.11*.

In addition to these complications, the regulation of utilities itself may make an exception to *Illinois Brick* unnecessary. Our decisions in *Hanover Shoe* and *Illinois Brick* often deny relief to consumers who have paid inflated prices **[*212]** because of their status as indirect purchasers. See 2 P. Areeda & D. Turner, ***Antitrust Law*** § 337e, pp. 193-194 (1978); Harris & Sullivan, Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis, 128 U. Pa. L. Rev. 269, 342 (1979). Although one might criticize *Illinois Brick* for this consequence in other circumstances, the criticism may have less validity in the context of public utilities. Both the Court of Appeals in this case and the Seventh Circuit in *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., 852 F.2d 891 (1988)*, **[****25]** have suggested that state regulators **[**2815]** would require the utilities to pass on at least some of the recovery obtained in a § 4 suit. See *Wyoming Tight Sands, 866 F.2d at 1291*; *Panhandle Eastern, supra, at 895*. State regulators have followed this approach elsewhere. See, *e. g., Louisiana Power & Light Co., Ex Parte*, Nos. U-17906, U-12636, U-17649, *1989 La. PUC LEXIS 3*, *31-*32 (Mar. 1, 1989) (requiring Louisiana Power & Light Co., which won a $ 190 million judgment against United Gas Pipe Line Co., to flow the proceeds back to ratepayers through reduced rates over a 5-year period). If Kansas and Missouri impose similar requirements, then even if the customers cannot sue the alleged antitrust violaters, they may receive some of the compensation obtained by the respondent. Creating an exception to allow apportionment in violation of *Illinois Brick* would make little sense when, in light of all its difficulty, its practical significance is so diminished.

B

LEdHN[3C][] [3C] **[****26]** **HN5**[] The *Illinois Brick* rule also serves to eliminate multiple recoveries. See *Illinois Brick, 431 U.S. at 730-731*;*McCready, supra, at 474*.The petitioners assert that no risk of multiple recovery would exist here, if we allowed them to sue, because the direct and indirect purchasers would be seeking different, not duplicative, damages; the petitioners would recover **[***184]** the amount of the overcharge and the utilities would recover damages for their lost sales. Leaving **[*213]** aside the apportionment issue, we reject the argument in this case, just as we did in *Illinois Brick*. Bringing all classes of direct and indirect purchasers together in a single lawsuit may reduce the risk of multiple recovery, but the reduction comes at too great a cost. See *Illinois Brick, supra, at 731, n.11*.

This case already has become quite complicated. It involves numerous utilities and other companies operating in several States under federal, state, and municipal regulation and, in some instances, under no rate regulation at all. Even apart from gas sold to customers, the utilities seek damages for lost sales and for gas purchased **[****27]** for their own use. The petitioners, in addition to their *parens patriae* claims, are asserting direct claims on behalf of numerous state agencies. Other direct purchasers also seek several measures of damages. Allowing the petitioners to proceed on behalf of consumers would complicate the proceedings further. Even if they could represent consumers residing in Kansas and Missouri, they could not represent industrial and commercial purchasers or consumers from other States. See *15 U. S. C. § 15c(a)(1)* (extending *parens patriae* representation only to resident natural persons). These unrepresented consumers might seek intervention and further delay the prompt determination of the suit. The expansion of the case would risk the confusion, costs, and possibility of error inherent in complex litigation. At the same time, however, it might serve little purpose because, as noted above, state regulatory law may provide appropriate relief to consumers even if they cannot sue under § 4. As in *Illinois Brick*, we continue to believe that "even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced **[****28]** into treble-damages proceedings argues strongly for retaining the *Hanover Shoe* rule." *431 U.S. at 731, n.11*.

[*214] C

LEdHN[4C][] [4C]We have maintained, throughout our cases, that our **HN6**[] interpretation of § 4 must promote the vigorous enforcement of the antitrust laws. See *Hanover Shoe, 392 U.S. at 493*;*Illinois Brick, supra, at 746*;*McCready, 457 U.S. at 475, n.11*;*California v. ARC America Corp., 490 U.S. 93, 102, n.6, 104 L. Ed. 2d 86, 109 S. Ct. 1661* ***[**2816]*** *(1989)*. If we were convinced that indirect suits would secure this goal better in cases involving utilities, the argument to interpret § 4 to create the exception sought by the petitioners might be stronger. On balance, however, we do not believe that the petitioners can prevail in this critical part of the case. The petitioners assert that utilities, such as the respondent, lack the incentive to prosecute § 4 cases for two reasons. First, they state that utilities, **[****29]** by law, may pass on their costs to customers. Second, they surmise that utilities might have to pass on damages recovered in a § 4 action. In other words, according to the petitioners, utilities lose nothing if they do not sue and gain nothing if they do sue. In contrast, the petitioners maintain, the large aggregate claims **[***185]** of residential consumers will give state attorneys general ample motivation to sue in their capacity as *parens patriae*.

The petitioners' argument does not persuade us that utilities will lack incentives to sue overcharging suppliers. Utilities may bring § 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges on to their customers. See *Kan. Stat. Ann. § 66-128a* (1985) (allowing the state commission to "review and evaluate the efficiency or prudence of any actions . . . of any public utility or common carrier for the purpose of establishing fair and reasonable rates"); *Mo. Rev. Stat. § 393.150* (1986) (interpreted in *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n, 706 S.W.2d 870, 879-880 (Mo. App. 1985)*, to give regulators "considerable discretion" **[****30]** in setting gas rates). In addition, even if state law would require a utility to reimburse its customers for recovered overcharges, a utility may seek treble damages in a § 4 action.

[*215] The petitioners have cited no authority indicating that a victorious utility would have to pay the entire exemplary portion of these damages to its customers.

Utilities, moreover, have an established record of diligent antitrust enforcement, having brought highly successful § 4 actions in many instances. The well-known group of actions from the 1960's involving overcharges for electrical generating equipment provides an excellent example. In these cases, which involved "a series of horizontal price-fixing conspiracies characterized as the most shocking in the history of the Sherman Act, plaintiff utilities . . . recovered in unprecedented sums" even though some of the utilities "passed on to their own customers whatever higher costs they incurred as a consequence of the alleged conspiracies." Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5, 10-11 (1966). The courts in these suits, even before the *Hanover Shoe* and *Illinois* **[****31]** *Brick* decisions, considered the pass-on issue and held that the causes of action were for the utilities to assert. See, *e. g., Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 208 (CA7 1964)*; *Ohio Valley Electric Corp. v. General Electric Co., 244 F. Supp. 914, 949-951 (SDNY 1965)*. Various factors may have prompted these and other utility actions. For example, in addition to the reasons stated above, the respondent asserts that, like any business, an investor-owned utility has an interest in protecting its market. But whatever the motivation for their § 4 suits, this history makes us quite hesitant to take from the utilities the responsibility for enforcing the antitrust laws.

Relying on indirect purchaser actions in utility cases might fail to promote antitrust enforcement for other reasons. Consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers. See Landes & Posner, The Economics of Passing On: A Reply to Harris and Sullivan, 128 U. Pa. L. Rev. 1274, 1278-1279 (1980). Although state attorneys general have greater expertise, **[*216]** they may **[****32]** hesitate to exercise the *parens patriae* device in cases involving smaller, more speculative harm to consumers. See Landes & Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust **[***186]** Laws? An Economic **[**2817]** Analysis of the Rule of *Illinois Brick*, 46 U. Chi. L. Rev. 602, 613 (1979). See also *Illinois Brick, 431 U.S. at 745* (stating that, in indirect actions, "the uncertainty of how much of an overcharge could be established . . . [and] the uncertainty of how that overcharge would be apportioned . . . would further reduce the incentive to sue"). And even when state attorneys general decide to bring *parens patriae* actions, they may sue only on behalf of resident natural persons. See *15 U. S. C. § 15c(a)(1)*. All others, including non-residents and small businesses, might fail to enforce their claims because of the insignificance of their individual recoveries. For these reasons, we remain unconvinced that the exception sought by the petitioners would promote antitrust enforcement better than the current *Illinois Brick* rule.

D

LEdHN[5C][] [5C] **[****33]** The preceding conclusions bring us to a broader point. The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to ***HN7***[] "carve out exceptions to the [direct purchaser] rule for particular types of markets." *Illinois Brick, 431 U.S. at 744*.The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. As we have stated:

> ***HN8***[] "The process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' **[*217]** into treble-damages proceedings, albeit at a somewhat higher level of generality. **[****34]** " *Id., at 744-745*.

In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.

IV

LEdHN[6B][] [6B]The suggestion in *Hanover Shoe* and *Illinois Brick* that a departure from the direct purchaser rule may be necessary when an indirect purchaser buys under a pre-existing cost-plus contract does not justify an exception in this case. In *Hanover Shoe*, we stated:

> "We recognize that there might be situations -- for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged -- where the considerations requiring that the passing-on defense not be permitted in this case would not be present." *392 U.S. at 494*.

We observed further in *Illinois Brick:*

> ***HN9***[] " **[****35]** In [a cost-plus contract] situation, the [direct] purchaser is insulated from any decrease in its sales as a **[***187]** result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case." *431 U.S. at 736*.

The petitioners argue that the regulations and tariffs requiring the respondent to pass on its costs to the consumers place this case within the cost-plus contract exception. We disagree.

[*218] The respondent did not sell the gas to its customers under a pre-existing cost-plus contract. Even if we were to create an exception for situations that merely resemble those governed by such a contract, we would **[**2818]** not apply the exception here. Our statements above show that we might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury. That certainty does not exist here.

The utility customers made no commitment **[****36]** to purchase any particular quantity of gas, and the utility itself had no guarantee of any particular profit. Even though the respondent raised its prices to cover its costs, we cannot ascertain its precise injury because, as noted above, we do not know what might have happened in the absence of an overcharge. In addition, even if the utility customers had a highly inelastic demand for natural gas, see *Panhandle Eastern, 852 F.2d at 895*, the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception. See *Illinois Brick, supra, at 742*; P. Areeda & H. Hovencamp, ***Antitrust Law*** § 337.3c, pp. 323-324 (Supp. 1988). Thus, although we do not alter our observations about the possibility of an exception for cost-plus contracts, we decline to create the general exception for utilities sought by the petitioners.

V

LEdHN[7B][] [7B]The petitioners, in their final argument, contend that § 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, as amended, *15 U. S. C. § 15c*, **[****37]** authorizes them to sue on behalf of consumers even though the consumers, as indirect purchasers, have no cause of action of their own. Section 4C(a)(1) provides in relevant part:

> ***HN10***[] "Any attorney general of a State may bring a civil action in the name of such state as parens patriae on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sustained **[*219]** by such natural persons to their property by reason of any violation of *sections 1 to 7* of this title." *15 U. S. C. § 15c(a)(1)*.

Because the Act, in their view, has the clear purpose of protecting consumers, see Kintner, Griffin, & Goldston, The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis, 46 Geo. Wash. L. Rev. 1, 23 (1977), the petitioners contend that it must allow the States to sue on behalf of consumers notwithstanding their status as indirect purchasers.

[*188]** ***LEdHN[1C]***[] [1C]***LEdHN[7C]***[] [7C] **[****38]** We have rejected this argument before. We stated in *Illinois Brick* that ***HN11***[] § 4C did not establish any new substantive liability. Instead, "it simply created a new procedural device -- *parens patriae* actions by States on behalf of their citizens -- to enforce existing rights of recovery under § 4 [of the Clayton Act]." *431 U.S. at 734, n.14*. Section 4, as noted above, affords relief only to a person "injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U. S. C. § 15(a)*. State attorneys general may bring actions on behalf of consumers who have such an injury. See, *e. g., Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc., 704 F.2d 125, 128 (CA4 1983)* (suit on behalf of consumers injured by an alleged conspiracy to fix the price of cars). But here the respondent is the injured party under the antitrust laws, and the predicate for a *parens patriae* action has not been established. We conclude that the petitioners may not assert any claims on behalf of the customers.

Affirmed **[****39]** .

Dissent by: WHITE

Dissent

JUSTICE WHITE, with whom JUSTICE **BRENNAN**, JUSTICE MARSHALL, and JUSTICE **BLACKMUN** join, dissenting.

I dissent from the Court's opinion and judgment because it is inappropriate for the Court to deny standing to sue under § 4 of the Clayton Act, *15 U. S. C. § 15*, to customers of a regulated utility in circumstances such as those presented in this case. By its plain language, § 4 reflects an "'expansive remedial **[*220]** purpose.'" *Blue Shield of Va. v.* ***[**2819]*** *McCready, 457 U.S. 465, 472, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)* (citation omitted). It does not distinguish between classes of customers, but rather grants a cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." *15 U. S. C. § 15(a)*. In enacting § 4, Congress sought to ensure that victims of anticompetitive conduct receive compensation. *Blue Shield, supra, at 472*; *Pfizer Inc. v. India, 434 U.S. 308, 314, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978)*.

In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, **[****40]** we held that certain indirect purchasers of concrete block lacked standing to challenge the manufacturer's business practices under the antitrust laws because they could not be deemed to have suffered injury from the alleged illegal conduct. This suit, however, is very different from *Illinois Brick*. That case involved a competitive market where concrete block manufacturers sold to masonry contractors who in turn sold to general contractors who in turn sold to the *Illinois Brick* respondents; this case involves a highly regulated market where utilities possessing natural monopolies purchase gas from natural gas suppliers and then sell the gas to residential customers. *Illinois Brick* did not hold that, in all circumstances, indirect purchasers lack § 4 standing. Indeed, just last Term we observed that under *Illinois Brick* "indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was **[***189]** passed on to them." *California v. ARC America Corp., 490 U.S. 93, 102, 104 L. Ed. 2d 86, 109 S. Ct. 1661, and n.6 (1989)*. See also *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*. **[****41]**

The issue in this case is whether *Illinois Brick* bars a suit by retail customers to whom the utilities have passed on the entire cost of the gas sold to them, including any illegal overcharge. Before the District Court, the utilities moved to dismiss the States as *parens patriae*, arguing that the States lacked standing because they represented indirect purchasers. **[*221]** In response, the States contended that the indirect purchasers were proper plaintiffs because the utilities had passed through the entire overcharge to their residential customers. The District Court found it unnecessary "to wait upon evidence establishing the degree to which the utilities passed on the overcharge," *In re Wyoming Tight Sands Antitrust Cases, 695 F. Supp. 1109, 1116 (Kan. 1988)*, for even accepting the States' position that there had been a total pass-on, decisions of this Court were thought to bar the suit. Likewise, in affirming the District Court, the Court of Appeals presumed a "perfect and provable pass-on of the allegedly illegal overcharge." *In re Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286, 1293 (CA10 1989)*. Indeed, the vice president **[****42]** and general counsel of one of the respondent utilities is on record as stating that the utility's customers "pay *all* of any increases in the cost of natural gas [Kansas Power & Light] must purchase to serve them." Affidavit of David S. Black, Vice President and General Counsel of the Kansas Power & Light Company, Record, Doc. No. 485, Exhibit D (emphasis in original). Rather than embarking, as the Court does, on what amounts to a factfinding mission, which the courts below eschewed, about the fact and provability of this pass-on, we should decide this case on the basis that there has been a complete passthrough of the overcharge. On that basis, it is evident that the concerns underlying the decision in *Illinois Brick* do not support the judgment below. Rather, we should follow the plain intent of § 4 that the victims of anticompetitive conduct be allowed the remedy provided by the section.

Illinois Brick barred indirect purchaser suits chiefly because we feared that permitting the use of pass-on theories under § 4 would transform these treble-damages actions into massive and inconclusive efforts **[**2820]** to apportion the recovery among all potential plaintiffs **[****43]** that could have absorbed part of the overcharge -- from direct purchasers to middlemen to ultimate consumers. *431 U.S. at 737*. As Judge Posner has **[*222]** written: "The optimal adjustment by an unregulated firm to the increased cost of the input will always be a price increase smaller than the increase in input cost, and this means that the increased cost will be divided between the two tiers, the direct and indirect purchasers -- but in what proportion will often be hard to determine, even by sophisticated techniques of economic analysis. This is a central insight of the *Illinois Brick* decision." *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., 852 F.2d 891, 894 (CA7 1988)*.

[*190]** In this case, however, it is regulation rather than market forces that determines the amount of overcharge that the utility passes through to its residential customers. The rates of utilities are determined by law and are set at a level designed to allow a fair return on a rate base that includes the cost of furnishing the service, plainly including in this case the cost of gas purchased from the pipelines and resold to customers. It is fanciful, **[****44]** at least unrealistic, to think that a utility entitled to pass on to its customers the cost of gas that it has purchased will not do so to the maximum extent permitted by law. Furthermore, petitioners assert that in this case the applicable law requires that such cost be passed on to consumers. And, as we have said, the Tenth Circuit opinion reflects the likelihood of a perfect and provable pass-on.

Of course, to recover in a case like this, the plaintiff must prove that the utility paid the pipelines an illegally high price and must demonstrate the amount of the overcharge. That amount is included in the rates charged by the utility and hence is passed through to the consumer. The result is that determining the injury inflicted on consumers involves nothing more than reading their utility bills, which reveal the amount of gas purchased by them at a price which includes the amount of the illegal overcharge passed through to them. Where it is clear that the entire overcharge is passed through, there can be no claim that indirect purchasers cannot **[*223]** prove the extent of their damage caused by a rate calculated on a rate base inflated by an illegal price paid for gas.

The **[****45]** Court contends that the apportionment problem is not so simple. It maintains that, even where a utility raises its rates to compensate for the overcharge and passes the overcharge through to the indirect purchasers, an apportionment problem still exists because "to show that a direct purchaser has borne no portion of an overcharge, the indirect purchaser would have to prove, among other things, that the direct purchaser could not have raised its rates prior to the overcharge." 497 U.S. at 209. The problem identified by the majority is not peculiar to indirect purchaser suits. In antitrust cases where suppliers increase their prices, courts frequently must separate the price increase attributable to anticompetitive conduct (*i. e.*, the "overcharge") from the price increase attributable to legitimate factors. This type of calculation "has to be done in every case where the plaintiff claims to have lost sales because of the defendant's unlawful conduct and the defendant argues that the loss was due partly or entirely to other factors." *Panhandle Eastern, supra, at 897*; see *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574 (1946)*. **[****46]** The problem identified in *Illinois Brick* was entirely different: There, we were concerned that it would unduly complicate litigation to require courts to separate the portion of the overcharge absorbed by the direct purchaser from the portion of the overcharge passed onto the indirect purchaser. As argued above, this difficulty is not a concern in the present case. * It is at **[***191]** least very doubtful that a utility that is

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* The majority also suggests that "difficult questions of timing might necessitate apportioning overcharges if we allowed indirect suits by utility customers. Even if, at some point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process." 497 U.S. at 210. This suggestion, as indicated by the words "might" and "may," is quite

[*224] in position to secure a rate increase on grounds having nothing to **[**2821]** do with the price paid for its gas would fail to request a rate increase that included as well the entire amount paid for gas purchased from pipelines and sold to consumers.

[**47]** *Illinois Brick* also observed that granting standing to the indirect purchasers in that case would lead to the under-enforcement of the antitrust laws. *431 U.S. at 745-747*. In the cases where there is "a perfect and provable pass-through," however, the opposite is true for two reasons. First, because the passthrough of the overcharge is complete and easily demonstrated, the indirect purchasers -- and the States in their *parens patriae* capacity -- may readily discover their injury. Second, although the utility could sue to recover lost profits resulting from lost sales due to the illegally high price, its injury is not measured by the amount of the illegal overcharge that it has passed on, and hence the utility would have no incentive to seek such a recovery.

The majority suggests that, even where a utility passes the entire overcharge through to the indirect customers, the utility nonetheless might actively prosecute antitrust claims because the state regulatory commission may allow the utility to keep any damages that the utility recovers. But the utility commissions cannot allow an antitrust recovery forbidden by federal law. Given a passthrough, the customer, **[****48]** not the utility, suffers the antitrust injury, and it is the customer or the State on his behalf that is entitled to recover treble damages. In any event, it seems to me that the majority conjures up a very strange utility commission, the possible existence of which the court fails to document.

A third consideration prompting our decision in *Illinois Brick* was our belief that permitting indirect purchaser suits might subject antitrust defendants to multiple liability. *431 U.S. at 730-731*. Again however, where there is a "perfect and provable" passthrough, there is no danger that both the utilities and the indirect purchasers will recover damages for the same anticompetitive conduct because the utilities **[*225]** have not suffered any overcharge damage: The petitioners will sue for the amount of the overcharge, while the utilities will sue for damages resulting from their lost sales.

The majority argues that, even "leaving aside the apportionment issue" (*i. e.*, assuming that there is no apportionment difficulty as the Tenth Circuit did in affirming summary judgment), the multiple recovery problem identified in *Illinois Brick* still exists. 497 U.S. at 212-213. **[****49]** I disagree. *Illinois Brick* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Blue Shield, 457 U.S. at 474-475*. **[***192]** The danger of multiple recoveries does not exist aside from the apportionment difficulty; rather, it stems from it. If only defensive use of a pass-through defense were barred, or if it were extremely difficult to ascertain the percentage of an overcharge that the utility passed through, then the supplier of natural gas might potentially have to pay overlapping damages to successive purchasers at different levels in the distribution chain. But where there is no apportionment difficulty, there is no comparable risk.

In sum, I cannot agree with the rigid and expansive holding that in no case, even in the utility context, would it be possible to determine in a reliable way a passthrough to **[**2822]** consumers of an illegal overcharge that would measure the extent of their damage. There may be cases, as the Court speculates, where there would be insuperable difficulties. But we are to judge this **[****50]** case on the basis that the pass-through is complete and provable. There have been no findings below that this is not the fact. Instead, the decision we review is that consumers may not sue even where it is clear and provable that an illegal overcharge has been passed on to them and that they, rather than the utility, have to that extent been injured.

None of the concerns that caused us to bar the indirect purchaser's suit in *Illinois Brick* exist in this case. For that **[*226]** reason, rather than extending the *Illinois Brick* exception to § 4's grant of a cause of action to persons injured through anticompetitive conduct, I would hold that the petitioners in this case have standing to sue. This result would promote the twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims.

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speculative. It is much more realistic to believe that sooner or later, the customer will foot the cost of overpriced gas. If timing was such a problem, the Tenth Circuit would not have assumed a "perfect and provable" passthrough.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 246, *289*, *296*, *300*, *310*, *360*

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:164-54:169, 54:177, 54:191

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 15 **[****51]** *(a)*, *15c(a)(1)*

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Index to Annotations, Parens Patriae; Restraints of Trade and Monopolies; States

Annotation References:

Standing to sue, under 4 of the Clayton Act (*15 USCS 15*) and predecessor statute, to recover treble damages for antitrust violation-- Supreme Court cases. *73 L Ed 2d 1427*.

"Target area" doctrine as basis for determining standing to sue under 4 of Clayton Act (*15 USCS 15*) allowing treble damages for violation of antitrust laws. 70 ALR Fed 637.

Right of retail buyer of price-fixed product to sue manufacturer on federal antitrust claim. 55 ALR Fed 919.

Authority of state to sue as parens patriae to recover treble damages under 4 of Clayton Act (*15 USCS 15*). 23 ALR Fed 878.

Liability in damages for price-fixing in violation of federal antitrust laws as affected by plaintiff's passing excessive charges on to his own customers. 1 ALR Fed 500.

Alan's of Atlanta, Inc. v. Minolta Corp.

United States Court of Appeals for the Eleventh Circuit

June 22, 1990

No. 89-8073

Reporter

903 F.2d 1414 *; 1990 U.S. App. LEXIS 10067 **; 1990-1 Trade Cas. (CCH) P69,071

ALAN'S OF ATLANTA, INC., Plaintiff-Appellant, v. MINOLTA CORPORATION, Robert Lathrop, Wolf Camera, Inc., and Charles Wolf, Defendants-Appellees

Subsequent History: [1]** Rehearing En Banc Denied March 1, 1991, Reported at: *1991 U.S. App. LEXIS 8261*.

Prior History: Appeal from the United States District Court for the Northern District of Georgia. No. 1:86-CV-352-ODE; Evans, Judge.

Disposition: REVERSED and VACATED and REMANDED.

Core Terms

Camera, summary judgment, benefits, price discrimination, purchases, dealers, seller, antitrust, programs, sections, competitors, sales, retailer, discriminatory, advertising, district court, proportionally, customer, dollar, equal terms, good faith, discovery, genuine, grey, promotion, non-MDF, prices, resale, meeting competition, favoritism

LexisNexis® Headnotes

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN1[] **Robinson-Patman Act, Claims**

15 U.S.C.S. § 13(a) makes it illegal for a seller to discriminate in price between its customers where the discrimination leads to a reasonable possibility that competition in general or competition with the favored customer specifically may be adversely affected, unless the discrimination is justifiable on the basis of the seller's costs.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN2[] Price Discrimination, Competitive Injuries

See 15 U.S.C.S. § 13(a).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN3[] Robinson-Patman Act, Claims

The legal focus of a competitive injury inquiry is on the competitor, not the consumer.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN4[] Defenses, Cost Justification Defense

15 U.S.C.S. § 13(d) prohibits a seller from paying a customer for services or facilities furnished by the customer in connection with the resale of the seller's product, unless the opportunity to receive such a payment is available to all of the seller's customers on proportionally equal terms.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN5[] Antitrust & Trade Law, Robinson-Patman Act

15 U.S.C.S. § 13(e) bans a seller from furnishing to a customer a service or facility connected with the resale of the seller's product, unless the opportunity to receive the seller's service or facility is available to all of the seller's customers on proportionally equal terms.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN6[] Antitrust & Trade Law, Robinson-Patman Act

See 15 U.S.C.S. § 13(d).

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN7[] Antitrust & Trade Law, Robinson-Patman Act

See 15 U.S.C.S. § 13(e).

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN8[] Price Discrimination, Buyer Liability

See 15 U.S.C.S. § 13(f).

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN9[] Robinson-Patman Act, Defenses

15 U.S.C.S. § 13(b), known as the meeting competition defense, allows a seller to rebut a prima facie case of price discrimination, and therefore avoid liability, by showing that its discriminatory actions were taken in good faith to counter the actions of a competitor.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN10[] Price Discrimination, Defenses

See 15 U.S.C.S. § 13(b).

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN11[] **Clayton Act, Claims**

Private plaintiffs derive standing to sue for violations of the Robinson-Patman Act via *15 U.S.C.S. §§ 15(a)* and *26*. To recover under these sections a private plaintiff must show both the occurrence of an antitrust violation and the incurrence of an antitrust injury.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN12[] **Antitrust & Trade Law, Robinson-Patman Act**

15 U.S.C.S. § 13(d) and *(e)* require something more than access to different incentive programs before their proportionally equal standard is met. The sections' language requires that purchasers be given an equal opportunity to participate in certain types of seller programs relating to the resale of products, such as advertising and promotional programs, and that the benefits under those programs be disbursed on equal terms to purchasers in proportion to some objective value of their participation.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN13[] **Antitrust & Trade Law, Robinson-Patman Act**

Generally, financing programs do not relate to the resale of the supplier's goods and therefore are not services and facilities within the meaning of *15 U.S.C.S. § 13 (d)* and *(e)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN14[] **Entitlement as Matter of Law, Genuine Disputes**

Under summary judgment a conclusion may not be established as a matter of law unless no genuine issue as to any material fact" exists. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN15[] **Burdens of Proof, Movant Persuasion & Proof**

The party proposing a grant of summary judgment in its favor bears the initial burden of showing that the summary judgment standard is met.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

HN16[] **Antitrust & Trade Law, Robinson-Patman Act**

Under *15 U.S.C.S. § 13(b)*, a seller is required to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Torts > ... > Elements > Causation > Intervening Causation

HN17[] **Antitrust & Trade Law, Robinson-Patman Act**

Antitrust injury or "cognizable injury" needs for its establishment a showing that the plaintiff is injured in some measurable amount, the injury caused by an improper effect flowing from the defendant's antitrust violation. The fact of damage is made out upon proof that the plaintiff's level of profits or sales or its present value is or was less than it otherwise would have been absent some intervening cause.

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Judges: Fay and Cox, Circuit Judges, and Eschbach, * Senior Circuit Judge.

Opinion by: ESCHBACH

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Opinion

[*1415] Eschbach, Senior Circuit Judge.

This case concerns the propriety **[**2]** of summary judgment in an antitrust action **[*1416]** brought by a private plaintiff. The action alleges, among other things, violations of sections 2(a), 2(d), 2(e), and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. §§ 13(a)*, *(d)*, *(e)*, and *(f)*. The court below concluded that summary judgment was appropriate. After reviewing the record we conclude otherwise, and therefore reverse.

I.

Alan's of Atlanta, Inc. ("AA") was an Atlanta-based "specialty" retailer of cameras and related equipment. It had stores in Atlanta and throughout Georgia and Florida. At the start of 1979 AA had a substantial share of the Atlanta market for Minolta-brand camera sales, about 33%, and an overwhelming share of specialty store sales, about 78%. By the end of 1985 AA's fortunes had taken a turn for the worse. Its Atlanta market share of Minolta camera sales had plummeted to about 4%. Its share of specialty store sales suffered a similar fate. During this same period AA witnessed the dramatic rise of a competing specialty camera retailer, Wolf Camera, Inc. Wolf Camera had captured the 29% of the Minolta camera market lost by AA and then some. Its share **[**3]** of that market rose from about 6% to about 41%. Even more dramatic was the rise in its share of specialty camera store sales, which rocketed from about 14% to over 65%. AA's president, Alan Goodelman, could only guess at the cause of Wolf Camera's rise and AA's fall. He surmised that AA's problems were caused by a faulty computer system, or perhaps by a bad management decision to expand in Florida.

In June of 1985 Goodelman was approached by Eugene Grabowski, a former Southeast Region sales manager for Minolta Corporation ("Minolta"). [1] Grabowski brought news that a price discrimination scheme may have led to AA's woes. He told Goodelman that Minolta had market development fund ("MDF") accounts through which benefits were disbursed by either the national director of sales or the regional sales managers. These benefits had been used prior to 1979 for the equal good of all Minolta retailers. In 1979 Robert Lathrop took over as national director of sales, however, and instituted a "key dealer" program in which the MDF benefits were to be channeled disproportionately to "key dealers" in various cities. The MDF accounts were to support a program in which these selected dealers would **[**4]** be given free cameras and camera equipment, free advertising, free promotions, and various other benefits not available to non-key dealers.

Grabowski alleged that the key dealer program was motivated by two rationales. First, Minolta promotions could be cheaper if limited to one retailer with a large-volume capacity. For example, instead of making 100 shipments of 100 cameras to 100 retailers during a promotion, Minolta could make 1 shipment of 10,000 cameras to one retailer, saving distribution costs. Although the program was not designed to put non-key dealers out of business, it was designed to concentrate the market and to create a market leader through whom the promotions could be handled efficiently. Second, the program was designed to create a *de facto* vertical integration of Minolta with selected **[**5]** retailers, at least in some respects. According to Grabowski, Lathrop believed that after helping a retailer achieve success, he could dictate to the retailer what cameras to sell and at what price.

Key dealers were usually the highest volume dealers within a defined market area. AA was the highest volume dealer in the Atlanta market at the time the key dealer program was instituted, but it was not chosen by Minolta as the Atlanta area key-dealer. Grabowski alleged that Lathrop personally disliked Goodelman, and, in any case, felt that Wolf Camera had more sales potential. Thus Wolf Camera **[*1417]** was chosen in AA's stead. [2]

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[1] Minolta was the authorized United States distributor for and a wholly owned subsidiary of Minolta Camera Company Limited ("Minolta Japan"), a Japanese manufacturer of cameras and related equipment.

[2] Although Wolf Camera was allegedly selected as the Atlanta market key dealer, it was not the only key dealer selling Minolta cameras in Atlanta. Some national market key dealers, *e.g.*, Service Merchandise, had a substantial presence in Atlanta.

As beneficiary of the key dealer program, Wolf Camera was slated to receive over non-key dealers a price advantage on purchases. **[**6]** Grabowski alleged that Lathrop and Charles Wolf, the owner and CEO of Wolf Camera, hashed out the range of advantage. The range settled upon was four to seven percent per purchase dollar, generally, with specific instances of up to ten percent. [3] Grabowski told Goodelman of various incidents in which he furtively conferred some of this advantage to Wolf Camera by giving it free goods, advertising, and other benefits.

According to Grabowski, the key dealer participants realized that a program imbued with such favoritism bordered on illegality. To avoid legal trouble, Minolta and Lathrop purportedly instructed **[**7]** the regional managers to be familiar with three contrived explanations for their actions: (1) that the favoritism was necessary to meet competitive pricing actions within the marketplace; (2) that the favoritism was necessary to meet competitive advertising actions within the marketplace; and (3) that the favoritism was necessary to compete against grey market pricing. The latter excuse could prove particularly persuasive. In the United States there clearly were grey market [4] camera equipment sellers, the identity, prices, and practices of which were rather obfuscated.

[8]** After hearing this tale Goodelman's thinking changed about why AA had taken a bath in the marketplace. He no longer blamed the faulty computer or a bad management decision, but rather Minolta's alleged "key dealer" scheme. Goodelman immediately obtained the services of counsel. Sometime later AA cut off its relationship with Minolta and on February 18, 1986, it filed a five-count complaint in federal court against Minolta, Lathrop, Wolf Camera, and Wolf ("the Appellees").

The complaint, as amended, alleged in Count I that Minolta and Lathrop had violated section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act [hereinafter referred to simply as the RPA] by engaging in a scheme of price discrimination. Section 2(a) [5] **[**10]** ***HN1***[] makes it (potentially) illegal for a seller to discriminate in price between its customers where the discrimination leads to a reasonable possibility that competition in general or competition with the favored customer specifically may be adversely affected, *Corn Prod. Ref. Co. v. FTC, 324 U.S. 726, 742, 65 S. Ct. 961, 969, 89 L. Ed. 1320 (1945)*, **[**9]** unless the discrimination is justifiable on the basis of the seller's **[*1418]** costs. *FTC v. Morton Salt Co., 334 U.S. 37, 43-44, 68 S. Ct. 822, 827, 92 L. Ed. 1196 (1948)*. The section does not ban price discrimination *per se*, but only non cost-justified price discrimination that causes the requisite injury to competition or competitors. [6]

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[3] As Wolf Camera purchased Minolta goods in the amount of $ 12,891,883 over a period of time comparable to that in which the price discrimination was alleged to have taken place, the purported favoritism translates into the following amounts: (1) At 4%, $ 537,161 (.96X=$ 12,891,883; X=$ 13,429,044; $ 13,429,044-$ 12,891,883=$ 537,161); (2) At 5%, $ 678,520; (3) At 6%, $ 822,886; (4) At 7%, $ 970,356.

[4] The "grey market" refers to goods that were sold abroad by camera manufacturers at a price low enough to make it profitable for the foreign purchasers of those goods to export them into the United States. Once exported to the United States, the goods compete with those sold through normal, authorized, distribution channels. It is somewhat ironic that in this price discrimination case the alleged competitive threat is the grey market, which is often created by price discrimination on an international scale.

[5] Section 2(a) ***HN2***[] provides, in relevant part, as follows:

> It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

15 U.S.C. § 13(a).

[6] A controversy has raged (and continues to rage) over the meaning of the word "competition" as used in the so-called "competitive injury" phrase of section 2(a). *See, e.g., Boise Cascade Corp. v. FTC, 267 U.S. App. D.C. 124, 837 F.2d 1127, 1143* (Starr, J.); *id.*, at 1148-52 (Williams, J., concurring); *id., at 1152-63* (Mikva, J., dissenting). The word "competition" as

[11]** Count V alleged that Minolta and Lathrop, through the same scheme, had violated RPA sections 2(d) and 2(e). Sections **[*1419]** 2(d) and (e) are not as generous to discriminating sellers as is section 2(a). Section 2(d) [7] **[**13]** ***HN4***[] prohibits a seller from paying a customer for "services or facilities" furnished by the customer in

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generally used in the antitrust laws seems capable of meaning different things to different people and, according to one commentator, can be interpreted in at least five ways. *See R. Bork, The Antitrust Paradox* 58-61 (1978). To some, "competition" can only mean "any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree," *id., at 61*, and competitive injury under the antitrust laws cannot occur unless an action taken has the net effect of restricting output and raising prices, *i.e.*, lowering consumer welfare. *Id., at 122*. *See also* *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1334 (7th Cir. 1986)*. Under this interpretation a proven injury to competitors is irrelevant under the antitrust laws (including the RPA); the focus of inquiry is on the detrimental effects of prices on *consumers*, not the detrimental effect of prices on *competitors*, for rarely the twain shall meet.

Judicial precedent, however, suggests that in the RPA the meaning of competition is not so narrow, nor the gap between an injury to competition and an injury to competitors so wide. Indeed, many cases dealing with secondary-line price discrimination (as does this one) hold or suggest that an injury to competition is proved by showing an injury to competitors. *See, e.g.,* *Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434-38, 103 S. Ct. 1282, 1288-90, 75 L. Ed. 2d 174 (1983)* (section 2(a) competitive injury shown where price charged to "competing purchasers" was different; effect on consumers not considered); *Morton Salt, 334 U.S. 37, 45-47, 49-50, 68 S. Ct. 822, 828, 830, 92 L. Ed. 1196* (section 2(a) "was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination'"; proof that "the competitive opportunity of . . . merchants [was] injured" shown by fact that disfavored purchasers "had to pay [the seller] substantially more for their goods than their competitors had to pay"); *Corn Prod. Ref. Co., 324 U.S. 726, 738-39, 65 S. Ct. 961, 967, 89 L. Ed. 1320* (price differentials that divert business from one competitor to another create an effect that "may be to substantially lessen competition."); *Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040* (9th ed. is.Cir. 1988), *cert. granted*, *490 U.S. 1105, 109 S. Ct. 3154, 104 L. Ed. 2d 1018 (1989)* (injury of harm to competitors probative of injury to competition); *Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 385 (8th Cir. 1987)* (harm to competition established by showing harm to competitors); *Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 580* (5th Cir.), *cert. denied*, *459 U.S. 908, 103 S. Ct. 212, 74 L. Ed. 2d 169 (1982)* (to establish competitive injury under section 2(a) a plaintiff "must demonstrate that the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him, the disfavored competitor"); *Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 678* (5th Cir.), *cert. denied*, *382 U.S. 959, 86 S. Ct. 435, 15 L. Ed. 2d 362 (1965)* (recognizing that section 2(a) protects injury to competition as well as injury to competitors). *But see* *Boise Cascade, supra, at 1143* (harm to competition all that matters); *Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 420 (8th Cir. 1986)* (RPA refers to competition in general, not competitors). This interpretation has carried over to primary-line price discrimination as well. *See* *Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 87 S. Ct. 1326, 18 L. Ed. 2d 406 (1967)* (local market price war driving down prices injured competitor, thus it injured competition); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989)* (recognizing difference between law and economics); *McGahee v. Northern Propane Gas Co., 858 F.2d 1487 (11th Cir. 1988)*, *cert. denied*, *490 U.S. 1084, 109 S. Ct. 2110, 104 L. Ed. 2d 670 (1989)* (predatory intent to destroy competitor). *But cf.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (allegations conflicting with economic theory are to be viewed skeptically). The gist of these cases, representing about a half-century of RPA interpretation, is that ***HN3***[] the legal focus of the competitive injury inquiry is on the competitor, not the consumer. For section 2(a) purposes, whether or not output is restricted or prices are raised simply is not dispositive.

We need not address this issue in any greater detail at this time. We address it at all only because the controversy over competitive injury may have implications for our later analysis of "antitrust injury" under Clayton Act section 4, *15 U.S.C. § 16*. For the time being we are satisfied merely to make it clear that when confronted with contemporary economic argument on the one hand and judicial precedent on the other, we feel, unlike those of a more activist bent, *see, e.g., R. Bork, supra*, at 36, that economic argument is not ultimately controlling; judicial precedent is.

[7] ***HN6***[] This section states as follows:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

connection with the resale of the seller's product, unless the opportunity to receive such a payment is available to all of the seller's customers on "proportionally equal terms." *See* FTC v. Fred Meyer, Inc., 390 U.S. 341, 350-53, 88 S. Ct. 904, 909-10, 19 L. Ed. 2d 1222 (1967); FTC v. Simplicity Pattern Co., Inc., 360 U.S. 55, 65, 79 S. Ct. 1005, 1011, 3 L. Ed. 2d 1079 (1959). The section has no "competitive injury" or "cost justification" escape clause like section 2(a). Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 79, 99 S. Ct. 925, 932, 59 L. Ed. 2d 153 (1979); Simplicity Pattern, supra, 360 U.S. at 66, 70, 79 S. Ct. at 1012, 1014. To force all price discrimination to take a readily recognizable **[**12]** form -- from whence it can be tested under the "competitive injury" and "cost justification" guidelines of section 2(a) -- section 2(d) creates liability for certain indirect price discriminations related to resale programs upon the mere showing that the indirection *is* price discrimination, thus "nipping potentially destructive practices before they reach full bloom." Simplicity Pattern, supra, at 68, 79 S. Ct. at 1013. Section 2(e) [8] is similar in scope and language to section 2(d), *see e.g.,* Great Atl. & Pac. Tea Co., supra, 440 U.S. at 79, 99 S. Ct. at 932, except ***HN5***[] it bans a seller from furnishing to a customer a service or facility connected with the resale of the seller's product (rather than paying a customer for so furnishing), unless the opportunity to receive the seller's service or facility is available to all of the seller's customers on "proportionally equal terms." Simplicity Pattern, supra, 360 U.S. at 65, 79 S. Ct. at 1011.

Count II alleged the corollary of Counts I & V, that Wolf and Wolf Camera knowingly received discriminatory price advantages in violation of section 2(f) [9] of the RPA. The remaining counts alleged violations of state law: that the Appellees intentionally and tortiously interfered with AA's business and contractual relations (Count III) and that Minolta had breached an implied covenant of good faith and fair dealing made with AA (Count IV).

[14]** Appellees answered the complaint by asserting, among other things, a defense contained in RPA section 2(b). [10] In crafting the RPA the drafters and construers of the Act saw fit to allow a seller to breach the requirements of sections 2(a), (d), and (e) if it could prove that in so doing it was merely meeting the already prevalent **[*1420]** prices of a competitor. Standard Oil Co. v. FTC, 340 U.S. 231, 246, 71 S. Ct. 240, 248, 95 L. Ed. 239 (1951). This defense is the so-called ***HN9***[] "meeting competition" defense. It allows a seller to rebut a prima facie case of price discrimination, and therefore avoid liability, by showing that its discriminatory actions were taken in good faith to counter the actions of a competitor. *Id.* In effect, it gives a seller the right to economic "self-defense." United States v. United States Gypsum Co., 438 U.S. 422, 450-51, 98 S. Ct. 2864, 2880, 57 L. Ed. 2d 854 (1978) (quoting

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15 U.S.C. § 13(d).

[8] Section 2(e) states:

> ***HN7***[] It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15 U.S.C. § 13(e).

[9] Section 2(f) ***HN8***[] provides "that it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f).

[10] Section 2(b) of the Robinson-Patman Act ***HN10***[] states in relevant part as follows:

> Upon proof being made . . . that there has been discrimination in price or services of facilities furnished, the burden of rebutting the prima facie case shall be upon the person charged . . .: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

15 U.S.C. § 13(b).

Standard Oil, supra, 340 U.S. at 249-50, 71 S. Ct. at 249). Appellees asserted that any price discrimination on their part was **[**15]** economic self-defense, self-defense compelled by a competitive threat from the grey market.

Discovery ensued, but not without dispute. AA uncovered Minolta accounting evidence indicating that over the years Wolf Camera received from Minolta MDF **[**16]** benefits in the form of free goods worth at least $ 271,123 and free credit offsets for advertising and promotion worth at least $ 100,911, for a total value of $ 372,034. The discovered "numbers" also indicated that Wolf Camera received a sum of non-MDF benefits from Minolta in the amount of $ 26,961. [11] On April 1, 1987, in an effort to explore more of Minolta's data, AA filed a motion to compel discovery from Minolta and Lathrop. AA sought information from certain Minolta accounts regarding discriminatory benefits provided Wolf Camera. It also sought information regarding a nationwide "key dealer" scheme and the benefits provided other "key dealers" throughout the nation. Both Minolta and Lathrop responded with motions for protective orders. They felt that discovery was better restricted to limited information regarding only AA and Wolf Camera. On October 2, 1987, the district court ruled in favor of Appellees, believing that "the information sought is irrelevant to this litigation, overly burdensome to produce, and not likely to lead to the production of admissible evidence." A later-filed motion for reconsideration on this issue was denied.

[17]** When discovery came to a standstill, the parties filed various motions. [12] In a written memorandum and order entered December 30, 1988 the district court dismissed all motions as moot save Appellees' motions for summary judgment, which it granted. The court explained that summary judgment against AA was warranted because AA had failed to show that it had been harmed by anything done by the Appellees. As with other antitrust laws, ***HN11***[] private plaintiffs derive standing to sue for violations of the RPA via Clayton Act sections 4 and 16. [13] To recover under these sections a private plaintiff must show both the occurrence of an antitrust violation and **[*1421]** the incurrence of an antitrust injury. *See, e.g.,* *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (*Section 16*); *Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (Section 4). *See also* *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 101 S. Ct. 1923, 1927, 68 L. Ed. 2d 442 (1981)* **[**18]** (involving the RPA). The court found deficient AA's showing in the latter regard.

[19]** In the court's view AA had failed to produce evidence that Wolf Camera was able to draw away profits or sales from AA on account of the price advantage it received from Minolta. The evidence presented cut against AA, according to the court, showing, first, that the amount of price benefit actually received by Wolf was *de minimis* when compared to its total dollar volume of Minolta purchases. The court found that the most Wolf Camera could have been advantaged was an amount summing to $ 350,540. [14] Over the $ 12,891,883 of Wolf Camera's Minolta

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[11] On the other hand, the accounting evidence showed that Minolta, through financial and other incentive programs, provided AA with benefits totaling $ 140,904: MDF in the amount of $ 60,458; non-MDF in the amount of $ 80,446.

[12] AA filed four motions for partial summary judgment. Those motions sought judgment (1) rejecting Appellees' "meeting competition" defense; (2) establishing the element of interstate commerce; (3) establishing that the statute of limitations on the AA's claims was tolled by fraudulent concealment; and (4) finding that Appellees had violated sections 2(d) and 2(e) of the RPA. AA also filed a motion requesting the district court to certify for appeal its denial of AA's motion to compel discovery. Appellees responded with the following motions: (1) for summary judgment against AA's RPA claims; (2) for summary judgment against AA's state law claims; and (3) for the exclusion of AA's expert opinion damage study.

[13] A private plaintiff's standing to sue for damages is authorized by section 4(a) of the Clayton Act, as amended, which states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. § 15(a)*. A private plaintiff may also avail itself of injunctive relief. Clayton Act *section 16* provides that "any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." *15 U.S.C. § 26*.

Although AA's complaint requested both damages relief and injunctive relief, AA is no longer in a position to pursue an injunction. Thus, damages via section 4 are our only concern.

purchases made during the period of price discrimination, this advantage translated to a mere $.03 on the dollar. Moreover, when consideration was given to the $ 60,458 of MDF benefits and $ 53,505 of net non-market development fund ("non-MDF") benefits Minolta gave AA over its $ 6,983,174 of purchases, this advantage deteriorated steadily "to less than one cent for every dollar [Wolf Camera] spent on Minolta goods." Second, even if the price difference was not *de minimis*, the evidence showed that price is a secondary factor in consumers' minds. The court found that price does not influence specialty camera purchasers so the pricing **[**20]** advantage afforded Wolf Camera was irrelevant. Third, even if the price did matter to specialty camera consumers, it did not influence them in this case. The price advantage given Wolf was not passed on to consumers, according to the court, but was used to increase advertising and other promotions. Fourth, AA could not suffer antitrust injury because its profit margin on Minolta products was higher than its profit margins on other products. That margin stayed high during the period of discrimination, as did AA's retail prices on Minolta goods. Fifth, the court did not think that Wolf Camera and AA were competitors in Florida, although both had stores there, yet the profit margin derived by AA on its sales of Minolta products in Florida were the same as those derived in Georgia. This showed that AA was not injured in Georgia. Sixth, Minolta products apprised only 18% of Appellants total sales, thus "minimizing" any injury AA may have suffered. Lastly, whatever loss AA suffered was due not to the price discrimination, but to other reasons, such as its faulty computer system and poor management decision to expand in Florida. All of this proved that AA had not experienced the appropriate **[**21]** injury. Summary judgment, therefore, was required.

The court did not rest its judgment solely on its antitrust injury analysis. It noted additional reasons why summary judgment against AA was proper. First, as to the sections 2(d) and 2(e) claims, the court concluded that the terms and services offered AA and Wolf Camera by Minolta were "proportionally equal" because AA had received from Minolta certain non-MDF benefits relating to extended financing and generous return policies. This finding **[**22]** mandated summary judgment. Second, as to all of the RPA claims, the court found that the Appellees had proved that the price discrimination was caused by Minolta's need to meet competition. The court found that a grey market for Minolta products existed and that Wolf Camera had made Minolta aware that it would buy from such a market. The court felt that Minolta's discriminatory program was a reasonable response to this grey market threat, and thus its discrimination was excusable **[*1422]** via RPA section 2(b). This finding also mandated summary judgment. [15]

[23]** II.

The Robinson-Patman Act was enacted into law in 1936. It amended the Clayton Act's regulation of price discrimination by making its scope more inclusive and its standards much tougher. The RPA's enactment was motivated by concerns for small, independent distributors, which in the 1930's were threatened by the arrival of chain stores. It marked "the high-water mark of the anti-chain-store movement." *R. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences* 26 (1976). Although the Clayton Act had prohibited certain price discriminations, it was seen as ineffective in stopping the discriminatory prices granted chain stores by virtue of their size. *See H.R.Rep. No.* 2287, 74th Cong., 2d Sess. 7 (1936); *FTC v. Morton Salt Co., 334 U.S. 37, 43, 68 S. Ct. 822, 827, 92 L. Ed. 1196 (1948)*. So far as purchasing was concerned, this discrimination put the more normal "mom and pop" merchants of the day at a competitive disadvantage. Congress sought to alleviate the disadvantage by putting the new age retailing behemoths on a level "playing-field" with small independent merchants and businessmen. *See FTC v. Fred Meyer, Inc., 390 U.S. 341, 349, 88 S. Ct. 904, 908-09, 19 L. Ed. 2d 1222*

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[14] Appellees "conceded" for the purposes of summary judgment AA's calculation of price discrimination (based as it was on only discovered MDF accounts). They then argued, however, that the total should sum to $ 350,540, not $ 372,034. The Appellees ignored about $ 21,500 worth of advertising benefits granted Wolf Camera that did not appear in the accounts until after April 30, 1986. They asserted that these benefits were provided Wolf Camera after the "relevant period." The district court adopted the Appellees' view.

[15] Following from the court's RPA conclusions was its grant of summary judgment against AA's state law claim of tortious interference. With no antitrust injury or RPA "wrong," the court reasoned, there could be no claim. The court also concluded that AA's other state law claim -- breach of implied covenant -- must fail as well. The court held that Georgia law does not allow a claim for breach of implied covenant, if such a claim cannot be tied to a violation of an explicit contractual provision.

(1967); **[**24]** *FTC v. Henry Broch & Co., 363 U.S. 166, 168, 80 S. Ct. 1158, 1160, 4 L. Ed. 2d 1124 (1960)*. The RPA was Congress's tool for doing so, for leveling competition between these types of competitors.

As is obvious from this brief summary of the RPA's history, "it is fairness, as Congress perceives it, that Robinson-Patman is all about." *Boise Cascade Corp. v. FTC, 267 U.S. App. D.C. 124, 837 F.2d 1127, 1146-47 (D.C.Cir. 1988)*. The Act's goal is to abolish unwarranted favoritism among all functional competitors, big or small. [16] Its objective is to assure "that businessmen at the same functional level . . . start on equal competitive footing so far as price is concerned"; *FTC v. Sun Oil Co., 371 U.S. 505, 520, 83 S. Ct. 358, 367, 9 L. Ed. 2d 466 (1963)*; "to assure that all sellers regardless of size, competing directly for the same customers . . . receive evenhanded treatment from their suppliers"; *Fred Meyer, supra, 390 U.S. at 356, 88 S. Ct. at 912*.

[25]** In this case, the evenhanded treatment sought by the RPA is missing. In fact, favoritism abounds. The facts show that in selling to AA and Wolf Camera Minolta clearly favored Wolf Camera. The facts establish price discrimination on Minolta's part, for "a price discrimination within the meaning of [the RPA] is merely a price difference," *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549, 80 S. Ct. 1267, 1274, 4 L. Ed. 2d 1385 (1960)*, and the facts demonstrate a difference in price between what Minolta charged Wolf Camera and what Minolta charged AA. Making this clear is a comparison of ratios based on the documented benefits received from Minolta by Wolf Camera and AA in relation to their purchases. The evidence indicates that Wolf Camera received $ 372,034 of documented benefits in relation to $ 12,891,883 of purchases; thus Wolf Camera's documented benefit/purchases ratio is.029, or about $.03 on the dollar. Using the $ 350,540 figure Appellees prefer, the ratio drops to about.027. When $ 26,961 of non-MDF benefits received by Wolf Camera is added, these ratios are about.031 and.029, respectively. AA's ratio, based on MDF benefits **[*1423]** received of $ 60,458 **[**26]** and purchases of $ 6,983,174 is about.0087, or less than $.01 on the dollar. Thus, the competitors' benefit/purchases ratios are not equal. They show at the very least that Wolf Camera owned a two cent per dollar advantage in purchasing. This advantage remains even under a best-case scenario for the Appellees, when $ 80,446 of non-MDF benefits purportedly received by AA are taken into account. AA's ratio rises to about.02, still one cent per dollar behind Wolf Camera's. When the numbers are crunched using other evidence of benefits, such as the testimony of Grabowski, the price discrimination -- and Wolf Camera's purchasing advantage -- becomes embarrassingly large.

Despite this and other substantial evidence hinting of Minolta's discrimination in favor of Wolf Camera (and, consequently, against AA), the court below granted summary judgment against AA's claims. The court seemed to believe that in spite of the evidence indicating favoritism its reasons, based as they were on the "proportionally equal" test of RPA sections 2(d) and (e), the "meeting competition" defense of RPA section 2(b), and the "antitrust injury" test of Clayton Act section 4, were enough to support summary judgment. **[**27]** While in theory this certainly is true, in the reality of this case, it is not.

III.

We take the sections 2(d) and (e) issue first. The court below felt that no violation of these sections was possible because whatever Minolta provided Wolf Camera by way of benefits was available on "proportionally equal terms" to AA as well. Even though the opportunity afforded Wolf Camera to obtain certain advertising, promotional, and other benefits was not afforded AA, the court apparently felt that the two competitors had access to similar incentive programs because AA could and did participate in a Minolta program that provided AA with financial help.

Yet sections 2(d) and (e) ***HN12***[] require something more than access to different incentive programs before their "proportionally equal" standard is met. The sections' language requires that purchasers be given an equal opportunity to participate in certain types of seller programs relating to the resale of products, such as advertising and promotional programs, and that the benefits under those programs be disbursed on equal terms to purchasers

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[16] Though the birth of the RPA was motivated by a desire to place "big" purchasers on par with "small" ones, the Act's applicability is not limited to big buyer/small buyer cases. *Boise Cascade, supra, at 1139 n. 11*. "It 'is of general applicability and prohibits discriminations generally.'" *Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 436, 103 S. Ct. 1282, 1289, 75 L. Ed. 2d 174 (1983)* (quoting *FTC v. Sun Oil Co., 371 U.S. 505, 522, 83 S. Ct. 358, 368, 9 L. Ed. 2d 466 (1963))*.

in proportion **[**28]** to some objective value of their participation. *See* FTC v. Fred Meyer, Inc., 390 U.S. 341, 358-59, 88 S. Ct. 904, 913, 19 L. Ed. 2d 1222 (1967) (Fortas, J., concurring). *See also* FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 1 Trade Reg. Rep. (CCH) 6072 (1960). Such a program may be one, for example, where an advertising fund is made available by a supplier to its retail-trade customers on a basis proportional to the dollar amount of the supplier's goods purchased by each retailer, the fund's monies to be expended up to each retailer's earned limit according to the retailer's actual resale advertising. *See F. Rowe, Price Discrimination Under the Robinson-Patman Act* 407 (1962). But the disputed fact situation facing us here does not present such a program, or anything like it. The situation presented here is one in which AA's ability to partake in certain schemes involving Wolf Camera was *completely foreclosed*: AA could not participate in advertising, promotional, and other resale schemes that funneled Wolf Camera benefits of at least $ 100,911. [17] This hardly seems to fulfill the "guiding ideal" that **[**29]** motivated the RPA: "the preservation of *equality of opportunity* as far as possible to all who are usefully employed in the service of distribution and production." *H.R.Rep.* No. 2287, 74th Cong., 2d Sess. 6 (1936), *quoted in* FTC v. **[*1424]** Sun Oil Co., 371 U.S. 505, 520, 83 S. Ct. 358, 367, 9 L. Ed. 2d 466 (1963) (emphasis added). It does not fulfill the mandate of sections 2(d) and (e).

Putting this opportunity problem aside, we also find the financing program in which **[**30]** AA participated legally incomparable to the promotion programs doled out to Wolf. "Services and facilities" falling within the scope of sections 2(d) and (e) must relate to the resale of the supplier's goods. *See* Fred Meyer, supra, 390 U.S. at 355-57, 88 S. Ct. at 911-12. ***HN13***[] Generally, financing programs do not relate to the resale of the supplier's goods and therefore are not services and facilities within the meaning of sections 2(d) and (e). Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1328 (6th Cir.1983); L & L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113, 1119 & n. 7 (5th Cir. 1982); Skinner v. United States Steel Corp., 233 F.2d 762, 765 (5th Cir. 1956). Advertising and promotional programs are. *See* FTC v. Simplicity Pattern Co., Inc., 360 U.S. 55, 65, 79 S. Ct. 1005, 1011, 3 L. Ed. 2d 1079 (1959); Bouldis, supra, at 1329. Where two types of programs are segregated in law and nonequivalent in fact, comparing them to determine whether the promotional programs were available **[**31]** on "proportionally equal terms" seems nonsensical. Moreover, comparing the two types of programs would be proper only if Wolf Camera could not participate in the financing program on proportionally equal terms with AA. This is so because AA could not participate in the promotional programs on proportionally equal terms with Wolf Camera. But there is nothing to suggest that the financing programs in which AA participated were not open and available to Wolf Camera; indeed, the evidence suggests otherwise, as Minolta gave both AA and Wolf Camera non-MDF benefits.

Even if we assume that the financing and promotional programs are legally comparable, we still encounter problems. The evidence indicates that benefits under those programs were not disbursed by Minolta on proportionally equal terms. The benefits AA derived from the programs it was allowed access to were woefully short of those derived by Wolf Camera. The minimum quantified value of benefits provided AA through Minolta's programs (MDF: $ 60,458; non-MDF: $ 80,446) simply was not comparable with the minimum quantified value of benefits provided Wolf Camera (MDF: $ 372,034; non-MDF: $ 26,961). On a proportional basis, *i.e.* **[**32]** , per dollar of purchases, Wolf Camera received at least half again as much in the way of benefits as did AA.

On the sections 2(d) and (e) issue there seems to us, at the very least, "'sufficient evidence to create a jury question.'" Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 580 (5th Cir.) (quoting Malcolm v. Marathon Oil Co., 642 F.2d 845, 848 (5th Cir.), *cert. denied*, *454 U.S. 1125, 102 S. Ct. 975, 71 L. Ed. 2d 113 (1981))*, *cert. denied*, *459 U.S. 908, 103 S. Ct. 212, 74 L. Ed. 2d 169 (1982)*. The lower court's "proportionally equal terms" conclusion simply is incapable of supporting its grant of summary judgment.

That conclusion, however, was but one arrow in the court's summary judgment quiver. The district court also concluded that the Appellees had established as a matter of law the meeting competition defense of RPA section

[17] We count only those discovered MDF benefits which relate to advertising and promotion, for the $ 271,123 of MDF benefits relating to free goods are not "services or facilities" within the meaning of sections 2(d) or (e). "Services and facilities" under sections 2(d) and (e) must be related to the resale of the product in issue, and Minolta's provision of free goods was not connected with the resale of Minolta equipment. *See, e.g.,* Fred Meyer, supra, 390 U.S. at 355-57, 88 S. Ct. at 911-12.

2(b). Of course, if the Appellees merely were meeting their competition in good faith they are entitled to summary judgment, the type and amount of their price discrimination notwithstanding.

To establish that they merely were meeting the competition, Appellees **[**33]** alleged that a grey market in Minolta goods existed in Atlanta, that Wolf Camera actively and regularly purchased in this market, that Wolf Camera made known to Minolta that it would buy its Minolta cameras out of this market if Minolta did not cut it special deals, and that Minolta's action in giving Wolf Camera across-the-line discriminatory price concessions was a good faith effort to meet the grey market threat. AA disputed all of this, and hotly so. The district court chose to ignore AA's disputation; it accepted Minolta's testimony *in toto*. It then **[*1425]** opined that summary judgment was appropriate.

We cannot agree with the district court's opinion. ***HN14***[] Under summary judgment a conclusion may not be established as a matter of law unless "no genuine issue as to any material fact" exists. *Fed.R.Civ.P. 56(c)*. Yet in this case plenty of these genuine issues exist. We need not at this point lose ourselves in the facts. We merely pause to note that significant questions are present concerning, among other things, the extent and impact of the grey market for Minolta goods in **[**34]** Atlanta and elsewhere throughout the southeast, the good faith nature of the alleged investigation Minolta made into grey market conditions, *see* *FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 758-59, 65 S. Ct. 971, 976, 89 L. Ed. 1338 (1945)*; *Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 392 (8th Cir. 1987)*, the propriety of its rather generalized response to the purported competition, *see* *Staley Mfg., supra, 324 U.S. at 753, 758-59, 65 S. Ct. at 975, 977*, and the actual *purpose* which lies behind its price discrimination, *see* *Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 439, 103 S. Ct. 1282, 1291, 75 L. Ed. 2d 174 (1983)*.

Moreover, under summary judgment involving section 2(b) a legal conclusion that the meeting competition defense has been established is rarely, if ever, reachable. Even in the absence of "allegations to the contrary" that tend to refute the establishment of the defense, certain factors combine to force section 2(b) issues to trial. *See* *Falls City, supra, at 451, 103 S. Ct. at 1297*. First, **[**35]** ***HN15***[] the party proposing a grant of summary judgment in its favor -- here, the Appellees -- bears the initial burden of showing that the summary judgment standard is met. *Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368 (11th Cir. 1982)* (citing *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970))*. In the normal course of affairs this initial burden is satisfied when the summary judgment movant points out that a claim or issue is not supported by evidence sufficient enough "to require a [factfinder] to resolve the parties' differing versions of the truth." *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)*. But in the normal course of affairs the summary judgment movant does not bear the burden of proof at trial. Here our movant does, for "the statute places the burden of establishing the defense on the [defendant] not the [plaintiff]." *Falls City, supra, 460 U.S. at 451, 103 S. Ct. at 1297*. As is well established, in a summary judgment proceeding the party against whom the burden of proof falls **[**36]** at trial faces a challenge more difficult than otherwise. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)*. Here the Appellees must do more than put the issue into genuine doubt; indeed, they must remove genuine doubt from the issue altogether. Second, the test for establishing the section 2(b) defense makes the removal of genuine doubt well nigh impossible. The test for establishing the defense is particularly fact-bound. *United States v. United States Gypsum Co., 438 U.S. 422, 455, 98 S. Ct. 2864, 2882, 57 L. Ed. 2d 854 (1978)*. Whether section 2(b) is met depends on "'*the facts and circumstances of the particular case*.'" *Falls City, supra, 460 U.S. at 441, 103 S. Ct. at 1292* (quoting *United States Gypsum, supra, 438 U.S. at 454, 98 S. Ct. at 2882*) (emphasis added). ***HN16***[] A seller is required to "'show the existence *of facts* which would lead a reasonable and prudent person to believe that the granting of a lower price would *in fact* meet the equally low price of a **[**37]** competitor.'" *Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 82, 99 S. Ct. 925, 934, 59 L. Ed. 2d 153 (1979)* (quoting *Staley Mfg., supra, 324 U.S. at 759-60, 65 S. Ct. at 977*) (emphasis added). As the standards suggest, these facts are more attuned with a jury's discovery capabilities than a judge's, particularly so in a complex antitrust context like the present one. Furthermore, the concept of good faith lies at the core of the defense. *United States Gypsum, supra, 438 U.S. at 454, 98 S. Ct. at 2882*. Like the concept of "good faith" in other legal standards, the concept here concerns itself with the *belief* of those invoking its protection. **[*1426]** *See* *id., at 453, 98 S. Ct. at 2881*. Thus, issues of credibility are inherently bound up with a decision on the section 2(b) defense and in a summary judgment proceeding, of course, issues of credibility are beyond a judge's ken.

Altogether, these factors weigh heavily against any attempt to dispose of section 2(b) issues on summary judgment. Their weight, along with that of the disputed facts, is too much for the lower court's attempt in this case. Although **[**38]** "there is evidence in the record that might support an inference that [the section 2(b)] requirements were met, whether to draw that inference is a question for the trier of fact, not th[e] court." *Falls City, supra, 460 U.S. at 451, 103 S. Ct. at 1297*. Thus, the section 2(b) issues before us are not destined for summary disposal.

With the subsection (b), (d), and (e) issues out of the way, we are ready to address the final and main ground supporting the lower court's grant of summary judgment: that AA failed to raise a genuine issue of antitrust injury. The district court found the case devoid of any evidence showing an antitrust injury. We think such evidence exists, however, evidence creating a genuine issue of material fact about whether an antitrust injury was inflicted upon AA.

HN17[] Antitrust injury, which in this Circuit has been coined "the fact of damage," *Alabama v. Blue Bird Body Co., 573 F.2d 309, 317 (5th Cir. 1978)*, or "cognizable injury," *Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20* (5th Cir.), *cert.* **[**39]** *dismissed*, *419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974)*, needs for its establishment a showing that the plaintiff is injured in some measurable amount, the injury caused by an improper effect "flowing" from the defendant's antitrust violation. *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 101 S. Ct. 1923, 1927, 68 L. Ed. 2d 442 (1981)*; *Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1042 (9th Cir. 1988)*, *cert. granted*, *490 U.S. 1105, 109 S. Ct. 3154, 104 L. Ed. 2d 1018 (1989)*. As can be seen, the fact of damage and its cause are intertwined in the antitrust injury concept. The fact of damage is made out upon proof that the plaintiff's level of profits or sales or its present value is or was less than it otherwise would have been absent some intervening cause. *See* *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24, 89 S. Ct. 1562, 1576-77, 23 L. Ed. 2d 129 (1969)*; *Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 580*; *Hasbrouck, supra, at 1042*. Such a showing presents no problem in this case: AA lost a whole market **[**40]** in Minolta camera sales, the pecuniary effects of which were quantified by its economics expert. [18]

[41]** **[*1427]** The causation question is a little more involved. It asks for something other than an inquiry into whether an antitrust violation has put a plaintiff in a worse position than it otherwise would have been in. *See* *Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486, 97 S. Ct. 690, 696, 50 L. Ed. 2d 701 (1977)*. Often an antitrust-violating action has effects beneficial as well as banned. The causation question asks not whether the antitrust violation caused the plaintiff's injury, but whether the banned effects flowing from that violation -- as opposed to the beneficial ones -- led to plaintiff's harm. *Brunswick, supra, at 489, 97 S. Ct. at 697*. In many cases

[18] The lower court seemed to find that AA failed to establish injury at all, much less antitrust injury. The court found that the discriminatory benefits received by Wolf Camera were not passed on in the form of lower prices to its consumers and that AA never lowered prices to compete with Wolf Camera. Moreover, the lower court found from the evidence that AA's profit margins on Minolta products were comparable with or higher than those on its other products, and stayed that way throughout the period of discrimination. It apparently concluded from these findings that AA had suffered no loss of sales or profits and, consequently, that no damage had been sustained.

Such a conclusion is a *non sequitur*. Wolf Camera may not have passed on its discriminatory benefits in the form of lower prices, although we think the evidence on this is mixed at best. But lower resale prices are not necessary to establish injury. The evidence shows that discretionary dollars in the Atlanta specialty camera store industry were most often channelled into store-specific advertising rather than into investments in price cuts. Sales were gained not by cutting prices but by aggressive advertising or product/service enhancement. The evidence, more specifically, shows that Wolf Camera was an avid pursuer of marketing expense and enhanced service and, indeed, that it directed most of its discriminatory advantage into these areas of demand management, thereby expanding its sales at AA's expense. Although price is nice, it is this effect on sales that directs the injury inquiry. *See* *Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. at 437-38, 103 S. Ct. at 1290* (speaking of diverted sales); *Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d at 386-87* (speaking of injury through loss of potential customers).

That AA's product margins on Minolta goods remained comparable with those on its other goods or that AA did not lower its prices on Minolta goods (which is to say the same thing) is not critical in establishing injury, for a firm's profits are the product of an equation multiplying profit margin and dollar volume of sales. Where the dollar volume of sales drops, as it did for AA in a most dramatic fashion, a firm's amount of profit drops regardless of stability in its profit margin. And it is the firm's *profits*, not its *profit margin*, that the law is concerned with.

this distinction makes a difference. *See id.; Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. This is so because in many cases the "injury to competition" an ***antitrust law*** was established to prevent is different from an "injury to competitors" that a breach (or nonbreach) of that law may effect. *See Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986)*. In those **[**42]** cases a competitor cannot complain if injured unless the injury flows from anti-competitive, not anti-competitor, effects.

With secondary-line RPA violations the competition/competitor distinction tends to fade. *See FTC v. Morton Salt Co., 334 U.S. 37, 49-50, 68 S. Ct. 822, 830, 92 L. Ed. 1196 (1948)* (concerning competitive injury); *Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 678* (5th Cir.) (same), *cert. denied*, *382 U.S. 959, 86 S. Ct. 435, 15 L. Ed. 2d 362 (1965)*. As a price discrimination incipiency statute designed to "catch the weed in the seed," *S.Rep. No.* 1502, 74th Cong., 2d Sess. 4 (1936), the injury to secondary-line competition the RPA seeks to prevent is analogous, if not identical, to an injury to competitors of a favored buyer. *See H.R.Rep. No.* 2287, 74th Cong., 2d Sess. 8 (1936). *See also Morton Salt, supra, 334 U.S. at 46-50, 68 S. Ct. at 828-30*; *Corn Prod. Ref. Co. v. FTC, 324 U.S. 726, 738-39, 65 S. Ct. 961, 967, 89 L. Ed. 1320 (1945)*. The effects from which the RPA injury may flow, then, are the effects one would expect to injure competitors on the wrong end of a supplier's **[**43]** price discrimination scheme. These effects include a lowering of price by a favored purchaser. They also include a favored purchaser's effectuation of some other means by which it uses price discrimination benefits to lure from its rivals sales or profits or present value; for example, by increasing some expenditure that ultimately leads to a lower price, enhanced product, or extra promotion. *See World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1480* (10th Cir.), *cert. denied*, *474 U.S. 823, 106 S. Ct. 77, 88 L. Ed. 2d 63 (1985)*. *Cf. Foremost Dairies, supra, at 680*.

In final form the RPA causation question asks whether some or all of the plaintiff's injury was derived from or materially furthered [19] by a competitive advantage bestowed upon a favored purchaser through its receipt of discriminatory prices. *See Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1171 (7th Cir. 1978)*, *cert. denied*, *440 U.S. 982, 99 S. Ct. 1791, 60 L. Ed. 2d 242 (1979)*. The evidence in this case is enough to put the question genuinely in dispute, especially in light of the substantial evidence of Appellees' **[**44]** wrongdoing. *See J. Truett Payne, supra, 451 U.S. at 565-67, 101 S. Ct. at 1929-30*. That evidence suggests that Minolta gave Wolf Camera a purchasing advantage over AA and that Wolf Camera channeled its purchasing advantage into a promotional advantage, unmatched by AA, in an industry where store sales are heavily influenced by promotional expense. It shows conclusively that during the time of this discrimination AA's share of the market dropped precipitously, that **[*1428]** share being absorbed by Wolf Camera. And it contains, among other things, the report of an economic expert concluding that the advantage afforded Wolf Camera by the discrimination *caused* AA injury, and in quite a substantial amount. There is enough here for a jury to find an antitrust injury caused by Appellees "'as a matter of fact and with a fair degree of certainty.'" *See Chrysler Credit Corp., supra, at 581* (quoting *Terrell, supra, at 20*). There is enough for a jury to find otherwise, too, but not so much to eliminate a triable issue. [20] At the very least the

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[19] For damages "it is enough that the illegality is shown to be a *material cause* of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden." *Zenith Radio Corp., supra, 395 U.S. at 114 n. 9, 89 S. Ct. at 1571-72 n. 9*.

[20] This conclusion stands regardless of the specific concerns advanced by the lower court. The court felt that no injury could possibly arise from the amount of price discrimination involved in the case, which it called *de minimis*. But the *de minimis* doctrine, by which a price discrimination is held to be too inconsequential to have caused competitive injury under section 2(a) or actual injury under section 4, does not depend on the large or small amount of the price discrimination *per se*. It depends on the large or small *effect* that the price discrimination has on business rivalry. *See Lupia, supra, at 1171*. To illustrate, in a competitive market the smallest increment of price advantage to one competitor would theoretically allow it to capture from its rivals as much of a market share as its output allowed. The price advantage may be *de minimis*, but the effect of it is not. We are not suggesting that the market involved here is *perfectly* competitive, but it is imperfectly so, and even in such markets a little price discrimination can go a long way. *See Foremost Dairies, supra, at 679* (dairy industry); *Shreveport Macaroni Mfg. Co. v. FTC, 321 F.2d 404, 409 (5th Cir. 1963)*, *cert. denied*, ***375 U.S. 971, 84 S. Ct. 491, 11 L. Ed. 2d 418 (1964)*** (pasta industry). Indeed, AA's economic expert concluded that the competitive advantage given Wolf had a *substantial* effect on its ability to capture market share, and as far as we know the expert's conclusions constitute evidence. Thus, the lower court's *de minimis* objection cannot keep this issue from reaching the jury.

evidence gives rise to a reasonable inference that Appellees' misdeeds caused AA some harm. **[**45]** And where such a reasonable inference is raised by the evidence, summary judgment is uncalled for. *Gossett v. Du-Ra-Kel Corp., 569 F.2d 869, 871 (5th Cir. 1978)*; *Benton-Volvo-Metairie, Inc. v. Volvo S.W., Inc., 479 F.2d 135 (5th Cir. 1973)*.

[46]** IV.

We turn now to some peripheral issues. They are easily dispatched. The lower court granted Wolf and Wolf Camera's motion for summary judgment against AA's section 2(f) claim. Its reason for so doing was that no claim can lie against a buyer under section 2(f) where no claim lies against a seller under other sections of the **[*1429]** RPA. This reasoning is unassailable. *See Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 76-77, 99 S. Ct. 925, 931, 59 L. Ed. 2d 153 (1979)*; *Automatic Canteen Co. v. FTC, 346 U.S. 61, 70-71, 73 S. Ct. 1017, 1022-23, 97 L. Ed. 1454 (1953)*; *Boise Cascade Corp. v. FTC, 267 U.S. App. D.C. 124, 837 F.2d 1127, 1129 (D.C.Cir. 1988)*. But our analysis has determined that the lower court was in error on issues relating to seller liability. With this prong of its argument gone, the district court's conclusion concerning section 2(f) is no longer valid. Accordingly, AA's section 2(f) count must be revived.

The same can be said of AA's state law claim for tortious interference. The court granted summary judgment on this count relying on the strength of its previous conclusions regarding the RPA and section **[**47]** 4 of the Clayton Act. Because those conclusions have been undermined, the court's summary judgment on the tortious interference count is likewise undermined.

AA's complaint also included a state law claim asserting that Minolta had an ongoing contractual relationship with AA throughout the period of the alleged price discrimination, that an implied covenant of good faith and fair dealing was part of this contract, and that Minolta's discriminatory actions breached this covenant. AA did not allege, however, that any explicit term in its contracts with Minolta was breached. Thus, AA sought to set the implied covenant up as an independent term in its contracts, subject to breach apart from any other. The district court rejected this attempt, and rightly so, for the "covenant" is not an independent contract term. *Management Assistance, Inc. v. Computer Dimensions, Inc., 546 F. Supp. 666 (N.D.Ga.1982)*, *aff'd without opinion sub nom.,*

Nor can a variation on the *de minimis* theme relied on by the court: that no antitrust injury existed because Minolta products were only one line of many that AA carried. Simply because AA's injury derived from only one line of its products does not make that injury any less real. *See FTC v. Morton Salt Co., 334 U.S. at 49, 68 S. Ct. at 829*. If this particular strain of the *de minimis* argument failed in *Morton Salt*, where a grocer's potential injury came only from price differentials affecting one product amid thousands that it carried, it surely fails here.

The court also seemed to think that AA's injury could only be caused from price-lowering actions by Wolf Camera. But sales in the specialty camera industry are affected by more than price; they are affected by promotion and product as well. The court found as a matter of fact that Wolf Camera channeled most of its advantage into advertising and promotion, and it seems that it enhanced its product (photographic equipment *and* retail service combined) too. The evidence establishes that promotion and product enhancement were the primary factors affecting camera consumers' choice of sales outlet. Thus the fact that Wolf Camera did not lower its resale prices, even if true, by no means eliminates causation from jury consideration.

The court felt too that no genuine issue existed about AA's antitrust injury, or lack thereof, because AA was the cause of its losses, not Appellees. There can be no liability "when the injury is the result of the plaintiff's own competitive shortcomings, rather than a merely coincidental discrimination in price." *Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 421 (8th Cir. 1986)*. And it is true that AA had competitive shortcomings, including its faulty computer system and its decision to blunder about unprofitably in Florida. These shortcomings *could* easily have been the intervening cause of all AA's sales and profit losses or some part of them, of this there is no doubt. But whether the cause of all or some of AA's problems *actually was* AA's discrimination-based competitive disadvantage, AA's computer, AA's managers, all of these things or none of them, is a matter of educated inference that must be left for the jury. If it finds that Appellees' price discrimination was the cause of *some* of AA's injury, which is certainly a reasonable inference, Appellees will be "responsible to that extent." *Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. at 437, 103 S. Ct. at 1290*.

Computer Dimensions, Inc. v. Basic Four, Inc., 747 F.2d 708 (11th Cir. 1984). It is a doctrine that modifies the meaning of all explicit terms in a contract, preventing a breach of those explicit terms *de facto* when **[**48]** performance is maintained *de jure. See Smithloff v. Benson, 173 Ga.App. 870, 328 S.E.2d 759 (1985)*; *Koets, Inc. v. Benveniste, 169 Ga.App. 352, 354, 312 S.E.2d 846 (1983) aff'd*, *252 Ga. 520, 314 S.E.2d 912 (1984)*; *Fulton Nat'l Bank v. Willis Denney Ford, Inc., 154 Ga.App. 846, 848-49, 269 S.E.2d 916 (1980)*; *Carmichael v. Gonzalez, 107 Ga.App. 746, 131 S.E.2d 149 (1963)*. But it is not an undertaking that can be breached apart from those terms. Summary judgment on this count was appropriate.

One final issue. The district court precluded AA from pursuing discovery of information concerning discriminatory benefits that Minolta afforded Wolf Camera out of certain MDF accounts and discriminatory benefits that Minolta afforded other "key dealers" throughout the nation. It did so, in part, on the theory that the information sought was irrelevant to the litigation. But the information sought is relevant. Information showing that discriminatory benefits flowed not only to Wolf Camera but to other "key dealers" throughout the nation would go far in discrediting any attempt by Minolta to assert that the **[**49]** discriminatory benefits it afforded Wolf Camera were a "good faith" effort to meet competition in the Atlanta or southeast market. And information leading to a further quantification of the amount of price discrimination involved in Minolta's scheme would tend to clarify and perhaps refute any claims Appellees might raise relating to the competitive injury requirement of section 2(a), which concerns itself with injury to competition and competitors *in general*, not just injury to AA. [21]

[50]** In blocking the discovery of information such as this, the district court abused its discretion. We are not saying that the **[*1430]** district court was wrong to be concerned about elements of vexatiousness that may be lurking in this lawsuit, nor do we think that it should have given AA *carte blanche* in pursuing discovery. We say only that its order of October 2, 1987 was in error because it did not properly take into account the type of information that has value under the "key dealer" theory AA presented.

V.

In sum, we conclude that the district court abused its discretion with respect to the discovery order of October 2, 1987. We also conclude that summary judgment was improper with respect to all issues except the one concerning the implied covenant of good faith and fair dealing. Besides that one, the issues involved in this appeal are all "genuine issues of material fact," *Fed.R.Civ.P. 56(c)*, for which a trial would serve a useful purpose. Accordingly, they must be submitted to the jury. [22]

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[21] Even when AA's injury alone is considered, the district court's limitation on discovery was too severe. The court found that the Atlanta market was the only relevant market in this case, but this finding does not comport with the facts. AA had stores not only in Atlanta, but throughout the southeast United States and particularly in Florida. Grabowski's testimony alleged that Minolta channeled "key dealer" benefits to Florida camera stores other than AA, including Wolf Camera's Florida stores. The evidence is inconclusive with regard to the extent of competition, in Florida, between AA and the other key-dealer retailers. Thus, these benefits *may have injured* AA in Florida, or they may have been used to create a fund for injuring AA in Atlanta. Discovery should have been allowed to determine if this was the case.

Moreover, a narrow reading of AA's complaint cannot limit the relevant market in this case solely to Atlanta. Although the complaint naturally focuses on Minolta and Wolf Camera in the Atlanta market, it does not do so to the point of limiting discovery only to Wolf Camera in the Atlanta market. It seems to us that the district court's focus on the Atlanta market was too narrow. At least for the purposes of discovery, AA should have been allowed to find information on price discrimination affecting all of its stores, even those outside of Atlanta.

[22] Our analysis on summary judgment was based on a normal reading of the *Rule 56* standard. Appellees argue that our analysis should have been based on a stricter reading. They assert that the Supreme Court's decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* evinces a mandate for courts to use a stricter-than-normal summary judgment standard in antitrust cases, a standard that imposes extra burdens on a plaintiff, one that would lead us in this case to uphold the district court. We cannot agree with the Appellees' assertion, however, for *Matsushita* calls for no such deviation from the norm embodied in *Fed.R.Civ.P. 56*.

[51]** For the foregoing reasons, the judgment of the district court is REVERSED, and its order entered October 2, 1987 is VACATED. The case is REMANDED for further proceedings consistent with this opinion.

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In *Matsushita* the Supreme Court warned courts in summary judgment proceedings to be skeptical when presented antitrust allegations that clash with established economic theory. Such skepticism is well warranted because established economic theory indicates how rational entities generally act, and most antitrust cases involve the acts of rational entities. Generalizing, *Matsushita* warns courts to be wary of drawing irrational inferences in summary judgment proceedings, for irrational inferences fail to create genuine issues of material fact. But such a doctrine is hardly novel; and it certainly does not modify the standard for summary judgment. *Matsushita* said nothing new, it merely informed the proper *Rule 56* standard by placing it in a complex antitrust context (that of a predatory pricing conspiracy).

We did not base our conclusions on irrational inferences, of course. Thus, *Matsushita* provides Appellees with little help.

Austin v. Blue Cross & Blue Shield

United States Court of Appeals for the Eleventh Circuit

June 22, 1990

No. 88-7406

Reporter

903 F.2d 1385 *; 1990 U.S. App. LEXIS 9973 **; 1990-1 Trade Cas. (CCH) P69,070

Dennis W. AUSTIN, Individually and as representatives of the Plaintiff's Class; and Ernest D. Woodall, Jr., Individually and as representative of the Plaintiff's Class, Plaintiffs-Appellants, v. BLUE CROSS AND BLUE SHIELD OF ALABAMA, a corporation, Defendant-Appellee

Prior History: [1]** Appeal from the United States District Court for the Middle District of Alabama; No. 87-D-1051-N; N. Dubina, Judge.

Disposition: AFFIRMED.

Core Terms

antitrust, allegations, anti trust law, rates, damages, insured, Sherman Act, charges, antitrust violation, general contractor, Clayton Act, competitors, purchasers, contracts, patients, shifting, insurance company, subscribers, injuries, factors, prices, Brick, restraint of trade, monopoly power, anti-competitive, speculative, customers, indirect, remote, target

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

The question of standing to sue under the Sherman and Clayton Acts is one of law. In order to determine whether a plaintiff has standing to bring an antitrust action, a court must review the allegations contained in the complaint. More than constitutional standing must exist; the court must find a close relationship between the plaintiff's injury and the alleged antitrust violation.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN2[] **Standing, Clayton Act**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, defines very broadly the class of persons who may bring a private damage action under the antitrust laws.

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4[] **Clayton Act, Claims**

The question of whether a plaintiff can recover for alleged antitrust injuries cannot be answered simply by reference to the broad language of § 4 of the Clayton Act, *15 U.S.C.S. § 15*. Instead the question requires the court to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. It is clear that the judicial remedy of § 4 of the Act cannot encompass every conceivable harm that can be traced to alleged wrongdoing.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN5[] **Clayton Act, Claims**

Standing to prosecute a private antitrust action under § 4 of the Clayton Act requires the plaintiff to prove that he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry. The plaintiff must be the target against which anti-competitive activity is directed. The injury must be of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful. Incidental or consequential injury or injury remotely caused by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the anti-trust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] **Private Actions, Standing**

Both causation and antitrust injury are essential elements of antitrust standing. In order to receive damages under the antitrust laws, a plaintiff must prove more than the fact that he was injured through conduct of the defendant. The plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Moreover, the injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The antitrust laws were enacted for the protection of competition, not competitors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Monopolies & Monopolization, Attempts to Monopolize**

The Supreme Court has defined the offense of monopoly under *§ 2* of the Sherman Act as consisting of two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN8[] Clayton Act, Claims

Antitrust standing is lacking under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, where the antitrust injury alleged is remote and highly speculative.

Antitrust & Trade Law > Clayton Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN9[] Antitrust & Trade Law, Clayton Act

Effective employment of the antitrust remedy provided by § 4 of the Clayton Act, *15 U.S.C.S. § 15*, requires that these lawsuits not be weighed down with massive evidence and complicated theories.

Counsel: C. Knox McLaney, III, Montgomery, Alabama, Jerry R. Knight, Decatur, Alabama, for Plaintiffs-Appellants.

Lange, Simpson, Robinson & Somerville, William G. Somerville, Jr., Robert D. Eckinger, Birmingham, Alabama, for Defendant-Appellee.

Judges: Roney and Hill, Senior Circuit Judges, [*] and Marcus, [**] District Judge.

Opinion by: MARCUS

Opinion

[*1386] Marcus, District Judge.

Dennis W. Austin and Ernest D. Woodall, Jr. appeal from the June 7, 1988 district court order dismissing their Amended Complaint on the finding that Appellants lacked antitrust standing to bring this action. We find no error in the district court's determination and accordingly we affirm.

I.

This action arose out of allegations contained in Appellants' Amended Complaint filed in the United States District Court for the Middle District of Alabama. In their Amended **[**2]** Complaint, Austin and Woodall, residents of Decatur, Alabama, allege that Blue Cross and Blue Shield of Alabama ("Blue Cross") entered into contracts, combinations or conspiracies with all, or substantially all, of the hospitals in the state of Alabama for the purpose of creating or maintaining a monopoly or for the purpose of eliminating, lessening, discouraging, or impeding competition from others engaged in the health, medical and hospital insurance business. The Amended Complaint

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[*] See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

[**] Honorable Stanley Marcus, U.S. District Judge for the Southern District of Florida, sitting by designation.

further charges that the Defendant and the hospitals, including the Decatur General Hospital and the Huntsville Hospital, engaged in certain illegal acts and practices. The Amended Complaint claims that agreements reached between Blue Cross and the hospitals wrongfully provided for the hospitals to accept payments for services rendered from Blue Cross, on behalf of its insured, in amounts lower than charges which the hospitals assessed to patients insured by competitors of Blue Cross and patients who do not subscribe to health insurance for like services. Appellants say that the agreements between Blue Cross and the hospitals caused the hospitals to engage in a practice known as "cost shifting," a process **[**3]** whereby patients insured with other insurance companies as well as uninsured patients are assessed charges higher than they would be assessed but for the alleged preferential treatment given to Blue Cross and its insured pursuant to the alleged agreements. It is further charged that the agreements put Blue Cross in a superior competitive position by giving Blue Cross a decided actuarial advantage over its competitors. The Appellants claim that Blue Cross' actions in allegedly entering into agreements regarding price concessions with the hospitals violate both *Sections 1* and *2* of the Sherman Act, Title *15 U.S.C. §§ 1*, *2*.

Appellant Austin charges specifically that his wife and newborn child incurred substantial medical expenses at Decatur **[*1387]** General Hospital and Huntsville Hospital during the months of December 1986 and March 1987. While Dennis Austin and his dependents were covered by a health, medical and hospital insurance policy issued by Time Insurance Company -- not a party to the law suit -- Austin was responsible for certain uncovered hospital expenses as well as a twenty percent co-payment for costs which were covered under the policy. Austin **[**4]** claims that due to "cost shifting" engaged in by the hospitals as a result of agreements reached with Blue Cross, he was forced to pay inflated charges for the health care received by his wife and child.

Appellant Ernest D. Woodall, Jr. claims to have been treated at the Emergency Room of Decatur General Hospital at various times during 1985 and 1986. He charges that he was not covered by health, medical or hospital insurance during the period in which he received treatment and that he, too, incurred inflated charges for hospital services due to the "cost shifting" practices engaged in by the hospital. The Amended Complaint sought declaratory and injunctive relief as well as treble damages for the purported violations of the Sherman Act.

On March 4, 1988, Appellee moved to dismiss based on the lack of antitrust standing. Appellants responded on March 30, 1988, and on June 7, 1988 the district court granted the motion to dismiss finding that Austin and Woodall lacked "antitrust standing." This appeal ensued.

II.

HN1[] The question of standing to sue under the Sherman and Clayton Acts is one **[**5]** of law. *Midwest Communications v. Minnesota Twins, 779 F.2d 444, 449 (8th Cir. 1985)*, *cert. denied*, *476 U.S. 1163, 106 S. Ct. 2289, 90 L. Ed. 2d 730 (1986)*. In order to determine whether a plaintiff has standing to bring an antitrust action, a court must review the allegations contained in the complaint. *Pan-Islamic Trade Co. v. Exxon Corp., 632 F.2d 539, 547 (5th Cir. 1980)*, *cert. denied*, *454 U.S. 927, 102 S. Ct. 427, 70 L. Ed. 2d 236 (1981)*; *In Re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1168 (5th Cir. 1979)*. More than constitutional standing must exist; "the court must find a close relationship between the plaintiff's injury and the alleged antitrust violation." *Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1493 (11th Cir. 1985)*, *cert. denied*, *476 U.S. 1153, 106 S. Ct. 2267, 90 L. Ed. 2d 712 (1986)*.

Section 4 of the Clayton Act, *15 U.S.C. § 15*, **[**6]** defines ***HN2***[] very broadly the class of persons who may bring a private damage action under the antitrust laws. That section provides:

> ***HN3***[] Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The Supreme Court has observed that "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." Associated General Contractors v. Carpenters, 459 U.S. 519, 529, 103 S. Ct. 897, 903, 74 L. Ed. 2d 723 (1983). However, in *Associated General Contractors*, the Court rejected so expansive a reading of § 4 noting that **HN4**[] the question of whether a plaintiff can recover for alleged antitrust injuries "cannot be answered **[**7]** simply by reference to the broad language of § 4. Instead . . . the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." Id. at 535, 103 S. Ct. at 907. It is clear that "the judicial remedy [of § 4] cannot encompass every conceivable harm that can be traced to alleged wrongdoing" Id. at 537, 103 S. Ct. at 908. *See also* Hawaii v. Standard Oil Co., 405 U.S. 251, 263, n. 14, 92 S. Ct. 885, 891, n. 14, 31 L. Ed. 2d 184 (1972) ("The lower [federal] courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a **[*1388]** remedy in damages for all injuries that might conceivably be traced to an antitrust violation"); Southhaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1081 (6th Cir. 1983) ("Application of Section 4 has of necessity been judicially confined to limit the remedy available thereunder to particular classes of persons and for redress of particular forms of injury.")

The federal courts have long struggled to develop a precise test to determine whether a party alleged **[**8]** to have been injured by an antitrust violation may recover treble damages. This struggle has been compared with "the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause'". Associated General Contractors, 459 U.S. at 535-36, 103 S. Ct. at 907. In *Associated General Contractors*, the Supreme Court recognized the impracticality inherent in the application of a "black-letter rule" to determine whether a plaintiff has standing to recover for an antitrust violation. Id. at 536, 103 S. Ct. at 907. In doing so, the Court suggested that the use of formulations such as the "direct injury" test and the "target area" test may tend to "lead to contradictory and inconsistent results." Rather, the Court observed, "in our view, courts should analyze each situation in light of the factors set forth in the text. . . ." Id. at 536, n. 33, 103 S. Ct. at 907, n. 33.

Associated General Contractors involved a union's claim that an association of contractors coerced third parties and other members of the contractor's association into avoiding business relationships with union contractors and subcontractors. **[**9]** In determining that the union lacked standing to bring an action under the Clayton Act, the Supreme Court declined to apply a rigid test to resolve the standing issue. Instead, the Court applied the following battery of factors to reach its conclusion: 1) the existence of a causal connection between the antitrust violation and the alleged injury; 2) the nature of plaintiff's alleged injury; 3) the directness or indirectness of the asserted injury and the related inquiry of whether the damages are speculative; 4) the potential for duplicative recovery or complex apportionment of damages; and, finally, 5) the existence of a more direct victim of the alleged anti-competitive conduct. Id. at 536-45, 103 S. Ct. at 907-12. *See also* Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1494-95 (construing factors employed in *Associated General Contractors*). The Court noted that the foregoing factors are reflective of "previously decided cases [which] identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." Associated General Contractors at 536-37, 103 S. Ct. at 908. **[**10]**

Subsequent to the Supreme Court's decision in Associated General Contractors, this Court reaffirmed its employment of the target area test in determining standing under the Clayton Act. See Amey, 758 F.2d at 1496-97; Palazzo v. Gulf Oil Co., 764 F.2d 1381, 1387 (11th Cir. 1985), *cert. denied*, *474 U.S. 1058, 106 S. Ct. 799, 88 L. Ed. 2d 775 (1986)*. In National Independent Theatre Exhibitors v. Buena Vista Distribution Co., 748 F.2d 602-08 (1984), *cert. denied sub. nom., Patterson v. Buena Vista Distributing Co., 474 U.S. 1013, 106 S. Ct. 544, 88 L. Ed. 2d 473 (1985)*, this Court expounded on the requirements for standing in a private antitrust action:

> **HN5**[] Standing to prosecute a private antitrust action under section 4 of the Clayton Act requires the plaintiff to prove that "he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry." Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975). See Construction Aggregate Transport Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 762 (11th Cir. 1983). **[**11]** The plaintiff must be the target against which anti-competitive activity is directed. Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710 (11th Cir. 1984); Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-47 (5th Cir. 1980), *cert. denied*, *454 U.S. 927, 102 S. Ct. 427, 70 L. Ed. 2d 236*

> *(1981)*. The injury must be "of the type the antitrust laws were intended to prevent and that **[*1389]** flows from that which makes defendants' act unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*. "Incidental or consequential injury or injury remotely caused by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the anti-trust laws." *Midwestern Waffles, 734 F.2d at 710-11*. See *Jeffrey, 518 F.2d at 1131* (citing cases)

In *Amey*, this Court observed that the target area test does not produce results materially different from the results obtained by applying the factorial analysis embodied in *Associated General Contractors* **[**12]** . Indeed, the target zone test incorporates the factors delineated in *Associated General Contractors. See* *Amey, 758 F.2d at 1496-97*. Measured by any of these standards Appellants have not established antitrust standing.

III.

To begin, a review of the Amended Complaint establishes, as the district court observed, that the causal connection between Plaintiffs' injuries and Blue Cross' alleged misconduct is at best remote and tenuous. The Complaint alleges only that the hospitals and Blue Cross entered into contracts for the provision of hospital services to Blue Cross and its insured or subscribers; that as a result of these contracts, Blue Cross receives hospital services for its subscribers at rates more favorable than those received by competing health insurers and uninsured patients; that because of favorable rates given to Blue Cross, the hospitals charge competing insurers and other patients more than is paid by Blue Cross ("cost shifting"); and, finally that this practice of "cost-shifting" results in Blue Cross' competitors and uninsured patients paying more for services.

The Complaint does not allege, however, that the contracts between Blue Cross and **[**13]** the hospitals say anything at all as to the rates the hospitals charge to other purchasers. There is no claim that Blue Cross plays any role in the decisions of the hospitals to set various rates for others. Indeed, there is no claim that Blue Cross in any way coerced the hospitals to charge non-Blue Cross customers higher rates than those charged to Blue Cross customers. Nor, finally, is there any claim that Blue Cross conspired with the hospitals to engage in any predatory pricing. It is important to observe that the only allegations of "cost shifting" contained in the Complaint are limited to actions purportedly taken by the hospitals. In short, the Appellants have made no real showing of a causal connection between their injury and Blue Cross' alleged antitrust violation. The connection is indirect and collateral.

In the second place, whether measured by the factors delineated in *Associated General Contractors* or by the target area test, the plaintiffs have not alleged injuries brought about by a violation of the antitrust laws. ***HN6***[] Both causation and antitrust injury are essential elements **[**14]** of antitrust standing. In *Brunswick Co. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, the Supreme Court held that in order to receive damages under the antitrust laws, a plaintiff must prove more than the fact that he was injured through conduct of the defendant. The "plaintiff[] must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id. at 489, 97 S. Ct. at 697* (emphasis original). Moreover, "the injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* "The antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors'[.]"* *Id. at 488, 97 S. Ct. at 697* (emphasis original) (citing *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962))*.

The rationale for placing so great an emphasis on antitrust injury as the touchstone for antitrust standing has been offered in these terms:

> The antitrust injury **[**15]** concept . . . requires the private antitrust plaintiff to show **[*1390]** that his own injury coincides with the public detriment tending to result from the alleged violation. This requirement increases the likelihood that public and private enforcement of the antitrust laws will further the same goal of increased competition.

P. Areeda and H. Hovenkamp, ***Antitrust Law***, 335.1, at 261 (Supp.1987).

Accordingly, Appellants must show that the contractual agreements between Blue Cross and the hospitals as alleged are anticompetitive. Framed more precisely, at issue is whether, standing alone, Blue Cross' use of its market power to gain lower rates for its subscribers *from* hospitals violates the Sherman Act.

In *Travelers Insurance Company v. Blue Cross of Western Pennsylvania, 481 F.2d 80 (3rd Cir.1973)*, *cert. denied*, *414 U.S. 1093, 94 S. Ct. 724, 38 L. Ed. 2d 550 (1973)*, the Third Circuit was faced with a case of striking similarity to the instant one. In *Travelers*, a competing insurance company brought an action under *§ 1* of the Sherman Act alleging that Blue Cross of Pennsylvania had restrained trade and monopolized and **[**16]** attempted to monopolize the health care industry in Western Pennsylvania through the negotiation of favorable health care rates with hospitals. Travelers claimed that Blue Cross had monopoly power with some 62% of the market, and that it used that power to obtain hospital rates for approximately 14% to 15% below the rates charged to non-Blue Cross purchasers. As in the instant case, there were *no* allegations in *Travelers* that Blue Cross had attempted to influence relationships between hospitals and other health insurance companies. *Id. at 84*.

The *Travelers* Court analyzed whether the complaint alleged sufficient facts to constitute a claim for damages resulting from a violation of *§§ 1* and *2* of the Sherman Act. After assuming, *arguendo*, that Blue Cross possessed sufficient market strength to have "monopoly power," the Court observed:

> In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every rational enterprise does, i.e., get the best deal possible. This pressure encourages hospitals to keep their costs down; and, for its own competitive advantage, Blue Cross passes along the saving thus realized to **[**17]** consumers. To be sure, Blue Cross' initiative makes life harder for commercial competitors such as Travelers. The antitrust laws, however, protect competition, not competitors; and stiff competition is encouraged, not condemned.

Id. The Court concluded that Blue Cross' use of market power to obtain discounts for its customers from hospital providers did not constitute a restraint of trade or the willful acquisition or maintenance of monopoly power. Efforts to obtain lower prices for subscribers are not anti-competitive. A similar conclusion was reached by the First Circuit in *Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984)*, *cert. denied*, *471 U.S. 1029, 105 S. Ct. 2040, 85 L. Ed. 2d 322, 105 S. Ct. 2049 (1985)*. The *Kartell* Court found no right of action under the Sherman Act under circumstances similar to the instant case, holding that pricing agreements between an insurance company and participating physicians do not represent a restraint of trade or monopolization.

Applying these principles to the facts of the instant case yields a straightforward result. Here, the allegations fail to charge actions on the **[**18]** part of the Appellee which would constitute a violation of ***antitrust law*** if proved. The Appellants' Amended Complaint alleges that the Appellee

> entered into contracts, combinations or conspiracies with all, or substantially all, of the entities operating hospitals in the State of Alabama for the purpose of creating or maintaining a monopoly or monopoly power or for the purpose of eliminating, lessening, discouraging or impeding competition from others engaged in the health, medical and hospital insurance business.

Amended Complaint at para. 7. The Amended Complaint further alleges that

> Pursuant to the aforesaid contracts, combinations or conspiracies, the various hospitals accept from the Defendant, in behalf of its insured, in full settlement **[*1391]** and discharge of the accounts for services rendered to the Defendant's insured amounts lower than the standard charges assessed for services rendered to persons insured by insurers in competition with the Defendant and to private patients or uninsured persons[.]

Amended Complaint at para. 8(a).

An examination of these allegations reveals that the Appellants, like the plaintiffs in *Travelers* **[**19]** , have merely charged Appellee with using its market power to bargain for the lowest possible price for services provided to its customers. Again, we observe that Appellants do not allege that the Appellee in any way coerced the hospitals to charge non-Blue Cross customers higher rates than those charged to Blue Cross customers. Moreover, there is no claim that Blue Cross conspired with the hospitals to engage in predatory pricing. There is no suggestion that the hospitals priced their services below average variable cost, *see* International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714, 722 (5th Cir. 1975), *cert. denied*, *424 U.S. 943, 96 S. Ct. 1411, 47 L. Ed. 2d 349 (1976)*, or below total cost, *see* McGahee v. Northern Propane Gas Company, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, *490 U.S. 1084, 109 S. Ct. 2110, 104 L. Ed. 2d 670 (1988)*, or that any "cost-shifting" by the hospitals was either required by or approved of by the Blue Cross contracts, or, finally, that Blue Cross acted as if it were a "third force" intervening in the market place in such a way as to prevent willing buyers and sellers **[**20]** from "independently" coming together to strike bargains as to price and service. *See* Kartell, supra, 749 F.2d at 924.

In short, we can find no allegations in the Amended Complaint which support the conclusion that the agreements between Blue Cross and the hospitals amount to a restraint of trade. Rather, the agreements actually promote competition within the relevant health care market by allowing Blue Cross to charge lower rates to its subscribers resulting from a reduction in the cost of health care services which it purchases from hospitals. To the extent competitors seek to compete successfully with Blue Cross, they will be required to lower their rates or improve the benefits offered to subscribers. We are unable to see how Blue Cross' action in simply entering into agreements with hospitals to reduce costs restrained trade in violation of Section 1 of the Sherman Act. We underscore again that we are not called on to consider any allegations that the contracts either contemplated or provided for "cost-shifting," or that they in any way restrained or interfered with any other persons or insurance companies who may purchase services from the hospitals.

The **[**21]** Amended Complaint also alleges that the agreements constitute monopolization in violation of § 2 of the Sherman Act. In United States v. Grinnell Co., 384 U.S. 563, 570-571, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778 (1966), **HN7**[] the Supreme Court defined the offense of monopoly under § 2 of the Sherman Act as consisting of two elements:

> (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

In the instant case, even assuming that Blue Cross possessed monopoly power within the relevant market, we can find no violation of § 2 of the Sherman Act and no indication of antitrust injury. In light of our finding that the agreements between Blue Cross and the hospitals do not represent a restraint of trade, we have little trouble concluding likewise that Appellants have not established any antitrust injury arising from allegations of monopolization. Again, the complained of conduct **[**22]** arises from Blue Cross' ability to provide a superior product, namely health coverage at *lower* rates than its competitors. *See* Travelers, 481 F.2d at 85 (finding no violation of § 2 of the Sherman Act in the face of essentially the same allegations as the allegations contained in the Amended Complaint). In short, Appellants have not shown antitrust injury.

[*1392] In the third place, we observe that neither of the Appellants dealt directly with Blue Shield, suggesting the remoteness of Appellants injury from any purported antitrust violation. The Amended Complaint only alleges that most of Austin's medical expenses were covered through a policy issued by Time Insurance Company, notably not a party to this action. It is also claimed that Austin was required to pay some medical bills directly to the hospital. The Amended Complaint also states that Woodall was not covered by health insurance and all charges incurred for his medical treatment were owed directly to the hospital.

In Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), the Supreme Court addressed the issue of whether plaintiffs asserting "pass-on" **[**23]** damages have standing to bring an action under § 4 of the Clayton Act. *Illinois Brick* arose out of a lawsuit brought by a large group of government entities located within the State of Illinois. Antitrust injury was premised on the contention that the Defendant brick manufacturers had conspired to engage in price-fixing, thus raising the price of cement bricks and eventually leading to inflation of the prices paid for finished buildings by the government entities. As the Court noted, the Plaintiffs were "indirect purchasers of concrete block, which passes through two separate levels in the chain of distribution before reaching [the Plaintiffs]. The block [was] purchased directly from petitioners by masonry contractors and used by them to build masonry structures; those structures [were] then incorporated into entire buildings by general contractors and sold to [the Plaintiffs]." *Id. at 726, 97 S. Ct. at 2064*. In finding that the government entities lacked standing to bring an antitrust action under § 4, the Court held that where potential plaintiffs include both direct purchasers and indirect purchasers only the direct purchasers have standing to bring **[**24]** an action under § 4. The Court concluded:

> The legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4 is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it. *Id. at 746, 97 S. Ct. at 2075*. (Citation omitted)

Here, Appellants base their claims for damages upon the contention that the "cost shifting" practices of the hospitals resulted in the hospital charging them inflated prices for medical services. These claims essentially constitute pass-on claims proscribed by *Illinois Brick*. Neither Woodall nor Austin was in privity with Blue Cross. Their claims are wholly derivative in that Appellants assert their costs were inflated only as a result of the hospitals' alleged "cost shifting." The Appellants are at least one step removed from the antitrust violation.

Appellants argue, however, that *Illinois Brick* does not apply because they dealt directly with the hospitals which are alleged to be co-conspirators with Blue Cross. However in **[**25]** *In Re Beef Industry Litigation, 600 F.2d 1148, 1163 (5th Cir. 1979)*, the former Fifth Circuit found that the effect of the *Illinois Brick* prohibition of pass-on damage claims cannot be avoided by a plaintiff's assertion that it had direct dealings with an alleged co-conspirator who is not joined as a defendant in the action.

Closely related to the proscription of pass-on damages is the principle that ***HN8***[] antitrust standing is lacking under § 4 of the Clayton Act where the antitrust injury alleged is remote and highly speculative. The Supreme Court has on several occasions pointed to indirectness and speculativeness of asserted injury as indicia for finding no standing. *See, e.g., Associated General Contractors, 459 U.S. at 543-544, 103 S. Ct. at 911*; *Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-477, 102 S. Ct. 2540, 2546-47, 73 L. Ed. 2d 149 (1982)*.

In the present case, the claimed antitrust injuries are extremely remote from the actions complained of. The allegations rely on a theory that the hospitals have somehow charged **[**26]** higher rates to the Appellants **[*1393]** and insurers other than Blue Cross based on price concessions to Blue Cross. Such allegations require an evaluation not only of the actions taken by Blue Cross but also an evaluation of the reaction of the hospitals, who were not joined as co-Defendants, to the price-fixing allegedly engaged in by the Appellee. The indirect nature of the Appellants' injury claims squarely "implicates the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *Associated General Contractors, 459 U.S. at 543, 103 S. Ct. at 911*. If the Appellants have standing in this case, and the Appellee was found to be liable on these claims, determination of antitrust damages would require the construction of complex and highly speculative economic models. The economic questions requiring determination would surely include, among others, the precise extent to which the hospitals charges directly billed to Austin and Woodall were increased to compensate for concessions made to Blue Cross and the degree to which the "cost shifting" derivatively effected the premiums charged by Austin's insurer. **[**27]** ***HN9***[] Effective employment of the antitrust remedy provided by § 4 of the Clayton Act requires that these law suits not be weighed down with "massive evidence and complicated theories." *See Illinois Brick, 431 U.S. at 741, 97 S. Ct. at 2072* (citing *Hanover Shoe v. United Shoe Machinery Co., 392 U.S. 481, 493, 88 S. Ct. 2224, 2231, 20 L. Ed. 2d 1231 (1968))*. The speculativeness of Appellants' claims militates still further in favor of the conclusion that Appellants lack antitrust standing.

IV.

In short, we find that Appellants lack antitrust standing to sue under § 4 of the Clayton Act because of the remote and tenuous connection between Appellants' injuries and Blue Cross' conduct, the failure to allege antitrust injury, the application of the *Illinois Brick* doctrine, and the abstract and speculative nature of Appellants' claimed injuries. Accordingly the district court's order of dismissal is AFFIRMED.

Energy Productivity Sys. v. Public Serv. Co.

United States District Court for the District of New Mexico

June 22, 1990, Decided ; June 25, 1990, FILED, ENTERED

No. CIV 88-0852 JC

Reporter
1990 U.S. Dist. LEXIS 20798 *

ENERGY PRODUCTIVITY SYSTEMS, INC., a New Mexico Corporation, Plaintiff, vs. PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico Corporation, Defendant.

Disposition: [*1] Defendants' Motion for Summary Judgment denied.

Core Terms

regulation, anti trust law, co-generation, state policy, public utility, state action, anti-competitive, antitrust, articulated, displace, policies, Lights, rates, immunity, Lease, state action doctrine, Sherman Act, electricity, provisions, supervise, mandates, monopoly, energy, electric power, monopolistic, exempt, pro-competitive, summary judgment motion, regulatory scheme, repugnant

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN1[] **Sherman Act, Defenses**

In Parker, the United States Supreme Court held that the Sherman Act does not bar states from restricting competition in regulating domestic commerce. The "state action" defense recognizes that a state may adopt an anti-competitive policy as a state policy, and thereby authorize governmental or private parties to engage in activities which would otherwise violate the federal antitrust laws. Where this occurs, the Supreme Court has recognized that principles of federalism call for deference to the state's sovereign power to articulate anti-competitive policies, and therefore, conduct carrying out that state policy should not be subject to liability. Simply stated, a governmental or private actor should not be held liable for doing what the regulatory authority requires it to do.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

In order to properly avail itself of state action immunity, a private actor must (1) be acting under a state imposed restraint which is a clearly articulated and affirmatively expressed state policy and (2), the policy must be actively supervised by the state itself.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN3[] **Antitrust & Trade Law, Exemptions & Immunities**

The mere fact that a utility is regulated by a state does not automatically exempt it from compliance with federal antitrust provisions. The state action doctrine only protects that anti-competitive behavior which is actively supervised, or mandated, by a regulatory commission. Thus, a defendant relying on the "state action" doctrine must show that the challenged conduct is sanctioned by clearly articulated and affirmatively expressed state policy, and not simply that the industry itself is regulated.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Energy & Utilities Law > Utility Companies > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN4[] **Energy & Utilities, State Regulation**

Under the New Mexico Public Utility Act (NMPUA), the New Mexico Public Service Commission has the power to regulate and supervise every public utility in respect to its rates and service regulations. *N.M. Stat. Ann. §§ 62-5-1*, *62-6-4*. The NMPUA also imposes certain duties on public utilities. It requires that all rates made, demanded or received by any utility be just and reasonable, and that every utility furnish adequate, efficient and reasonable service. *N.M. Stat. Ann. §§ 62-8-1*, *62-8-2*. The NMPUA compels public utilities to file rate schedules, indicate user classifications, adhere strictly to schedule rates and provide services in a non-discriminatory manner. *N.M. Stat. Ann. §§ 62-8-3 - 62-8-6*.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

HN5[] **Energy & Utilities, State Regulation**

"Mere" regulation is insufficient to establish the entitlement to state action doctrine protection. All economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with anti-trust standards to the extent that it engages in business activity in competitive areas of the economy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

Implied repeal of antitrust laws is not favored and not casually to be allowed. Only where there is a plain repugnancy between antitrust and regulatory provisions will repeal be implied. While the pervasive nature of a regulatory scheme is a factor in determining whether an implied repeal of the antitrust laws is deemed to exist, certain activities by industries perceived to be heavily regulated have been held subject to the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

Four factors considered critical in determining whether a private actor is entitled to state action protection are: (1) the existence and nature of any relevant statutorily expressed policy; (2) the nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator; (3) the fairness of subjecting a regulated private defendant to the mandates of ***antitrust law***; and (4) the nature and extent of the state's interest in the specific subject matter of the challenged activity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN8[] **Exemptions & Immunities, Parker State Action Doctrine**

Where the federal and state policies underlying regulation are pro-competitive, a private actor who engages in monopolistic conduct may not rely on the regulations to establish the state action defense unless the regulation specifically mandates the questioned conduct.

Counsel: For Plaintiff: Joseph Goldberg, CARPENTER & GOLDBERG, P.A.

For Defendant: Russell Moore and Thomas C. Bird, KELEHER & MCLEOD, P.A.

Judges: John E. Conway, UNITED STATES DISTRICT JUDGE

Opinion by: John E. Conway

Opinion

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on the Public Service Company of New Mexico's Motion for Summary Judgment. Having reviewed the memoranda of the parties and the applicable law, and being otherwise fully advised in the premises, the Court finds that the motion is not well-taken and will be denied. In reaching this decision, this Court specifically finds that the defendant has not met the first prong of the test for state action immunity under ***California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,*** *445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*.

This case involves alleged violations of *§ 2* of the Sherman Act (*15 U.S.C. § 2*), § 3 of the Clayton Act (*15 U.S.C. § 15*), §§ 1 and 4 of the New Mexico Antitrust Act (*N.M. Stat. Ann. §§ 57-1-1*, *57-1-2*), and alleged violations of the New Mexico common law. The plaintiff, Energy Productivity Systems, Inc. ("EPS"), engages in **[*2]** the energy co-generation business. As part of its operations, it sells leases and services co-generation equipment, consults with actual and potential co-generators, and owns and operates co-generation systems for the production of electricity for sale to commercial and residential users. The term co-generation refers to the operation of a facility that produces both electricity and some other form of useful energy. The defendant Public Service Company of New Mexico ("PNM") is a public utility which owns, operates and services electric power generating facilities and transmission lines for both residential and commercial consumers. The New Mexico Public Service Commission ("the Commission") regulates PNM pursuant to the Commission's authority to supervise the business of public utilities under the New Mexico Public Utility Act, *N.M. Stat. Ann. § 62-13-1* ("The NMPUA").

In Count I of the Complaint, EPS alleges that "PNM has monopolized and restrained trade in the market or sub-market for generation and distribution of electric power in New Mexico and geographic sub-markets by controlling prices and eliminating competition." *Complaint,* para. 5. The Complaint then lists alleged misconduct **[*3]** by the defendant designed to monopolize the market for electric power. The alleged misconduct includes the erection of barriers to keep competitors, like EPS, from entering the energy market, wrongfully depriving EPS and other potential competitors of competitive business opportunities, attempting to eliminate EPS as a competitor, and discouraging PNM subsidiaries from selling gas to co-generators. **Id**. at paras. 10 (a), (g), 11 and 12.

EPS also alleges that PNM has dissuaded potential customers from dealing with EPS by refusing to provide access to PNM's backup power, making misrepresentations to EPS' potential customers about the efficiency of co-generation, providing EPS' potential customers with misleading projections of the future cost of PNM's power, unreasonably increasing the cost of co-generation systems, and engaging in other unspecified "unfair and misleading tactics." **Id**., pps. 10 (b) and (h). These allegations form the basis of EPS' cause of action for monopolization and violation of *§ 2* of the Sherman Act.

In Count II of the Complaint, EPS charges that PNM entered into, or attempted to enter into, exclusive dealing arrangements for the sale of electricity. **[*4]** **Id**. at pps. 15-16. The plaintiff alleges that PNM entered into contracts for the sale of electricity which purportedly contain provisions prohibiting the purchaser from using co-generation systems or dealing with any competitor of PNM. EPS' Clayton Act claim is premised on these alleged exclusive dealing arrangements.

Counts III-VI of the Complaint allege various pendent state law claims. I will defer discussion of those claims until the analysis of the federal claims is complete.

PNM has yet to file an answer in this case, choosing instead to proceed with the current summary judgment motion. Insofar as this motion does not contest the material allegations of the Complaint, namely that PNM exercised monopoly power in relevant markets in New Mexico and engaged in anti-competitive conduct in order to drive EPS from those markets, the Court will proceed on the assumption that PNM engaged in the type of monopolistic activity normally regulated by the federal anti-trust laws. ***U.A.W. v. Federal Forge, Inc.****, 583 F. Supp. 1350, 1352 (W.D. Mich. 1984)*; ***Wilkie v. Schwan Sales Enterprises, Inc.****, 541 F. Supp. 1193 (N.D. Mich. 1982)*; ***Richmond Educ. Assn. v. Crockford****, **[*5]** 55 F.R.D. 362, 364 (E.D. Va. 1972)*.

The defendant has moved for summary judgment on Counts I and II on the basis of state action immunity. PNM argues that its conduct, including all interactions with co-generators, is regulated by a program deriving its authority from the legislative command of the state. Because of the existence, and the extent, of the state imposed regulatory framework, PNM claims it is shielded by the doctrine of state action immunity under ***Parker v. Brown****, 317 U.S. 341, 350, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. The defendant also moves for dismissal of the state law claims on the grounds that, absent federal jurisdiction over the Sherman Act and Clayton Act issues, this Court should elect not to exercise its discretion to retain the state law causes of action. ***United Mine Workers v. Gibbs****, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*.

Applicable Law:

As just noted, the defendant relies on the "state action doctrine" first articulated in **Parker**. ***HN1***[] There, the Supreme Court held that the Sherman Act does not bar states from restricting competition in regulating domestic commerce. The "state action" defense recognizes that a state **[*6]** may adopt an anti-competitive policy as a state policy, and thereby authorize governmental or private parties to engage in activities which would otherwise violate the federal antitrust laws. Where this occurs, the Supreme Court has recognized that principles of federalism call for deference to the state's sovereign power to articulate anti-competitive policies, and therefore, conduct carrying out that state policy should not be subject to liability. Simply stated, a governmental or private actor should not be held liable for doing what the regulatory authority requires it to do. **See generally**, P. Areeda & D. Turner, ***Antitrust Law****,* paras. 211, 212 (Supp. 1987).

Though the various opinions of the courts are frought with ambiguity, a consistent standard for determining whether a private actor may derive the benefits of the state action doctrine has emerged. In ***Midcal****, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937*, the Court held that ***HN2***[] in order to properly avail itself of state action immunity, a private actor must:

1. be acting under a state imposed restraint which is a clearly articulated and affirmatively expressed state policy; and

2. the policy must be **[*7]** actively supervised by the state itself.

445 U.S. at 105.

The ruling in **Midcal** was later clarified in ***Southern Motor Carriers Rate Conference, Inc., et al. v. United States****, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)* (**"SMCRC"**), where the Court added that the actions of a private party could be attributed to a clearly articulated state policy within the meaning of **Midcal** even if the complained of conduct was not compelled by the state. "As long as the state as a sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the **Midcal** test is satisfied." ***Id.,*** *471 U.S. at 64*. **See also,** ***Town of Hallie v. City of Eau Claire,*** *471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*.

In ***Lafayette v. Louisiana Power & Light Co.,*** *435 U.S. 389, 413, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*, the Court ruled that the clearly articulated state policy in question must be one that is intended to displace competition with regulation or monopoly public service. *435 U.S. at 413*.

Further insight into the **Midcal** analysis is provided in ***Lease Lights, Inc. v. Public Service [*8] Co. of Oklahoma,*** *849 F.2d 1330 (10th Cir. 1988)* and ***Consolidated Gas Co. of Florida v. City Gas Co.,*** *880 F.2d 297 (11th Cir. 1989)*, where both the Tenth and Eleventh Circuits acknowledged that ***HN3***[] the mere fact that a utility is regulated by the state does not automatically exempt it from compliance with federal antitrust provisions. Both cases stand for the proposition that the state action doctrine only protects that anti-competitive behavior which is actively supervised, or mandated, by a regulatory commission. Thus, a defendant relying on the "state action" doctrine must show that the *challenged conduct* is sanctioned by clearly articulated and affirmatively expressed state policy, and not simply that the industry itself is regulated.

Another example of the distinction between industry-wide regulation and specific conduct regulation is found in ***City of Mishawaka v. Indiana & Michigan Electric Co.***, *560 F.2d 1314 (7th Cir. 1977)*. There, the Court held that although the state utility commissions had approved retail rates charged by a power company, thereby evidencing extensive regulation of the industry, the utility was not protected from Sherman Act scrutiny by the **[*9]** state action doctrine with regard to all aspects of its conduct. That Court went on to find that the maintenance of a dual rate structure was subject to scrutiny under the antitrust laws.

Even if a state has informally allowed an anti-competitive practice to flourish, the state action doctrine may not protect a private actor from Sherman Act liability. In ***Reynolds Metals Co. v. Commonwealth Gas Services, Inc.***, *682 F. Supp. 291 (E.D. Va. 1988)*, the Court was persuaded that tacit approval of a natural gas company's transportation practices did not rise to the level of clearly articulated and affirmatively expressed state policy, so as to exempt the transportation policies from application of the federal antitrust laws, where other circumstances indicated a state policy of increased competition in transportation.

Finally, where the state policies underlying regulation are pro-competitive, the state-imposed regulation may not serve to establish a **Parker** defense to charges of monopolistic conduct. ***Sound, Inc. v. AT&T***, *631 F.2d 1324 (8th Cir. 1980)*.

As noted above, my opinion in this matter turns on the first prong of the **Midcal** test. I will therefore not address **[*10]** the second requirement under **Midcal** here.

The **Midcal** test has also been held to determine the availability of state action immunity for claims under the Clayton Act. **See, e.g.,** ***Cine 42 Street Theater Corp. v. Nederlander Organization, Inc.***, *790 F.2d 1032, 1038-41 (2d. Cir. 1986)*. Therefore, the discussion of the Sherman Act claims below should be read as a discussion of the Clayton Act claims as well.

Analysis:

Under **Midcal**, the defendant must first establish that it was following a clearly articulated and affirmatively expressed state policy designed to displace competition with regulation or monopoly public service. The defendant has correctly asserted that the NMPUA is a clear expression of the New Mexico legislature's desire to regulate public utilities. *N. M. Stat. Ann. § 62-3-1(B)*. ***HN4***[] Under the NMPUA, the Commission has the power "to regulate and supervise every public utility in respect to its rates and service regulations." **Id.** *§§ 62-5-1* and *62-6-4*. The NMPUA also imposes certain duties on public utilities. It requires that all rates made, demanded or received by any utility be just and reasonable, and that every utility furnish adequate, **[*11]** efficient and reasonable service. **Id.**

§§ 62-8-1, *62-8-2*. It compels public utilities to file rate schedules, indicate user classifications, adhere strictly to schedule rates and provide services in a non-discriminatory manner. **Id**. *§§ 62-8-3 to 62-8-6*.

The defendant relies on the existence of the NMPUA in support of the conclusion that the New Mexico legislature intends to displace unfettered competition with regulation. Defendant's Reply Brief at p. 5, n.5. In the defendant's view, the NMPUA is a clear expression "that electric utilities should operate as natural monopolies under the control of the Commission." Defendant's Brief in Support of Motion for Summary Judgment at 11. Assuming that PNM has met the burden of establishing that the state of New Mexico clearly intends to regulate public utilities, the defendant still has the burden of establishing that the regulations affirmatively express a state policy to displace the competitive marketplace.

In an effort to establish that the NMPUA regulations are indicative of a clearly articulated state policy, the defendant cites the recent case of ***Lease Lights, Inc. v. Public Service Electric & Gas Co.,*** *849 F.2d 1330* ***[*12]*** *(10th Cir. 1988)*. There the Court reversed a $ 2.5 million antitrust verdict against Public Service Company of Oklahoma ("PSO"). The plaintiffs, four electrical contractors engaged in the outdoor lighting business, claimed that PSO had attempted to put them out of business by reducing its rates for outdoor lighting services to the public and increasing electric rates. ***Id.*** *at 1332*. The utility argued on appeal that the state action doctrine immunized it from claims that it had monopolized the outdoor lighting market since the challenged conduct was required by the Oklahoma Corporation Commission.

The Tenth Circuit reviewed the **Midcal** analysis and noted that the relevant constitutional and statutory provisions clearly articulated a state policy to regulate. *849 F.2d at 1333-34*. These provisions generally empowered the Oklahoma Public Service Commission to set rates and regulate electric power companies by prescribing rules governing services, operations, and management. **Id.** The Court then ruled that under Oklahoma law the system of regulation clearly articulated and affirmatively expressed a policy to displace a competitive market, since the active regulation and **[*13]** supervision imposed by the Oklahoma Corporation Commission in mandating the rate change provided a basis for the fact that PSO's conduct was required by the state. It is important to note that Oklahoma had not legislated the challenged conduct. Instead, the Court found that the state had indicated its regulatory anti-competitive policy through the acts of the Commission.

This Court finds **Lease Lights** instructive in terms of the great deference granted state agencies when those bodies exercise their authority in furtherance of state policy in a direct and tangible fashion. This Court does not dispute that where anti-competitive conduct is attributable to a state policy, and the state regulatory Commission requires the allegedly monopolistic behavior, the private actor being regulated is entitled to **Parker** protection.

However, the **Lease Lights** decision does not address the issue of whether conduct which is not attributable to a state policy, and which is not directly mandated by the regulatory body, is protected under **Parker**.

This Court is of the opinion that the defendant overstates the holding in **Lease Lights** when it says that "a statute authorizing **[*14]** a state agency to supervise the operation of an area of commerce expresses a legislative intent to substitute state regulation for competition." Defendant's Brief in Support of Motion for Summary Judgment at 13. In fact, the latter statement is in direct conflict with dicta in **Lease Lights**, and that body of case law which holds ***HN5***[] that "mere" regulation is insufficient to establish the entitlement to state action doctrine protection. **See, e.g.** ***Lease Lights****, 849 F.2d at 1333*, c.1, lines 11-12; **SMCRC, supra**, 471 U.S. at 58; ***Consolidated Gas, supra,*** *880 F.2d 297*; ***City of Mishiwaka, supra****, 560 F.2d 1314*; and ***Cantor v. Detroit Edison,*** *428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*. This rule is best expressed in **Cantor**, where the Supreme Court noted that:

> … all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring a firm to meet regulatory criteria insofar as it is exercising its natural **[*15]** monopoly powers and also to comply with anti-trust standards to the extent that it engages in business activity in competitive areas of the economy.

Cantor, supra*, 428 U.S. at 595*.

While PNM argues that all public utility conduct is supervised pursuant to the NMPUA, it cannot point to a specific NMPUA provision addressing co-generators. Pages 14-15 of the defendant's Brief simply restate the general regulatory provisions. As such, PNM has failed to show how the NMPUA in and of itself sanctions the anti-competitive behavior at issue in this case. The mere existence of the NMPUA does not establish a state policy to displace competition with regulation insofar as the public utilities are concerned.

The defendant then suggests that this Court make the finding which the Tenth Circuit deemed crucial in **Lease Lights:** that the state has indicated its regulatory anti-competitive policy through the acts of the Commission. The argument is that the Commission controls public utility dealings with co-generators pursuant to G.O. 37 and that the extent of the regulation is evidence of an intent to replace the free market economy for electrical power with regulation.

General **[*16]** Order 37 ("G.O. 37") governing co-generation and small power production was issued by the Commission on March 27, 1981 in order to assure compliance with the Federal Energy Regulatory Commission ("FERC") requirements for state action implementing Section 210 of the Public Utility Regulatory Policy Act of 1978 ("PURPA"). The Commission has promulgated three successive revisions of the original G.O. 37. The versions of G.O. 37 in effect for the largest portion of time, relevant to the allegations of the Complaint, were First Revised G.O. 37 and Second Revised G.O. 37, which were adopted November 26, 1986 and in effect through March 10, 1988.

General Order 37 defines the policies of the Commission with regard to the relationships between New Mexico utilities and qualifying facilities. A "qualifying facility" is a co-generation facility which satisfies the operating and efficiency standards described in the federal regulations. C.F.R. 292.201, **et seq.**, (1988). General Order 37 governs the purchase and sale of power between qualifying facilities and utilities by: 1) encouraging the development of the market for the power produced; 2) establishing guidelines for the calculation of **[*17]** avoided costs; and 3) providing meaningful access to critical cost information from utilities.

The set of regulations which governs the relationship, the Commission and potential co-generators, is extensive. General Order 37 compels a utility to interconnect with co-generators in its service area meeting the criteria set out in § 2.1. The Commission entertains complaints of rejected applicants for interconnection to determine whether the application was justifiably rejected. § 2.2. A utility must also enter into a contract for interconnection in compliance with the requirements of *§ 2*, and a detailed set of standard contracting terms and conditions must be met. The Commission then referees disputes over such contracts through a complaint process. Significantly, G.O. 37 mandates that public utilities shall buy and sell energy and capacity. Section 3 states that utilities "shall purchase capacity and/or energy from a qualifying facility at rates which reflect the utility's avoided costs determined in accordance with G.O. 37."

This is not by any means a conclusive or exclusive list of the regulatory requirements. However, the scope of these regulations adequately establishes that **[*18]** the Commission has developed a significant amount of regulation as regards co-generators.

If the law simply required that a private actor show that his conduct was extensively regulated in order to establish the state action defense, then PNM would have carried that burden with its recitation of the applicable regulations under G.O. 37. However, as discussed above, the **Lease Lights** decision, and others, requires that PNM show that its particular anti-competitive conduct, with regard to co-generators, was sanctioned by the state even if not compelled by the state. **See, Discussion, supra,** at pps. 5-6.

Because PNM has not challenged the material allegations of the Complaint, this Court must assume that PNM's conduct is anti-competitive and of the type normally regulated by the federal antitrust laws. **See, Discussion, supra,** p. 3. Although PNM has clearly established that it was regulated in this area, it has not been able to point to language within G.O. 37 or a Commission requirement which mandates the alleged anti-competitive conduct.

In fact, PNM acknowledges that the Commission issued G.O. 37 in compliance with the FERC requirements for implementing Section 210 **[*19]** of PURPA. That section requires that the state regulatory agency issue regulations implementing the provisions and policies of PURPA to *promote* co-generation. Pursuant to the *Supremacy Clause*, any attempt by the Commission not to implement the PURPA policies and provisions would have been unconstitutional. ***FERC v. Mississippi**, 456 U.S. 742, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982)*.

The plaintiff convincingly argues that Congress never intended the policies underlying PURPA to be anti-competitive, or in any way to replace the antitrust laws. "Nothing in this Act, or in any Amendment made by this Act, affects (1) the applicability of the antitrust laws to any electric utility…." *16 U.S.C. § 2603*.

The pro-competitive policies of PURPA are likewise embodied in the NMPUA and in G.O. 37. When the Commission first promulgated G.O. 37, it explained in detail the policies that animated the regulation. A review of the Commission's statement found in "Discussion of Commission Policies," attached as an exhibit to G.O. 37, indicates that the Commission intended to establish a pro-competitive policy.

An excellent discussion of the impact of pro-competitive regulatory policy on monopolistic **[*20]** conduct is contained in ***Sound, Inc., supra,** 631 F.2d 1324*. There, the Eighth Circuit Court of Appeals affirmed the district court's denial of defendant Bell Telephone's Motion for Judgment on the Pleadings, holding that the defendant's monopolistic conduct was subject to antitrust scrutiny. In that case, the Court was squarely presented with the problem of reconciling the pro-competitive policies of the federal antitrust laws with federal and state regulations protecting the public interest in the context of terminal telephone equipment.

The plaintiff in that matter, Sound Inc., brought an antitrust action against AT&T, the Bell system, and its subsidiaries, alleging violations of Sections 1, 2 and 3 of the Sherman Act and of Iowa tort law. The Bell system moved for judgment on the pleadings, contending that its conduct was immune from antitrust liability under the state action doctrine by virtue of regulations issued by the Federal Communications Commission and the Iowa State Commerce Commission. The basic allegations in that matter were that Bell engaged in a concerted effort to destroy the plaintiff's business by excluding the plaintiff from the terminal telephone equipment **[*21]** marketed through the use of predatory pricing, economic retribution to the plaintiff's customers, and threats to withhold telephone service from those purchasing or leasing the plaintiff's equipment.

In answer to the complaint, the Bell system claimed that its rate related conduct was regulated, and therefore exempt, from antitrust scrutiny. Bell also alleged that all activity undertaken by it, regarding the interconnection of privately owned terminal telephone equipment, was impliedly immune from the antitrust laws because those laws were inconsistent with the regulations.

In reaching its decision, the Court focused generally on the tension between the antitrust laws and regulatory schemes designed to protect the public interest. The analysis began with the premise that ***HN6***[] implied repeal of antitrust laws "is not favored and not casually to be allowed. Only where there is a plain repugnancy between the antitrust and regulatory provisions will repeal be implied." *631 F.2d at 1327*, quoting ***Gordon v. New York Stock Exchange,** 422 U.S. 659 at 682, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975)*. While the pervasive nature of a regulatory scheme is a factor in determining whether an implied **[*22]** repeal of the antitrust laws is deemed to exist, the Court noted that certain activities by industries perceived to be heavily regulated have previously been held subject to the antitrust laws. ***Silver v. New York Stock Exchange, supra*, **(securities); ***Otter Tail Power Co. v. United States,** 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)* (generation and transmission of electric power); ***United States v. Philadelphia National Bank,** 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715* (National Banking); and ***United States v. RCA**, 358 U.S. 334, 79 S. Ct. 457, 3 L. Ed. 2d 354 (1959)* (broadcasting).

The **Sound, Inc.** Court recognized that application of the principle of mutual repugnance often resulted in a finding of implied immunity when enforcement of the antitrust laws interfered with the operation of the regulatory agency. (Interference is normally found when the antitrust laws prohibit action specifically contemplated by the regulatory statute, or when the antitrust laws prohibit conduct falling precisely within the detailed statutory scheme of enforcement, and that statutory scheme specifically requires consideration of competition. *631 F.2d at 1328*). The approach taken by the Eighth Circuit, **[*23]** therefore, was to consider both the statute under which the industry was regulated and the exercise of regulatory authority over the challenged activity pursuant to the statute. *631 F.2d at 1329*.

Analyzing the statute at issue, the **Sound, Inc.** Court found that nothing in the Communications Act established Congress' intent to displace the antitrust laws by creating a system of regulation of the telecommunications industry. Having found that no goals set forth in the statute were clearly repugnant to the antitrust laws, the Court then turned to the regulatory agency's exercise of its authority over the industry, to determine whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme. The Court then found that the regulatory agency, in that case the FCC, had not exercised its supervisory authority in an effort to prevent the development of competition in the terminal equipment market; rather, the regulatory agency's rulings indicated that Bell's attempt to retain its monopoly on that market were disfavored. *631 F.2d at 1330*. In light of that simple factor, the Court found that the maintenance of an antitrust suit did not conflict with the **[*24]** operation of the regulatory scheme, but instead supplemented that scheme.

Having thereby developed the principle that when regulatory agency supervision does not conflict with federal antitrust laws, no implied exemption from the ***antitrust law*** exists, the Court turned to a discussion of the state action exemption issue. Bell contended that its rate structure and marketing practices in regard to the terminal equipment market were exempt from the antitrust laws as state action, since Iowa regulated the rates Bell charged for the installation and monthly use of its equipment. Bell specifically relied on **Parker** and **Midcal** in making this argument.

The Court found that although Bell was required to file tariffs setting forth its proposed rates, and although the Commission heard complaints or grievances regarding those rates, the existence of the regulations was not repugnant to an application of the federal antitrust laws. Moreover, the mere existence of those regulations, which were admittedly extensive, did not establish an Iowa state policy requiring anti-competitive conduct on the part of a public utility.

In reaching its decision, the Eight Circuit relied on ***HN7***[] four factors **[*25]** that it considered critical in determining whether a private actor is entitled to state action protection. They are:

1. The existence and nature of any relevant statutorily expressed policy;

2. The nature of the regulatory agency's interpretation and application of its enabling statute, including the accommodation of competition by the regulator;

3. The fairness of subjecting a regulated private defendant to the mandates of ***antitrust law***; and

4. The nature and extent of the state's interest in the specific subject matter of the challenged activity.

The lesson that emerges from **Sound, Inc.** and **Lease Lights** can be stated as a general principle, or starting point, for analyzing a state action defense under facts similar to those presented here. ***HN8***[] Where the federal and state policies underlying regulation are pro-competitive, a private actor who engages in monopolistic conduct may not rely on the regulations to establish the state action defense, *unless* the regulation specifically mandates the questioned conduct.

Because I find that the four factors test set forth in **Sound, Inc.** is helpful in analyzing the availability of the state action defense, I will use that **[*26]** pattern as a model for analyzing this case.

Regarding the first factor, there is nothing in PURPA or the NMPUA which indicates that either the United States Congress or the New Mexico legislature intended to displace the antitrust laws by establishing a system of regulation of the public utilities industry. There is no goal set forth in either statute which is clearly repugnant to the ***antitrust law***, and I can envision no way in which the allowance of an antitrust suit in this matter would conflict with the operation of the regulatory scheme. In fact, as discussed above, it is clearly New Mexico's intent to foster co-generation as an alternative energy source.

As to the second factor, whether the nature of the regulatory agency's interpretation and application of this enabling statute weighs for or against the defendant, I find nothing in the PSC's interpretation and application of its regulation which indicates a requirement of anti-competitive conduct, or the displacement of competition. Rather, the

Commission, in issuing G.O. 37, has indicated an attempt to accommodate PURPA and the advancement of competition, its underlying goal, in the market for electrical power. The better **[*27]** reasoned approach to the regulations is to read them as an effort to foster competition through certain restrictions rather than displace the free market by authorizing monopolistic conduct.

Turning to the third factor suggested in **Sound, Inc.**, there is nothing in this record to indicate that it would be unfair to subject PNM to the ***antitrust law***. PNM was not deprived of its ability to exercise independent business judgment in determining its course of conduct with co-generators, and there is nothing in the state's involvement which creates an atmosphere in which it would be unfair to hold PNM responsible for its anti-competitive behavior.

Finally, nothing in the record of this case indicates that the state of New Mexico's interest in the public utility market is realized by mandating displacement of the antitrust laws. If New Mexico had a state policy intended to clearly and completely avoid competition in the public utilities marketplace, then that state policy would be at odds with the antitrust laws and PNM might claim a state action exemption. However, no such policy exists and, as discussed above, the policy is in fact quite the opposite.

For the foregoing reasons, I **[*28]** see no basis for a finding that the state of New Mexico has a clearly articulated and affirmatively expressed policy to supplant competition with regulation or monopoly with regard to the use of cogeneration systems and public utilities. I therefore find that the defendants have failed to meet the first prong of the **Midcal** test, and in accord with that finding, determine that summary judgment is inappropriate as to Counts I and II, since the defendants are not entitled to judgment as a matter of law under *Rule 56 of the Federal Rules of Civil Procedure*.

Having thus disposed of the federal claims, I find no merit to the defendants' argument that the state claims should be dismissed for want of pendent jurisdiction. Therefore, pursuant to this Court's discretion, ***United Mine Workers v. Gibbs,*** *383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*, I will choose to exercise pendent jurisdiction and retain the pending state court claims. In accordance with the foregoing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants' Motion for Summary Judgment be, and the same hereby is, **denied.**

DATED this 22d day of June, 1990.

John E. Conway

UNITED STATES **[*29]** DISTRICT JUDGE

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In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation

United States Court of Appeals for the Ninth Circuit

July 15, 1988, Argued and Submitted, Pasadena, California ; June 22, 1990, Filed

Nos. 86-6776, 86-6779, 86-6780, 86-6783, 86-6784

Reporter

906 F.2d 432 *; 1990 U.S. App. LEXIS 10456 **; 1990-1 Trade Cas. (CCH) P69,066; 30 Fed. R. Evid. Serv. (Callaghan) 1069

In re COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION; STATE OF ARIZONA, Plaintiff-Appellant, v. STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; ATLANTIC RICHFIELD CO.; EXXON CORP.; MOBIL OIL CORP.; and SHELL OIL CO., Defendants-Appellees, and CONTINENTAL OIL CO.; GULF OIL CORP.; PHILLIPS PETROLEUM CO.; CARIBOU FOUR CORNERS, INC.; and POWERINE OIL CO., Defendants. STATE OF CALIFORNIA, Plaintiff-Appellant, v. STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; EXXON CORP.; GULF OIL CORP.; MOBIL OIL CORP., and SHELL OIL CO., Defendants-Appellees, and ATLANTIC RICHFIELD CO.; GETTY OIL CO.; and PHILLIPS PETROLEUM CO., Defendants, STATE OF OREGON, on behalf of itself, its residents and all political subdivisions within the State similarly situated, Plaintiff-Appellant, v. STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; ATLANTIC RICHFIELD CO.; EXXON CORP.; MOBIL OIL CORP.; and SHELL OIL CO., Defendants-Appellees, and GETTY OIL CO.; GULF OIL CORP.; and PHILLIPS PETROLEUM CO., Defendants. STATE OF WASHINGTON, on behalf of itself and its public entities and residents, Plaintiff-Appellant, v. STANDARD OIL CO. OF CALIFORNIA; TEXACO, INC.; UNION OIL CO. OF CALIFORNIA; ATLANTIC RICHFIELD CO.; EXXON CORP.; GULF OIL CORP.; MOBIL OIL CORP.; SHELL OIL CO., Defendants-Appellees, and GETTY OIL CO.; and PHILLIPS PETROLEUM CO., Defendants

Prior History: [1]** Appeal from the United States District Court for the Central District of California; MDL No. 150-WPG, USDC Nos. CV-76-3247-WPG, CV-76-2839-WPG, CV-77-0615-WPG, CV-77-3487-WPG; William P. Gray, District Judge, Presiding.

Disposition: REVERSED and REMANDED.

Core Terms

prices, dealer, conspiracy, restoration, contacts, competitors, summary judgment, district court, indicates, retail price, antitrust, posting, interdependent, memorandum, tankwagon, circumstantial evidence, increased price, discounts, oil company, gasoline, coordination, levels, announcing, Oil, price information, shortage, dissemination, stabilize, markets, conspired

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN1[] **Standards of Review, De Novo Review**

The appellate court reviews de novo the district court's grant of summary judgment.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A trial judge should not permit an inference of antitrust conspiracy from circumstantial evidence where to do so would have the effect of deterring significant pro-competitive conduct. However an antitrust defendant is not entitled to summary judgment simply by virtue of the fact that the plaintiff's inference of conspiracy would have some deterrent effects; the effects must be significant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN3[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The trial court faced with allegations of illegal conspiracies must consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement. If it does, then the plaintiff must come forward with additional, "sufficiently unambiguous" evidence that does not have these undesirable deterrent effects.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN4[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Courts should be careful not to permit inferences of antitrust conspiracy when to do so would create a significant irrational dislocation in the market or would result in significant anticompetitive effects.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] Summary Judgment, Evidentiary Considerations

Where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial pro-competitive behavior. Once the defendant has made such a showing, the plaintiff must come forward with other evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN6[] Monopolies & Monopolization, Conspiracy to Monopolize

In applying the Matsushita standard, a court must consider the nature of the evidence that the plaintiffs have offered with respect to each element of the cause of action. If the plaintiffs rely exclusively on circumstantial evidence in order to establish at least one element of their cause of action, then the court must proceed to analyze, under Matsushita, whether the inferences which the plaintiffs seek to draw from the indirect evidence are reasonable and permissible under the governing substantive law. If, however, the plaintiffs offer direct evidence to support each element, then summary judgment must be denied.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN7[] Sherman Act, Claims

Interdependent pricing to test the waters without any sort of advance commitment from competitors may often produce economic consequences that are comparable to those of classic cartels. Nonetheless, proof of such pricing, standing alone, is generally considered insufficient to establish a violation of the Sherman Act, *15 U.S.C.S. §§ 1-2*. Additional proof beyond mere parallel pricing usually is required.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN8[] Sherman Act, Claims

Agreements to exchange pricing data do not themselves constitute a per se violation of the Sherman Act. Accordingly, information exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of *15 U.S.C.S. § 1* under a rule of reason analysis.

Evidence > ... > Exemptions > Statements by Party Opponents > Vicarious Statements

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

HN9[] **Statements by Party Opponents, Vicarious Statements**

Fed. R. Evid. 801(d)(2)(D) provides that a statement made by a party's agent or servant may be introduced against that party if it concerns a matter within the scope of the agency or employment and was made during the existence of the relationship.

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

HN10[] **Procedural Matters, Preliminary Questions**

Under *Fed. R. Evid. 104(a)* an out-of-court statement may be considered by the court in making the preliminary factual determinations concerning admissibility of statements under *Fed. R. Evid. 801(d)(2)(E)*.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

HN11[] **Conspiracy, Elements**

Statements admitted under *Fed. R. Evid. 801(d)(2)(D)* may be used to prove conspiracy without any showing that the existence of the conspiracy is corroborated by independent, non-hearsay evidence.

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Rule Components > Statements

HN12[] **Exemptions, Statements by Coconspirators**

Fed. R. Evid. 801(d)(2)(E) provides that a statement made by a co-conspirator of a party may be introduced against that party if the statement was made during the course, and in furtherance, of the conspiracy.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

HN13[] **Conspiracy, Elements**

Before any statements can be admitted, they must meet all of the prerequisites of *Fed. R. Evid. 801(d)(2)(E)*. Specifically, the party seeking to introduce the statement must show, by a preponderance of the evidence, that there was a conspiracy involving the declarant and the non-offering party, and that the statement was made in the course and in furtherance of the conspiracy. Although a judge may consider the statements themselves in deciding whether these prerequisites have been met, the offering party must present some evidence aside from the proffered co conspirator's statements to show that the non-offering party knowingly participated in the alleged conspiracy.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN14[] **Trials, Judgment as Matter of Law**

Credibility determinations are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN15[] **Antitrust & Trade Law, Sherman Act**

In determining if summary judgment should be granted in a case alleging conspiracy to fix prices, it is not the court's task to decide whether it thinks that an inference of innocent conduct is more plausible than an inference of conspiracy. Rather, the task is to consider whether an inference of conspiracy is plausible and whether permitting such an inference would have the effect of deterring significant pro-competitive conduct.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN16[] **Supplemental Jurisdiction, Pendent Claims**

Federal courts have no jurisdiction to enforce the criminal laws of the states, however, they do have jurisdiction to enforce state penalties that are civil in nature.

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Judges: Wallace, Nelson, and Reinhardt, Circuit Judges. Opinion by Judge Nelson.

Opinion by: NELSON

Opinion

[*436] NELSON, Circuit Judge.

The States of Arizona, California, Oregon, and Washington appeal from the district court's grant of summary judgment to the defendants in these consolidated antitrust actions. For the reasons stated below, we reverse the judgment of the district court and remand for further proceedings.

I. INTRODUCTION

Between June 1975 and August 1977, the plaintiffs filed their complaints in these actions, alleging several violations of the Sherman Act, *15 U.S.C. § 1 et seq.* As developed during the subsequent pretrial proceedings, the plaintiffs' allegations fall into three categories. First, the plaintiffs allege **[**4]** that the defendant oil companies conspired to raise or stabilize prices for refined oil products in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. The plaintiffs assert that, in furtherance of this conspiracy, the defendants continually engaged in the mutual exchange of pricing and price-related information. Second, the plaintiffs allege that the defendants conspired to create, by various means, an artificial scarcity of crude oil and refined oil products in the western United States, in violation of *§§ 1* & *2* of the Sherman Act, *15 U.S.C. §§ 1* & *2*. Third, the plaintiffs allege that the defendants conspired not to compete in bidding on the plaintiffs' annual bulk sale petroleum supply contracts, in violation of *§ 1* of the Sherman Act.

After several years of extensive discovery, the plaintiffs filed in January 1983 a three volume pretrial brief ("Plaintiffs' Initial Pretrial Brief" or "PIPB"), setting out their analysis of what the evidence would prove. The PIPB was supplemented on several occasions. In July 1983, the defendants moved for summary judgment, asserting that the evidence as summarized in the PIPB failed to raise a triable **[**5]** issue of antitrust conspiracy. After three days of oral argument on the summary judgment motions, the district court took the matter under submission. On November 25, 1986, the court filed an opinion and order granting the defendants' summary judgment motion in its entirety. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 656 F. Supp. 1296 (C.D.Cal. 1986)* [hereinafter *Petroleum Prods.*]. The plaintiffs have timely appealed.

Before turning to an analysis of the proper summary judgment standards and their application in this case, we think it appropriate and useful first to outline certain background facts concerning the industry's structure as well as the nature of appellants' theory concerning the operation of the alleged conspiracy.

The appellees are major oil companies which, among other activities, produce crude oil, refine it into gasoline, and sell the gasoline to various distributors. During the time periods relevant to this appeal, these distributors fell into roughly four classes: (1) independent service station owners who operated franchises selling one particular brand of gasoline; (2) company-owned service stations **[**6]** run by company employees; (3) independent "jobbers" or brokers who resold gasoline to various service stations and other purchasers; and (4) governmental entities and others who purchased under bulk sales contracts. All parties agree that the lion's share of appellees' gasoline that was sold at retail was sold by independent franchised service stations.

As franchisees, these "independent" dealers were not free to purchase their supply of gasoline from any oil company at any time; as long as they remained franchisees they could only purchase from their particular franchisor. Each company sold gasoline to its franchised dealers at a price known as the "dealer tankwagon price." In actuality, the official tankwagon prices were only occasionally changed; fluctuations in the cost of gasoline to franchised dealers were more frequently reflected in **[*437]** changes to the applicable discounts from the tankwagon price. These discounts were variously known as "temporary dealer assistance," "dealer aid," or simply "discounts."

The appellants argue that, as a consequence of this market structure, each oil company was effectively able to control the retail price at which its gasoline was **[**7]** sold. That is, the appellants claim that, although individual dealers "showed varying degrees of independence," an oil company could essentially determine the retail price by setting the applicable discount from the tankwagon price at which it sold gasoline to its franchised dealers.

In the present actions, the appellants claim that the appellees have engaged in a conspiracy to raise and stabilize the retail price of gasoline at the pump. They do not claim, however, that the appellees engaged in a resale price maintenance scheme whereby each dealer was required to charge a predetermined price; indeed, they have expressly disavowed such a theory. Rather, the appellants claim that the appellees conspired to fix retail prices by coordinating dealer discounts from the tankwagon price.

The parties hotly contest on appeal whether the application of this theory is limited by the Supreme Court's decision in *Illinois Brick v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, which held that indirect purchasers of goods whose price was fixed earlier in the stream of commerce may not maintain an antitrust damages action for overcharges passed on to them by **[**8]** those who purchase directly from the pricefixers. Although the district court had earlier ruled that *Illinois Brick* limited the relief available to the plaintiffs, *see In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 497 F. Supp. 218, 225-27 (C.D.Cal. 1980)*, *aff'd on other grounds*, *691 F.2d 1335 (9th Cir. 1982)*, *cert. denied*, *464 U.S. 1068, 104 S. Ct. 972, 79 L. Ed. 2d 211 (1984)*, it nonetheless recognized that *Illinois Brick* did not completely bar recovery. Accordingly, in ruling on the summary judgment motion, the district court recognized that, despite the ruling that *Illinois Brick* limited the relief that was available, the plaintiffs would still be able to receive some relief if they could establish that the defendants conspired to fix retail prices by fixing wholesale prices. *See Petroleum Prods., 656 F. Supp. at 1299* (noting that plaintiffs' theory was that the defendants conspiratorily eliminated dealer discounts, thus "restoring" the official tankwagon prices, in order to fix retail prices). For purposes of this appeal, we operate with this same premise. Accordingly, **[**9]** we have no occasion to consider whether the district court was correct in its earlier ruling concerning the applicability of *Illinois Brick*.

II. SUMMARY JUDGMENT STANDARDS

HN1[] We review de novo the district court's grant of summary judgment to the defendants. *Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)*.

Determining whether the grant of summary judgment was proper in this case involves a careful application of the standards set down by the Supreme Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Because the parties sharply disagree over the proper interpretation of *Matsushita*, and because the issue is crucial to a proper resolution of this case, we think it appropriate to review in some detail the nature of the standards established in *Matsushita*.

A. *The Matsushita Decision*

In *Matsushita*, plaintiffs Zenith and National Union Electric Corp. ("Zenith") sued several Japanese companies that manufacture consumer electronic products. Zenith alleged **[**10]** that the Japanese companies had engaged in a predatory pricing conspiracy aimed at driving American firms from the U.S. consumer electronic products market. After several years of discovery, the defendants moved for summary judgment. The **[*438]** district court granted the defendants' motion, concluding that any inference of conspiracy was unreasonable. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100 (E.D.Pa. 1981)*. The Third Circuit reversed as to 21 of the 24 defendants, concluding that the plaintiffs had presented sufficient evidence to permit a reasonable factfinder to infer that the defendants had engaged in a predatory pricing conspiracy. *In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 304-11 (3d Cir. 1983)*.

The Supreme Court reversed this decision because it concluded that the evidence proffered by the plaintiffs did not provide any basis for concluding that the alleged predatory pricing was rational; in the Court's words, the defendants simply "had no rational economic motive to conspire." *Matsushita, 475 U.S. at 596*. This fact, combined with the evidence that the defendants' conduct **[**11]** was "consistent with other, equally plausible [innocent] explanations" implied that the defendants' conduct could "not give rise to an inference of conspiracy." *Id. at 596-97*. Moreover, the Court stated that, even if the defendants had had a rational economic motive to conspire, summary judgment would still have been appropriate in light of the fact that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Id. at 597 n. 21* (citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-64, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984))*. In such circumstances, the plaintiff must come forward with "sufficiently unambiguous" evidence "'that tends to exclude the possibility'" that the defendants were acting lawfully. *Id. 475 U.S. at 588, 597* (quoting *Monsanto, 465 U.S. at 764*).

We do not take these latter comments as suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are **[**12]** equally plausible. Allowing the district court to make that decision would lead to a dramatic judicial encroachment on the province of the jury. To read *Matsushita* as requiring judges to ask whether the circumstantial evidence is more "consistent" with the defendants' theory than with the plaintiff's theory would imply that the jury should be permitted to choose an inference of conspiracy *only* if the judge has first decided that he would himself draw that inference. This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.

Indeed, under this interpretation of *Matsushita*, a trial judge would not even need to evaluate whether the inference of conspiracy meets a threshold standard of reasonableness, which is the usual standard for judging inferences on summary judgment. *See* *Batchelor v. Oak Hill Medical Group, 870 F.2d 1446, 1447 (9th Cir. 1989)*. Since any inference that the trial judge thinks is more plausible than its alternatives must necessarily be a reasonable one, the trial judge would only need to ask whether he thinks the inference of conspiracy is the more plausible **[**13]** one. This cannot be what the Supreme Court meant when it stated that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita, 475 U.S. at 588*. The Court purported to *limit* the application of the traditional summary judgment rules in the antitrust context; it did not intend to abolish them and replace them with an entirely different set, one which raises troubling *seventh amendment* concerns. *Cf.* *Standard Oil v. Arizona, 738 F.2d 1021 (9th Cir. 1984)* (holding, in a prior appeal in this case, that the *seventh amendment* guarantees a right to jury trial in antitrust cases), *cert. denied*, *469 U.S. 1132, 105 S. Ct. 815, 83 L. Ed. 2d 807 (1985)*. Indeed, the Court noted that, within the limits imposed by ***antitrust law***, it remained true that "'on summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita, 475 U.S. at 587-88* (quoting *United States v. Diebold, Inc., 369 U.S. 654, 655, **[*439]** 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962))*.

Nor **[**14]** do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. Such an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case. After all, circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences. *See* *United States v. Henderson, 693 F.2d 1028, 1031 (11th Cir. 1982)* ("Circumstantial evidence is not testimony to the specific fact being asserted, but testimony to other facts and circumstances from which the jury may infer that the fact being asserted does or does not exist."). Thus, such an interpretation of *Matsushita* would seem to be tantamount to requiring direct evidence of conspiracy. This cannot be what the Court meant in *Matsushita*. Since direct evidence will rarely be available, such a reading would seriously undercut the effectiveness of the antitrust laws. Furthermore, *Monsanto* itself clearly indicates that circumstantial evidence **[**15]** may be sufficiently unambiguous to survive summary judgment. *Monsanto, 465 U.S. at 764* (plaintiff must "present direct or *circumstantial* evidence" that reasonably tends to prove that the defendants were engaged in a conspiracy rather than acting independently) (emphasis added); *see also* *Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477, 485 (9th Cir. 1988)* (circumstantial evidence found to be sufficiently unambiguous under *Monsanto*), *cert. denied*, *488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 806 (1989)*.

We think that the key to the proper interpretation of *Matsushita* lies in the Court's emphasis on the dangers of permitting inferences from certain types of ambiguous evidence. In *Matsushita*, the Court was unwilling to permit an inference of predatory pricing in part because the Court was concerned about the inference's possible anticompetitive side-effects. The Court noted that the plaintiffs attempted to prove an antitrust conspiracy "through evidence of rebates and other price-cutting activities." *475 U.S. at 594*. However, as the Court went on to observe,

> "Cutting **[**16]** prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the anti trust laws are designed to protect. See *Monsanto*, [465 U.S.] at 763-764. 'We must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.'"

Id. (quoting *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983))*.

Thus, *Matsushita* establishes that ***HN2***[] a trial judge should not permit an inference of antitrust conspiracy from circumstantial evidence where to do so would have the effect of deterring significant procompetitive conduct. We emphasize, however, that an antitrust defendant is not entitled to summary judgment simply by virtue of the fact that the plaintiff's inference of conspiracy would have *some* deterrent effects; the effects must be significant. As the Court stated in *Matsushita*, the concern with avoiding deterrent **[**17]** effects "must be balanced against the desire that illegal conspiracies be identified and punished." *475 U.S. at 594*. In short, ***HN3***[] the trial court must consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement. If it does, then the plaintiff must come forward with additional, "sufficiently unambiguous" evidence that does not have these undesirable deterrent effects. *Id. at 597-98* & n.21.

This reading of *Matsushita* is further supported by examining the Court's decision in *Monsanto Co. v. Spray-Rite Serv.* ***[*440]*** *Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, upon which the *Matsushita* Court relied heavily. In *Monsanto*, plaintiff Spray-Rite alleged that Monsanto had illegally conspired with its other distributors in deciding to terminate Spray-Rite's distributorship. Among the items of evidence introduced in support of this claim was the fact that Monsanto terminated Spray-Rite after receiving **[**18]** complaints from its other distributors about Spray-Rite's price cutting practices. Monsanto, on the other hand, contended that it had acted independently in deciding to terminate Spray-Rite. In analyzing the proper standard of proof for such a claim, the Supreme Court began by noting that, while it is *per se* illegal for a manufacturer to get together with its distributors and agree on prices, *see Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-09, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*, it is nonetheless permissible for a manufacturer to announce its retail prices in advance and then to terminate those distributors who fail to comply, *see United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. *See Monsanto, 465 U.S. at 761*. In light of these cases, the Court concluded that it could not permit an inference of conspiracy to be drawn from the mere fact that a distributor had been terminated after the manufacturer had received complaints from other distributors about price cutting. The Court reasoned that permitting such an inference would effectively preclude a manufacturer from **[**19]** exercising its independent termination rights under *Colgate* once it received any complaints from its distributors. In the Court's words:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. . . . To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market. In sum, "to permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would . . . inhibit management's exercise of its independent business judgment. . . ."

Monsanto, 465 U.S. at 763-64 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 n. 2 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981))* (other citations omitted).

Monsanto thus clearly illustrates that **[**20]** ***HN4***[] courts should be careful not to permit inferences of antitrust conspiracy when to do so would create a significant irrational dislocation in the market or would result in significant anticompetitive effects. [1]

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[1] We should note that the holding of *Monsanto* primarily applies to discussions between the manufacturer and its distributors. Under *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*, it is clear that a manufacturer can have discretion over whom it wishes to deal with so that it can maintain order in its distribution ranks. As this court stated in *T.W. Electrical Services, Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 632 n. 4 (9th Cir. 1987)*, "a manufacturer's independent refusal to deal with distributors did not violate antitrust laws." But the same rationale does not necessarily apply to relationships among competitor companies, and we note that horizontal relationships among co-competitors, such as those which exist in this case, are distinguishable from vertical relationships between a manufacturer and its distributors.

[21]** In summary, we conclude that ***HN5***[] where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior. Once the defendant has made such a showing, the plaintiff must come forward with other evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully.

B. *Direct v. Circumstantial Evidence*

Before turning to the specific issues of this case, we must add one further comment **[*441]** with regard to the applicability of *Matsushita*. As the above analysis demonstrates, the concerns highlighted in *Matsushita* and *Monsanto* arise only in the context of whether to permit inferences from circumstantial evidence. Accordingly, the *Matsushita* standards do not apply when the plaintiff has offered direct evidence of conspiracy.

This important limitation **[**22]** on the applicability of *Matsushita* was emphasized in our decision in *McLaughlin v. Liu, 849 F.2d 1205 (9th Cir. 1988)*. In *Liu*, the Secretary of Labor argued that summary judgment was properly granted, under *Matsushita*, on the grounds that the defendant's sworn affidavit -- which, if believed, would have provided a complete defense as to part of the Secretary's claim -- was "implausible." *Id. at 1207*. We emphatically rejected this argument, noting that in *Matsushita*, "the Court was not speaking of direct evidence, but of circumstantial evidence." *Id.* We noted the important difference between circumstantial evidence, in which a party asks that certain "inferences be drawn in his favor" and direct evidence, where, in order to defeat a request for summary judgment, the nonmovant need only ask that his evidence "be taken as true." *Id. at 1208*. We emphasized that the cases of both the Supreme Court and this court "have honored the difference between weighing direct evidence and refusing to draw unreasonable inferences from circumstantial evidence." *Id.* We summarized our cases as indicating that *Matsushita* only **[**23]** applies "where the non-movant relie[s] on inferences from circumstantial evidence." *Id.* We then went on to quote extensively from *T.W. Electrical Services, Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626 (9th Cir. 1987)*, highlighting that the *Matsushita* inquiry was appropriate only "'*where there is no direct evidence of a conspiracy.*'" *Id. at 1209* (quoting *T.W. Elec., 809 F.2d at 632*) (emphasis added by *Liu*). *See also Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1172 n. 4 (9th Cir. 1988)* (standards spelled out in *T.W. Elec.* apply only "if there is no direct evidence of a conspiracy)".

Thus, ***HN6***[] in applying *Matsushita*, a court must consider the nature of the evidence that the plaintiffs have offered with respect to each element of the cause of action. If the plaintiffs rely exclusively on circumstantial evidence in order to establish at least one element of their cause of action, then the court must proceed to analyze, under *Matsushita*, whether the inferences which the plaintiffs seek **[**24]** to draw from the indirect evidence are reasonable and permissible under the governing substantive law. *T.W. Elec., 809 F.2d at 631*; *see also United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1542* (9th Cir.) (en banc), *cert. denied*, *493 U.S. 809, 110 S. Ct. 51, 107 L. Ed. 2d 20 (1989)*. In the antitrust field, this inquiry will be guided by the principles outlined earlier. If, however, the plaintiffs offer direct evidence to support each element, then summary judgment must be denied.

III. APPELLANTS' PRICE-FIXING CLAIMS

In their briefs to this court, the appellants have identified three classes of evidence that they claim create a genuine issue of material fact as to whether the appellees were engaged in a conspiracy to fix or stabilize prices. For purposes of analysis, we will first examine these classes of evidence successively; having done so, we will then be in a better position to evaluate the probative value of the entirety of the appellants' evidence.

A. *Pricing Pattern Evidence*

The first set of evidence that the appellants claim indicates the existence of a conspiracy is a set of analyses **[**25]** of the appellees' pricing patterns. [2] This analysis was performed **[*442]** by appellants' expert Keith Leffler. The raw data which Mr. Leffler analyzed were derived, in large measure, from pricing information collected by Lundberg Surveys, Inc. During the period from 1968 to 1973, the Lundberg firm collected, on a weekly basis, retail price information from individual stations in 14 different cities in Arizona, California, Oregon, and Washington. Mr. Leffler analyzed this data for the largest city in each of the four states. His analysis of this weekly price data indicates that, between 1968 and August 1972, the average retail prices of stations selling appellees' gasoline in the Los Angeles, Phoenix, Portland, and Seattle markets generally followed a "sawtooth" pattern. That is, the average prices would generally decline over a period of time ranging from approximately three to eleven weeks, and then the prices would return to roughly their original, higher levels over approximately a one to four week period. Both the price increases and decreases from week to week were often quite sharp; but the increases were often especially sharp.

[26]** The parties do not seriously dispute that the sharp increases in retail prices were generally the consequence of the withdrawal of dealer discounts, thus resulting in the "restoration" of the "normal" higher dealer tankwagon prices. [3] **[**28]** Accordingly, we cannot accept the district court's conclusion that the cyclical pattern of retail prices does not suggest that wholesale prices followed a similar pattern. *See* *Petroleum Prods., 656 F. Supp. at 1300* ("the cycle of retail price changes reflected by the charts does not establish that the defendants' wholesale prices followed the same pattern"). [4] Indeed, we note that the data presented by the appellees themselves concerning their wholesale prices indicates that the pattern of these prices was a cyclical one of sharp increases followed by gradual declines. The key disagreement between the parties concerns the significance of this pattern. The appellees argue that the restorations and the sawtooth pattern of prices do not indicate conspiracy because the same pattern would be produced by individual companies each deciding to follow the others' price lead. In short, the appellees essentially assert that their pricing behavior **[**27]** was interdependent rather than conspiratorial. [5] The appellants disagree, arguing that these price cycles were not the result of any sort of independent action, but are rather an indication of collusion. The appellants assert that a conspiracy may be inferred from this pricing data because the price increases were too large and too risky to have occurred in a competitive market. According to the appellants, any company that raised its prices this sharply would so risk losing business that it would never take such a step without some advance assurance that others would follow. Therefore, argue the appellants, the fact that such price increases were made is an indication of a prior agreement to raise prices.

[*443] In applying *Matsushita*, our first task is to decide whether the appellees' claim of interdependent pricing constitutes a sufficiently plausible independent explanation for their pricing behavior. The appellants' key argument

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[2] In first considering the parallel pricing evidence alone we do not ignore our mandate to "take special caution to give the [plaintiffs] 'the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.'" *Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 526 (9th Cir. 1977)* (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962))*; *see also* *City of Long Beach v. Standard Oil Co., 872 F.2d 1401, 1404-05* (9th Cir.), *amended*, *886 F.2d 246 (1989)*, *cert. denied*, ***493 U.S. 1076, 110 S. Ct. 1126, 107 L. Ed. 2d 1032 (1990)***. Thus, later in sections III-B and III-C we will consider appellants' claim that appellees exchanged various information to facilitate price coordination in the context of the parallel pricing evidence.

[3] We note, however, that the parties sharply disagree over whether this correlation indicates sufficient "control" of the dealers to avoid the holding of *Illinois Brick*. Nonetheless, as stated earlier, we do not reach this issue. In analyzing the significance of the retail pricing data, we think it sufficient to note that, regardless of the specific degree of control over individual stations, movements in the appellees' wholesale prices generally influenced the retail prices that were charged by the dealers. The parties do not dispute this latter fact.

[4] Curiously, the district court later went on to state, in apparent contradiction, that "wholesale prices play a major part in any decision to set retail prices, and we therefore can assume that the defendants' wholesale prices had a tendency to follow a similar pattern". *656 F. Supp. at 1300*. We agree with this latter statement of the district court.

[5] As used here, the term "interdependent" merely describes the phenomenon of sequential competitive pricing decisions that are each made (1) in response to the ones preceding it and (2) in hope or expectation of the ones that follow it. The legal significance of such conduct is analyzed below.

on this score is that the price increases were so risky that it is implausible to believe that any firm would have undertaken them without some advance agreement from competitors. We note that such **[**29]** an argument may often be valid when the relevant market is highly unconcentrated or where the increase cannot be reversed easily or readily without substantial loss of goodwill. *See* VI P. Areeda, ***Antitrust Law*** para. 1425d at 150-53, para. 1431a at 183-84 (1986). In a highly unconcentrated market, any firm that attempted a unilateral supracompetitive price increase would quickly lose business to its many other competitors. Interdependent pricing is not likely to occur because each firm realizes that the possibility of undetected "shading" of the interdependent price by a single firm would quickly lead to a return to the original market price. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv.L.Rev. 655, 659-60 (1962); *see also* VI P. Areeda, *supra*, at para. 1429a. In such a market, any single firm can increase its output without substantially affecting the market price or the market shares of its competitors. This fact substantially increases the odds that shading by an individual firm would either go undetected or be ignored, and the consequent spread of such discounting would rapidly bring **[**30]** the overall price back down. Turner, 75 Harv.L.Rev. at 660; VI P. Areeda, *supra*, at para. 1429a. Therefore, without some sort of prior agreement prohibiting such shading, the temptation for any individual firm would be almost irresistible. Turner, 75 Harv.L.Rev. at 660. Accordingly, in highly unconcentrated markets, a claim that price increases were the result of sequential interdependent price increases is often likely to prove implausible.

However, as the number of firms in a market declines, the possibilities for interdependent pricing increase substantially. In determining whether to follow a unilateral price increase by a competitor, a firm in a relatively concentrated market will recognize that, because its pricing and output decisions have an effect on market conditions and will generally be watched by its competitors, there is less likelihood that any shading would go undetected or would be ignored. The firm thus knows that if it fails to follow the price lead, the leading firm will quickly reduce its prices back to their earlier level. VI P. Areeda, *supra*, at para. 1429b. On the other hand, the firm may recognize that the higher price **[**31]** is one that would produce higher profits. It may therefore decide to follow the price increase, knowing that the other firms will likely see things the same way and that, at any rate, any subsequent downward movement in prices would likely be detected before there was any substantial loss of market share. *Id.*; Turner, 75 Harv.L.Rev. at 661-62.

There has been a considerable debate in the literature over whether interdependent pricing is an inevitable or inherent feature of certain types of concentrated markets. *Compare* VI P. Areeda, *supra*, at paras. 1430-32 (inherent); Sullivan, *The Viability of the Current Law on Horizontal Restraints*, *75 Cal.L.Rev. 835, 858-59 (1987)*; Turner, 75 Harv.L.Rev. at 665-66 *with* R. Posner, ***Antitrust Law****: An Economic Perspective* 42-47 (1976) (not inherent); Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan.L.Rev. 1562, 1566-75 (1969). We need not take any side in this debate. [6] Regardless of whether such conduct is an inevitable consequence of a more concentrated market structure, we conclude that it is at least plausible to assert that such pricing **[**32]** behavior *can* occur when the number of significant rivals in a market is sufficiently small.

[*444] We do not think that the number of significant firms in the gasoline markets involved in this case is so large as to render the possibility of sequential interdependent price increases wholly implausible. Although these markets would probably not be considered highly concentrated in Herfindahl-Hirschmann terms, that does not imply that the appellees' claim of interdependent pricing is implausible. VI P. Areeda, *supra*, para. 1431a at 183 (noting that the Herfindahl-Hirschmann Index "cannot capture the full range of factors bearing upon the existence or strength of recognized **[**33]** interdependence"). As Professor Areeda has noted, "All one can say with assurance is that such interdependence and price coordination are implausible when there are 'many' 'significant' rivals (more than a dozen?) but more likely as the number of firms decreases." *Id. at 184*. The gasoline markets under discussion here appear to lie in that gray area where, although not altogether inevitable, interdependence is distinctly possible. See F. Scherer, *Industrial Market Structure and Economic Performance* 288 (2d ed. 1980) (discussing empirical evidence of interdependent pricing in the gasoline industry). Indeed, the appellants have not pointed to any evidence indicating that the number of firms in these markets is too large for interdependence to occur.

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[6] Were it necessary to do so, we would be hard-pressed to conclude that interdependent pricing is "inevitable" or "inherent" in the gasoline markets at issue in this case. Given the generally rapid deterioration in prices that followed each restoration, any interdependence in the appellees' pricing behavior was at best imperfect.

Nonetheless, we noted earlier that, even in highly concentrated markets, a unilateral price hike might be too risky to make without advance agreement if the increase could not be readily reversed without a significant loss of goodwill. On the other hand, where a unilateral price increase can be withdrawn quickly, a firm may very well decide to test the waters without any sort of advance commitment from its competitors as to whether **[**34]** they will follow. In this regard, we note that the uncontested record evidence indicates that unilateral price increases in these markets were quickly reversible. [7] Furthermore, the evidence indicates that, although unilateral restorations could often entail significant costs if unsuccessful, the costs do not appear to have been so prohibitive as to suggest that the possibility of such unilateral action was implausible. [8]

[35]** We recognize that ***HN7***[] such interdependent pricing may often produce economic consequences that are comparable to those of classic cartels. Nonetheless, proof of such pricing, *standing alone*, is generally considered insufficient to establish a violation of the Sherman Act. *See* *Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 526 (9th Cir. 1977)* ("The fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.") (quoting *United States v. International Harvester Co., 274 U.S. 693, 708-09, 71 L. Ed. 1302, 47 S. Ct. 748 (1927))*; *see also* *Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988)*, *cert. denied*, *488 U.S. 1007, 109 S. Ct. 789, 102 L. Ed. 2d 780 (1989)*; *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54* (2d Cir.), *cert. denied*, *484 U.S. 977, 108 S. Ct. 489, 98 L. Ed. 2d 487 (1987)*; *E.I. DuPont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984)* **[**36]** ("The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws."); VI P. Areeda, *supra*, at para. 1432; Turner, 75 Harv.L.Rev. at 669-72. Additional **[*445]** proof beyond mere parallel pricing usually is required. [9]

Our discussion of *Matsushita* highlights the wisdom of this rule. In applying the second prong of the *Matsushita* test, we must ask whether, given the possibly interdependent nature of the pricing behavior observed in this case, permitting a *§ 1* violation to be found *solely* on such evidence would have the effect of deterring important legitimate conduct. We conclude that, if we were required to decide based on the price cycle evidence standing alone, we would find that it would not be enough to survive summary judgment. **[**37]** To permit an antitrust violation to be based on the sawtooth price pattern in this case, without more, would require a company making wholly independent pricing decisions to consider that the possible responses of its competitors might render it liable for treble damages. Similarly, following another company's price increase might very well provide the evidence that a disgruntled customer would need to get to a jury in a treble damage antitrust suit. It thus appears that permitting an inference of conspiracy from the parallel pricing evidence alone would result in an anticompetitive dislocation by distorting independent pricing decisions.

We also cannot agree that, without more, the conspiratorial nature of the price restorations is indicated by the fact that the price hikes were "too high." Were we to permit such a theory, few pricing decisions would be immune from antitrust scrutiny. Any unhappy buyer in a market experiencing a general increase in prices could bring an antitrust action against the sellers, arguing that the conspiratorial nature of the price increase is indicated by the fact that the increase was "too high." The court would then be required to receive evidence as **[**38]** to the wisdom of, and necessity for, the price increase, and to judge what constitutes a "fair" price. The federal courts generally are unsuited to act as rate-setting commissions. *See* VI P. Areeda para. 1432 at 203. Accordingly, the appellants must rely on additional evidence beyond mere price parallelism in order to avoid summary judgment.

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[7] Thus, for example, the record indicates that in mid-February 1971, Union "restored" prices to its dealers in California by withdrawing dealer discounts, but when only two other companies followed suit, it reinstated dealer aid just a few days later.

[8] In reaching this conclusion, we take note of the fact that the record indicates that the appellees generally learned quite rapidly of one another's price moves by reading about them in the trade press. In section III-B, *infra*, we consider the appellants' claim that the appellees' exchange of information through the trade press is, under the circumstances of this case, probative of a conspiracy. For purposes of the present analysis, however, we take the rapid dissemination of such pricing information as a given.

[9] In some cases, when a market is highly unconcentrated, parallel pricing alone may be all the proof that is required.

B. *Price Data Dissemination Evidence*

The appellants point to two additional classes of evidence which they claim indicate the existence of a conspiracy to fix or stabilize prices. The first of these two sets consists of evidence concerning various practices whereby the appellees disseminated information concerning their wholesale and retail prices. The appellants contend that, not only were these price dissemination practices themselves conspiratorily and unlawfully adopted, but that they were adopted pursuant to an agreement or understanding to engage in concerted restorations. The appellees argue that these practices were both lawful and independently adopted and that they are not probative of a conspiracy to stabilize prices.

1. Press releases

The appellants presented evidence indicating that at various times each of the defendants **[**39]** except ARCO, Union, and Gulf engaged in the practice of publicly announcing, in press releases, their decisions to withdraw dealer assistance and to restore tankwagon prices. [10] Indeed, the evidence indicates that such price increases were sometimes announced in advance of their effective date. Thus, for example, Mobil announced on March 26, 1970 that it would withdraw dealer aid effective March 30. The appellees argue that no inference of conspiracy may be drawn from such evidence because they claim that the publication of this information was "perfectly lawful" and an "ordinary business practice." We conclude, however, that such an inference is both reasonable and permissible under *Matsushita*.

[*446] In their depositions in this case, **[**40]** several officers of the appellee oil companies were questioned concerning the business reasons for publicly announcing changes in tankwagon prices and in the levels of dealer assistance. Their virtually uniform response was that it was done for the purpose of quickly informing competitors of the price change, in the express hope that these competitors would follow the move and restore their prices.

Thus, the appellees' officers' own testimony indicates that there was essentially no purpose for publicly announcing tankwagon prices and dealer discount information other than to facilitate either interdependent or plainly collusive price coordination. Announcing such price increases publicly reduced the likelihood that the increase would fail to be detected or that it would be detected only after the price leader had been "hung out to dry" in the market for several days. Without a press release, a withdrawal of dealer support might not be readily detected because the retail prices of individual branded gas stations varied considerably. As one Standard Oil official put it: "Street pricing [was] all over the lot; so to us it was important that we set forth clearly and exactly what we **[**41]** had done so there would be no misunderstanding of it." Indeed, Arco's failure publicly to announce its restoration attempts to the trade press appears to have been responsible for the failure of its January 1970 restoration. An internal Arco memorandum explained that "the reason this partial restoration did not work is that our competitors obviously thought our dealers were merely overpricing and our constructive efforts went completely unnoticed at the market place." To avoid this problem, the memorandum recommended that if Arco decided to lead a restoration in the future, it should be "telegraphed to all news media as far as possible in advance as Legal will approve."

It was important for the appellees to reduce the uncertainties concerning restorations because the costs associated with leading a restoration were significant, and they increased with each day that a move was not detected or was not followed. An internal Arco memorandum noted that its unsuccessful restoration attempts had been "costly to us, not only in terms of volume, but more importantly in expense dollars required to recoup and serious adverse reaction with our customers and in our dealer organization." Another **[**42]** Arco document noted that "past experience has taught us how disastrous it can be for us to be the leader in an upward move." Even with public announcement, the costs of leading a restoration were substantial; Standard Oil's internal analysis of the effect of three restorations it led indicated an average drop in sales volume of over 19% within one week. The same Standard Oil document blamed, in part, the company's practice of leading restorations for causing a significant

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[10] The record indicates that in the 1960s Exxon issued press releases concerning its withdrawal of dealer aid, but that it stopped doing so in 1969. Nonetheless, the record also indicates that Exxon continued to respond to press inquiries concerning its price moves.

decline in Standard's overall market share. An Arco document echoed this view, noting that Standard's and Shell's leading of restorations had led to their "disastrous" loss in market share.

The evidence presented by the appellants thus indicates that the publication of wholesale price increases was intended to make, and had the effect of making, restorations more effective by ensuring that competitors could quickly learn of, and respond to, any withdrawal of dealer aid. [11] **[**45]** The appellees' actions in announcing such information made the market more receptive to price coordination than it otherwise would have been. Although we concluded earlier that mere proof of interdependent pricing, standing alone, may not serve **[**43]** as proof of an antitrust violation, we believe that the evidence concerning the purpose and effect of price announcements, when considered together with the evidence concerning the parallel pattern of price restorations, is sufficient to support a reasonable and permissible inference of an agreement, whether express or tacit, to raise or **[*447]** stabilize prices. The inference is reasonable because at the very least, a jury could conclude that the appellees implicitly agreed to engage in practices that they knew and hoped would lead to greater price coordination, [12] with the result that when a price leader wished to initiate a restoration, it could effectively solicit tacit agreement. *See* *United States v. Container Corp., 393 U.S. 333, 336-37, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)* (informal agreement to provide price information may, under appropriate market conditions, constitute circumstantial evidence of an agreement to stabilize prices); [13] *King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1152 (10th Cir. 1981)* (*Container* established that exchange of price information may serve as basis for inferring price fixing where **[**44]** effect of such exchange is to stabilize prices), *cert. denied*, *454 U.S. 1164, 71 L. Ed. 2d 320, 102 S. Ct. 1038 (1982)*; *Penne v. Greater Minneapolis Area Bd. of Realtors, 604 F.2d 1143, 1148-49 (8th Cir. 1979)* (summary judgment was erroneously granted where evidence indicated possible connection between price information exchanges and alleged conspiracy to fix brokerage fees); *see also* Posner, *Information and Antitrust: Reflections on the* Gypsum *and* Engineers *Decisions*, 67 Geo.L.J. 1187, 1199 (1979) ("If the effect of the information exchange were to raise the level [of] prices, one could infer that the motive was price fixing."); *id.* at 1203 (a jury should be allowed "to consider exchanges of information, other communications among the parties to an alleged conspiracy, and such other relevant circumstances as the effect on the price level . . ., as circumstantial evidence of alleged price fixing.").

[46]** We reject the appellees' circular argument that the publication of dealer discount and price information cannot support an inference of conspiracy because the information was "publicly available." The information was publicly available only because the appellees chose to make it so; without such dissemination, price moves were not always readily and easily detected. Furthermore, we agree with Professor (now Judge) Posner that "the *form* of the exchange -- whether through a trade association, through private exchange as in *Container*, or through public

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[11] As noted earlier, the record indicates that price increases were occasionally announced in advance of their effective date. Such announcements are, of course, even more effective in allowing the price leader to communicate its intention and to receive reactions without having to incur substantial risk.

[12] An inference that the parallel use of the trade press was the result of at least a tacit agreement is reasonable in light of the fact that, as noted in section III-C, *infra*, the use of the trade press was arguably a substitute for the direct competitor contacts that the appellees admit occurred during the period prior to the Court's decision in *United States v. Container Corp., 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)*.

[13] Consistent with the limited nature of the holding in *Container*, the Court has held that ***HN8***[] agreements to exchange pricing data do not themselves constitute a *per se* violation of the Sherman Act. *United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*. Accordingly, information exchanges help to establish an antitrust violation only when either (1) the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices, or (2) the exchange is made pursuant to an express or tacit agreement that is itself a violation of *§ 1* under a rule of reason analysis. Given Container's conclusion that the agreement in that case fell within the *per se* ban against price fixing, *see* *393 U.S. at 337-38* & n. 4 (citing *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-21, 84 L. Ed. 1129, 60 S. Ct. 811 (1940))*, it seems clear that *Container* falls into the first of these two classes. *See* *Wilcox v. First Interstate Bank, 815 F.2d 522, 526 (9th Cir. 1987)* (noting that *Container* involved an agreement to fix prices); *Hanson v. Shell Oil Co., 541 F.2d 1352, 1360 (9th Cir. 1976)* (characterizing *Container* as a case in which companies exchanged price information "for the purpose of price stabilization"), *cert. denied*, *429 U.S. 1074, 50 L. Ed. 2d 792, 97 S. Ct. 813 (1977)*.

announcements of price changes -- should not be determinative of its legality." R. Posner, ***Antitrust Law****: An Economic Perspective* 146 (1976). The fact that it is feasible for the appellees to communicate the necessary price information through press releases does not "immunize the exchange of price information from legal sanction [where] the conditions of the market suggest that the exchange promotes collusive rather than competitive pricing." *Id. at 147*.

We do not believe that permitting such an inference poses any problem under *Matsushita*. The district court concluded that the inference could not be permitted, **[**47]** reasoning that the hope of imitation was a **[*448]** proper business purpose for the announcements, and that the publication of such information was in the legitimate individual interest of each company. *Petroleum Prods., 656 F. Supp. at 1304-05*. We agree that it is plausible to contend that independent considerations of self-interest would have led a company to choose to publish a price increase that it had decided to make. That does not settle the inquiry, however; the question remains whether permitting an inference of conspiracy from the fact of such publication would significantly deter important legitimate conduct. Given the market conditions present in this case, we conclude that it would not.

It is important to recognize that, given the system of branded franchising, the tankwagon prices or dealer discounts are not of immediate significance to anyone other than the oil companies and their franchised dealers. Retail purchasers do not care what the dealer paid for the oil; they are concerned only with the price at the pump. Moreover, the public dissemination of information concerning dealer tankwagons and discounts could hardly be described as fostering **[**48]** the efficient or rational operation of the market inasmuch as there simply was no wholesale market to rationalize; the branded dealers were not free to shop around for their oil. Accordingly, the district court's reliance on *Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582-84, 69 L. Ed. 1093, 45 S. Ct. 578 (1925)* (noting that certain types of price information exchanges may help to "avoid the waste which inevitably attends the unintelligent conduct of economic enterprise"), *quoted in* *Petroleum Prods., 656 F. Supp. at 1304*, is wholly inapposite.

The uncontested record evidence indicates that the dealers were individually notified concerning any changes in the tankwagon price or in the level of dealer discount. In light of this fact, it appears that the public dissemination of such information served little purpose other than to facilitate interdependent or collusive price coordination. Under these circumstances, there is no significant probability that permitting the proffered inference would deter important legitimate conduct. [14] The *Matsushita* balance is particularly one-sided in this case.

[49]** Nothing in our earlier discussion concerning mere proof of parallel pricing is to the contrary. Simple interdependent pricing does not violate the Sherman Act, not because it is desirable (it is not), but because permitting proof of conspiracy solely on the basis of price parallelism *is* undesirable. The appellants, however, have offered evidence indicating that the appellees in this case did more than simply price interdependently. A jury could conclude that the oil companies agreed, either implicitly or explicitly, to create market conditions that would facilitate tacit or express price coordination. The evidence would support a conclusion that the appellees strove to make such coordination possible where it otherwise might not have been. To paraphrase Professor Areeda, "One may reluctantly tolerate interdependent pricing behavior as such and still condemn [those agreements involving] practices which unjustifiably facilitate interdependent pricing and which can be readily identified and enjoined." P. Areeda, *Antitrust Analysis* para. 325, at 381 (3d ed. 1981). We think that a jury should decide whether the appellees' actions were undertaken pursuant to an agreement or understanding **[**50]** concerning prices or whether their activities were simply noncollusive and independent. [15]

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[14] Our conclusion would necessarily be different were the appellants' inference of a price-fixing conspiracy based on the dissemination or advertising of *retail* prices; permitting an inference of conspiracy from such evidence would make it more difficult for retail consumers to get the information they need to make efficient market decisions. In the district court, the appellants did indeed base their claims in part on the public announcement of retail prices by dealers, but they have not pressed such a theory on appeal.

[15] We also note that, as an alternative to using the price data dissemination evidence as a means of proving the existence of a *per se* illegal conspiracy to fix prices, the appellants on remand may also seek to challenge directly, under a rule of reason

[*449] 2. Posting of prices

The appellants also presented evidence indicating that several of the appellees publicly posted their dealer tankwagon prices and any applicable dealer discounts. Specifically, the appellants produced evidence indicating that Mobil, Standard Oil, and Exxon posted such information, for public inspection, at either their company headquarters, division offices, **[**51]** or bulk plants. The appellants also presented testimony from an Arco executive to the effect that Arco "probably" posted its tankwagon prices at its bulk plants. In addition, there is evidence in the record indicating that Arco, among others, checked these postings.

For reasons comparable to those discussed above, we conclude that the practices of posting and checking this detailed information supports a reasonable and permissible inference of an agreement or understanding concerning prices. The appellees' assertedly independent explanation for such posting was that, as one Standard Oil official put it:

> It was our desire to be open and straightforward in the matter of our product pricing and to make available for any customer the ability to look and see what our posted price was. . . . I guess one might say that it was for the logic of being open and aboveboard on what our prices were to our customers. We had nothing to conceal and it was just a mechanism to accomodate that openness.

Another Standard official testified that the posting was done "for the customer's benefit, to inform the customer what the applicable prices were." A Mobil official testified that **[**52]** the purpose of the posting was to allow any individual dealer to come in and check "that he wasn't being discriminated against." It is uncontested, however, that any changes in tankwagon prices or dealer discounts were directly reported to the dealers.

Other testimony indicates that the purpose and effect of the posting was to allow competitors to learn quickly of any withdrawal of dealer support. The following testimony from a Standard Oil official is illustrative:

> Q. . . . Was there any business reason why the temporary dealer assistance that was being granted in the trade zone . . . should have been published or made available to anybody other than the dealers?
> A. Yes, I think a practical business reason. If we had raised our prices to our dealers, and our dealers had raised it on the street generally, I think particularly our dealers . . . may have been as much as one, two, three, four cents -- they were all over the lot. If a competitor saw this, he might wonder, "Is this a dealer movement, or has Standard Oil Company raised their prices to cause this reaction in the marketplace?" . . .
>
> Q. . . . The reason you are giving, then, is that you wanted the competition **[**53]** to know what the price move was.
> A. Exactly.

Given that the evidence thus indicates that the purpose and effect of the public posting was the same as for the press releases, we similarly conclude that a reasonable inference of agreement may be drawn from this evidence.

We also perceive no *Matsushita* problem in permitting such an inference. To the extent that the appellees assert business motivations comparable to those discussed in Section III-B-1, our analysis is the same. Furthermore, given that the appellees' asserted purpose of assuring dealers that there was no discrimination could easily be achieved through other means, we have little difficulty concluding that permitting such an inference will not deter any significant or valuable independent conduct.

Lastly, we perceive an additional reason why the posting of this information may serve as the basis for an inference of conspiracy. The record indicates that the information posted was unusually detailed, listing tankwagons and dealer discounts **[*450]** for each individual price zone. Such detailed information would have the effect of revealing any gradual shading of wholesale prices that might occur in **[**54]** a particular zone. The record indicates that the spread of such shading was one factor that contributed to the gradual collapse of price restorations. By posting and checking such information, several of the appellees created a mechanism whereby shading might be discouraged

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analysis, the alleged agreement to exchange price information. *See* note 13 *supra*. Given the evidence indicating a lack of a strong procompetitive purpose for such data dissemination, the appellants' evidence clearly presents a jury question under this alternative theory.

or detected. In light of the fact that disclosure of this sort of sensitive price information might be considered contrary to a firm's self-interest, a jury may reasonably conclude that it was the intention and common understanding of these companies to discourage such shading, thus facilitating and possibly lengthening restoration periods.

C. *Evidence of Competitor Contacts*

The third set of evidence which the appellants claim supports an inference of an agreement consists of evidence concerning alleged contacts between the appellees.

1. Pre-Container contacts

The appellants assert that, prior to the Supreme Court's decision in *Container*, the appellees all regularly provided one another with information concerning dealer tankwagons and discounts. The record contains evidence indicating that the appellees did in fact engage in direct communication concerning price levels and dealer support. For **[**55]** example, Agnar Nerheim, a marketing official with Standard Oil, testified that between 1956 and 1958 he telephoned competitors to determine what retail price level they were supporting in the market, and that he sometimes asked what was the specific amount of dealer assistance being given. He also testified that he received similar calls from competitors. When asked about which specific companies were involved, Nerheim testified that he had such conversations with individuals from Union, Richfield (now ARCO), Texaco, General (now Mobil) and Shell.

Nerheim testified that such price verifications continued after he was transferred to Standard's Los Angeles office. Nerheim stated that he was transfered [sic] to Los Angeles because most of the major oil companies were headquartered there, and it would therefore be easier for him to contact competitors. In addition to verifying prices, Nerheim stated that he also spoke with competitors in order to obtain "market intelligence," including information concerning wholesale and retail matters. Among the subjects discussed were the price wars that were taking place in Los Angeles. Nerheim testified that, during this time period, he had discussions **[**56]** concerning such market intelligence with officers from ARCO, Humble (now Exxon), Texaco, Mobil, and Gulf. Most of these contacts were face-to-face visits rather than phone calls. Nerheim stated that he kept no records of these competitor contacts, and that he had been specifically instructed by his superior not to put down on his expense reports the names of any competitors whom he took to lunch. Nerheim stated that such contacts continued until 1967.

Moreover, Robert Erhard, an official with the Carter Oil Company (later acquired by Humble, now Exxon) testified that, sometime between 1959 and 1961, Agnar Neirheim came to his office in Seattle and explained to him how they could converse about pricing without there being any telephone record. According to Erhard, Neirheim explained that the local Standard office in Seattle could reach him on a company WATS line, and that calls could therefore be made through the local office without appearing on company long-distance records. In light of Erhard's and Nerheim's testimony, it seems clear that the record supports an inference that Nerheim engaged in secret conversations with competitors concerning price levels during the 1960s. Other **[**57]** testimony indicates that other Standard employees engaged in similar conversations with competitors during this time period.

The appellees do not appear to contest the appellants' suggestion that such contacts took place prior to the decision in *Container*. Instead, they raise two arguments as to why the evidence should not be **[*451]** considered as supporting an inference of conspiracy. The appellees first argue that the testimony is "ancient" and is too "stale" to have any probative value. For several reasons, we must reject this contention. First, although all of this pre-Container evidence falls outside the limitations period applicable in this case, the district court dismissed this action without ruling on the plaintiffs' claim that the statute of limitations had been equitably tolled by the defendants' alleged fraudulent concealment of their activities. If the statute was tolled, then we would have little difficulty concluding that the appellants' evidence of secret direct price exchanges among the appellees supports an inference of an agreement to fix or stabilize prices. Accordingly, on remand the district court should consider whether the statute of limitations has **[**58]** been tolled; if it has, then the plaintiffs may use this evidence of competitor contacts in order to establish the existence of a conspiracy during the pre-Container period.

Second, we think that the pre-Container evidence is relevant to establishing the appellees' intent and motive in publicizing, through press releases and posting, their dealer tankwagons, dealer discounts, and supported retail prices. The appellants have produced evidence indicating that these methods of publication were generally meant to serve the same purposes as the direct competitor contacts that had preceded *Container*, and, indeed, that they were used as a substitute for such contacts in the post-Container period. Thus, for example, Nerheim testified that, by 1967 (two years before *Container*) Standard had largely abandoned the practice of verifying its prices directly to its competitors, relying instead on its system of posting such information publicly, a practice which it had begun earlier in the decade. Nerheim stated that, before he left Los Angeles in 1967, such information was publicly posted, and competitors therefore no longer needed to verify prices with him verbally; they would just check **[**59]** the listings and then drop by his office to say hello. Occasionally during this period, however, Nerheim still responded to phone calls requesting information on specific wholesale dealer allowances.

Similarly, C. R. Jones, an official with Mobil, testified that Mobil used several different methods to obtain information from competitors concerning dealer aid, but that the use of direct horizontal communications was dropped after the decision in *Container* was announced. Thereafter, Mobil relied largely on trade publications, contacts with competitive service station dealers, and checking postings in order to obtain information concerning competitors' levels of dealer aid. Although various Mobil bulk plants had been posting in various degrees for some time, after *Container* Mobil instituted a uniform practice of posting at all of its plants across the United States. As noted earlier, this uniform system of posting included publicizing Mobil's tankwagons and dealer discounts for specific trade zones. Mr. Jones specifically testified that this shift in methods did not represent a change in overall business practices:

> . . . The decisions in the *Container* case changed **[**60]** our communications. But we did not intend that it change any business procedures or practices that we had historically been operating under, that we felt were not necessary to change. We were attempting to maintain our conduct on a -- in a legal manner, and certainly not attempting to say we have to change our way of life because of a decision in a court case.

We think that this evidence concerning the shift to indirect methods of informing competitors of wholesale price levels provides some support for the appellants' claim that the post-Container price publications were made pursuant to a common understanding or agreement. The pre-Container activities, which involved verifications of dealer support levels upon personal request, fit squarely within the scope of *Container*. The appellants' evidence suggesting that the appellees shifted methods of communication, without abandoning the goal of giving and receiving such information, supports an inference that the public dissemination of dealer support information **[*452]** was undertaken pursuant to a mutual understanding. [16]

[61]** The appellees also claim that the legality of their pre-Container conduct was upheld in *Hanson v. Shell Oil Co., 541 F.2d 1352, 1359-60 (9th Cir. 1976)*, *cert. denied*, *429 U.S. 1074, 50 L. Ed. 2d 792, 97 S. Ct. 813 (1977)*, and *Gray v. Shell Oil Co., 469 F.2d 742, 746-47 (9th Cir. 1972)*, *cert. denied*, *412 U.S. 943, 37 L. Ed. 2d 403, 93 S. Ct. 2773 (1973)*. We disagree. First, we note that both of those cases arose under different procedural postures than the present case, and they involved different standards of review. *Hanson* was an appeal from a jury verdict for the defendants after a second trial. The plaintiffs contended that the granting of a new trial after the first jury had ruled in their favor was an abuse of discretion. *Hanson, 541 F.2d at 1359*. After reviewing the record, we held that the trial court did not abuse its discretion in concluding that the first jury's verdict was against the weight of the evidence. *Id. at 1359-60*. In *Gray*, the jury had rendered a verdict for the *defendant*, Shell Oil Co.; we therefore noted that, on appeal, we were required **[**62]** to view the evidence in the light most favorable to Shell. *Gray, 469 F.2d at 746*. Our standard of review in the present case is, of course, very different from that applied in *Hanson* or *Gray*. Here, the appellants contest the entry of summary judgment against them. We review the district court's decision de novo, and, within the limits established by *Matsushita*, we view the evidence in the light most favorable to the appellants. *See* *Matsushita, 475 U.S. at 587-88* (noting that, within the limits imposed by ***antitrust law***, "on summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most

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[16] We disagree with the appellees' suggestion that the lack of agreement is clearly indicated by the diversity of publication practices. The fact that the appellees may have chosen different methods of publication does not imply that they did not each recognize and act upon a mutual understanding that such information would somehow be made available to competitors.

favorable to the party opposing the motion") (quoting *United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962))*.

Furthermore, as the appellants correctly note, the claims in *Hanson* and *Gray* were quite the opposite of those alleged in this case. As required by *Container*, in both *Hanson* and *Gray* we undertook a highly fact-specific inquiry. In neither case did we broadly endorse competitor contacts for the purpose of price verification. The **[**63]** plaintiffs in *Hanson* and *Gray* sought to establish that the defendants had conspired to *create* price wars in order to drive independent marketers out of business. *Hanson, 541 F.2d at 1355*; *Gray, 469 F.2d at 746*. We noted that the exchange of wholesale price information was initiated by dealers in *Gray* and by the companies in *Hanson* in order to benefit *dealers* facing severe competition, and we concluded that on the specific facts of those two cases "such exchange of information does not rise to the level of an illegal conspiracy." *Hanson, 541 F.2d at 1360*; *Gray, 469 F.2d at 747*.

By contrast, the evidence in the present case amply supports an inference that the exchange of price information by the appellees was done with the purpose and effect of allowing greater coordination and stabilization of prices. Thus, while in *Hanson* we distinguished *Container*, noting that "the goal of either company was not shown to be price stabilization. . . ." *541 F.2d at 1360*; *see also* *Gray, 469 F.2d at 746-47* ("Here, as distinguished from *Container*, the price inquiries **[**64]** were initiated [by the dealers] and the information was sought, not for the direct benefit of Shell, but for the benefit of the dealers. . . . This is a far cry from *Container*, where the price information was sought solely for the benefit of the manufacturers. . . ."), exactly the opposite is true in this case.

In sum, we conclude that the evidence concerning the appellees' pre-Container activities is sufficient, when considered together with the evidence concerning pricing patterns, to support an inference of an agreement to stabilize prices. If anything, **[*453]** the pre-Container contacts are stronger evidence of conspiracy than the price dissemination practices discussed above in Section III-B. Accordingly, on remand the district court must consider whether the statute of limitations has been equitably tolled. Furthermore, even if the statute has not been tolled, we think that the pre-Container evidence is nonetheless relevant in helping to establish the appellees' intent and purpose in disseminating, during the post-Container period, information concerning dealer tankwagons and levels of dealer support and assistance.

Finally, as with the price dissemination practices, **[**65]** permitting an inference of conspiracy from direct competitor contacts will not have significant anticompetitive effects. Appellees have alleged no pro-competitive rationale for their behavior that easily could not be achieved through other means. *See* discussion in III-B-1 and III-B-2 *supra*. Moreover, given that appellees have largely abandoned the practice already there is no reason to believe that allowing the inference now will have any significant economic impact. Thus, we find that the inference of a conspiracy to stabilize prices is permissible under *Matsushita*.

2. Post-Container contacts

The appellants point to a number of items of evidence which they claim indicate that direct verbal contacts concerning pricing continued to occur after the decision in *Container*. In their intitial pretrial brief below, the appellants asserted that although such contacts were reduced after *Container*, they were not eliminated, and they remained an important supplement to the alternative methods of data dissemination that were "tried and perfected" in the post-Container period.

The appellants refer to several instances of direct evidence of competitors contacts after **[**66]** *Container*, some of which concededly involved discussion of price information, and others of which the appellants claim support an inference that prices were discussed. For example, the appellants point out that J. F. Rogers testified that, while he was a pricing manager with ARCO in 1971, he spoke with E. H. McGee of Mobil on a few occasions in order to confirm Mobil's dealer allowances. Rogers also stated that he called McGee on "a couple of occasions" in 1971 in order to confirm preliminary field reports he had received from ARCO employees to the effect that Mobil had withdrawn dealer support and restored its prices. The appellees attempt to belittle this evidence by suggesting that Rogers was a "low-level" employee and by pointing out that he did not report his contacts with McGee to his superior at ARCO, Mr. Douglas.

With regard to the appellees' contention that Rogers was too low-level an employee to be of significance, we see no reason for concluding that such information gathering cannot be delegated to subordinates. Accordingly, the fact that Rogers did not himself have authority to make ARCO pricing decisions is not dispositive. At any rate, an argument concerning the **[**67]** relative significance of Rogers' testimony in light of his position in ARCO's overall chain of command seems more appropriately addressed to a jury than to a summary judgment court. Furthermore, examination of Rogers' testimony indicates that although he claimed that he did not tell Douglas the source of his information concerning restorations, Rogers testified that he did convey to Douglas the substance of the information obtained:

> Q. Did you report to Mr. Douglas in these instances that you had received confirmation from McGee that Mobil had restored?
>
> A. No, sir.
>
> Q. Why not?
>
> A. Well, I -- I didn't think it was necessary for one thing. I -- I could -- I could report that Mobil had -- had restored and I -- and I'd already had a preliminary field report, so I was comfortable in reporting it to him a few hours earlier than I would have otherwise.

Rogers claimed that these contacts only shortened by "a few hours" the time in which he could report a Mobil restoration, suggesting that the significance of such contacts was of negligible importance. **[*454]** However, a memorandum written by Rogers to Douglas in late 1971 suggests that such contacts were an **[**68]** important means of verifying or ascertaining whether Mobil was restoring its prices. In the memorandum, Rogers noted that "even though Mobil announces a restoration, it is often times hard to detect because of rent considerations which are reflected in lower street prices."

The appellants also noted in their pretrial brief that McGee testified that he discussed Mobil's distributor discounts with Herbert Wetzler at some point after the early 1970s. McGee stated that he knew that Wetzler wanted such information as a pricing consultant, although he also stated that he did not know for whom Wetzler was consulting. The record indicates that Wetzler was a consultant for Union beginning in late 1971 and lasting throughout the 1970s, and that he also did some consulting work for Lerner Oil Co., Powerine Oil Co., and the Lundberg Surveys. In addition to the conversations with McGee, Wetzler testified that he spoke with Frank White of Mobil concerning general "market intelligence." Wetzler also testified that, although he did not have a specific recollection, he may have discussed some retail prices with Nerheim after *Container*. Wetzler stated that his understanding of *Container* was **[**69]** that, although he and Nerheim could not discuss their own companies' prices or future prices of any sort, they could discuss past or present prices of other competitors. Although, as the appellees note, Nerheim denied having such conversations, we are required to view the evidence in the light most favorable to the appellants.

The appellants also point to a memorandum from V. T. Chamberlain to Mr. McGee, which described the results of a Mobil survey of competitor publication practices in the Phoenix area. The memorandum states that pricing information "is available at the Texaco plant here in Phoenix." An asterisk is penciled in after the word "the" in this sentence, and the following handwritten comment appears in the margin under a corresponding asterisk: "Not Posted but available on pers. req." One could reasonably infer from this statement that Texaco continued to respond to direct personal requests for dealer price information. Indeed, the appellees' only response to this contention is to argue that any such provision of information by Texaco was innocent because the information provided was "public." For the reasons outlined in Section III-B-1, *supra*, this argument is unavailing.

[70]** Lastly, the appellees claim that these items of evidence are too "anecdotal" and fragmentary to support a broad inference of conspiracy of the sort alleged here. Were these items of evidence standing alone, we might be inclined to agree. At the very least, we note that the appellants' evidence of direct competitor contacts is substantially less impressive for the post-Container period than for the pre-Container period. Nonetheless, we conclude that, in light of the evidence concerning the appellees' shift to different methods of price data dissemination and the evidence indicating similar patterns of price restorations during the pre- and post-Container periods, this evidence supports the appellants' limited claim that direct competitor contacts remained an occasional, although less frequently employed, method of circulating information concerning dealer discounts and supported price levels. [17] **[**71]** Indeed, some of the items discussed above are examples of *direct* evidence of such contacts. As such, we are not free to discredit them on summary judgment. *McLaughlin, 849 F.2d at 1207-08*. [18]

[*455] The appellants also claim that the existence of direct verbal contacts after *Container* may be inferred from various items of evidence which they claim indicate that the appellees had advance notice of price changes. In particular, the appellants point to a log kept by W. B. Lovell, a pricing clerk for Standard. The log contains several entries indicating that on a number of occasions Lovell was aware of restoration moves in advance of their effective date. In addition, an ARCO memorandum from Rogers to Douglas indicates that ARCO had obtained advance information concerning **[**72]** Shell's dealer aid levels from "always reliable sources."

The district court considered this evidence to be of little value because it did not disclose the manner in which Standard had obtained such information. *Petroleum Prods., 656 F. Supp. at 1301*. For example, the July 26, 1971 Lovell log entry stated that "Ag Nerheim called to inform us of the possibility of Shell returning to normal effective opening of business 7-27-71. Have field watch closely and report any movement to him." The district court noted that "we do not know where Mr. Nerheim got his information concerning Shell's impending move," but, in light of the fact that Shell dealers would have been notified of the move in advance, the district court speculated that "it may be that Mr. Nerheim saw a Shell dealer changing his price posting sign." *Id.* The appellants argue that this sort of speculation defies summary judgment law by failing to view the evidence in the light most favorable to the nonmovant. The appellees contend that the district court merely recognized that, under *Matsushita*, such evidence was insufficient to support an inference of conspiracy.

We appreciate the district court's **[**73]** concern over the absence of any evidence indicating the source of this sort of advance information. As the court correctly noted, it is possible that such information might have been obtained through innocent means, such as the direct observation of retail price changes at individual competitive stations. This concern is especially appropriate where, as here, the record indicates that the appellees regularly conducted surveys of the pump prices at competitive stations. Accordingly, were such evidence standing alone, we would be inclined to agree with the district court that, under *Matsushita*, this evidence does not support an inference of conspiracy. To allow an inference of agreement from such evidence, standing alone, would have the effect of deterring competitors from obtaining information about other companies' actual retail prices, even through legitimate means. We can think of few inferences that would have a more undesirable distorting effect on market conduct. For this reason, as we found with the pricing pattern evidence, this advance notice information may not serve as proof of an antitrust violation without further evidence that is sufficiently unambiguous and tends **[**74]** to exclude the possibility that the appellees acted lawfully. In the present case appellants have proffered such evidence. Given the other items of evidence that we have already described, we perceive no *Matsushita* problem in permitting the jury to draw a reasonable inference that this advance knowledge was acquired through what are in this case less innocent data dissemination techniques, namely direct competitor contacts or public posting or advance public announcement.

3. Contacts with independent marketers

Finally, the appellants rely upon a number of items of evidence which they contend indicate that the appellees used direct contacts in order to coordinate their activities with the independent segment of the market. [19] For example, the appellants presented testimony indicating that Paul Erdos, an officer of the Serve Yourself & Multiple Pump

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[17] As we found with the evidence of direct competitor contact in the pre-Container period, we also perceive no *Matsushita* problem in permitting an inference of conspiracy in the post-Container period for the same reasons. *See* vSection III-C-1 *supra*.

[18] We note, however, that this evidence is direct evidence only of limited competitor contacts specifically described. It requires an additional inference to conclude that the existence of such contacts indicates the existence of other, undisclosed competitor conversations. As noted above, we conclude that, considered in the context of the other evidence in this case, such evidence does at least support a permissible inference that a number of the appellees continued to engage in occasional competitor contacts.

[19] We note, however, that no independent oil company is presently a party in this action.

Association ("SYMPA"), an organization of independent gasoline dealers, had conversations with officials of a number of the appellees concerning various pricing matters. Erdos testified that, during the pre-Container period, he had conversations concerning dealer tankwagons **[*456]** and wholesale prices with employees of several **[**75]** of the appellees. Charles Temme of ARCO also testified that during the 1960s Erdos provided information concerning upcoming restoration attempts and that Erdos urged ARCO's support. The evidence also indicates that during the post-Container period Erdos continued to obtain information concerning dealer tankwagons, either from direct personal contacts, postings, or the trade press. Thus, James Carbonetti of Mobil stated that, during the second half of the 1970s, he provided Erdos with information concerning Mobil's posted tankwagon prices. [20] Erdos also contacted members of the trade press in order to confirm changes in dealer tankwagon levels. Finally, the appellants have produced evidence indicating that Erdos sometimes complained directly to oil companies concerning their dealers' pricing practices.

[76]** The most significant evidence of a connection between the major oil companies and the independents comes from the testimony of Kenneth Galligan, an official with Powerine Oil Company. Galligan testified that he and other Powerine officials had a number of conversations with Herb Wetzler of Gulf concerning the independents' pricing. For example, Galligan stated that, shortly after he joined Powerine in 1969, he and several other Powerine officials spoke with Wetzler, who told them that it would benefit everyone if the independents could be "priced and moved as a group," much as the majors had been able to coordinate their pricing.

Galligan also testified that he had other meetings with Wetzler during the period from July 1970 to September 1971. Galligan stated that the purpose of those meetings was to "gain [Wetzler's] cooperation in getting commitments from major oil companies who retailed gasoline in the markets [in which Galligan operated]," and "to arrange with [Wetzler] and establish with him the prices to which those companies would move to on specific dates prior to the time the restoration was made at service station level." Galligan testified that Wetzler told him **[**77]** that "a specific oil company would move its tank wagon price to support a retail price . . . in certain areas on certain dates." It should be noted, however, that Galligan testified on cross-examination that he had no personal knowledge concerning whom Wetzler contacted or which majors he contacted. He testified to the same effect on direct examination, stating that Wetzler refused to tell him.

Galligan also testified that he contacted Herb Wetzler, Paul Erdos, and several non-major oil company executives concerning a proposed schedule for a retail price increase in October 1970. In particular, Galligan spoke to Wetzler, who told Galligan that the majors had told Wetzler that if there were any difficulties with the price move, Galligan should wait until Wetzler had had a chance to straighten it out. The following week, Wetzler and Erdos spoke to Galligan and confirmed that the price move had been successful.

Galligan also testified concerning conversations with majors other than Gulf. For example, Galligan testified that, sometime between 1969 and July 1970, he overheard several conversations between Jack Keane of Powerine and Nerheim of Standard. Galligan testified that Keane **[**78]** and Nerheim discussed retail price hikes among independents, and Keane would ask Nerheim what he thought of a particular proposal. Nerheim would usually respond by first saying something like "As you know, Jack, we don't get into that," and then saying something that would indirectly indicate approval such as "That might be a good idea" or "The weather looks good." Galligan also stated that he overheard Keane and Nerheim discussing the schedule whereby the oil companies would restore retail prices. In one case, Standard would go first and Shell second, while in another Standard went first and Mobil second. Galligan testified that he instructed Keane to make these calls in order to confirm information he had received from Wetzler and Erdos **[*457]** concerning when Standard stations would restore their retail prices. After Keane had made one such call, Galligan and Keane discussed what had taken place during the call. Galligan stated that he and Keane concluded that "Wetzler's information that Standard was committed was true."

In addition, Galligan testified that Keane had received confirmation of Mobil's participation in a restoration directly from a Mobil marketing manager. Furthermore, **[**79]** Galligan testified that the person in charge of retail pricing in

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[20] During this period, Erdos was paid by Mobil for conducting surveys concerning wholesale prices in the independent market.

Los Angeles for Shell Oil Company committed in advance to retail price restorations. Galligan's information on this score was based on what he was told by Erdos and Wetzler.

In addition to this testimony concerning contacts between the independents and the major oil companies, the appellants presented other evidence concerning contacts among the independents themselves. This evidence indicates that Erdos was involved in coordinating the responses of independent dealers to restoration attempts by the appellees. For example, several memoranda prepared by Newton Carey, a general manager for the independent oil company Simas Brothers, summarized a number of phone calls that Carey received and made to other independents. Several of these calls, including a number involving Erdos, concerned price changes among the independents after major oil company restorations. Many of the calls appear to have involved quite blatant price-fixing activity. Thus, Carey's October 12, 1970 memorandum to Mr. Simas states that "I phoned Mr. Erdos and asked him about getting those Douglas stations up in the El Cerrito area. He said that he would **[**80]** phone."

Furthermore, Galligan testified that, while at Powerine, he asked Erdos on numerous occasions to contact competitors, both major and independent, to see what their reaction would be to a proposed retail price restoration. Erdos would get a commitment from these competitors before the restoration took place. Galligan also stated that Powerine would never restore its prices unless it had a prior commitment from the "vast majority of major oil companies."

Other portions of Galligan's testimony are to the same effect. Galligan stated that Erdos was frequently a source of advance information concerning various companies' participation in price increases, although most of the time Galligan got this information indirectly through Keane or Wetzler. Galligan stated that Erdos' job was to "get people in line for future pricing," and after the price increase had taken effect, to threaten noncomplying dealers that they had better participate or they would face retaliation from their suppliers.

We have little difficulty concluding that, if admissible, this testimony is sufficient to permit a jury to conclude that representatives of several of the appellees were involved in activities **[**81]** designed to assure that the independent sector of the market would follow restoration attempts, and that several officials of independent companies engaged in direct price-fixing with one another in order to produce such coordination. The appellees, however, argue that there are a number of evidentiary problems in Galligan's testimony and that, without this testimony, the appellants do not have sufficient evidence to establish a link between the independent market and the appellees. For several reasons, the district court agreed with the appellees. First, the court concluded that most of Galligan's testimony was irrelevant or immaterial. Second, the court also concluded that most of the testimony was hearsay. Third, the court noted that Galligan's testimony had been challenged "by every other relevant witness" and that Galligan had been "substantially discredited." *Petroleum Prods., 656 F. Supp. at 1302-03*. In reaching these conclusions, however, the district court did not focus upon any specific portions of Galligan's testimony; the court simply rejected it in a wholesale fashion.

In light of our above discussion of certain specific portions of Galligan's deposition, **[**82]** we have little doubt that such testimony is relevant and material to the issues in this case. The hearsay issue, however, is somewhat more difficult. We note that **[*458]** much of the information provided by Galligan consists of out-of-court statements of third parties. As such, the statements initially appear to fit within the definition of hearsay specified in *Fed.R.Evid. 801(c)*. Upon closer analysis, however, we conclude that each of the statements qualifies as nonhearsay under either *Rule 801(d)(2)(D)* or *Rule 801(d)(2)(E)*.

Rule 801(d)(2)(D) ***HN9***[] provides that a statement made by a party's agent or servant may be introduced against that party if it concerns a matter within the scope of the agency or employment and was made during the existence of the relationship. We conclude that this exception applies to Wetzler's various statements that Gulf would support retail price restorations. Wetzler was Gulf's marketing director, and the statements are therefore related to a matter within Wetzler's scope of employment. We reach this conclusion despite the fact that the appellees point out that Wetzler **[**83]** testified that he did not have authority, on his own, to raise Gulf's prices whenever he wanted to do so. First, we note that Wetzler testified that he was responsible for gathering "market intelligence" for his superiors and that he acted as a liaison between top Gulf management and the field with respect to "price changes approved by top management [or] initiated in the field." In light of these duties of Wetzler, it seems clear that the statements that Galligan claims Wetzler made are related to a matter within his scope of employment. Second, in light of the fact that the Supreme Court has held that ***HN10***[] under *Fed.R.Evid. 104(a)* an out-of-court statement may be considered by the court in making the preliminary factual determinations concerning admissibility of statements under *Rule 801(d)(2)(E)*, *see* *Bourjaily v. United States, 483 U.S. 171, 177-81, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987)*, we conclude that Wetzler's out-of-court statements may themselves be considered in determining the preliminary question, under *Rule 801(d)(2)(D)*, of the scope of Wetzler's employment duties. **[**84]** Since the statements clearly indicate an ability to communicate information on behalf of Gulf, we conclude that, considering all of the evidence, Wetzler's statements concerned a matter within the scope of his employment.

In light of this conclusion, no further showing is required to admit these statements against Gulf. *See* *United States v. Ramsey, 785 F.2d 184, 191* (7th Cir.) (***HN11***[] statements admitted under *Rule 801(d)(2)(D)* may be used to prove conspiracy without any showing that the existence of the conspiracy is corroborated by independent, nonhearsay evidence), *cert. denied*, *476 U.S. 1186, 106 S. Ct. 2924, 91 L. Ed. 2d 552 (1986)*; *see also* *United States v. Cross, 816 F.2d 297, 302 (7th Cir. 1987)* (same). Similarly, Nerheim's statement that Standard was committed to a retail restoration is admissible against Standard. None of these statements is admissible against the other defendants, however, unless they meet the requirements of *Rule 801(d)(2)(E)*, which relates to statements of a coconspirator.

[85]** *Rule 801(d)(2)(E)* ***HN12***[] provides that a statement made by a co conspirator of a party may be introduced against that party if the statement was made during the course, and in furtherance, of the conspiracy. The numerous instances wherein various third parties assertedly told Galligan that certain defendants had agreed to price restorations would appear to be prime candidates for this exception from the definition of hearsay. As noted above, Galligan's testimony included evidence of the following statements: Wetzler said Standard was committed to a particular restoration; Nerheim said that on particular occasions Shell and Mobil were committed; Erdos and Wetzler said Shell was committed to a particular increase.

HN13[] Before these statements can be admitted, however, they must meet all of the prerequisites of *Rule 801(d)(2)(E)*. Specifically, the party seeking to introduce the statement must show, by a preponderance of the evidence, that "there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'in the **[**86]** course and in furtherance of the conspiracy.'" *Bourjaily, 483 U.S. at 175*. **[*459]** Although a judge may consider the statements themselves in deciding whether these prerequisites have been met, *see* *id. at 177-81*, the offering party must present "*some* evidence aside from the proferred co conspirator's statements [to] show that the [nonoffering party] knowingly participated in the alleged conspiracy." *United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988)*; *see also* *United States v. Gordon, 844 F.2d 1397, 1402 & n. 2 (9th Cir. 1988)*. Moreover, in *Silverman* we defined the character of the additional evidence: "Evidence of conduct that is completely consistent with defendant's unawareness of the conspiracy" cannot serve as corroborating evidence under *Rule 801(d)(2)(E)*. *Silverman, 861 F.2d at 578*.

In the antitrust context the *Silverman* requirement can be met if the circumstantial evidence offered in addition to the co-conspirator's statements is adequate to defend against summary judgment under *Matsushita*. Under *Matsushita* in order to survive summary judgment on **[**87]** the basis of circumstantial evidence alone, a plaintiff must offer evidence that is consistent with an inference of illegal conduct and permitting that inference must not be significantly harmful. This requirement comports with the *Silverman* mandate against allowing "wholly innocuous conduct" alone to serve as proof of conspiracy. *Id.*

In the instant case, the press releases, price postings and evidence of competitor contacts previously discussed provide evidence of a conspiracy aside from Galligan's statements. Since we have concluded earlier that appellant's evidence is sufficient to survive summary judgment under *Matsushita*, the appellants have met their burden of producing *some* evidence apart from Galligan's testimony that indicates the existence of conspiracy.

The remaining question, then, is whether this evidence along with Galligan's statements are sufficient to show, by a preponderance of the evidence that there was a conspiracy. Viewing the evidence in the light most favorable to appellants, we find that there is sufficient evidence to conclude, for purposes of *Rule 801(d)(2)(E)*, that the appellees were co conspirators. [21] The statements are therefore admissible **[**88]** against all defendants under *Rule 801(d)(2)(E)*.

Finally, we reject the district court's suggestion that Galligan's testimony could be disregarded because it had been "substantially discredited." *Petroleum Prods., 656 F. Supp. at 1303*. It is well-established that ***HN14***[] "credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. **[**89]** The two cases cited by the district court, *Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339, 344* (9th Cir.), *cert. denied*, *464 U.S. 820, 78 L. Ed. 2d 93, 104 S. Ct. 83 (1983)*, and *Radobenko v. Automated Equip., Corp., 520 F.2d 540, 543-44 (9th Cir. 1975)*, do not support its conclusion. *Mesirow* and *Radobenko* dealt with the narrow situation where the only material issue of fact was created by a party's own directly contradictory affidavits or deposition testimony, given during the course of the same litigation. In *Mesirow* and *Radobenko*, we held that, under those narrow circumstances, the party's conflicting statements do not create a genuine issue of material fact. In the present case, by contrast, Galligan is not a party, and he has not given flatly contradictory testimony during the course of this litigation.

Since Galligan's testimony is admissible for summary judgment purposes against all of the appellees, we conclude that his testimony, considered along with the other evidence discussed in this subsection, **[*460]** is sufficient to create a jury question as to whether the appellees, as part of their efforts **[**90]** to coordinate their own prices, also sought to assure that the independent oil companies would coordinate their pricing behavior. [22]

IV. APPELLANTS' CLAIMS OF A CONSPIRACY TO RESTRICT SUPPLY

In the proceedings below, the plaintiffs also alleged that the defendants engaged in a conspiracy to restrict the supply of crude oil and refined petroleum products. The plaintiffs claimed that the defendants' efforts to restrict supply culminated in the August 1972 "restoration to end all restorations." That is, after August 1972, price cycling stopped; from that point forward the pressure created **[**91]** by supply shortages was sufficient to keep prices at their restored "normal" level, and indeed, in 1973 retail prices began a steady climb as supplies continued to prove inadequate to meet growing demand. The district court, however, concluded that the plaintiffs had failed to produce sufficient evidence to support their claims of a conspiracy to restrict supply, and it therefore granted summary judgment to the defendants.

On appeal, the appellants assert that they produced sufficient evidence to permit a jury to conclude that the appellees agreed to engage in various activities designed to reduce the domestic supply of petroleum products. They contend that, as part of this conspiracy, the appellees agreed to exchange information concerning actual production levels, expected future demand, and expected supply projections. The appellants also assert that, as part of the same plan, the appellees conspired to reduce the amount of crude oil lifted overseas and shipped into the United States. We will consider each of these contentions in turn.

A. *Domestic Activities*

The appellants have produced evidence indicating that by the early 1970s several of the appellees had come to the **[**92]** conclusion that excess production was a key factor in creating price wars. As the district court noted, "the files of several of the defendants contained in-house memoranda that expressed dissatisfaction with the practice by

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[21] We are *not* deciding the greater question of whether there was a conspiracy to fix prices. Nor are we deciding whether Galligan's testimony should be admitted during trial. When the lower court judge makes that decision he will not be viewing appellant's evidence from the same procedural posture. We simply are deciding the very narrow issue of whether the court can consider Galligan's testimony for the purposes of summary judgment on the discrete issue of independent dealer contacts.

[22] Because there is direct evidence of defendant's efforts to coordinate pricing with the independent segment of the market, the *Matsushita* standards for summary judgment do not apply to this evidence. *McLaughlin, 849 F.2d at 1207*. We simply decide whether there is a genuine issue of material fact. *Tzung v. State Farm Fire and Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989)*.

their respective employers of producing so much gasoline that they were obliged to sell the surplus to independents, who, in return, competed with the sellers at reduced prices." Petroleum Prods., 656 F. Supp. at 1307. The appellants also produced evidence indicating that several of the appellees had begun thinking that it would be better to eliminate this excess production, but that they also recognized that this could not be accomplished without some sort of joint action. For example, in commenting on the National Oil Jobbers' Council's recommendation that "excess" production be eliminated, a 1971 internal Shell memorandum remarked: "good thought -- how accomplish short of collusion." An earlier May 1971 Shell memorandum had reached a similar conclusion:

> If the wholesale price of gasoline moves up commensurate with the current and anticipated crude price increases and *refinery operations are geared to maintaining such increased wholesale* **[**93]** *prices*, then cut-price marketers will have to raise their prices proportionately. . . . [This alternative] involves one refiner after another acting in statesmanlike fashion.

(emphasis added).

The appellants contend that the appellees reached an agreement or understanding to restrict supply in this fashion in part by means of an exchange of information concerning projected supply and demand. In this regard, we note that the record indicates that several of the appellees did in fact occasionally obtain information, sometimes through direct personal contacts, concerning supply and demand forecasts and **[*461]** production levels. For example, a May 1972 Mobil memorandum summarized the aggregate crude oil demand forecasts of several competitors, including appellees Mobil, Exxon, Texaco, Gulf, and Shell. The memorandum indicated that the information had been obtained from a variety of sources, including direct competitor contacts. The memorandum noted that "in several cases we were able to get quite specific volume figures by area from direct contacts." In most of the other cases, the information had been obtained from press releases, public statements, or annual reports, **[**94]** and in many of these instances, Mobil was "able to render [the figures] more precise by checking them out with people we know inside the companies." The exchange of supply information among the appellees is further indicated by the fact that ARCO had in its files a copy of a detailed summary of supply and demand forecasts that had been prepared by Union.

In addition, the appellants produced a June 1972 Mobil memorandum reporting the results of direct competitor contacts with officials of Texaco, Exxon, and Gulf concerning sour crude production capabilities. The memorandum indicates that the competitors had provided fairly detailed information concerning refinery processing levels. Although, as the appellees note, the memorandum indicates that the information was obtained for the purpose of buying and selling crude oil, one could reasonably conclude that the detail of the information obtained exceeded that which was necessary for this purpose.

The appellants also presented evidence indicating that the appellees were able to obtain detailed competitive information concerning supply by participating as observers at meetings of the Independent Petroleum Association of America ("IPAA"). **[**95]** For example, a memorandum in Standard's files contained an IPAA chart listing the supply projections made by several different oil companies. The chart lists, for each quarter of 1970, the supply projections for several different types of petroleum products. Although the chart "anonymously" labels each company by a code letter, the Standard copy has the names of the various companies handwritten along the top of the chart. The companies listed include Union, Getty, and Shell. The record also indicates that Standard itself submitted supply projections for 1970 to the IPAA.

The record also reveals that ARCO obtained similar IPAA supply forecasts for the year 1971. ARCO's 1971 chart, like Standard's 1970 chart, contains additional notations indicating which companies made which forecasts. The cover memorandum accompanying the chart states that this information is valuable because "the exact expectations of 8 oil companies and 2 banks are revealed in detail." The memorandum also noted that, although most majors did not formally participate in IPAA activities, "most are present as observers to receive the materials and to contribute to the discussions. This includes even the usually highly **[**96]** reticent Texaco."

We also note that the appellants have produced an Exxon memorandum from August 1972 (the month that price cycling ended) indicating that Exxon had contacted a large number of oil companies in order to determine their crude oil supply situation. The memorandum contains a chart summarizing the information obtained as a result of these contacts. Among the companies whose supply information is listed are ARCO, Standard, Getty, Gulf, Mobil, and Shell. The information obtained indicates that most of these companies expected to experience supply shortages during the remainder of 1972.

In response to this evidence, the appellees raise two arguments. First, they contend that these exchanges of information were "innocuous" and that no inference of conspiracy can be drawn from them. This argument cannot be squared with the Supreme Court's holding that, under certain circumstances, the exchange of production and supply information may supply "an attractive basis for cooperative, even if unexpressed, 'harmony' with respect to future prices." *American Column & Lumber Co. v. United States, 257 U.S. 377, 398, 66 L. Ed. 284, 42 S. Ct. 114 (1921)*; *see also* **[**97]** Sullivan, *Antitrust* **[*462]** § 97 (1977) (Data as to production figures "can be used to police production quotas imposed by a cartel or, in an oligopolistic structure, can facilitate interdependent action in reducing output.") *American Column & Lumber* teaches that production and supply data dissemination cannot be treated as categorically different from price information exchanges. Accordingly, application of the principles of *Container* in the supply data context suggest that an agreement to exchange supply and production information may, under appropriate circumstances, serve as circumstantial evidence of an agreement to restrict supply and raise prices. We think that, in light of the evidence concerning the appellees' intent to stabilize the market by reducing excess capacity, *see infra*, an inference of conspiracy drawn from the appellants' evidence of supply data exchanges is plausible.

Second, the appellees argue that the shortages experienced during 1972 and 1973 were real, and that their production facilities operated at "record levels" during this period. In particular, the appellees point out that their refineries were operating at the "maximum sustainable **[**98]** rate." The appellants do not dispute this latter point; instead, they claim that the appellees deliberately chose not to expand refinery capacity and that they did so in order to create a shortage.

In support of this claim, the appellants produced evidence indicating, for example, that Standard chose not to expand refinery capacity, despite long-range forecasts of a shortage. Similarly, an Exxon employee based his conclusion that Exxon's refining capacity was sufficient on the assumption that sales of gasoline to the independents would be curtailed. A Shell official reached a similar conclusion that a "conservative" program of refinery expansion would avoid "throwing surplus products into the market place." Furthermore, as the district court noted, *see* *Petroleum Prods., 656 F. Supp. at 1307*, an Exxon study committee recommended that refining capacity not be expanded until "forecasts show large and growing shortages for at least two years prior to the onstream time of the expansion." Other items in the record further indicate the appellees' concern with the problem of spare capacity. For example, a 1971 Exxon memorandum noted that Exxon considered the "spare capacity **[**99]** problem to be the single most important problem facing the refining segment of our business over the next several years." Finally, the appellants produced evidence indicating that the resulting "lull in domestic refining capacity construction" contributed to tight supplies and upward pressure on petroleum prices. As one September 1972 Shell memorandum put it, "the current shortage being proclaimed is more apparent than real. Refining capacity has merely moved from a 'long' supply position to what could be characterized as a 'balanced' position. . . . It just feels 'tight' to some people who have been used to a 'long' situation for a number of years."

The district court, in ruling on the motion for summary judgment, simply accepted the defendants' explanations for the shortage and for the lack of refinery expansion. With respect to the failure to expand refinery capacity, the court noted that the cost of constructing refineries had gone up, that environmental litigation was a concern, that it was hard to estimate how much refinery capacity was necessary, and that price controls were a disincentive to further expansion. *Petroleum Prods., 656 F. Supp. at 1307-08*. **[**100]** With respect to the shortage, the court blamed it mostly on increasing demand. The court asserted that demand had increased due to various factors, such as more people driving and the increasing number of cars with air conditioning and power-operated features. *Id. at 1308*. The court finally concluded that the evidence showed "quite clearly" that the defendants' actions were the result of independent decisions. *Id. at 1309*.

We think that the district court misconceived the nature of its task under *Matsushita*. As noted earlier, *Matsushita* does not authorize the district court to weigh the evidence and decide which inference is the more plausible one; so long as a particular inference is plausible and permissible under *Matsushita*, it is for the jury to decide **[*463]** whether to draw it. *Matsushita, 475 U.S. at 587-88*. The district court in this case appears simply to have adopted one of two competing theories of the evidence. *Matsushita* does not authorize this sort of resolution, on summary judgment, of disputed issues of fact.

Appellants have offered a plausible conspiracy theory. The evidence supports the **[**101]** conclusions that (1) in the early 1970s several of the appellees began taking steps to reduce excess capacity; (2) they did so with the intent and effect of reducing the strength of the independent sector of the market; (3) during this period the appellees exchanged information concerning supply forecasts and production levels, and (4) the shortage of refining capacity, as well as the foreign activities of several of the appellees (discussed below), resulted in supply shortages and upward price pressure. Most significantly, however, it seems clear that these objectives could only be achieved if all others performed similar actions. A single company reducing output would lose market share and sales. Only if all the companies reduced supply would the price rise enough to increase profits. The risk involved in leading a supply reduction suggests that purely interdependent supply decisions are unlikely. Changes in refinery capacity are not readily reversible. Once a company is committed to reducing its capacity it cannot easily recover if the other companies do not follow its lead. Thus, it is unlikely that a firm would undertake a reduction in its refinery capacity without some advance **[**102]** agreement from competitors. It is in this context that the exchange of supply and demand forecasts must be considered. We think that, viewing all of this evidence, a rational jury could conclude that the appellees had agreed to exchange supply and demand forecasts in order to facilitate mutual decelerations of increases in production capacity.

This does not settle the matter, however. The question remains whether permitting an inference of conspiracy from the evidence that the appellants have produced would have the effect of deterring important independent conduct. We conclude that it would not. As we stated previously, appellants have offered evidence that the exchange of information followed by shortage was accompanied by appellees' actions to reduce excess capacity, appellees' anticompetitive intent, the actual reduction in the independent sector, and appellees' recognition of the need for parallel action. Appellants have also offered evidence of market conditions in which interdependent supply decisions are unlikely. Although an inference of conspiracy could not permissibly be drawn *solely* from the exchange of supply forecasts followed by a shortage, we can conceive of no **[**103]** significant procompetitive behavior that will be deterred by permitting an inference of conspiracy when the combination of actions and intent described above occurs. [23]

[104]** B. *Foreign Activities*

The appellants also contend that, as part of the alleged conspiracy to restrict supply, the appellees agreed to restrain Middle East production of petroleum products. In support of this contention, the appellees point to a number of items of evidence indicating that the appellees engaged in discussions about how to keep supply pressures under control. For example, in response to the problem of spare capacity in Iran, the five American majors (Exxon, Gulf, Texaco, Mobil, and Standard) who **[*464]** owned shares of the Iranian Consortium ("IOP") agreed in 1968 that in deciding upon planned capacity targets, the group should be careful not to rely simply on their own estimated needs inasmuch as this procedure might result in capacity figures being set too high. As a memorandum distributed among the five companies indicated:

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[23] Unlike the tankwagon price information discussed earlier, petroleum supply and demand information is important to a number of actors in the economy, and courts should hesitate to permit inferences of conspiracy based on the exchange of supply information alone. Such an inference will not have a negative deterrent effect, however, when it is based on the combination of actions and intent in this case. For example, while it might have harmful anticompetitive effects to allow an inference from the exchange of supply forecasts alone, it might not be harmful to allow that inference from supply forecasts and actions to reduce capacity and evidence of anticompetitive intent. Companies who were innocently distributing supply information would be unaffected by an antitrust rule that only prohibited the exchange of supply forecasts when accompanied by actions to reduce excess capacity and evidence of anticompetitive intent. Thus, permitting the inference in this case will not have an undue deterrent effect on the proper dissemination of petroleum supply and demand information.

> Members should [review] the IOP weighted figures to be sure that growth rates in planned capacity are consistent with annual growth rates generally expected for demand, rather than relying solely on the composite of individual Member estimates for each forward year. In this regard it should be appreciated that small changes **[**105]** in growth percentages lead to plans for rather large capacity additions several years forward.

The record also indicates that the IOP members jointly agreed to resist the Shah of Iran's efforts to get IOP to increase available capacity.

The record also contains evidence indicating that the owners of Aramco (Exxon, Standard, Mobil, and Texaco) held a two day meeting aimed at arriving at a response to Saudi Arabian complaints that their oil liftings were not keeping pace with those of other countries such as Iran. During the course of these discussions, Texaco proposed that, if the other IOP owners who were also owners of Aramco would do likewise, it was willing to reduce its liftings in Iran in order to improve Aramco's relative position. Although, as the appellees note, Mobil labeled this blatant cartel allocation proposal "ridiculous," "Mobil did state, however, that if [they] had a competitive price in Aramco, they felt it would definitely hold down the growth rate in Iran." Similarly, although Exxon also rejected Texaco's proposal "legally and for other reasons," it also stated that "it would be our policy to have our Iranian liftings so that they could be defensible **[**106]** with our Aramco performance." Other evidence further indicates that the Aramco owners recognized the need to coordinate production levels among Iran and Saudi Arabia in order to alleviate Saudi pressure for increased production.

Finally, we note that the appellants produced evidence indicating that, in connection with these various activities, several of the appellees circulated amongst themselves memoranda containing specific information regarding supply and demand projections for various regions of the world.

The appellees raise a number of arguments in response to this evidence. First, they contend that, because IOP and Aramco "were created or operated with the knowledge and acquiescence of the United States Government," the actions taken by the two consortiums cannot serve as a basis of antitrust liability in this case. This argument is without merit. Even if the President had approved the cartel there is no evidence indicating that he authorized any of the appellees' alleged concerted efforts to hold down the growth of foreign production. [24]

[107]** Second, the appellees argue that each item of evidence upon which the appellants rely does not in fact support an inference of conspiracy. Indeed, they assert that the evidence indicates normal business behavior. Once again, however, we emphasize that ***HN15***[] it is not our task to decide whether we think that an inference of innocent conduct is more plausible than an inference of conspiracy. Rather, our task is to consider whether an inference of conspiracy is plausible and whether permitting such an inference would have the effect of deterring significant pro-competitive conduct. We recognize that it is possible that each IOP owner company independently resisted the increases in production requested by the Shah. However, when considered in the context of their domestic activities with regard to prices and supply, the various actions that the consortium members took in order to control the level of growth in Middle East production plausibly could be construed as part of a conspiracy to restrict supply. In addition, appellees have **[*465]** suggested no procompetitive behavior that would be deterred if plaintiffs were allowed to bring antitrust actions against defendants who undertook the **[**108]** domestic and foreign supply actions alleged in this case.

We conclude that the appellants have presented sufficient evidence concerning their allegations of a conspiracy to create a shortage to warrant submission of the issue to a jury. Accordingly, the district court erred in granting summary judgment on these claims. Furthermore, we note that since the parties agree that the shortage, however caused, led to the elimination of the competitive bidding market in bulk sales to government entities, the appellees may be held liable for this consequence if the jury concludes that they did in fact jointly act to restrict supply.

V. CALIFORNIA'S CLAIM FOR CIVIL PENALTIES

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[24] Because there is no evidence of the President's approval of the cartel's activities at issue we need not reach the question of whether it is within the powers of the executive branch to convey antitrust immunity through its acquiescence in an overseas consortium.

The State of California also appeals the district court's January 12, 1978 order dismissing California's claim for civil penalties under *Cal.Civ.Code § 3370.1*. [25] The district court concluded that it had no jurisdiction to entertain the claim because to do so would, in its view, have violated the principle that federal courts generally do not enforce the penal laws of the states. *See Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 32 L. Ed. 239, 8 S. Ct. 1370 (1888)*; *The Antelope, 23 U.S. (10 Wheat.) 66, 123, 6 L. Ed. 268 (1825)*. **[**109]**

We disagree with the district court's conclusion. The Second Circuit recently rejected a similar challenge to enforcement, in federal court, of pendent state ***antitrust law*** claims for civil penalties. *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1086* (2d Cir.), *cert. denied*, *488 U.S. 848, 109 S. Ct. 128, 102 L. Ed. 2d 101 (1988)*. The court noted that, although the ***HN16***[] "federal courts have no jurisdiction to enforce the criminal laws of the states, they do have jurisdiction to enforce state penalties that are civil in nature." *Id.* Since California treats the penalties under *§ 3370.1* as civil in nature, *see People v. Superior Court (Kaufman), 12 Cal.3d 421, 431, 525 P.2d 716, 115 Cal.Rptr. 812, 818-19 (1974)*; *People v. E.W.A.P., Inc., 106 Cal.App.3d 315, 321, 165 Cal.Rptr. 73, 76-77 (1980)*, **[**110]** the district court was not barred from entertaining the claim. *Hendrickson Bros., 840 F.2d at 1086*. Because the district court found this case to be otherwise "ideal" for the exercise of pendent jurisdiction, we reverse its order dismissing California's claim for civil penalties.

VI. CONCLUSION

The judgment of the district court is REVERSED and the case is REMANDED.

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[25] *Cal.Civ.Code § 3370.1* has since been recodified as *Cal.Bus. & Prof.Code § 17206*.

Pharmaceutical & Diagnostic Services, Inc. v. University of Utah

United States District Court for the District of Utah, Central Division

June 25, 1990, Decided ; June 26, 1990, Filed

Civil No. 88-C-807 J

Reporter
801 F. Supp. 508 *; 1990 U.S. Dist. LEXIS 19959 **; 1992-1 Trade Cas. (CCH) P69,757

PHARMACEUTICAL AND DIAGNOSTIC SERVICES, INC., a Utah corporation, Plaintiff, vs. THE UNIVERSITY OF UTAH, a body politic and corporate, et al., Defendants.

Core Terms

immunity, antitrust immunity, individual capacity, state law, arm, motion to dismiss, purposes, sovereign capacity, injunctive relief, anti trust law, defendants', malice, executive branch, federal court, federal law, alleges, enjoin

LexisNexis® Headnotes

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

HN1[] **Federal & State Interrelationships, State Sovereign Immunity**

The *Eleventh Amendment* long has stood for the principle that federal courts are without authority to entertain suits by private parties against a state or its agencies without the state's consent.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Federal Judicial Limitations

Constitutional Law > State Sovereign Immunity > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

HN2[] **State Sovereign Immunity, Federal Judicial Limitations**

The language of the *U.S. Const. amend XI* provides as follows: the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

HN3[] State Sovereign Immunity, State Immunity

The Eleventh Amendment applies to a state agency, functioning as an arm, an alter ego of the state. In determining the status of the state agency, the court must look to applicable state law.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

HN4[] Injunctions, Grounds for Injunctions

The Eleventh Amendment does not bar federal courts from issuing injunctive relief against a state based upon violations of federal law. That relief, if any, may be founded upon violations of federal constitutional or statutory law, but is limited to prospective injunctive relief.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

HN5[] Higher Education & Professional Associations, Colleges & Universities

States acting in their sovereign capacities are exempt from federal antitrust laws. In order to qualify for antitrust immunity, an entity must demonstrate either that it is the state acting in its sovereign capacity or that it is acting pursuant to a clearly articulated and affirmatively expressed state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > State & Territorial Governments > General Overview

Torts > Public Entity Liability > Immunities > Judicial Immunity

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

HN6[] Exemptions & Immunities, Parker State Action Doctrine

It is clear under the Parker immunity doctrine that the legislative and judicial branches of state government act as the state in its sovereign capacity. The court discerns no sound reason for distinguishing state executive agencies from their legislative and judicial counterparts, regardless of whether the executive agencies' particular actions or their anticompetitive effects were contemplated by the legislature.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

Even the constitutional invalidity of the attempted state activity is not an appropriate basis for disregarding Parker state action immunity.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Employees & Officials

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

HN8[] **Higher Education & Professional Associations, Colleges & Universities**

The *Eleventh Amendment* prohibits the court from enjoining an instrumentality of the state based upon state law, unless the alleged conduct is ultra vires or without any authority whatever.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Governments > State & Territorial Governments > Employees & Officials

International Trade Law > General Overview

HN9[] **Directors & Officers, Management Duties & Liabilities**

An ultra vires claim must be founded upon an officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

Governments > State & Territorial Governments > Employees & Officials

HN10[] **Local Officials, Customs & Policies**

Under Utah law, Utah Code Ann. § 63-30-4(4) (1989), an individual employee of the state may not be held personally liable for acts or omissions occurring during the performance of his duties unless it is established that he acted or failed to act due to fraud or malice.

Judges: [1]** JENKINS

Opinion by: BY THE COURT; BRUCE S. JENKINS

Opinion

[*509] MEMORANDUM OPINION AND ORDER

On September 12, 1988, plaintiff Pharmaceutical and Diagnostic Services, Inc. ("PDS") filed a complaint in this court against the University of Utah, Intermountain Radiopharmacy, the Utah State Board of Regents, and David Bragg, Chairman of the Department of Radiology of the University of Utah (the "University defendants"), [1] seeking declaratory relief and damages for alleged federal and state antitrust violations, unfair competition, and other state law violations. On February 17, 1989, PDS filed a first amended complaint, [2] **[**2]** **[*510]** seeking similar declaratory, injunctive, and monetary relief and adding as defendants additional University officials. [3]

On July 13, 1989, the University defendants filed a motion to dismiss pursuant to *Rule 12 of the Federal Rules of Civil Procedure*. Following the parties' submission of supporting, opposing, and reply memoranda, the court, on November 22, 1989, heard oral argument on the University defendants' motion to dismiss and took the motion under advisement. Having considered fully the pleadings, the parties' oral and written arguments, and the relevant **[**3]** law, the court now grants in most aspects the University defendants' motion to dismiss. PDS's remedy, if any, must be found before a state tribunal.

I. Facts

The relevant facts are straightforward. In 1973, the University of Utah Colleges of Pharmacy and Medicine jointly established a program known as Intermountain Radiopharmacy ("IRP"). The University designed IRP to promote teaching and research. IRP is operated presently as a radiopharmacy, which involves the manufacture and sale of radiopharmaceuticals used in diagnostic imaging and therapeutic application by hospitals, clinics, and other institutions. William Baker operated IRP from its inception in 1973 until 1986. In 1986, Baker left IRP to organize PDS, a Utah corporation which has operated as a privately owned radiopharmacy since January 1, 1987. Baker is now President of and a shareholder in PDS.

PDS alleges in its complaint that IRP does not function primarily as a teaching and research institution. Instead, PDS maintains that IRP operates as a commercial, profit-making enterprise, in direct competition with PDS and in violation of federal and state law and University policy. PDS further alleges that the University **[**4]** defendants compete unfairly and illegally against PDS by using state-owned equipment in furthering IRP's "business," by

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[1] Throughout this opinion the court uses the term "University defendants" to refer to The University of Utah, Intermountain Radiopharmacy, the State Board of Regents, and all those persons (including David Bragg in his official capacity) named in PDS's first amended complaint who are affiliated with the University of Utah and who are sued in their official capacities.

[2] Throughout the remainder of this opinion, the term "the complaint" refers to PDS's first amended complaint.

[3] PDS's complaint also named as defendants the United States of America, Secretary of the Treasury Nicholas Brady, and Internal Revenue Service Commissioner Laurence Gibbs (the "federal defendants"). PDS sought to enjoin the federal defendants from continuing to grant the University of Utah tax exempt status pursuant to *26 U.S.C. § 501(c)(3)*, or in the alternative, to require the federal defendants to assess and collect taxes allegedly due as a result of the sale of radiopharmaceuticals at a profit. On September 14, 1989, the court granted the federal defendants' motion to dismiss, holding that PDS lacked standing to seek relief against the federal defendants.

refusing to deal with PDS, by offering goods and services at or below cost in violation of state and federal law, and by using illegal and void contracts to compete.

Based upon these allegations, PDS has brought federal antitrust claims against IRP under *section 1* of the Sherman Act, *15 U.S.C. § 1*, and *sections 3* and *16* of the Clayton Act, *15 U.S.C. §§ 14*, *26*. PDS has also brought claims under Utah ***antitrust law***, the Utah Administrative Code, the Utah Unfair Practices Act, and the common law of unfair competition and intentional interference with economic relations.

The University defendants have moved to dismiss PDS's claims on a number of separate grounds, including *Eleventh Amendment* immunity, the Utah Governmental Immunity Act, *Parker v. Brown* antitrust immunity, failure to exhaust administrative remedies, and failure to state a claim. In this opinion, the court grants the University defendants' motion to dismiss based on *Eleventh Amendment* immunity and on *Parker* antitrust immunity.

II. *Eleventh Amendment* Immunity

The University defendants' motion **[**5]** to dismiss hinges primarily on the *Eleventh Amendment to the United States Constitution*. [4] ***HN1***[] The *Eleventh Amendment* long has stood for the principle that federal courts are **[*511]** without authority to entertain suits by private parties against a state or its agencies without the state's consent. *See* *Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 462 (1945)*; *Hans v. Louisiana, 134 U.S. 1, 14-15 (1890)*. In their motion to dismiss, the University defendants argue that IRP, the Board of Regents, and other University officials sued in their official capacities are arms of the State of Utah and are thus immune from suit in federal court. PDS concedes the *Eleventh Amendment's* general effect, but insists that the University of Utah is not an arm of the state for purposes of *Eleventh Amendment* immunity. In the alternative, PDS argues that, before passing upon whether the University is an arm of the state, the court should allow further discovery into the nature of the relationship between the University of Utah, the Board of Regents, IRP, and the state.

[6]** As is noted above, both sides agree that the *Eleventh Amendment* generally protects a state from suit in federal court without the state's consent. [5] This court, then, must resolve the specific question whether the University of Utah is "the state" for purposes of the *Eleventh Amendment*. It is well-settled that ***HN3***[] the *Eleventh Amendment* applies to a "state agency, functioning as an arm, an alter ego of the state." *Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971)* (University of Kansas is the state for purposes of *Eleventh Amendment* immunity). And in determining the status of the state agency, the court must look to applicable state law. *Id.* Thus, this court looks to Utah law and finds that the University of Utah is an arm of the state for *Eleventh Amendment* purposes.

This court's review of Utah law clearly indicates that the University of Utah **[**7]** should be considered an arm of the state. The statutory foundation upon which the University is constructed gives the state virtually exclusive control over University governance. [6] The State Board of Regents is endowed with "the power to govern the state system of higher education consistent with state law" and, to that end, "is vested with the control, management, and

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[4] ***HN2***[] The language of the *Eleventh Amendment* provides as follows: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI.

[5] There is no suggestion here that the state has consented to suit against the University of Utah by expressly waiving its immunity.

[6] In addition, the Utah Governmental Immunity Act defines the term "State" to include "any office, department, agency, authority, commission, *board,* institution, hospital, college, *university, or other instrumentality of the state."* Utah Code Ann. § 63-30-2(9) (1986 & 1988 Supp.). Hence, in denoting those entities protected by state law immunity, the Legislature specifically considered the University of Utah and Board of Regents instrumentalities of the state.

supervision of [the University of Utah]." Utah Code Ann. §§ 53B-1-101(2), -103(2) (1989). The governor of the state, with the consent of the Senate, appoints fifteen of the Board's sixteen members. Utah Code Ann. § 53B-1-104(1) (1989). The Board is required by law to account to the state by submitting "an annual report of its activities to the governor and to the Legislature." Utah Code Ann. § 53B-1-107 (1989). In addition, eight of ten members of the University of Utah's Institutional Council (and of each state institution of higher education) are appointed by the governor, and the Council is charged with fund-raising, public relations, and other administrative responsibilities. Utah Code Ann. §§ 53B-2-103, -104(1) (1989). The Institutional Council, in turn, consults with the Board of Regents before the Board takes **[**8]** action on matters pertaining to the University of Utah. Utah Code Ann. § 53B-2-105 (1989). Thus, the Utah Legislature has established the University of Utah as an institution squarely within the state's control. The University is not, as PDS suggests, akin to a municipal corporation or political subdivision of the state. *Cf.* Mount Healthy City Board of Educ. v. Doyle, 429 U.S. 274 (1977) (Ohio law provides that local Board of Education is treated as political subdivision and not as an arm of the state).

The Utah Supreme Court also **[**9]** has taken the view that the University of Utah is an institution firmly within the state's control. **[*512]** In University of Utah v. Board of Examiners, 295 P.2d 348 (Utah 1956), the Supreme Court examined the intent of the Utah Constitution's framers and reversed the district court's ruling that the Utah Constitution establishes the University as a constitutional corporation free from the Legislature's control. The Court relied upon one of its earlier opinions and reasoned that:

When all of the provisions of law, which in some way relate to and affect the government of the university are considered and construed together, it is made very clear that the corporation designated the University of Utah was created and exists for the sole purpose of more conveniently governing and conducting the educational institution called the "University." *The university is clearly a state institution,* and is so treated, since the members constituting its governing board are all appointed by the Governor with the consent of the senate, and the board regularly reports to the Governor. *Moreover, the corporation holds all the property in trust merely. In fact the property belongs* **[**10]** *to the state of Utah.*

Id. at 364 (quoting State v. Candland, 104 P. 285, 293 (Utah 1909)) (emphasis added). Thus, the state's highest court [7] **[**11]** has indicated in unequivocal terms that the University acts as a state-created, state-financed entity with a severely constricted degree of autonomy. Any judgment against the University necessarily would be satisfied, even if indirectly, from state resources. And "where the recovery sought by the parties would 'expend itself on the public treasury or domain . . .,' the action is essentially one against the State. . . ." [8] Prebble v. Brodrick, 535 F.2d 605, 610 (10th Cir. 1976) (citations omitted) (University of Wyoming is a state instrumentality for purposes of Eleventh Amendment immunity).

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[7] PDS urges the court to adopt an opinion of the Utah Attorney General to the effect that the University is not an arm of the state for purposes of Eleventh Amendment immunity. *See* Op. Att'y Gen. No. 87-001 (May 8, 1987) at 46-47. The opinion, though informative, is not authoritative. This court is unwilling to give greater credence to the Attorney General's non-binding opinion than to Utah statutory structure and the Utah Supreme Court's construction of that structure.

[8] The court specifically rejects PDS's suggestion that a judgment against the University is not necessarily a judgment against the state. While it may be true that a significant proportion of University funding comes from non-state sources, it is a fiction to suggest that a judgment against the University will not ultimately be made up through state appropriations. Any use of non-state funds to satisfy a judgment inevitably will necessitate increased state outlays. *See* Ferguson v. Greater Pocatello Chamber of Commerce, 647 F. Supp. 190, 192 (D. Idaho 1985) (Idaho State University is immune under Eleventh Amendment since judgment would ultimately "impact" on state treasury).

Given the University's status under Utah law, [9] this court is bound by the view of the Tenth Circuit [10] and adopts the view of a majority of other courts [11] that have treated state universities as arms of the state for *Eleventh Amendment* purposes. The University of Utah partakes of *Eleventh Amendment* immunity as an instrumentality **[*513]** of the state. This court is without authority to award PDS damages against **[**12]** the University, its officers, or IRP.

[13] III. Injunctive Relief**

The court's determination that the University of Utah is an arm of the state for *Eleventh Amendment* purposes does not dispose entirely of PDS's claims. PDS has sought injunctive relief against the University defendants, specifically asking this court to order IRP to cease operations which are alleged to violate federal and state law. Thus, the court examines the availability to PDS of injunctive relief and concludes that this court may not enjoin IRP's activities based upon either federal or state law grounds.

A. Federal Law

The court turns first to the availability of injunctive relief under federal law. It is well-settled that ***HN4***[] the *Eleventh Amendment* does not bar federal courts from issuing injunctive relief against a state based upon violations of federal law. *See Ex Parte Young, 209 U.S. 123 (1908)*. That relief, if any, may be founded upon violations of federal constitutional or statutory law, but is limited to *prospective* injunctive relief. *See Edelman v. Jordan, 415 U.S. 651, 666-68 (1974)*.

In its complaint, PDS alleges that the University defendants operate IRP in violation of federal ***antitrust law***. **[**14]** PDS seeks an order from this court enjoining the University defendants from the alleged continuing violation of both the Sherman Act and the Clayton Act. PDS has raised no other federal law claim for injunctive relief. [12] The University defendants counter that they are entitled to immunity from federal antitrust laws because they are the state acting in its sovereign capacity. The University defendants rely upon the landmark case of *Parker v. Brown, 317 U.S. 341 (1943)*, and subsequent cases interpreting it. They argue that they are officers acting within the executive branch of state government, and as such, that they are acting for and on behalf of Utah in its sovereign capacity.

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[9] PDS insists that the court should at least allow factual discovery into the relationship between IRP, the University, and the state. And indeed it is true that "each state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances." *Soni v. Board of Trustees, 513 F.2d 347, 352 (6th Cir. 1975)*, *cert. denied,* ***426 U.S. 919 (1976)***. In this case, however, the court need only look to the peculiarities of Utah law. Utah law, as distinguished from any detailed factual inquiry, clearly renders the University of Utah an arm of the state. Factual discovery would in no way alter the state law basis of this court's conclusion. *See Prebble, 535 F.2d at 610* (relying on the Wyoming Constitution and statutes to hold that University of Wyoming is immune under *Eleventh Amendment*).

[10] *See Prebble, 535 F.2d at 610* (University of Wyoming); *Brennan, 451 F.2d at 1290-91* (University of Kansas).

[11] The court in *Durham v. Parks, 564 F. Supp. 244, 246 (D. Minn. 1983)*, surveyed a number of cases that dealt with the status of state universities under the *Eleventh Amendment*. The *Durham* court concluded that "the majority of courts which have considered the 'alter ego' relationship of a state university to its state have concluded that a suit against the university is a suit against the state for the purposes of the *eleventh amendment*." *Id.*

[12] Count II of PDS's complaint alleges that PDS is entitled to a declaratory judgment pursuant to *Federal Rule of Civil Procedure 57* and the federal Declaratory Judgment Act, *28 U.S.C. § 2201*. However, the declaratory judgment sought in Count II is based on state law violations, and the Declaratory Judgment Act does not extend the subject matter jurisdiction of federal courts. *See* 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2766 (2d ed. 1983) ("there must be an independent basis of [federal] jurisdiction, . . . before a federal court may entertain a declaratory judgment action"). Thus, the only alleged federal law bases for injunctive relief are the Sherman and Clayton Acts.

[15]** *Parker* and its progeny have established the general proposition that ***HN5***[] states acting in their sovereign capacities are exempt from federal antitrust laws. In order to qualify for antitrust immunity, an entity must demonstrate either that it is the state acting in its sovereign capacity or that it is acting pursuant to a "clearly articulated and affirmatively expressed state policy." *Hoover v. Ronwin, 466 U.S. 558, 568-69 (1984)*. This court does not reach the second prong of this test because it concludes that the University defendants constitute the state acting in its sovereign capacity. As such, they are entitled to *Parker* antitrust immunity.

HN6[] It is clear under the *Parker* immunity doctrine that the legislative and judicial branches of state government act as the state in its sovereign capacity. *See* *Parker, 317 U.S. at 351* (legislature acts as the state); *Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977)* (state supreme court acting in legislative capacity acts as the state). In deciding that the University defendants are acting as the state for purposes of *Parker* immunity, this court adopts the holdings **[**16]** of the Fifth and Ninth Circuits [13] that the executive **[*514]** branch of state government is no less entitled to antitrust immunity than are the legislative and judicial branches. *See* *Charley's Taxi Radio Dispatch v. SIDA of Hawaii, 810 F.2d 869, 874-76 (9th Cir. 1987)* (Hawaii Department of Transportation entitled to antitrust immunity as part of executive branch); *Deak-Perera Hawaii, Inc. v. Department of Transp., 745 F.2d 1281, 1282 (9th Cir. 1984)* (similar conclusion); *Saenz v. University Interscholastic League, 487 F.2d 1026, 1027-28 (5th Cir. 1973)* (division of University of Texas entitled to antitrust immunity). This court discerns no sound reason for distinguishing state executive agencies from their legislative and judicial counterparts -- "regardless of whether [the executive agencies'] particular actions or their anticompetitive effects were contemplated by the legislature." *Charley's Taxi, 810 F.2d at 876*. *See also* Areeda, *Antitrust Immunity for "State Action" After Lafayette,* 95 Harv. L. Rev. 435, 445 n.49 (1981) ("delegation of governmental powers necessarily includes the discretion **[**17]** to make decisions not compelled by the legislature").

Further, as was true in the *Eleventh Amendment* context, there can be little question that the University defendants act as the state in its sovereign capacity for purposes of *Parker* antitrust immunity. The Board of Regents is appointed by the governor. The Board accounts annually to the governor and the Legislature. In *Saenz, 487 F.2d at 1027-28*, the Fifth Circuit reasoned that the University Interscholastic League and its officials, as part of the Extension Division of the University of Texas, were entitled to antitrust immunity as the state acting in its sovereign capacity. Such is also true of IRP, the Board of Regents, and other University officials in this case. **[**18]** They act within the state executive branch, under statutorily mandated supervision, and thus come within the ambit of *Parker* antitrust immunity. [14]

PDS contends, finally, that even if the University defendants act as the state in the executive branch, their activities through IRP are not those of the sovereign because they exceed the authority conferred under the Utah Constitution and Utah statutes. This court does not -- and need not **[**19]** -- decide whether IRP's activities run afoul of specific provisions of Utah law. As the University defendants correctly point out, ***HN7***[] even "the constitutional invalidity of the attempted state [activity] is not an appropriate basis for disregarding *[Parker]* state action immunity." *Lease Lights, Inc. v. Public Serv. Co., 849 F.2d 1330, 1334 (10th Cir. 1988)* (citing *Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985))*. Indeed, *Parker* immunity is based upon principles of federalism, and "'ordinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control." Areeda, *Antitrust Immunity for "State Action" After Lafayette,* 95 Harv. L. Rev. 435, 453 (1981). The University defendants' activities do not violate Utah law (if at all) to the degree that *Parker* immunity is defeated. This court will not enjoin the University defendants on the basis of federal ***antitrust law***.

[13] The United States Supreme Court has yet to pass upon the specific question whether state executive agencies are entitled to *Parker* antitrust immunity. *See Hoover,* 446 U.S. at 568 n.17. Neither has the Tenth Circuit treated that specific question.

[14] Again, PDS would have the court rely upon an Opinion of the Utah Attorney General, which concluded that the University of Utah was not the state acting in its sovereign capacity for purposes of *Parker* antitrust immunity. *See* Op. Att'y Gen. No. 85-002 (Oct. 21 1985). However, the court notes once again that the opinion is non-binding. The opinion does not even mention the Fifth and Ninth Circuit cases decided before it was rendered, and it could not have considered the *Charley's Taxi* decision because it was decided after the Attorney General opinion was rendered.

B. State Law

PDS also seeks prospective injunctive relief against the University defendants based upon a number of separate state law grounds, including the Utah Administrative Code, the **[**20]** Utah Unfair Practices Act, and Utah ***antitrust law***. The University defendants respond that, under the Supreme Court's holding in *Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984)*, ***HN8***[] the *Eleventh Amendment* prohibits the **[*515]** court from enjoining an instrumentality of the state based upon state law, unless the alleged conduct is ultra vires or "without any authority whatever." [15] *Id. at 101 n.11*.

[21]** This court determined, *supra,* that the University is an arm of the state and thus enjoys *Eleventh Amendment* immunity. All that remains, then, is an inquiry into whether the University defendants' activities through IRP are supported by any "colorable basis" of authority. *Id.* That determination is simple. The Board of Regents is given full authority by the Legislature to decide what programs and departments will be established at the University of Utah. Accordingly, the Board has authorized the operation of IRP within the Colleges of Medicine and Pharmacy. It may be that this authorization misconstrues provisions of Utah law, or that the actual practices of IRP do not comport fully with Utah law, [16] **[**23]** but this court cannot accept PDS's contention that IRP is operated Without any "colorable basis" of authority. [17] ***HN9***[] An ultra vires claim must be founded upon an "officer's lack of

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[15] The University defendants suggest that *Pennhurst* may have entirely eliminated the ultra vires exception. It is true that the *Pennhurst* Court did "question the continued vitality of the ultra vires doctrine in the *Eleventh Amendment* context." *465 U.S. at 114 n.25*. The Court concluded that "to the extent the [ultra vires] doctrine is consistent with the analysis of this opinion, it is a very narrow exception. . . ." *Id.*

This court need not pass upon the continued existence or nonexistence of the ultra vires doctrine because it holds that the University defendants' activities are not "without any authority whatever." *Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 697 (1982)*.

[16] At issue are the provisions of Board of Regents Rule 765-555, which PDS suggests have been incorporated into the Utah Administrative Code. Utah Code Ann. §§ 63-46a-2, -16 (1989). Rule 765-555 is entitled "Policy on Colleges and Universities Providing Facilities, Goods and Services in Competition with Private Enterprise." The Rule provides in pertinent part:

R765-555-4. Policy

* * *

4.3. An institution shall not provide services to persons other than members of the campus community unless:

4.3.1. The service offers a substantial and valuable educational or research experience for registered students and faculty;

4.3.2. The service fulfills the institution's public service mission;

4.3.3. The service is incidental to the ordinary and authorized function of a campus entity, i.e. occasional sales by bookstores, food services, etc., to campus visitors;

4.3.4. The service consists of recreational, cultural, and athletic events; health services and medical treatment; public service radio and TV broadcasting; events or functions which have as their principal purposes the improvement of relations between the institutions and the general public; and sales of contributed services, if related to fund raising activities;

4.3.5. The equivalent service is not available in the local area; or

4.3.6. The service to persons not members of the campus community has been specifically authorized by the State Board of Regents.

* * *

4.6. Exceptions to this policy may be authorized by the State Board of Regents if it determines that an exception is clearly in the best interests of the public.

[17] It is arguable whether the University defendants' activities through IRP violate Rule 765-555 or other provisions of Utah law at all. Even so, under *Pennhurst's* *Eleventh Amendment* analysis, the court does not focus on the violation or nonviolation of state

delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949)*. The University defendants may or may not have misinterpreted the breadth of their authority, but they have not acted **[**22]** here without any authority whatever. The court will not enjoin **[*516]** them based upon alleged violations of state law.

[24] IV. Relief Against Defendant Bragg in His Individual Capacity**

The court turns last to PDS's contention that this court may order relief against defendant David Bragg in his individual capacity. Bragg serves as Chairman of the University's Department of Radiology and is the only defendant sued by PDS in an individual capacity. PDS argues correctly that the *Eleventh Amendment* and state sovereignty generally provide no immunity to state officers sued in their individual capacities. *See* *Papasan v. Allain, 478 U.S. 265, 278 n.11 (1985)*. PDS also points out that this result is unchanged even if the state chooses to indemnify its officers. *See* *Schaefer v. Wilcock, 676 F. Supp. 1092, 1101 (D. Utah 1987)*.

Bragg appears to concede that he does not benefit in his individual capacity from *Eleventh Amendment* immunity. He argues, however, that ***HN10***[] under Utah law he may not be held Personally liable for "acts or omissions occurring during the performance of [his] duties . . . *unless it is established that [he] acted or failed to act due to fraud or malice."* Utah Code Ann. § 63-30-4(4) (1989) (emphasis added). Bragg's position, at least as to Utah law, **[**25]** is supported by Utah Supreme Court decisions interpreting section 63-30-4. *See* *Lancaster v. Utah State Prison, 740 P.2d 261, 262 (Utah 1987)*; *Maddocks v. Salt Lake City Corp., 740 P.2d 1337, 1339-40 (Utah 1987)*. The state law claims in PDS's complaint do not allege that Bragg acted through either fraud or malice, and there is little doubt that Bragg's "acts or omissions," if any there were, occurred during the performance of his duties as Chairman of the University's Department of Radiology. The court notes, however, that the "fraud or malice" pleading requirement does not apply to PDS's federal law claims against Bragg in his individual capacity. The parties do not advance -- nor will the court embrace -- the suggestion that Utah Code section 63-30-4 adds to ***antitrust law*** (or other federal law) a "fraud or malice" pleading requirement.

Thus, the court dismisses without prejudice PDS's state law claims against Bragg in his individual capacity and grants PDS twenty days' leave to amend its complaint to include any properly founded state law allegations of malice or fraud against Bragg. As to the federal law claims against Bragg in his individual **[**26]** capacity, the motion to dismiss is denied.

V. Conclusion

Based upon the foregoing analysis, the court holds that PDS's remedy against the University defendants, if any, must be obtained in state court. The principles of federalism, as found in the *Eleventh Amendment* and the *Parker* antitrust immunity doctrine, teach that federal courts must not intrude upon the sovereign domain of the several states. Therefore, the court hereby orders, adjudges, and decrees that PDS's claims against the University defendants in their official capacities are DISMISSED with prejudice. The court further orders, adjudges, and decrees that PDS's state law claims against defendant David Bragg in his individual capacity are DISMISSED without prejudice, and PDS is hereby granted twenty days' leave to amend its complaint to include any properly founded state law claims of fraud or malice against defendant David Bragg in his individual capacity. With respect to PDS's federal law claims against Bragg in his individual capacity, the motion to dismiss is DENIED.

IT IS SO ORDERED.

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law. Rather, the query is whether the activities are "without any authority whatever." *Pennhurst, 465 U.S. at 101 n.11*. In this case it is clear that the University defendants' activities are not without any authority whatever.

PDS's reliance on *Miami Univ. Assoc. Student Gov't v. Shriver, 735 F.2d 201 (6th Cir. 1984)*, is unavailing. In that case, the Sixth Circuit, in dicta, merely directed the district court to consider on remand the effect of *Pennhurst* on its ability to order compliance with state law. The court hinted, without holding, that Miami University officials' attempts to enforce a student "no-car" policy off-campus may be without any authority whatever. *Id. at 204*. The court suggested that the ultra vires doctrine survived *Pennhurst,* but did not hold that the doctrine applied to the facts of the particular case. *Id.*

Dated this 25th day of June, 1990.

BY THE COURT:

BRUCE S. JENKINS, CHIEF JUDGE

UNITED STATES DISTRICT COURT **[**27]**

Sun Dun, Inc. v. Coca-Cola Co.

United States District Court for the District of Maryland

June 25, 1990, Filed

Civil Action No. S-88-2540

Reporter

740 F. Supp. 381 *; 1990 U.S. Dist. LEXIS 7813 **; 1990-2 Trade Cas. (CCH) P69,244

SUN DUN, INC. OF WASHINGTON, Plaintiff, v. THE COCA-COLA COMPANY and GENERAL CINEMA BEVERAGES OF WASHINGTON, D.C., INC., d/b/a PEPSI-COLA BOTTLERS OF WASHINGTON, D.C. and MID-ATLANTIC COCA-COLA BOTTLING COMPANY, INC. and PEPSICO, INC., Defendants

Core Terms

monopolize, conspiracy, motion to dismiss, alleges, defendants', purchases, products, brand, Sherman Act, soft drink, indirect, manufacturer, monopoly, bottler, anti trust law, facilities, conspired, damages, market power, vertical, Counts, competitors, horizontal, oligopoly, injunctive relief, antitrust, plaintiff's claim, provisions, relevant market, vending machine

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

In deciding a motion to dismiss, all inferences must be drawn in favor of the plaintiff, and the facts must be viewed as the plaintiff most strongly can plead them. The district court may not, then, grant a motion to dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. The Supreme Court has applied this standard rigorously in antitrust cases, holding that in such cases dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN2[] **Purchasers, Direct Purchasers**

Federal ***antitrust law*** provides no remedy for treble damages under the Clayton Act § 4, *15 U.S.C.S. § 15*, for those who have made merely indirect purchases from defendants.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN3[] **Remedies, Damages**

Following the lead of the Third and Fifth Circuits, other judges of the court have held that a plaintiff who cannot seek damages for indirect purchases under the Clayton Act § 4, *15 U.S.C.S. § 15* may nevertheless seek injunctive relief under the Clayton Act § 16, *15 U.S.C.S. § 26*. Plaintiff must still establish, as § 16 requires, that principles of equity entitle it to such injunctive relief.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Governments > Federal Government > US Congress

Transportation Law > Interstate Commerce > Federal Powers

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Governments > Legislation > Enactment

HN4[] **Commerce Clause, Interstate Commerce**

The only significant distinction between the Sherman Act *§ 1*, *15 U.S.C.S. § 1* and the Sherman Act *§ 3*, *15 U.S.C.S. § 3* lies in the geographical area covered by each statute. *Section 1*, as well as *§ 2*, regulates interstate commerce, and was enacted pursuant to Congress' power under the *Commerce Clause of the Constitution*, *U.S. Const. art. I, § 8, cl. 3*. Section 3 of the Sherman Act regulates commerce in the District of Columbia, and in United States territories, and rests in part upon Congress' power to enact legislation for the District of Columbia. *Section 3* also regulates commerce between the District of Columbia and states or territories.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5[] Antitrust & Trade Law, Sherman Act

To state a claim under the Sherman Act *§ 1*, *15 U.S.C.S. § 1*, a plaintiff normally must allege facts supporting: (1) an agreement, conspiracy, or combination among the defendants in restraint of trade; (2) injury to the plaintiff's business and property as a direct result; and (3) damages capable of reasonable ascertainment.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

It is well settled that price-fixing constitutes restraint of trade in violation of the Sherman Act *§ 1*, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN7[] Antitrust & Trade Law, Exemptions & Immunities

To the extent that the combinations and conspiracies alleged attack vertical arrangements, the complaint in this case must overcome the hurdle presented by the Soft Drink Interbrand Competition Act (Act), *15 U.S.C.S. §§ 3501-3503*, in addition to meeting the ordinary pleading requirements for a Sherman Act *§ 1* claim, *15 U.S.C.S. § 1*. The chief effect of the Act is to shield soft drink manufacturers and bottlers from antitrust liability to which they might otherwise be subject on the grounds of their enforcement of vertically organized territorial restraints. Defendants are not entitled to the protection of the Act, however, unless their products are in substantial and effective competition with other products of the same general class in the relevant market or markets, *15 U.S.C.S. § 3501*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN8[] Price Fixing & Restraints of Trade, Vertical Restraints

The Soft Drink Interbrand Competition Act (Act), *15 U.S.C.S. § 3501 et seq.*, does not purport to grant antitrust immunities. Its protections represent a legislative response to questions over the proper application to the soft drink industry of the rule of reason approach to vertical restraints re-adopted by the Supreme Court. Under this standard, vertical restraints such as those at issue in this case do not violate the antitrust laws if the overall effect of the restraint is to promote interbrand competition. Thus, while there is no price-fixing conduct alleged against defendants, the allegations pertaining to their enforcement of vertical restraints could conceivably subject them to Sherman Act *§ 1* liability, *15 U.S.C.S. § 1*, if: (1) it is eventually established that the Act does not apply and (2) the conduct of the two manufacturers fails an independent rule-of-reason analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN9[] Price Fixing & Restraints of Trade, Vertical Restraints

Substantial and effective interbrand competition is not defined in the text of the Soft Drink Interbrand Competition Act itself, *15 U.S.C.S. § 3501 et seq.*, but a number of factors may be weighed in determining whether such competition does in fact exist: the number of brands, types, and flavors of competing products available; persistence of long-run monopoly profits; the number of retail price options available to consumers; the persistence of inefficiency and waste; the degree of service competition among vendors; ease of entry into the market; the failure of output levels to respond to consumer demands; the number and strength of competing products in the territory; and a lack of opportunity to introduce more efficient methods and products.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

***HN10*[]** **Price Fixing & Restraints of Trade, Vertical Restraints**

In weighing the factors to determine whether the Soft Drink Interbrand Competition Act, *15 U.S.C.S. § 3501 et seq.*, applies in a given case it is essential that the court consider only facts tending to demonstrate the effect on interbrand competition. Facts tending to show, for example, that there exists little or no service competition among vendors of a particular brand are irrelevant for this purpose. Even a showing that such a condition exists within the chain of distribution of every brand in the market would have no bearing on the question of interbrand competition. Such facts go only to the question of intra brand competition.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

***HN11*[]** **Scope, Monopolization Offenses**

The Sherman Act *§ 2*, *15 U.S.C.S. § 2*, prohibits monopolization, attempt to monopolize, and conspiracy to monopolize interstate trade or commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Transportation Law > Interstate Commerce > Federal Powers

***HN12*[]** **Antitrust & Trade Law, Sherman Act**

As with Sherman Act *§ 1*, *15 U.S.C.S. § 1*, Sherman Act *§ 2*, *15 U.S.C.S. § 2*, regulates interstate commerce and was enacted pursuant to Congress' power under the *Commerce Clause*. On its face *§ 2* does not purport to regulate commerce in the District of Columbia, as does *§ 3*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN13[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The Supreme Court made clear that the illegal market power which is the centerpiece of a monopoly must exist with respect to the competitive market for a commodity, as distinguished from legitimate market power over a single brand. The Supreme Court emphasized in dicta that the power that, let us say, automobile or soft drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN14[] **Antitrust & Trade Law, Sherman Act**

The court agrees with plaintiff's contention that parallel concerted action may support a finding of a combination or conspiracy in violation of Sherman Act *§ 1*, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Sherman Act, Claims**

The Supreme Court set out the elements of a Sherman Act *§ 2* claim of actual monopolization, *15 U.S.C.S. § 2*. They are: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN16[] **Regulated Practices, Market Definition**

An attempt to allege the necessary market power by aggregating the market power of several defendants is mere tautology.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN17[] Monopolies & Monopolization, Actual Monopolization

An oligopoly, or shared monopoly, does not in itself violate Sherman Act § 2, 15 U.S.C.S. § 2. Rather, in order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a particular defendant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN18[] Monopolies & Monopolization, Actual Monopolization

The idea that a monopoly is composed of a single economic entity is also reflected in the requirement in an actual monopolization claim that the requisite market power be held by a single defendant. This idea in no way precludes the possibility of a group of firms conspiring to monopolize, if the aim of the conspiracy is to form a single entity to possess the illegal market power. When, however, two or more competitors conspire to create a market environment in which competition and market entry is improperly restricted, but in which market power continues to be shared among these otherwise unrelated entities, the court holds that there is no conspiracy to monopolize claim stated under Sherman Act § 2, 15 U.S.C.S. § 2, and the claim must therefore be dismissed.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN19[] Monopolies & Monopolization, Attempts to Monopolize

The so-called essential facilities doctrine does not create a new species of antitrust violation. It simply addresses the narrow situation in which a firm gains monopoly power by controlling and refusing to deal in an essential facility at one stage of production, thus extending its monopoly to other stages of production, and to other markets. The elements of liability under the doctrine are: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. Failure to plead facts supporting any one of these elements is sufficient to support dismissal.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > Football

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN20[] Sherman Act, Claims

The essential facilities doctrine relates most directly to a claim of monopolization under Sherman Act *§ 2*, *15 U.S.C.S. § 2*. Nevertheless, some courts have applied the doctrine to claims under Sherman Act *§§ 1*, *3*, *15 U.S.C.S. §§ 1*, *3*, as well.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN21[] **Monopolies & Monopolization, Attempts to Monopolize**

Although the essential facilities doctrine applies to facilities which enable the monopolist to extend monopoly power from one stage of production to another, it does not apply to end products in markets containing several competing brands. A single brand cannot function as a bottleneck over such a market. By withholding access to a brand, therefore, a firm is not able to extend monopoly power through subsequent stages of production.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN22[] **Monopolies & Monopolization, Attempts to Monopolize**

Even firms that are nominally competitors, if they act as a single economic entity with respect to the facility, e.g., by sharing a single facility, may be subject to liability under the essential facilities doctrine.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN23[] **Monopolies & Monopolization, Attempts to Monopolize**

The requirement that a plaintiff not be able to practically or reasonably duplicate the purported facility is not met simply by an allegation that the plaintiff is unable to participate in the manufacture and distribution of whatever brand of a product it chooses. Assuming, arguendo, that the brand name products can be essential facilities, plaintiff cannot state a claim as long as it is able to find reasonable substitutes for these products.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN24[] **Monopolies & Monopolization, Attempts to Monopolize**

Particular brand names within a product market are not the appropriate subject matter of an essential facilities claim. Generally, the doctrine has been applied to situations in which physical conditions prohibit duplication of the facility.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property

HN25[] Jurisdiction, Jurisdictional Sources

Under *28 U.S.C.S. § 1366*, laws applicable exclusively to the District of Columbia are not federal laws, though enacted by Congress; and under *28 U.S.C.S. § 1332(d)*, the District of Columbia is a state for purposes of diversity jurisdiction.

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property

Governments > Local Governments > Home Rule

Constitutional Law > Congressional Duties & Powers > General Overview

HN26[] Congressional Duties & Powers, District of Columbia & Federal Property

The District of Columbia's antitrust laws are set forth at *D.C. Code Ann. §§ 28-4501*- 28-4518 (1981). These statutes were adopted in 1980 by the Council of the District of Columbia, pursuant to the legislative authority granted to it by Congress in the District of Columbia Self Government and Governmental Reorganization Act of 1973, the Home Rule Act, 87 Stat. 774, Pub. L. 93-198 (1973), codified at Title 1 of the D.C. Code). That power extends to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of the Act subject to all the restrictions and limitations imposed upon the states by the *U.S. Const. art. I, § 10*, D.C. Code Ann. § 1-204 (1981).

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property

HN27[] Congressional Duties & Powers, District of Columbia & Federal Property

Even though the District of Columbia is not a state, Congress has specifically determined that the legislative enactments of the D.C. Council are subject to the same constitutional constraints as are those of the states. Specifically, acts passed by the D.C. Council are subject to analysis under the federal preemption doctrine and the *Commerce Clause*.

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property

Governments > Local Governments > Home Rule

Constitutional Law > Congressional Duties & Powers > General Overview

Governments > Federal Government > General Overview

Governments > Federal Government > US Congress

Governments > Legislation > Enactment

HN28[] Congressional Duties & Powers, District of Columbia & Federal Property

The United States Constitution grants Congress the power to legislate for the District of Columbia, *U.S. Const. art. I, § 8, cl. 17*. Through the Home Rule Act, Congress has ceded some of that authority to the D.C. Council, D.C. Code Ann. §§ 1-206, 1-233 (1981). The D.C. Code provisions were enacted by the Council, subject to the congressional oversight provided for in D.C. Code Ann. § 1-233(c), and subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by *U.S. Const. art. I, § 8*, D.C. Code ann. § 1-201(a). The Supreme Court long ago determined that there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power.

Antitrust & Trade Law > Sherman Act > General Overview

HN29[] **Antitrust & Trade Law, Sherman Act**

D.C. Code Ann. § 28-4502 is substantively the same as the first sentence of Sherman Act *§ 3*, *15 U.S.C.S. § 3*, and is therefore akin to the first sentence of Sherman Act *§ 1*, *15 U.S.C.S. § 1*. *D.C. Code Ann. § 28-4503* prohibits the same conduct as does *§ 2* of the Sherman Act.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN30[] **Remedies, Damages**

D.C. Code Ann. § 28-4508 provides that any person who is injured may seek monetary and/or injunctive relief. As with the Clayton Act § 4, *15 U.S.C.S. § 15*, treble damages are available, *D.C. Code Ann. § 28-4508* (1981).

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN31[] **Purchasers, Indirect Purchasers**

Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies, and that consequently federal antitrust laws do not preempt state law.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN32[] **Congressional Duties & Powers, Commerce Clause**

The *Commerce Clause, U.S. Const. art I., § 8, cl. 3*, permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN33[] **Interstate Commerce, Restraints of Trade**

The D.C. Code provisions at issue purport to regulate antitrust activity throughout the District of Columbia, *D.C. Code Ann. § 28-4501* (1981), and are therefore constitutional on their face. Nevertheless, it clearly would be unconstitutional under the *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*, to apply the D.C. Code to claims which, though bearing some connection to the District of Columbia, are in fact interstate in nature and are thus regulated by federal antitrust provisions.

Torts > Business Torts > Unfair Business Practices > General Overview

HN34[] **Business Torts, Unfair Business Practices**

Under Maryland law, a claim for unfair competition can encompass damaging or jeopardizing another's business by fraud, deceit, trickery or unfair methods of any sort. What constitutes unfair competition in a given case is governed by its own particular facts and circumstances.

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN35[] **Commercial Interference, Business Relationships**

Under Maryland law, the tort of interference with business relations consists of four elements: (1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants, which constitutes malice; and (4) actual damage and loss resulting.

Counsel: **[**1]** Wilbur D. Preston, Jr., Fenton L. Martin, Nevett Steele, Jr., and Whiteford, Taylor & Preston, Baltimore, Maryland, for Plaintiff.

Francis B. Burch, Jr. and Jeffrey D. Herschman, Piper & Marbury, Baltimore, Maryland, and William M. Dreyer, Atlanta, Georgia, for Defendant Coca-Cola Company.

Thomas M. Wilson, III, Tydings & Rosenberg, Baltimore, Maryland, and C. Benjamin Crisman, Jr., William J. Guzick, and Henry L. Huser, Skadden, Arps, Slate, Meagher & Flom, Washington, District of Columbia, for Defendant General Cinema Beverages.

Gerald A. Connell, Lee H. Simowitz, Peter B. Kenney, Jr., and Jenifer M. Brown, Baker & Hostetler, Washington, District of Columbia, and Lee T. Ellis, Jr., Baker & Hostetler, Beltsville, Maryland, for Defendant Mid-Atlantic Coca-Cola Bottling Company.

Theodore Sherbow and Henry R. Abrams, Weinberg & Green, Baltimore, Maryland, and Fred A. Freund, Richard M. Steuer, and John K. Crossman, Kaye, Scholer, Fierman, Hays & Handler, New York, New York, and Gerard W. Casey, Sommers, New York, for Defendant PepsiCo, Inc.

Judges: Frederic N. Smalkin, United States District Judge.

Opinion by: SMALKIN

Opinion

[*384] MEMORANDUM

FREDERIC N. SMALKIN, UNITED STATES DISTRICT JUDGE

This antitrust case is before the Court on motions of all defendants to dismiss the Amended Complaint pursuant **[**2]** to Federal Civil Procedure Rule 12(b)(6). There has been thorough briefing by all parties, and the motion will be decided without oral argument, as permitted by Local Rule 105(6), D. Md.

FACTUAL BACKGROUND

Plaintiff, Sun Dun, Inc., is in the business of marketing and servicing vending machines as a "full service vendor." [1] Defendants Coca-Cola and PepsiCo manufacture trademarked, secret formula soft drink syrup and sell it to licensed, franchised distributors, who in turn mix, package, and distribute the final products. Defendant Mid-Atlantic Coke is a licensed distributor for Coca-Cola in the Washington, D.C. metropolitan area, which includes portions of Maryland and Virginia. Defendant General Cinema, Inc., is a distributor for PepsiCo in the same region. Both General Cinema and Mid-Atlantic are also engaged **[*385]** in the full service vending machine business.

[3]** Sun Dun seeks in this action to redress alleged harm arising from its inability to obtain Coca-Cola and Pepsi-Cola products "at competitive prices" in the Washington, D.C. metropolitan area from Mid-Atlantic and General Cinema ("the bottler defendants") or from any other source. Plaintiff claims that the imposition of, and adherence to, territorial and marketing restrictions by various combinations of the defendants have prevented it from competing effectively in the market, by essentially cutting off supply of two of its major product lines. Sun Dun argues that the conduct of the defendants in creating these unfavorable conditions violates *Sections 1*, *2*, and *3* of the Sherman Act, *15 U.S.C. §§ 1-3 (1982)*, as well as the District of Columbia's antitrust laws, *D.C. Code Ann. §§ 28-4502* and -4503 (1981). Plaintiff seeks the monetary and injunctive relief available under Sections 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15*, *26 (1982)*, and *D.C. Code Ann. §§ 28-4508*, -4509 (1981). Sun Dun has also set forth claims in tort for unfair competition and tortious interference with business relationships.

DISCUSSION

Standard of Review of Motions to Dismiss

HN1[] In deciding a motion to dismiss, **[**4]** all inferences must be drawn in favor of the plaintiff, and "the facts must be viewed as the plaintiff most strongly can plead them." *Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456, 457 (4th Cir. 1983)*, *cert. denied*, *475 U.S. 1121, 90 L. Ed. 2d 185, 106 S. Ct. 1640 (1986)*. The district court may not, then, grant a motion to dismiss for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. The Supreme Court has applied this standard rigorously in antitrust cases, holding that in such cases "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*.

The Federal Claims

[1] A "full service vendor" is one who, in addition to supplying and maintaining the machines themselves, stocks them with beverages and collects the monies. Amended Complaint, para. 7. Sun Dun's machines are capable of dispensing different drinks at different prices, and it therefore stocks its machines with a variety of products, including cans of soft drinks and fruit juices.

Standing

As a threshold issue, defendants challenge Sun Dun's standing to assert Sherman Act claims, arguing that Sun Dun has made only indirect, not direct, purchases from the defendants. Under the holding of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, ***HN2***[] federal ***antitrust law*** provides no remedy for treble damages under Section 4 of the Clayton Act, *15 **[**5]** U.S.C. § 15 (1982)*, for those who have made merely indirect purchases from defendants. The Supreme Court recently reaffirmed this interpretation of Section 4 in *Kansas v. Utilicorp United, Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*. *See also* *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. Sun Dun, however, has asserted that, in addition to its indirect purchases, it made some direct purchases from one or more of the defendants. Amended Complaint, at paras. 22, 24, 31, 55. Although the Amended Complaint provides few details about the direct purchases, the allegations are sufficient to confer standing upon Sun Dun to assert claims for damages arising from those purchases.

Sun Dun also seeks injunctive relief under Section 16 of the Clayton Act, *15 U.S.C. § 26 (1982)*. Here, Sun Dun's status as an indirect purchaser is not a bar to standing. ***HN3***[] Following the lead of the Third and Fifth Circuits, other judges of this Court have held that a plaintiff who cannot seek damages for indirect purchases under Section 4 of the Clayton Act may nevertheless seek injunctive relief under Section 16. *National Constructors Association v. National Electrical Contractors Association,* ***[**6]*** *498 F. Supp. 510, 524 (D. Md. 1980)* (Murray, J.), *aff'd as modified*, *678 F.2d 492 (4th Cir. 1982)*, *cert. dismissed*, *463 U.S. 1234, 77 L. Ed. 2d 1449, 104 S. Ct. 26 (1983)*; *Dart Drug Corp. v. Corning Glass Works,* ***[*386]*** *480 F. Supp. 1091, 1105 (D. Md. 1979)* (Watkins, J.). *See also* *In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1167 (5th Cir. 1979)*, *cert. denied sub nom. Safeway Stores, Inc. v. Meat Price Investigators Association, 449 U.S. 905, 101 S. Ct. 280, 66 L. Ed. 2d 137 (1980)*; *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 590-94 (3d Cir. 1979)*. *Cf.* *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 524 n. 5, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (declining to address issue of standing under Section 16); *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)* (determining that equitable relief under Section 16 requires proof of only "a significant threat of injury" from antitrust violations, not an "actual injury"). Of course, "plaintiff here must still establish, as Section 16 requires, that principles of equity entitle it to such injunctive relief." *Dart Drug, 480 F. Supp. at 1105*. *See also* *National Constructors, 498 F. Supp. at 524*. For the purposes **[**7]** of ruling on defendants' motions to dismiss, however, it is not necessary to consider the merits of plaintiff's claims. *Dart Drug, 480 F. Supp. at 1105*. It is sufficient to note that at this stage of the proceedings, Sun Dun has standing to seek injunctive relief under federal antitrust laws as both a direct and indirect purchaser.

Restraint of Trade

In Counts I, II, and III of its Amended Complaint, Sun Dun alleges unreasonable restraint of trade in violation of *Sections 1* and *3* of the Sherman Act. Because the substantive elements of a claim under *Section 3* are identical to those under *Section 1*, *see* *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association, 236 U.S. App. D.C. 311, 735 F.2d 577, 580 n. 1 (D.C. Cir. 1984)*, the Court will deal with these claims simultaneously. [2]

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[2] ***HN4***[] The only significant distinction between *Sections 1* and *3* lies in the geographical area covered by each statute. *Section 1* (as well as *Section 2*) regulates interstate commerce, and was enacted pursuant to Congress' power under the *Commerce Clause of the Constitution*. *U.S. Const. art. 1, § 8, cl. 3*. *Section 3* regulates commerce in the District of Columbia (and in United States territories), and rests in part upon Congress' power to enact legislation for the District of Columbia. *Id*. at cl. 17. *See* *United States v. National Association of Real Estate Boards, 339 U.S. 485, 488, 94 L. Ed. 1007, 70 S. Ct. 711 (1950)*; *Darnell v. Markwood, 95 U.S. App. D.C. 111, 220 F.2d 374, 376 (1954)*. *Section 3* also regulates commerce between the District of Columbia and states or territories. Thus, plaintiff's federal claims alleging conspiracy or restraint of trade which involve interstate conduct properly fall within *Section 1*, while those federal claims involving conduct within the District of Columbia or between the District and neighboring states fall within *Section 3*. As discussed below in connection with the pendent claims, plaintiff's Amended Complaint does not specify where the transactions at issue took place. Nevertheless, it is not necessary to determine which section applies to a particular claim, because *either* *Section 1* *or* *Section 3* will govern.

[8]** ***HN5***[]

To state a claim under *Section 1*, a plaintiff normally must allege facts supporting (1) an agreement, conspiracy, or combination among the defendants in restraint of trade; (2) injury to the plaintiff's business and property as a direct result; and (3) damages capable of reasonable ascertainment. *Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1139 n. 1 (4th Cir. 1980)*.

Count I is based on an alleged horizontal price-fixing conspiracy between General Cinema and Mid-Atlantic. In support of this Count, plaintiff has alleged facts relating to Sun Dun's own experiences in attempting to buy at competitive prices from General Cinema and Mid-Atlantic which could support an inference that the two were engaged in price-fixing. In addition, the complaint alleges that both bottler defendants pleaded guilty to informations charging price-fixing during the time period at issue in this case. ***HN6***[] It is well settled that price-fixing constitutes restraint of trade in violation of *Section 1*. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. Sun Dun has also sufficiently alleged a direct injury to its business which, if proved, could support an award of damages. **[**9]** Defendants' motions to dismiss with respect to Count I are therefore *denied*.

[*387] Count II alleges combination and conspiracy among all four defendants [3] **[**10]** to prevent "transshipment" [4] of Coca-Cola and Pepsi-Cola products in violation of *Sections 1* and *3*. Count III asserts, on the same underlying facts, that the territorial restraints imposed by the manufacturer defendants and adhered to by the bottler defendants violated *Sections 1*, *2*, and *3*. Taking the facts alleged in the complaint as true, the basis for these claims is essentially as follows.

The price-fixing conduct of the bottler defendants resulted in a price, per case, for Coca-Cola and Pepsi-Cola products in the Washington, D.C., metropolitan area that exceeded the price in surrounding areas by approximately $ 1.00. The bottler defendants then prevented Sun Dun from competing effectively with their own vending machine businesses by demanding higher prices from it than those charged other customers, and by preventing it from purchasing from any other resellers. In response, plaintiff attempted to purchase the products from local retailers. These efforts were initially successful, but were soon frustrated when the bottler defendants threatened those retailers with discontinuation of their own supply. Attempts to purchase the products from resellers outside the region also failed after defendants placed Sun Dun trucks under surveillance, traced the cans sold in Sun Dun vending machines **[**11]** to the transshipping distributors, and imposed substantial fines on those distributors. While fixing wholesale prices of the two brands and preventing transshipment, the bottler defendants operated their own retail vending machines at prices which made it impossible for Sun Dun to compete.

The Soft Drink Act

HN7[] To the extent that the combinations and conspiracies alleged attack vertical arrangements, [5] the complaint in this case must overcome the hurdle presented by the Soft Drink Interbrand Competition Act, *15 U.S.C. §§ 3501 to 3503 (1982)*, in addition to meeting the ordinary pleading requirements for a *Section 1* claim. The chief effect of

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[3] Although Sun Dun has asserted that "all four defendants combined and conspired," Amended Complaint, at para. 57, plaintiff is in fact alleging the existence of three separate conspiracies: a vertical conspiracy between PepsiCo and General Cinema, another vertical conspiracy between Coca-Cola and Mid-Atlantic, and a horizontal conspiracy between General Cinema and Mid-Atlantic. Any doubts with regard to the more ambiguous allegations throughout this count and the rest of the complaint are resolved by Sun Dun's own memorandum in opposition to the motions to dismiss. On pages 4-5 of its Opposition, plaintiff expressly states that it does not allege a conspiracy between Coca-Cola and PepsiCo.

[4] Transshipment refers to the practice of resellers selling to other resellers outside of their territory. *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 174-75 (3d Cir. 1988)*.

[5] "Vertical arrangements" refer to agreements between the manufacturers and their respective bottler/distributors. It is through such agreements that Coca-Cola and PepsiCo are able to impose fines on distributors who overstep their territorial bounds by transshipping.

the Act is to shield soft drink manufacturers and bottlers from antitrust liability to which they might otherwise be subject on the grounds of their enforcement of vertically organized territorial restraints. [6] Defendants are not entitled to **[*388]** the protection of the Act, however, unless their products are "in *substantial and effective* competition with other products of the same general class in the relevant market or markets." *15 U.S.C. § 3501 (1982)* (emphasis added). Sun Dun alleges a lack of effective competition in the relevant market. Amended **[**12]** Complaint, para. 15. In addition, it alleges as the relevant market in this case "the manufacture, distribution, and sale of soft drinks which are to be resold to customers through soft drink vending machines in the Washington, D.C. metropolitan area, including Maryland and Virginia." Amended Complaint, paras. 10, 65.

[13]** ***HN9***[]

"Substantial and effective" interbrand competition is not defined in the text of the Act itself, but the committee reports suggest a number of factors to be weighed in determining whether such competition does in fact exist. The Senate report provides:

> The number of brands, types, and flavors of competing products available . . .; persistence of long-run monopoly profits; the number of retail price options available to consumers; the persistence of inefficiency and waste; the degree of service competition among vendors; ease of entry into the market; the failure of output levels to respond to consumer demands; the number and strength of competing products in the territory; and a lack of opportunity to introduce more efficient methods and products.

S. Rep. No. 645, 96th Cong., 2d Sess. 10-11 (1980). The House report contains a similar litany, substituting "anti-competitive" for "monopoly" profits, and adding "availability of various forms of containers or packaging." H.R. Rep. No. 1118, 96th Cong., 2d Sess. 5-6 (1980). It is evident from the reports that Congress intended to protect the enforcement **[**14]** of vertical restraints only in those markets which actually yield the benefits of competition. It is not enough that the market contain nominal competitors; basic characteristics of a healthy market such as low consumer prices, wide availability of merchandise, and high quality must be present.

HN10[] In weighing these factors to determine whether the Act applies in a given case, therefore, it is essential that the Court consider only facts tending to demonstrate the effect on *inter* brand competition. Facts tending to show, for example, that there exists little or no service competition among vendors of a particular brand are irrelevant for this purpose. Even a showing that such a condition exists within the chain of distribution of every brand in the market would have no bearing on the question of interbrand competition. Such facts go only to the question of *intra* brand competition.

Based on the facts alleged, it seems highly unlikely that there is an absence of "substantial and effective" interbrand competition in the relevant market. Even if a lack of competition could be shown to exist between Coca-Cola and Pepsi-Cola products, the Act would still apply in this case as long as those brands **[**15]** were in effective and substantial competition with the many other soft drink brands in the market. Still, for the purposes of this motion, plaintiff's allegation of a lack of effective interbrand competition must be taken as true. Of course, it might be established, through discovery, that there is no genuine dispute of material fact on this issue. But, because the Court must now assume that the Act does not apply, the allegations of restraint of trade in Count II are sufficient to

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[6] ***HN8***[] The Act does not purport to grant antitrust immunities. *See* H.R. Rep. No. 1118, 96th Cong., 2d Sess. 2 (1980). Its protections represent a legislative response to questions over the proper application to the soft drink industry of the "rule of reason" approach to vertical restraints re-adopted by the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Under this standard, vertical restraints such as those at issue in this case do not violate the antitrust laws if the overall effect of the restraint is to promote interbrand competition. After an in-depth investigation of the industry, Congress determined that "the public policy stated in the antitrust laws would be better served by the retention of the existing competitive structure [including vertical restraints] of the soft drink industry under the standards of this bill." S. Rep. No. 645, 96th Cong., 2d Sess. 9 (1980). *See Zimmerman, 836 F.2d at 175-76*.

Thus, while there is no price-fixing conduct alleged against either Coca-Cola or PepsiCo, the allegations pertaining to their enforcement of vertical restraints could conceivably subject them to *§ 1* liability, if (1) it is eventually established that the Act does not apply *and* (2) the conduct of the two manufacturers fails an independent rule-of-reason analysis under *Sylvania*.

withstand defendants' motions to dismiss, and the motions are therefore *denied*. For the same reasons, defendants' motions with respect to the functionally equivalent claims under Sections 1 and 3 contained in Count III will also be *denied*.

The Vertical Monopoly Claim

Plaintiff also alleges in Count III that the vertical restraints discussed above violate Section 2 of the Sherman Act. **HN11**[] That statute prohibits monopolization, attempt to monopolize, and conspiracy to monopolize interstate trade or commerce. [7] *15 **[*389]** U.S.C. § 2 (1982)*. Plaintiff has simply alleged a general violation of Section 2. Because only the vertical restraints are at issue in this Count, the allegations may be viewed as two independent **[**16]** identical charges against each manufacturer/bottler combination. At the heart of the claim is the proposition that each has monopolized, attempted to monopolize, or conspired to monopolize the market for its own brands by distributing those brands in a manner that exploited market power. While it is clear that this claim would be barred if the Soft Drink Interbrand Competition Act were found applicable in the instant case, the Court concludes that it must be *dismissed* for the independent reason that "monopolization" of one's own brand is not an antitrust violation. *See International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 908 (6th Cir. 1989)*, *cert. denied*, *494 U.S. 1066, 108 L. Ed. 2d 784, 110 S. Ct. 1783 (1990)*.

[17]** In *United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*, **HN13**[] the Supreme Court made clear that the illegal market power which is the centerpiece of a monopoly must exist with respect to the competitive market for a commodity, as distinguished from legitimate market power over a single brand. *Id. at 393*. The Court emphasized in *dicta* that "the power that, let us say, automobile or soft drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly." *Id*. With respect to the Section 2 claims in Count III, therefore, the defendants' motions to dismiss are *granted*.

Parallel Conscious Behavior

Count IV involves the same core facts as the prior counts, but asserts violations of Sections 1, 2, and 3 arising from the two vertical arrangements, as well as the horizontal price-fixing arrangement between the bottlers. As with the prior counts, the bottlers are essentially charged with price fixing and prevention of transshipment, while the alleged liability of the manufacturers stems from conduct associated with the enforcement of vertical territorial restraints. Here, however, plaintiff does not plead a conspiracy between **[**18]** defendants but rather "parallel conscious behavior" which resulted in the creation of an oligopoly in the soft drink market. This count further alleges that the conduct creating the oligopoly rose to the level of concerted action, which damaged Sun Dun and competition in the market generally.

HN14[] The Court agrees with plaintiff's contention that parallel concerted action may support a finding of a combination or conspiracy in violation of Section 1. *See* United States v. General Motors Corp., 384 U.S. 127, 142-43, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966) (explicit agreement not required for Section 1 conspiracy when defendants acted neither separately nor independently). General Cinema cites Universal Lite Distributors, Inc. v. Northwest Industries, Inc., 452 F. Supp. 1206, 1217 (D. Md. 1978), *aff'd in part and rev'd in part*, 602 F.2d 1173 (4th Cir. 1979), for the proposition that "conscious parallelism does not *establish* horizontal price fixing." *Id*. (emphasis added). That case does not compel dismissal here. In *Universal*, after extensive discovery, the plaintiffs had failed to produce any evidence of overt collusion, and summary judgment was granted. Here, plaintiff has alleged facts pertaining **[**19]** to overt collusion which, viewed in the light most favorable to it, are sufficient to overcome a motion to dismiss on these grounds.

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[7] **HN12**[] As with Section 1 of the Sherman Act, Section 2 regulates interstate commerce and was enacted pursuant to Congress' power under the Commerce Clause. *See supra* note 2. On its face, Section 2 does not purport to regulate commerce in the District of Columbia, as does Section 3. Nevertheless, because all four defendants are incorporated and do business outside of the District of Columbia, the Court will assume, for purposes of ruling on these motions, that at least some of the alleged monopolization activity by the defendants was interstate in nature, and therefore would fall within Section 2. Because the Section 2 claims fail for the reasons set forth *infra*, the Court need not decide whether the statute would govern monopolization which occurred between states and the District of Columbia.

Because the facts alleged in Counts I and II parallel those alleged in Count IV, with the exception of the element of express conspiracy, the Court finds the claims under *Sections 1* and *3* sufficient to survive a 12(b)(6) motion. Also, because, for purposes of this motion, it must be assumed **[*390]** that the Soft Drink Interbrand Competition Act does not apply, it is unnecessary to rule on plaintiff's contention in this Count that *15 U.S.C. § 3502 (1982)* deprives defendants of the Act's protection.

The Horizontal Monopoly Claims

Sun Dun's claim that the allegations in Count IV establish violations of *Section 2* must be *dismissed*. First, no *Section 2* claim can be stated with respect to the vertical arrangements as alleged in this case, for the reasons discussed in connection with Count III. Second, there is no allegation of any horizontal arrangement between the two manufacturers at all. [8] The only possible *Section 2* claim remaining in Count IV, therefore, must be based on the horizontal arrangements between General Cinema and Mid-Atlantic.

[20]** In Count IV, Sun Dun alleges an oligopoly in violation of *Section 2*, and in Count VI it redepicts this state of affairs by alleging that "together they [General Cinema and Mid-Atlantic] monopolize the market." Amended Complaint, para. 80. Count V contains related allegations of a conspiracy to monopolize. The Amended Complaint does not specifically invoke the *Section 2* prohibition against *attempted* monopolization. Each of these Counts alleges facts amounting to oligopoly and then simply applies a monopoly label to those facts in an effort to state a *Section 2* claim. Oligopoly can, in some cases, violate *Sections 1* and/or *3* of the Sherman Act, but *competitors*, by conspiring to maintain or create an oligopoly, do not run afoul of the *Section 2* prohibitions against monopoly.

HN15[] The Supreme Court set out the elements of a *Section 2* claim of actual monopolization in *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. They are: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." **[**21]** *Id*. Plaintiff has sufficiently alleged facts under the second element to support its claim that some market power was willfully, as opposed to accidentally, acquired, but its conclusory allegations to the effect that defendants as a group possessed monopoly power or dominant market power do not meet the requirements of the first element. Nowhere does plaintiff allege the requisite market power on the part of any *individual* defendant.

The court held in *Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F. Supp. 225 (S.D.N.Y. 1982)*, that ***HN16***[] an attempt to allege the necessary market power by aggregating the market power of several defendants is mere tautology. *Id. at 228*. Allegations that a group of defendants together possess dominant market power may state a *Section 1* claim of oligopoly, but as the court held in *Consolidated*, ***HN17***[] "an oligopoly, or shared monopoly, does not in itself violate *Section 2* of the Sherman Act. Rather, in order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a particular defendant." *Id. at 228-29*. In *American Telephone & Telegraph Co. v. **[**22]** Delta Communications Corp., 408 F. Supp. 1075, 1106 (S.D. Miss. 1976)*, *aff'd per curiam*, *579 F.2d 972 (5th Cir. 1978)*, *cert. denied*, *444 U.S. 926, 100 S. Ct. 265, 62 L. Ed. 2d 182 (1979)*, the court explained the dangers of such a rule: "To hold that an oligopoly violates *Section 2* amends the Act to subject to antitrust regulation businesses which lack the *Section 2* required market control and the *Section 1* conspiracy." *See also* *Crimpers Promotions, Inc. v. Home Box Office, Inc., 554 F. Supp. 838, 841 n. 2 (S.D.N.Y. 1982)*, *aff'd*, *724 F.2d 290 (2d Cir. 1983)*, *cert. denied*, *467 U.S. 1252, 82 L. Ed. 2d 841, 104 S. Ct. 3536 (1984)* ("To the extent that plaintiff is alleging that defendants as a **[*391]** group attempted to or have monopolized the cable industry, this is a claim of oligopoly, and is not cognizable under *Section 2* of the Sherman Act."). This Court declines to interpret the Sherman Act in a way which would produce such a result. The actual monopolization claims are therefore *dismissed*.

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[8] *See supra* note 3. The only allegations in Count IV pertaining to conscious parallel behavior are directed toward the bottler defendants. The manufacturers are alleged to have participated in the maintenance of an illegal oligopoly only through their enforcement of the *vertical* restraints.

The claim that the bottlers engaged in a horizontal *conspiracy* to monopolize in violation of *Section 2* is contained in Count V, and it can also be found in a broad reading of Count IV. The question whether two completely separate entities in **[**23]** competition with one another are capable of conspiring to monopolize has been the subject of theoretical debate. *See* 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 841 (1978). [9] It does not appear, however, that any federal court has specifically ruled on this issue.

In *H.L. Hayden Co. v. Siemens Medical Systems, Inc., 672 F. Supp. 724 (S.D.N.Y. 1987)*, *aff'd*, *879 F.2d 1005 (2d Cir. 1989)*, the court noted its "considerable discomfort" with the "seemingly antithetical" idea that two competitors could conspire to monopolize, but did not directly rule on the question. *Id. at 741-42*. In *American Tobacco Co. v. United States,* ***[**24]*** *328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*, the Court affirmed a conviction of horizontal competitors for conspiracy to monopolize, but the issue whether *competitors* were capable of conspiring to monopolize was neither presented nor decided. The Court limited its review to the narrow question "whether actual exclusion of competitors is necessary to the crime of monopolization under *Section 2* of the Sherman Act." *Id. at 784*. [10]

An examination of the history of the Sherman Act reveals that Congress' concept **[**25]** of "monopoly" did not include "shared monopolies" or "oligopolies" at all, but rather the complete domination of a market by a *single* economic entity. [11] For example, Senator Hoar, relating to the Senate the understanding of the committee, stated the definition of monopoly as "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." 21 Cong. Rec. 3152 (1890). Senator Edmunds, also reporting on the deliberations of the committee, stated that the subject "was not lightly considered by the committee," and endorsed a dictionary definition to the effect that monopoly exists when one "obtains by any means the *exclusive* right [of trading]." *Id*. (emphasis added). *See also Mobil Oil Corp. v. Blanton, 471 U.S. 1007, 1008, 85 L. Ed. 2d 166, 105 S. Ct. 1874 (1985)* (White, J., dissenting from denial of certiorari) ("*Section 1* proscribes concerted action . . . *Section 2* regulates unilateral conduct.").

[26]** ***HN18***[]

The idea that a monopoly is composed of a single economic entity is also reflected in the requirement in an actual monopolization claim that the requisite market power be held by a single defendant. This idea in no way precludes the possibility of a group of firms conspiring to monopolize, if the aim of the conspiracy is to form a single **[*392]** entity to possess the illegal market power. When, however, two or more competitors conspire to create a market environment in which competition and market entry is improperly restricted, but in which market power continues to be shared among these otherwise unrelated entities, this Court holds that there is no conspiracy to monopolize claim stated under *Section 2*, and the claim must therefore be *dismissed*.

In Count V, Sun Dun alleges that all four defendants conspired to monopolize the relevant market for soft drinks as defined in the preceding counts. While it clearly asserts that each defendant "conspired," the Amended Complaint is

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[9] Indeed, the whole issue of the applicability of Sherman Act *§ 2* to so-called "shared monopolies" is a matter debated among the treatise writers. *Compare* 3 P. Areeda & D. Turner, *supra*, paras. 842-862 (arguing for regulation of oligopoly under *§ 2*) *with* 2 E. Kintner, *Federal* ***Antitrust Law*** § 12.1 (1980) (actual monopolization can be accomplished only by a single firm).

[10] Conversely, in its recent decision in *Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 713 F. Supp. 937*, slip op. at 18-19, (4th Cir. 1990), the Fourth Circuit affirmed the granting of defendants' motion for summary judgment on a *Section 2* claim, based on an alleged conspiracy between competitors to monopolize. The appellate court's decision, however, rested on the absence of evidence of a conspiracy; the opinion did not address the issue of whether competitors could ever conspire to monopolize in violation of *Section 2*.

[11] Horizontal conspiracies among competitors have not been contemplated as candidates for monopoly regulation in subsequent legislation either. The SDICA, for example, exempts from protection the private enforcement of vertical restrictions by means of price-fixing agreements, horizontal restraints of trade, or group boycotts. *15 U.S.C. § 3502 (1982)*. Each of these means of enforcement violates *§ 1* of the Sherman Act. Were conspiracy to monopolize among competitors possible, we would be left with the anomalous result that horizontal conspiracy to monopolize might be a *protected* means of enforcement of vertical restraints.

totally ambiguous regarding the question of which defendants conspired with which other(s). As discussed above, Sun Dun's memorandum in opposition to the motions to dismiss makes clear that it does not allege any **[**27]** conspiracy between the two manufacturers. [12] If no high-level horizontal conspiracy is alleged, it is not possible that all four defendants were joined in one comprehensive conspiracy. Thus, in order to give effect to the allegation that Coca-Cola and PepsiCo were conspirators, at least two vertical conspiracies must be inferred. The possibility of an additional claim of a low-level horizontal conspiracy between the two bottlers fails for the reasons discussed above.

If Count V is viewed as alleging twin vertical conspiracies to monopolize involving each manufacturer and its bottler, it must also be *dismissed*. The relevant market over which a monopoly exists cannot be defined as narrowly as a single brand. Indeed, plaintiff does not purport to define the relevant market as containing only the products of a single manufacturer, but rather as the more general market for soft drinks dispensed through vending machines. It is impossible for either manufacturer to conspire with its bottler **[**28]** to monopolize this market unless the conspiracy has as its *purpose* the elimination not only of other full-service vendors such as Sun Dun, but also of other soft drink brands, from this market. There are no facts alleged remotely suggesting such an objective. Further, it appears fatally inconsistent to assert that General Cinema and Mid-Atlantic each independently engaged in conspiracies to vertically monopolize (to the exclusion of one another) and at the same time conspired *with* one another to monopolize horizontally.

Essential Facilities

In Count VI, Sun Dun alleges a conspiracy to monopolize between General Cinema and Mid-Atlantic, claiming that defendants violated *Sections 2* and *3* by denying it access to "essential facilities" of its business, namely cans of Coca Cola and Pepsi-Cola products.

HN19[] The so-called "essential facilities" doctrine does not create a new species of antitrust violation. It simply addresses the narrow situation in which a firm gains monopoly power by controlling and refusing to deal in an essential facility at one stage of production, thus extending its monopoly to other stages of production, and to other markets. *MCI Communications Corp. v. American* ***[**29]*** *Telephone & Telegraph Co., 708 F.2d 1081, 1132* (7th Cir.), *cert. denied*, *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*. The elements of liability under the doctrine are: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *Id. at 1132-33*. [13] Failure to plead facts supporting any one of these elements is sufficient to support dismissal. Due to the **[*393]** somewhat novel nature of the essential facilities claim here, however, the Court will discuss the deficiencies in the allegations in turn.

[30]** In support of the first element, Sun Dun alleges that "together, they [General Cinema and Mid-Atlantic] monopolize the market." Amended Complaint, para. 80. Because, as discussed above, competitors in the same market are not capable of monopolizing that market, Sun Dun is no more able to state a *Section 2* claim under the essential facilities doctrine than it was in the prior counts. Sun Dun argues, however, that cases like *Beverage Management, 653 F. Supp. at 1156*, establish the proposition that control by a group of businesses does not defeat liability under the doctrine. While it is certainly true that an essential facility need not be controlled by a single firm, [14] it does not follow that competitors, each exercising control over *separate products*, meet the requirements of the

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[12] *See supra* notes 3 and 8.

[13] As is suggested by these elements, ***HN20***[] the essential facilities doctrine relates most directly to a claim of monopolization under *Section 2* of the Sherman Act. *See* *Hendricks Music Co. v. Steinway, Inc., 689 F. Supp. 1501, 1509 (N.D. Ill. 1988)*. Nevertheless, some courts have applied the doctrine to claims under *Sections 1* and *3* as well. *See, e.g., Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992-93 (D.C. Cir. 1977)*, *cert. denied*, ***436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978)***; *Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144, 1156 (S.D. Ohio 1986)*. Because, as discussed *infra*, Sun Dun has otherwise failed to state a claim under the essential facilities doctrine, the Court need not decide the scope of the doctrine's application.

first element. *See* *Flip Side Productions, Inc. v. Jam Productions, Ltd., 843 F.2d 1024, 1034* (7th Cir.), *cert. denied*, *488 U.S. 909, 109 S. Ct. 261, 102 L. Ed. 2d 249 (1988)*. ***HN21***[] Although the essential facilities doctrine applies to facilities which enable the monopolist to *extend* monopoly power from one stage of production to another, it does not apply to *end products* in markets containing several competing brands. **[**31]** A single brand cannot function as a bottleneck over such a market. By withholding access to a brand, therefore, a firm is not able to extend monopoly power through subsequent stages of production.

Sun Dun alleges that it is "unable to duplicate the essential facility [cans of Coca-Cola and Pepsi] since it is not a franchised, licensed bottler and must buy pre-mixed cans of Coca-Cola and Pepsi-Cola to stock its soft drink vending machines." Amended Complaint, para. 82. Sun Dun also alleges, however, that its machines sell both soft drinks and fruit juices, and that Coca-Cola and Pepsi-Cola products combined account for only 50% of its business. Amended Complaint para. 16. It is the opinion of this Court **[**32]** that plaintiff also fails to allege sufficient facts to the effect that it is practically unable to duplicate the "facility."

HN23[] The requirement that a plaintiff not be able to practically or reasonably duplicate the purported facility is not met simply by an allegation that the plaintiff is unable to participate in the manufacture and distribution of whatever brand of a product it chooses. Assuming, *arguendo*, that the brand name products can be "essential facilities," plaintiff cannot state a claim as long as it is able to find reasonable substitutes for these products. *See* *Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority, 715 F. Supp. 1290, 1300* (D.N.J.), *aff'd without op*. *893 F.2d 1331 (2d Cir. 1989)* (arena not likely to be an essential facility unless there are no other facilities which could enable some form of competition); P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 736.2b (Supp. 1988) (essential facility must be vital, not merely helpful, to the plaintiff's competitive viability). Given the allegation that plaintiff is able to find other products with which to stock its machines, the fact that it is unable to "duplicate" cans of certain soft **[**33]** drinks is insufficient to meet the requirements of the second element. After all, people still do drink RC Cola. [15]

This Court is also of the opinion that ***HN24***[] particular brand names within a product market are not the appropriate subject matter of an essential facilities claim. Generally, the doctrine has been applied to situations in which *physical conditions* prohibit duplication of the facility. *Hendricks Music Co., 689 F. Supp. at 1509*. *See, e.g.,* *Otter Tail Power Co. v. United States, 410 U.S. 366, 375, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)* (electric power lines); *Hecht, 570 F.2d at 993* (football stadium); **[*394]** *MCI Communications Corp., 708 F.2d at 1133* (telephone signal distribution facilities); *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc., 704 F. Supp. 1309, 1322 (D. Md. 1989)* (railroad tracks). No support emerges from the cases for the proposition that the legal impossibility of duplicating a trademarked product should be sufficient to satisfy **[**34]** this requirement of the doctrine. Indeed, it is not at all impossible for Sun Dun to manufacture and distribute its own soft drink products, as do many supermarket chains. It is merely impossible for Sun Dun to duplicate them in such a way as to capitalize on the brand recognition and goodwill of another firm's product. The antitrust laws protect competition; they do not compel a manufacturer to share the value of the goodwill acquired through competition. Defendants' motions to dismiss Count VI of the Amended Complaint are therefore *granted*.

The Pendent Claims

The Exercise of Pendent Jurisdiction

The Court must next consider whether to exercise pendent jurisdiction over the claims set forth by Sun Dun which arise under the D.C. Code and tort law. *Cf*. *28 U.S.C. § 1366 (1982)* ***HN25***[] ("laws applicable exclusively to the District of Columbia" are not federal laws, though enacted by Congress); *id*. *§ 1332(d)* (District of Columbia is a

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[14] ***HN22***[] Even firms that are nominally competitors, if they act as a single economic entity with respect to the facility (e.g., by sharing a single facility), may be subject to liability under the doctrine. *See* *Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 822* (9th Cir.), *cert. denied*, ***456 U.S. 1011, 73 L. Ed. 2d 1308, 102 S. Ct. 2308 (1982)***.

[15] "RC Cola" is a registered trademark of the Royal Crown Cola Company.

"state" for purposes of diversity jurisdiction). The decision to exercise pendent jurisdiction lies solely within this Court's discretion. *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*; *ARC America, 109 S. Ct. at 1666*. Here, Sun **[**35]** Dun's federal claims and its claims based on tort and the D.C. Code "derive from a common nucleus of operative fact." *Gibbs, 383 U.S. at 725*. Moreover, for the reasons set forth above, the federal claims have "substance sufficient to confer subject matter jurisdiction on the court." *Id*. Finally, the Court believes that "considerations of judicial economy, convenience and fairness to [the] litigants," *id. at 726*, make it appropriate to exercise pendent jurisdiction over Sun Dun's common-law and statutory claims which do not rest on federal law. As discussed below, the D.C. Code provisions are *in pari materia* with the corresponding provisions of the Sherman Act; therefore, it is an economical use of judicial resources to resolve all claims in this proceeding. In addition, because the pendent claims might be time-barred were Sun Dun to seek to file suit in the District of Columbia or in a Maryland state court, it would be unfair for this Court to decline to exercise jurisdiction over these claims. *See* *Hector v. Weglein, 558 F. Supp. 194, 207 (D. Md. 1982)*; 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3567.1, at 128-32 (1984).

Claims Based **[**36]** on the D.C. Code

In each of the counts of the Amended Complaint alleging a federal antitrust violation, Sun Dun has also invoked the parallel provisions of the D.C. Code. In considering these claims, it is necessary to address the background of the D.C. Code, the substantive interpretation of the pertinent statutes, and the applicability of the D.C. Code to the allegations set forth in the Amended Complaint.

HN26[] The District of Columbia's antitrust laws are set forth at *D.C. Code Ann. §§ 28-4501* to -4518 (1981). These statutes were adopted in 1980 by the Council of the District of Columbia, pursuant to the legislative authority granted to it by Congress in the District of Columbia Self Government and Governmental Reorganization Act of 1973 (the "Home Rule Act"), 87 Stat. 774, Pub. L. 93-198 (1973) (codified at Title 1 of the D.C. Code). [16] That power

> **[*395]** extends to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.

D.C. Code Ann. § 1-204 (1981). **[**37]** ***HN27***[] Thus, even though the District of Columbia is not a state, Congress has specifically determined that the legislative enactments of the D.C. Council are subject to the same constitutional constraints as are those of the states. Specifically, acts passed by the D.C. Council are subject to analysis under the federal preemption doctrine and the *Commerce Clause*. *See, e.g.,* *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp., 206 U.S. App. D.C. 122, 642 F.2d 527, 534 n. 2 (D.C. Cir. 1980)* ("Surely the preemption doctrine effects [*sic*] District of Columbia legislation no less than state enactments."); *Quality Brands, Inc. v. Barry, 715 F. Supp. 1138, 1139 (D.D.C. 1989)*, *aff'd*, *284 U.S. App. D.C. 78, 901 F.2d 1130 (D.C. Cir. 1990)* ("[A] conventional *Commerce Clause* analysis does apply to laws passed by the D.C. government."). *Cf. John R. Thompson Co*., 346 U.S. at 107 (suggesting, in a case preceding the Home Rule Act, that District of Columbia legislation would be subject to *Commerce Clause* analysis). This is true even though the Council's enactments are subject to congressional review. *See, e.g.,* *Doe v. Stephens, 271 U.S. App. D.C. 230, 851 F.2d 1457, 1465 (D.C. Cir. 1988)* (finding that District of Columbia Mental Health Information **[**38]** Act, which was enacted after congressional review, was preempted by preexisting federal statute); *Goudreau v. Standard Federal*

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[16] As discussed above, *see supra* note 2, ***HN28***[] the Constitution grants Congress the power to legislate for the District of Columbia. *U.S. Const. art. 1, § 8, cl. 17*. Through the Home Rule Act, Congress has ceded some of that authority to the D.C. Council. *See* D.C. Code §§ 1-206, -233 (1981) (limits on Council's legislative authority). The D.C. Code provisions at issue here were enacted by the Council, subject to the congressional oversight provided for in § 1-233(c), and "subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution." *Id*. § 1-201(a). The Supreme Court long ago determined that "there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power." *District of Columbia v. John R. Thompson Co., 346 U.S. 100, 109, 97 L. Ed. 1480, 73 S. Ct. 1007 (1953)*.

Saving & Loan Association, 511 A.2d 386, 391-92 (D.C. 1986) (holding that District of Columbia statute, enacted after congressional review, was preempted by federal banking law). *Cf.* *Gary v. United States, 499 A.2d 815, 829 (D.C. 1985)*, *cert. denied*, *477 U.S. 906, 91 L. Ed. 2d 568, 106 S. Ct. 3279 (1986)* (examining legislative history of Home Rule Act and concluding that Congress did not consider oversight provisions central to the Act).

[39]** The substantive provisions of the D.C. Code upon which Sun Dun relies mirror the corresponding provisions of the Sherman Act. In fact, *Section 28-4515* declares: "It is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes." *D.C. Code Ann. § 28-4515* (1981). *Cf.* *Neugebauer v. A.S. Abell Co., 474 F. Supp. 1053, 1071 (D. Md. 1979)* (success or failure of state antitrust claims depended on that of federal claims, where state antitrust laws were patterned on federal statutes).

Specifically, *Section 28-4502 of the D.C. Code* ***HN29***[] is substantively the same as the first sentence of *Section 3* of the Sherman Act, and is therefore akin to the first sentence of *Section 1* of the federal law. *Section 28-4503* prohibits the same conduct as does *Section 2* of the Sherman Act. Thus, the discussion above concerning Sun Dun's claims under the Sherman Act pertains equally to Sun Dun's claims under the D.C. Code, and, thus, Sun Dun's claims brought under *Section 28-4502* survive the pending motions, while its claims under *Section 28-4503* must be *dismissed*.

[40]** The remaining sections of the D.C. Code which Sun Dun has invoked are remedial in nature. *Section 28-4508* ***HN30***[] provides that "any person who is injured" may seek monetary and/or injunctive relief. As with Section 4 of the Clayton Act, *15 U.S.C. § 15 (1982)*, treble damages are available. *D.C. Code Ann. § 28-4508* (1981).

Section 28-4509 defines "injured" person to include "any indirect purchaser in the chain of manufacture, production, or distribution of goods or services." *Id*. § 28-4509(a). Sun Dun has alleged in its Amended Complaint that it made both direct and indirect purchases from the defendants. As noted in the discussion above concerning Sun Dun's standing to sue under **[*396]** federal law, Section 4 of the Clayton Act does not permit claims for damages by indirect purchasers. *See* *Illinois Brick, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061*. Although the defendants argued in their motions to dismiss that the *Illinois Brick* doctrine mandated that the D.C. Code's cause of action for indirect purchasers be preempted by federal law, the Supreme Court has since answered this question squarely to the contrary in *ARC America, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86*. In that case, several states brought class actions against various **[**41]** cement manufacturers, alleging a nationwide conspiracy to fix prices. The plaintiffs invoked both federal and state antitrust statutes; the state laws provided a cause of action for indirect purchasers. The Court pointed out that ***HN31***[] "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies," and that consequently "federal antitrust laws do not preempt state law." *Id. at 1665*. The Court then determined that "nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws." *Id. at 1666*. Consequently, Sun Dun's claims for damages as an indirect purchaser under the D.C. Code are not preempted by federal antitrust laws. Plaintiff's claims for injunctive relief survive as well, not only because the Supreme Court has held that state antitrust laws are not preempted, but also because, as noted above in the discussion of standing, federal law itself permits injunctive relief for indirect purchasers.

The final issue is whether the D.C. Code can be applied to plaintiff's claims. The defendants maintain that Sun Dun has not alleged a sufficient **[**42]** nexus to the District of Columbia for its law to apply. In fact, the defendants assert that Sun Dun has invoked the D.C. Code only because, unlike federal and Maryland antitrust statutes, it provides a remedy in damages for indirect purchasers.

Sun Dun's Amended Complaint contains few specific references to the District of Columbia itself; most of the allegations refer to the "Washington, D.C. metropolitan area," which by plaintiff's own definition includes Maryland and Virginia. Nevertheless, Sun Dun has asserted that it does much of its business in the District of Columbia, and thus it is possible that plaintiff has suffered harm there. Maryland applies the doctrine of *lex loci delecti.* *Hauch v. Connor, 295 Md. 120, 123-25, 453 A.2d 1207, 1209 (1983)*; *White v. King, 244 Md. 348, 352, 223 A.2d 763, 765*

(1966). Consequently, this Court sitting in Maryland, could apply the law of the District of Columbia to the alleged harm suffered there by plaintiff. Although the allegations in the Amended Complaint are vague in terms of the *situs* of harm, the Court believes that they are sufficient to withstand defendants' motions to dismiss the claims based on the D.C. Code.

Nevertheless, **[**43]** even if, after discovery, it becomes apparent that the alleged harm suffered by Sun Dun bears a sufficient nexus to the District of Columbia to warrant application of that jurisdiction's law, a second and more significant bar may prohibit Sun Dun from recovery under the D.C. Code. As discussed above, the *Commerce Clause of the United States Constitution* applies to the laws of the District of Columbia. It is well established that ***HN32***[] "the *Commerce Clause* . . . permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited." *Edgar v. MITE Corp., 457 U.S. 624, 640, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982)* (emphasis in original). *See also* *City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978)*; *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)*. ***HN33***[] The D.C. Code provisions at issue purport to regulate antitrust activity "throughout the District of Columbia," *see* *D.C. Code Ann. § 28-4501* (1981), and are therefore constitutional on their face. Nevertheless, it clearly would be unconstitutional under the *Commerce Clause* to apply the D.C. Code to claims which, though bearing some connection to the District of Columbia, are in fact interstate in nature and are **[**44]** thus regulated by federal antitrust provisions. *See* *Flood v. Kuhn, 407 U.S. 258, 284-85, **[*397]** 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972)* (interstate transactions are governed by federal, not state, antitrust laws); *Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403, 413 (5th Cir. 1962)* (because defendant's activities in Texas were "occasional and isolated and that the contract in question was interstate as to execution and performance," federal rather than state antitrust laws applied); *In re Wiring Device Antitrust Litigation, 498 F. Supp. 79, 85 (E.D.N.Y. 1980)* (state antitrust laws could not apply because defendants' activities were interstate in nature).

Thus, the only claims of Sun Dun to which the D.C. Code might possibly apply are those for direct and indirect purchases within the District of Columbia which do not involve an interstate link, and which thus do not fall within the scope of federal ***antitrust law***. Because all defendants, as well as plaintiff, are incorporated and have their principal places of business outside of the District of Columbia, it is uncertain whether Sun Dun in fact has any viable claims under the D.C. Code. *See id*. This determination, however, must await discovery and **[**45]** any motions for summary judgment which defendants choose to file.

The Common-Law Tort Claims

Sun Dun has also set forth claims for unfair competition and for tortious interference with business relations. In their motions to dismiss, the defendants have assumed that Maryland law governs these claims, and Sun Dun has not disputed the applicability of Maryland law. Thus, although the *situs* of the alleged harm is not specified in the Amended Complaint, for the purpose of deciding the pending motions, the Court will consider these claims as arising under Maryland law. [17]

Count VII of the Amended Complaint alleges that all four defendants unfairly competed with plaintiff by curtailing Sun Dun's supply of cans of Coke and Pepsi and by disparaging Sun Dun to its customers. ***HN34***[] Under Maryland law, a claim for unfair competition can encompass "damaging or jeopardizing another's business by fraud, deceit, trickery or unfair methods of any sort. . . . What constitutes unfair competition in a given case is governed by its own particular facts and circumstances." *Baltimore Bedding Corp. v. Moses, 182 Md. 229, 237, 34 A.2d 338, 59 U.S.P.Q. (BNA) 405 (1943)*. *See also* *Cavalier Mobile Homes, Inc. v. Liberty Homes, **[**46]** Inc., 53 Md. App. 379, 389, 454 A.2d 367, 374 (1983)* (quoting *Baltimore Bedding*). Sun Dun has alleged the "unfair methods" necessary

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[17] The Court finds it interesting that Sun Dun relies on Maryland common law, but District of Columbia statutory law, for relief from various harms arising from the same conduct by the defendants. As noted above, the defendants maintain that Sun Dun has invoked the D.C. Code only because it provides relief to an indirect purchaser, which is unavailable under federal and Maryland antitrust statutes. Although Sun Dun might have suffered separate injuries in Maryland and the District of Columbia, which would allow the law of each jurisdiction to apply to the respective harms, this apparent discrepancy in Sun Dun's pleading raises further questions about whether the D.C. Code can in fact apply to any of plaintiff's alleged injuries.

to set forth a claim for unfair competition. Moreover, because a violation of antitrust laws could itself constitute unfair competition, *see id*., this count must stand so long as Sun Dun has viable antitrust claims. Consequently, defendants' motions to dismiss Count VII are *denied*.

[47]** Count VIII sets forth a claim for tortious interference with business relations against defendants PepsiCo and General Cinema, alleging that they disparaged Sun Dun to its customers and threatened suppliers who dealt with Sun Dun. ***HN35***[] Under Maryland law, this tort consists of four elements: "'(1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.'" *Willner v. Silverman, 109 Md. 341, 355, 71 A. 962, 964 (1909)* (quoting *Walker v. Cronin, 107 Mass. 562 (1881))*, *quoted in* *Natural Design, Inc. v. Rouse Co., 302 Md. 47, 71, 485 A.2d 663, 675 (1984)*. Plaintiff's allegations **[*398]** in its Amended Complaint sufficiently state the elements of the tort to survive the pending motions to dismiss.

Moreover, as Chief Judge Harvey of this Court has noted, the third element of the test relating to malice "necessarily hinges on whether defendants' actions constitute a violation of federal or state antitrust laws." *Purity Products, Inc. v. Tropicana* ***[**48]*** *Products, Inc., 702 F. Supp. 564, 575 (D. Md. 1988)*, *aff'd*, *887 F.2d 1081 (4th Cir. 1989)*. For this reason, "a summary disposition in favor of the defendants [is] appropriate only in the absence of a demonstrable antitrust violation. . . . [Plaintiff's] business tort action under Maryland law stands or falls along with its federal antitrust claims." *Faulkner Advertising Associates, Inc. v. Nissan Motor Corp. in U.S.A., 905 F.2d 769, 775 (4th Cir. 1990)* (quoting *Purity Products, 702 F. Supp. at 575*, with approval and remanding state claim for consideration with federal antitrust claim). Because the Court has found that some of plaintiff's antitrust claims are sufficient to withstand defendants' motions to dismiss, the claim for tortious interference likewise must remain. Defendants' motions to dismiss Count VIII are therefore *denied*.

CONCLUSION

To summarize the Court's rulings, plaintiff Sun Dun has standing as a direct purchaser to seek damages under Section 4 of the Clayton Act for any harm suffered in that capacity as a result of defendants' alleged violations of federal ***antitrust law***. In addition, plaintiff has standing as both a direct and **[**49]** indirect purchaser to seek injunctive relief under Section 16 of the Clayton Act. The D.C. Code, under which plaintiff has set forth pendent claims, affords Sun Dun standing as both a direct and indirect purchaser for damages and injunctive relief.

Defendants' motions to dismiss plaintiff's claims under *Section 2* of the Sherman Act are *granted*, as are the motions to dismiss claims under *Section 3* which rely on the essential facilities doctrine. In all other respects, defendants' motions to dismiss plaintiff's claims under *Sections 1* and *3* of the Sherman Act are *denied*.

The Court, in its discretion, will exercise pendent jurisdiction over plaintiff's claims which rest on the D.C. Code or on Maryland tort law. Because an assessment of defendants' liability for unfair competition and tortious interference with business relations depends upon the resolution of the antitrust claims, defendants' motions to dismiss Counts VII and VIII are *denied*.

Defendants' motions to dismiss the claims brought under the District of Columbia's law are *granted* with respect to the claims arising under *D.C. Code Ann. § 28-4503* (1981), for the reasons stated in dismissing plaintiff's claims based **[**50]** on *Section 2* of the Sherman Act. In all other respects, defendants' motions to dismiss the D.C. Code claims are *denied*. The Court cautions, however, that the D.C. Code can only apply to those of plaintiff's claims which involve a sufficient nexus to the District of Columbia to warrant the application of that jurisdiction's law under the doctrine of *lex loci delecti*, and which are not so interstate in nature as to offend the *Commerce Clause*, were the D.C. Code to be applied to them.

An Order will be entered separately which embodies the above rulings.

ORDER

For the reasons set forth in the foregoing Memorandum of even date, IT IS, this 25th day of June, 1990, ORDERED:

1. That the defendants' motions to dismiss claims set forth in Counts III, IV, V, and VI of plaintiff's Amended Complaint which arise under *Section 2* of the Sherman Act BE, and the same hereby ARE, GRANTED;

2. That the defendants' motions to dismiss claims set forth in Count VI of plaintiff's Amended Complaint which arise under *Section 3* of the Sherman Act and which rest upon the "essential facilities doctrine" BE, and the same hereby ARE, GRANTED;

3. That the defendants' motions to dismiss claims set forth **[**51]** in Counts III, IV, V, **[*399]** and VI of plaintiff's Amended Complaint which are based on pendent jurisdiction and arise under *D.C. Code Ann. § 28-4503* (1981) BE, and the same hereby ARE, GRANTED;

4. That in all other respects defendants' motions to dismiss federal and pendent claims set forth in Counts I, II, III, IV, VII and VIII of plaintiff's Amended Complaint BE, and the same hereby ARE, DENIED; and

5. That the Clerk of Court mail copies of this Order and the accompanying Memorandum to counsel for the parties.

Thompson v. Metropolitan Multi-List, Inc.

United States District Court for the Northern District of Georgia, Atlanta Division

June 28, 1990, Decided ; June 28, 1990, Filed

Civil Action No. 1:88-cv-2883-RLV

Reporter

1990 U.S. Dist. LEXIS 14487 *; 1990-2 Trade Cas. (CCH) P69,173

FLETCHER L. THOMPSON, d/b/a FLETCHER L. THOMPSON REALTY and EMPIRE REAL ESTATE BOARD, INC., Plaintiffs, v. METROPOLITAN MULTI-LIST, INC., d/b/a METRO LISTING SERVICE and DEKALB BOARD OF REALTORS, INC., Defendants

Core Terms

Metro, multiple listing service, realtors, membership, competitors, market power, monopolize, real estate broker, no evidence, summary judgment, duplicated, relevant market, tied product, defendants', conspiracy, brokers, economic interest, essential element, economic power, rule of reason, plaintiffs', associates, sales, insufficient evidence, geographic, privileges, antitrust, terms

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

Summary judgment should be used sparingly in complex antitrust litigation where motive and intent play leading roles. In addition, the plaintiff carries the burden of adducing significant probative evidence of the essential elements of the asserted claims and the existence of genuine issues of fact.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN2[] Per Se Rule & Rule of Reason, Per Se Violations

A particular restraint is considered a per se violation of § 1 of the Sherman Act when the restraint is "plainly anticompetitive" and lacking of "any redeeming virtue." A practice is plainly anticompetitive and lacking in any redeeming virtue when it denies consumers the opportunity to choose among alternative offers without offering the possibility of any efficiency-producing economic activities.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] Price Fixing & Restraints of Trade, Tying Arrangements

A tying arrangement is an arrangement in which a seller agrees to sell one product, the tying product, only on the condition that the buyer also purchase a second product, the tied product. There are four basic elements in a tying claim: (1) two separate products, the tying and the tied product; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market. Tying agreements are regarded as illegal per se because they deny competitors free access to the market for the tied product not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN4[] Price Fixing & Restraints of Trade, Tying Arrangements

An essential element of a tying claim is a finding that the defendants possess sufficient economic power to restrain free competition. The defendants possess such economic power if they have the ability to force a purchaser of multiple listing services to do something that he would not do in a competitive market and have some advantage whether legal, physical or economic, which is not shared by their competitors in the multiple listing service market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5[] Price Fixing & Restraints of Trade, Tying Arrangements

It is the plaintiffs' burden to demonstrate sufficient evidence from which a reasonable jury could find that the defendants possess the requisite market power, an essential element of the tying claim.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6[] Price Fixing & Restraints of Trade, Tying Arrangements

Unlike cases where the unique nature of the tying product gives one party an advantage over its competitors and thus creates a disincentive for competition, multiple listing services can and have been effectively duplicated.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN7[] Regulated Practices, Price Fixing & Restraints of Trade

The essential facilities doctrine provides that a monopolist's refusal to give competitors reasonable access to an essential facility is an illegal restraint of trade. Where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN8[] Regulated Practices, Price Fixing & Restraints of Trade

To establish liability under the essential facilities doctrine the plaintiffs must prove four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability, practically or reasonably, to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to the competitor. The plaintiffs must provide some evidence of each element in order to survive the defendants' motion for summary judgment.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN9[] Monopolies & Monopolization, Actual Monopolization

A business monopolizes in violation of antitrust laws if it deliberately follows a course of conduct through which it obtains or maintains power to control price or exclude competition in the relevant market.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] Per Se Rule Tests, Manifestly Anticompetitive Effects

A plaintiffs may prevail under the ***antitrust law*** by showing that the membership requirement in a multi-listing service, as it actually operates in the market, unreasonably restrains competition. This test, known as the "rule of reason," focuses analysis on the competitive significance of the challenged practice and requires courts to void any practice whose anticompetitive effects outweigh its contributions to competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The "rule of reason" test requires a showing that a multi-listing service has sufficient market power in the relevant market such that an exclusion from membership is not reasonably grounded in competitive needs produces competitive harm. Only if the multi-listing service possesses such market power does the inquiry turn to the issue of whether the membership requirement is justified by legitimate competitive needs and whether it is narrowly tailored to that end.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Real Property Law > Brokers > Fiduciary Responsibilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Evidence > Privileges > General Overview

HN12[] **Preservation of Relevant Evidence, Exclusion & Preservation by Prosecutors**

In determining whether a defendant has sufficient market power in the relevant market, the plaintiff need not demonstrate that the defendant has a monopoly in the market. Rather, the evidence need show only that exclusion from such privileges results in the denial of the opportunity to compete effectively on equal terms.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

HN13[] **Conspiracy to Monopolize, Elements**

A conspiracy to monopolize claim under *§ 2* of the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, requires proof of (1) a conspiracy; (2) a purpose to achieve monopoly power; and (3) a specific intent to injure the plaintiff and to monopolize. In addition, the plaintiff must submit proof of the relevant product and geographic markets.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Sherman Act, Scope**

Increasing sales and market share without other intent to monopolize is not forbidden under the Sherman Act.

Business & Corporate Compliance > ... > Public Health & Welfare Law > Housing & Public Buildings > Fair Housing

Civil Procedure > Trials > Evidence & Testimony > Depositions

Civil Rights Law > ... > Fair Housing Rights > Prohibited Conduct > Leasing & Sales

Civil Rights Law > ... > Contractual Relations & Housing > Fair Housing Rights > General Overview

HN15[] **Housing & Public Buildings, Fair Housing**

The unsupported allegation that black real estate brokers' memory of racism practiced by realtors discourages them from joining a board of realtors or multiple listing service is insufficient to support a Fair Housing Violation claim.

Judges: [*1] Robert L. Vining, Jr., United States District Judge.

Opinion by: VINING

Opinion

ORDER

This antitrust action is before the court on the parties' cross motions for summary judgment and the plaintiffs' motion to compel. [1] The plaintiffs, Fletcher Thompson Realty and Empire Real Estate Board ("Empire"), allege that Metropolitan Multi-List's ("Metro MLS") requirement that members of the multiple listing service also be members of a board of realtors violates *sections 1* and *2* of the Sherman Act, *15 U.S.C. § § 1*, *2*, the Fair Housing Act, *42 U.S.C. § 3604*, and *42 U.S.C. § 3606*.

Metro MLS is a real estate multiple listing service wholly owned by the co-defendant, DeKalb Board of Realtors ("DeKalb Board"). Metro MLS offers **[*2]** a shared information service through which its members advertise real property listings and offers of commission splits to assisting brokers. As a condition of membership in and access to its multiple listing services, Metro MLS requires real estate brokers to be members of a board of realtors. It is this membership requirement that the plaintiffs challenge.

Plaintiff Fletcher Thompson, a real estate broker, applied to participate in Metro MLS but was denied access to the service because he is not a member of his local board of realtors. He has never applied for a board of realtors membership. Plaintiff Empire is a professional organization predominantly made up of black real estate brokers and sales associates. Like a board of realtors, Empire has an arbitration process available for the resolution of disputes and a code of ethics. Together the parties argue that the requirement of membership in a board of realtors as a precondition to access to Metro MLS services restrains competition in the market for multiple listing services.

Because of the complexity of this action and the numerous arguments made, the court will consider the motions for summary judgment as they relate to each **[*3]** count of the amended complaint. In doing so, the court is mindful that *HN1*[] summary judgment should be used sparingly in complex antitrust litigation where motive and intent play leading roles, *Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486 (1962)*, but also recognizes that the plaintiffs carry the burden of adducing significant probative evidence of the essential elements of the asserted claims and the existence of genuine issues of fact.

COUNT I

[1] Based on the court's decision as to the defendants' Motion for Summary Judgment the plaintiffs' Motion for Partial Summary Judgment and Motion to Compel are rendered moot. Also pending is a Motion for Reconsideration of the court's previous denial of a motion to intervene; for the same reasons that motion also is now moot.

Count I of the amended complaint alleges that Metro MLS's membership requirement is a per se violation of *section 1* of the Sherman Act because it is an illegal tying arrangement. ***HN2***[] A particular restraint is considered per se illegal when the restraint is "plainly anticompetitive" and lacking of "any redeeming virtue." *See Broadcast Music, Inc. v. Columbia Broadcasting Co., 441 U.S. 1, 8, 99 S.Ct. 1551, 1556 (1979)*. A practice is plainly anticompetitive and lacking in any redeeming virtue when it denies consumers the opportunity to choose among alternative offers without offering the possibility of any efficiency-producing economic activities. *Id.*

HN3[] A tying arrangement is an arrangement in which a seller agrees to sell **[*4]** one product, the tying product, only on the condition that the buyer also purchase a second product, the tied product. *Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 12, 104 S.Ct. 1551, 1558 (1984)*. There are four basic elements in a tying claim: (1) two separate products, the tying and the tied product; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market. *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 711-12 (11th Cir. 1984)*; *Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321 (5th Cir 1974)*. Tying agreements are regarded as illegal per se because "they deny competitors free access to the market for the tied product not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. *Northern Pac. Ry. v. United States, 356 U.S. 1, 6, 78 S.Ct. 514, 518 (1958)*.

The plaintiffs allege that participation in Metro MLS, the tying product, can be attained only through the purchase of membership in a **[*5]** board of realtors, the tied product. Thus, the relevant product market is the market for multiple listing services, and the relevant geographic market is that portion of the metropolitan Atlanta area in which the defendants operate. *See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S.Ct. 623, 628 (1961)*.

HN4[] An essential element of a tying claim is a finding that the defendants possess sufficient economic power to restrain free competition. *Midwestern Waffles, 734 F.2d at 711-12*. The defendants possess such economic power if they have the ability to force a purchaser of multiple listing services to do something that he would not do in a competitive market and have some advantage - legal, physical or economic - not shared by their competitors in the multiple listing service market. *See United States Steel v. Fortner Enter., Inc., 429 U.S. 610, 620, 97 S.Ct. 861, 867 (1977)* (Fortner II); *Tic-X-Press v. Omni Promotions Co., 815 F.2d 1407, 1420 (11th Cir. 1987)*. The plaintiffs allege that the defendants' market power is evident in the fact that the bulk of broker assisted residential real estate business on the south side of Atlanta is conducted through Metro **[*6]** MLS. The plaintiffs further allege that the defendants have an economic advantage over would-be competitors in that Metro MLS's services cannot be effectively duplicated because of the substantial capital outlay required and the unlikelihood of penetrating the multiple listing service market.

HN5[] It is the plaintiffs' burden to demonstrate sufficient evidence from which a reasonable jury could find that the defendants possess the requisite market power, an essential element of the tying claim. The court finds, however, that the plaintiffs' evidence relating to the defendants' economic power is insufficient as a matter of law. The plaintiffs have produced no evidence of the defendants' ability to force brokers to purchase real estate board memberships other than the general allegations of one real estate broker who stated that "the bulk of broker-assisted residential real estate business on the south side of Atlanta, by any measure, is conducted through Metro MLS." Affidavit of Sid Venable at 7. The relevant geographic market is not limited to the south side of Atlanta but encompasses the area of effective competition within which the defendants operate, *see Tampa Electric Company,* ***[*7]*** *365 U.S. 320, 81 S.Ct. 623*, and there is no evidence in the record concerning the defendants' position in that market. *See Jefferson Parish Hosp., 466 U.S. at 26-27, 104 S.Ct. at 1566* (hospital with 30% share of patients in its market lacked sufficient economic power).

Moreover, there is a competitive multiple listing service, First Multiple Listing Service (FMLS), within the relevant market which does not require board of realtors membership. The plaintiffs have failed to produce any evidence that FMLS is not able to provide substantially the same services as Metro MLS within the relevant market.

Even assuming that the defendants possess the ability to force brokers to purchase board of realtors memberships, the plaintiffs have not demonstrated that the defendants have a cost advantage in operating a multiple listing service. In fact, the existence of FMLS, which operates within at least a portion of the same geographic market, proves that the services can be successfully duplicated and offered on competitive terms. That one real estate broker failed in his endeavor to start a competitive service does not dispute the fact that FMLS can provide substantially the same multiple **[*8]** listing services to its members. The plaintiffs have produced no evidence that FMLS is hindered in the operation of its business by an alleged economic advantage held by Metro MLS. ***HN6***[] Unlike cases where the unique nature of the tying product gives one party an advantage over its competitors and thus creates a disincentive for competition, *see* *Tic-X-Press, 815 F.2d 1407*, multiple listing services can and have been effectively duplicated. Furthermore, Empire's business decision not to provide its members multiple listing services is not evidence that the defendants, because they provide such services, have a cost advantage in providing these services.

The plaintiffs' tying claim fails on yet another ground. There is insufficient evidence in the record to support a finding that the defendants have an economic interest in the Atlanta Board or the membership fees collected by it. Because the plaintiffs' principal places of business are in Fulton County, Georgia, the specific tied product the plaintiffs must purchase is membership in the Atlanta Board of Realtors. The plaintiffs contend that Metro MLS possesses the necessary financial interest in the Atlanta Board because Metro MLS is a **[*9]** subsidiary of and has an interest in another realtor group, the DeKalb Board. The plaintiffs also imply that Metro MLS has a financial interest in all boards of realtors because they are financially intertwined through the payment of dues to the state and national realtor associations and the benefits conferred on Metro MLS through such associations' lobbying efforts.

The court finds these arguments unpersuasive. There is no evidence that Metro MLS receives any part of the membership fees paid to the Atlanta Board or has any other economic interest in the Atlanta Board. The fact that such a relationship may exist between Metro MLS as a wholly owned subsidiary of the DeKalb Board has no effect on the court's determination of whether Metro MLS has a financial interest in the Atlanta Board. Nor do the efforts of the state and national associations to monitor and improve the industry as a whole create an economic interest in all boards of realtors. At most, these efforts provide incidental benefits to Metro MLS. Similarly, although the Atlanta Board provides arbitration services to resolve disputes among its members and, thus, Metro MLS need not provide these services, the court finds **[*10]** that this is insufficient to establish the requisite financial interest in the Atlanta Board. The performance of some services, without charge, does not of itself create an economic interest in the Atlanta Board. *See generally* *Pullen v. Bowen, 820 F.2d 105 (4th Cir. 1987)* (radiologists' reading of x-rays without charge to hospital not evidence of economic interest).

Because the court finds insufficient evidence of the defendants' economic power in the relevant market and no evidence that Metro MLS has an economic interest in the Atlanta Board, the source of the tied product, the plaintiffs have failed to establish an essential element of their illegal tying claim. Therefore, summary judgment is GRANTED as to COUNT I.

COUNT II

The plaintiffs allege in Count II of the amended complaint that the board membership requirement is a per se violation of antitrust laws because Metro MLS is an "essential facility" which the defendants must make available to all real estate brokers and sales associates. ***HN7***[] The essential facilities doctrine provides that a monopolist's refusal to give competitors reasonable access to an essential facility is an illegal restraint of trade. *Hecht v. Pro-Football,* ***[*11]*** *Inc., 570 F.2d 982, 992 (D.C. Cir. 1977)* ("Where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.").

HN8[] To establish liability under the essential facilities doctrine the plaintiffs must prove four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability, practically or reasonably, to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to the competitor. *MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1133 (7th Cir. 1983)*. The plaintiffs must provide some evidence of each element in order to survive the defendants' motion for summary judgment. The court finds that the plaintiffs have not met this burden.

First, there is insufficient evidence to support a jury finding that the defendants have monopolized the market for multiple listing service privileges in the Atlanta area. ***HN9***[] A business monopolizes in violation of antitrust laws if it deliberately follows a course of conduct through which it obtains or maintains power to control price or exclude competition **[*12]** in the relevant market. *United States v. E.I. Du Pont De Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 1005 (1956)*. Although the plaintiffs assert generally that the defendants possess the power to exclude multiple listing service competitors, the existence of FMLS proves otherwise. FMLS operates in the same geographic market as Metro MLS, provides substantially the same services, and creates competition in the market for multiple listing services privileges. The fact that Metro MLS may be more efficient or more successful than its competitors in providing such services does not serve as evidence of monopolistic conduct.

Second, even if Metro MLS were a monopolist, the plaintiffs have presented insufficient evidence to prove that Metro MLS, as opposed to another multiple listing service, is essential to the business of real estate brokers and sales associates or that the services are incapable of being duplicated. As discussed above, the existence of FMLS clearly shows that the multiple listing services provided by Metro MLS can be reasonably duplicated. That the plaintiffs have chosen not to duplicate such services is a business decision and not the result of an illegal restraint **[*13]** of trade.

COUNT III

Although the court finds that the membership requirement is not a per se violation of ***antitrust law***, ***HN10***[] the plaintiffs may still prevail by showing that the requirement, as it actually operates in the market, unreasonably restrains competition. *See* *Fortner Enter. v. United States Steel, 394 U.S. 495, 499-500, 89 S.Ct. 1252, 1256-57 (1969)* (Fortner I); *United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980)* (membership criteria of multiple listing service subject to rule of reason analysis). This test, known as the "rule of reason," focuses analysis on the competitive significance of the challenged practice and requires courts to void any practice whose anticompetitive effects outweigh its contributions to competition. *See* *National Society of Professional Engineers v. United States, 435 U.S. 679, 687-92, 98 S.Ct. 1355, 1363-65 (1978)*.

In Count III the plaintiffs allege that Metro MLS's membership requirement violates the rule of reason because it is unreasonable to require membership in a board of realtors when other professional organizations, such as Empire, provide the same or substantially the same arbitration services and codes of ethics **[*14]** which the defendants claim justifies the exclusion of non realtor board members. Such a limited requirement, the plaintiffs argue, is not justified by legitimate competitive goals.

The plaintiffs, however, have failed to establish an essential element of a claim under the rule of reason. ***HN11***[] The rule of reason requires a showing that Metro MLS has sufficient market power in the relevant market such that an exclusion from membership not reasonably grounded in competitive needs produces competitive harm. *See* *Realty Multi-List, 629 F.2d at 1372*. Only if Metro MLS possess such market power does the inquiry turn to the issue of whether the membership requirement is justified by legitimate competitive needs and whether it is narrowly tailored to that end. *Id. at 1374-75*.

HN12[] In determining whether Metro MLS has sufficient market power the plaintiffs need not demonstrate that Metro MLS has a monopoly in the market for multiple listing service participation privileges. Rather, the evidence need show only that exclusion from such privileges results in the denial of the opportunity to compete effectively on equal terms. *Id. at 1373*. As evidence of Metro MLS's market power the plaintiffs **[*15]** allege that the vast majority of area brokers belong to Metro MLS, the vast majority of area real estate sale parcels are listed with Metro MLS, and nearly all sales consummated in the area are of parcels listed with Metro MLS.

As discussed above, the plaintiffs have failed to establish the requisite market power in relation to the tying claim. Although the standard of market power applied to a rule of reason claim is somewhat different in that the court must determine whether the exclusion denies real estate brokers the opportunity to compete effectively, the court's findings as to the tying count also apply here.

In addition, the plaintiffs placed in the record evidence concerning the dollar volume of sales made through Metro MLS and general allegations that the vast majority of real estate business in the relevant market is conducted through Metro MLS. Conspicuously absent, however, is any affirmative evidence demonstrating what percentage of the relevant market Metro MLS's sales represent and the percentage or dollar volume of sales made by FMLS, a competitor in the same market. The plaintiffs' citation to a report which states that approximately 90% of homes sold nationally are **[*16]** sold through a multiple listing service in no way identifies the specific market power possessed by the defendants. Although the evidence that is in the record suggests that a substantial amount of sales are made through multiple listing services, there is insufficient evidence that the exclusion of brokers specifically from membership in Metro MLS denies them the opportunity to operate effectively on equal terms.

Because the plaintiffs failed to establish the requisite market power, summary judgment is appropriate as to Count III, and the court need not consider the actual competitive effects of Metro MLS's membership requirement.

COUNT IV

In Count IV of the amended complaint the plaintiffs allege a claim for conspiracy to monopolize in violation of *section 2* of the Sherman Act. ***HN13***[] A *section 2* conspiracy to monopolize claim requires proof of (1) a conspiracy; (2) a purpose to achieve monopoly power; and (3) a specific intent to injure the plaintiff and to monopolize. *Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667, 677 (N.D.Ga. 1982)*, *aff'd. 729 F.2d 1467 (11th Cir. 1984)*. In addition, the plaintiff must submit proof of the relevant product and geographic markets. **[*17]** *Bill Beasley Farms, Inc. v. Hubbard Farms, 695 F.2d 1341, 1343 (11th Cir. 1983)*.

In support of the conspiracy claim the plaintiffs rely on evidence that Metro MLS was acquired by the DeKalb Board of Realtors only after a meeting between the local participants and the National Association of Realtors and the affidavit of Mr. Walter Scott, part-owner of the independent Metro Multiple Listing Service, in which he stated that it was his belief that if DeKalb acquired Metro MLS it would have a better chance of competing with First Multiple Listing Service. The plaintiffs also point to the affidavit of Mr. Sid Venable who testified that he attempted to start a multiple listing service on the south side of metro Atlanta but has been frustrated in his attempts by the actions of the local board of realtors and Metro MLS.

Even assuming that the meeting between the National Association of Realtors and the local board raises a question as to the existence of a conspiracy, the court finds that there is insufficient evidence to establish a prima facie case of conspiracy to monopolize. The plaintiffs have produced no evidence that the defendants specifically intended to injure the plaintiffs **[*18]** or specifically intended to monopolize. The fact that the former owner of Metro MLS believed that Metro MLS would attract more members if it were acquired by the DeKalb Board of Realtors is not evidence of a specific intent to monopolize. Even considered in the light most favorable to the plaintiffs such testimony serves only as evidence of an intent to compete with FMLS. *See Fortner I, 429 U.S at 612-13 n. 1, 97 S.Ct. at 863-64 n. 1* ***HN14***[] (increasing sales and market share without other intent to monopolize is not forbidden under the Sherman Act). Nor have the plaintiffs produced any evidence that the defendants have engaged in any conduct specifically intended to injure the plaintiffs. Even accepting as true Mr. Venable's statements that the defendants deliberately acted so as to frustrate his attempts to create an independent multiple listing service in the south metro area, Mr. Venable is not a party in this action. Therefore, any injury he may have suffered will not serve as evidence that the defendants intended to injure the plaintiffs.

Because the plaintiffs have failed to establish an essential element of the conspiracy to monopolize claim, the defendants are entitled to summary **[*19]** judgment.

COUNTS V, VI AND VII

In counts V and VI of the complaint the plaintiffs allege that the Metro MLS participation rules violate the Fair Housing Act because they discriminate against black real estate brokers and sales associates in the provision of services in connection with the sale or rental of a dwelling and discriminate against black sellers in the terms, conditions and privileges in the sale or rental of a dwelling. *42 U.S.C. 3604(b) (Supp. 1990)*. The plaintiffs further allege in Count VII that the Metro MLS participation rules in effect deny membership in Metro MLS on account of race in violation of *42 U.S.C. § 3606*.

Despite these allegations, the plaintiffs have produced no evidence that any board of realtors or any multiple listing service has discriminated against membership applicants based upon race. In fact, plaintiff Thompson admitted in his deposition that he had no evidence of such discrimination. ***HN15***[] The unsupported allegation that black real estate brokers' memory of racism practiced by realtors discourages them from joining a board of realtors or multiple listing service is insufficient to support a Fair Housing Violation claim. Similarly, there is no evidence **[*20]** in the record from which a jury could determine that the benefits of a multiple listing service are not available to black homesellers on the same terms and conditions as they are available to any other homeseller.

Based on the absence of evidence in the record and the absence of issues of material facts, the court hereby GRANTS the defendants' Motion for Summary Judgment on all counts.

SO ORDERED, this 28th day of June, 1990.

Town Sound & Custom Tops, Inc. v. Chrysler Motor Corp.

United States District Court for the Eastern District of Pennsylvania

July 2, 1990 ; July 3, 1990, Filed

Civil Action No. 88-0083

Reporter

743 F. Supp. 353 *; 1990 U.S. Dist. LEXIS 8325 **; 1990-2 Trade Cas. (CCH) P69,105

TOWN SOUND AND CUSTOM TOPS, INC., SUBURBAN AUTO SOUND & COMMUNICATIONS, INC., NORTHEAST ELECTRONICS, INC. AND DOMINION RADIO SUPPLY, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. CHRYSLER MOTOR CORP.

Core Terms

market power, tying product, automotive, plaintiffs', tied product, summary judgment, tying arrangement, manufacturers, seller, rule of reason, market share, installation, consumers, customers, products, prices, automobile manufacturer, percent, studies, Clayton Act, antitrust, compete, cases, raise issues, competitors, surveys, courts, genuine, sales, sells

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Discovery, Methods of Discovery**

See Fed. R. Civ. P. 56 (c).

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Summary Judgment, Supporting Materials**

See *Fed. R. Civ. P. 56 (e)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] **Summary Judgment, Entitlement as Matter of Law**

If the adverse party fails to set forth material facts, summary judgment shall be entered against the party.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

Although summary judgment should be used sparingly in complex antitrust suits, it is appropriate in such suits where trial would merely result in delay and expense.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Of the antitrust suits which are summarily dismissed, several involve alleged tying violations.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is defined as an agreement by a party to sell one product, the tying product, but only on the condition that the buyer also purchases a different, or tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The antitrust laws do not prohibit all tying arrangements. Only those tying arrangements which are anticompetitive in defined markets are unlawful. In order to determine whether a tying arrangement is unlawful, courts rely on the per se rule and the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the per se rule, a tying arrangement is presumed unlawful without inquiry into the effects in the market if the seller has market power over the tying product. Absent a per se violation, a tying arrangement may be found unlawful under the rule of reason. The rule of reason requires proof of an actual unreasonable restraint of trade in the market for the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In order to establish a tying arrangement as per se unlawful, the plaintiff must prove the following three elements: (1) the tie links two separate products with distinct markets; (2) the tie affects a not insubstantial amount of interstate commerce; and (3) the seller has market power over the tying product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The product market is defined in antitrust cases not involving tying arrangements as the "areas of effective competition" within which a seller operates. Specifically, a product market is composed of products that have reasonable interchangeability for the purposes for which they are produced: price, use and qualities considered.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN11[] **Regulated Practices, Market Definition**

For purposes of a tying violation, market power has a precise meaning. As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market. Evidence of market power may be shown by: (1) exclusive control over the market through a patent or copyright; (2) domination of the market as evidenced by a high market share; or (3) a unique product that competitors are not able to offer.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN12[] **Regulated Practices, Market Definition**

For a showing of "uniqueness", the emphasis is not on whether the seller is selling a factually unique product; rather, the emphasis is on whether the seller has some advantage not shared by its competitors in the marketplace. This advantage is defined by the courts in terms of barriers to entry into the marketplace. If competitors can design and offer a package similar to defendant's product for a similar cost, there is no barrier and no market power, and hence no special advantage for purposes of establishing "'uniqueness."

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN13[] **Regulated Practices, Market Definition**

The fact that a product bears a "unique" trademark does not raise an issue of fact as to market power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN14[] **Price Fixing & Restraints of Trade, Tying Arrangements**

To establish a tying violation under the "rule of reason", plaintiffs have to demonstrate that the alleged tying arrangement actually forecloses competition in the market for the tied product or is anticompetitive in the tied product market.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Sherman Act, Claims**

Market power over the tying product is an essential element of a tying claim under § 1 of the Sherman Act, 15 U.S.C.S. § 1.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Tying Arrangements, Clayton Act**

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Clayton Act > General Overview

HN17[] **Antitrust & Trade Law, Clayton Act**

See 15 U.S.C.S. § 14.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Governments > Courts > Authority to Adjudicate

HN18[] **Regulated Practices, Market Definition**

A court is not required to submit the determination of the market to the jury. On the contrary, a court may define the product market as a matter of law.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN19[] **Summary Judgment, Motions for Summary Judgment**

On a motion for summary judgment, the party seeking to avert summary judgment has to set forth specific facts showing that there is a genuine issue for trial.

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Judges: Jan E. Dubois, United States District Judge.

Opinion by: DuBOIS

Opinion

[*355] MEMORANDUM AND ORDER

JAN E. DUBOIS, UNITED STATES DISTRICT JUDGE

Plaintiffs brought this proposed antitrust class action against the defendant, Chrysler Motors Corp. ("Chrysler"), asserting claims under *Section 1* of the Sherman Act, *15 U.S.C. § 1*, [1] and *Section 3* of the Clayton Act, *15 U.S.C. § 14*. [2] The Court has jurisdiction over the suit under *15 U.S.C. § 15* and *28 U.S.C. § 1337*.

Plaintiffs allege that Chrysler has created an unlawful tying arrangement through its sale of car radios and cassette **[**2]** players -- *i.e.* automotive sound equipment -- as a standard feature on its vehicles. Plaintiffs seek to enjoin Chrysler from continuing to make such sales and to recover damages from Chrysler as a result of past sales.

Presently before the Court is Chrysler's Motion for Summary Judgment. For the reasons set forth below, the Court will grant the Motion.

I. BACKGROUND:

Plaintiffs are four independent corporations which distribute and install automotive sound equipment. Plaintiffs sell automotive sound equipment to automobile dealers for installation either by the dealer or by the plaintiffs. Plaintiffs also sell automotive sound equipment directly to consumers through retail outlets operated by the plaintiffs and through distribution to independent retailers.

Defendant Chrysler is a corporation which manufactures and sells motor vehicles. Chrysler manufactures many of the components of its vehicles, including automotive sound equipment. Chrysler also purchases automotive sound equipment from independent suppliers. Chrysler sells its vehicles to consumers through a network of retail dealers located throughout the United States.

Chrysler does not dispute plaintiffs' allegations **[**3]** regarding Chrysler's sale of automotive sound equipment as a standard feature. [3] Between 1983 and the present, Chrysler has steadily increased the number of its vehicles sold with automotive sound equipment as a standard feature. At present, Chrysler sells approximately 97 percent of its vehicles with automotive sound equipment as a standard feature. *See* Complaint paras. 34-41

In their proposed class action, plaintiffs seek to represent all distributors and installers of automotive sound equipment who compete or have competed against Chrysler since January 1, 1984, for the sale and installation of automotive sound equipment in Chrysler vehicles. *See* Complaint paras. 8-15.

II. STANDARD FOR SUMMARY JUDGMENT:

The Federal Rules of **[**4]** Civil Procedure provide that ***HN1***[] summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. Rule 56 (c)*.

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[1] *See*, note 23, *infra.*

[2] *See*, note 24, *infra.*

[3] A standard feature is a feature for which the customer cannot obtain a credit against the base price of the automobile even if the feature is not purchased. A delete option, by contrast, is a feature for which a credit is given to the customer if the feature is not purchased.

HN2[] When a motion for summary judgment is made, the adverse party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. Rule 56 (e)*. HN3[] If the adverse party fails to set forth such material facts, summary judgment shall be entered against the party. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, **[*356]** 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986)*; *see also* *Equimark Comm. Fin. Co. v. C.I.T. Fin. Serv. Corp., 812 F.2d 141 (3rd Cir. 1987)*.

Plaintiffs argue that summary judgment is inappropriate in complex antitrust suits. The Court disagrees. HN4[] **[**5]** Although summary judgment should be used sparingly in complex antitrust suits, *see* *Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, it is appropriate in such suits where trial would merely result in delay and expense. *See, e.g.,* *A.I. Root Co. v. Computer/Dynamics, Inc., 615 F. Supp. 727 (N.D. Ohio 1985)*, *aff'd* *806 F.2d 673 (6th Cir. 1986)*; *Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1080 (3rd Cir. 1978)*; *Tripoli Co. v. Wella Corp., 425 F.2d 932, 935 (3rd Cir.1970)*, *cert. denied*, *400 U.S. 831, 27 L. Ed. 2d 62, 91 S. Ct. 62 (1970)* cited in *Chuy v. Philadelphia Eagles, 407 F. Supp. 717, 721 (E.D.Pa. 1976)*.

Furthermore, HN5[] of the antitrust suits which have been summarily dismissed, several involve alleged tying violations. *See, e.g.,* *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 491 F. Supp. 1199 (D.Hawaii 1980)*, *aff'd* *732 F.2d 1403 (9th Cir. 1984)*; *Tominaga v. Shepherd, 682 F. Supp. 1489 (C.D.Cal. 1988)*; and *Klo-Zik Co. v. General Motors Corp., 677 F. Supp. 499 (E.D.Tex. 1987)*.

III. DISCUSSION

HN6[] A tying arrangement is defined as "an agreement by a party to sell one product [the tying product] but only on the condition that **[**6]** the buyer also purchases a different (or tied) product." *Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*. HN7[] The antitrust laws do not prohibit all tying arrangements. Only those tying arrangements which are anticompetitive in defined markets are unlawful. In order to determine whether a tying arrangement is unlawful, courts have relied on the *per se* rule and the rule of reason. *See* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (5-4 majority reaffirmed use of both standards in tying cases). HN8[] Under the *per se* rule, a tying arrangement is presumed unlawful -- without inquiry into the effects in the market -- if the seller has market power over the tying product. Absent a *per se* violation, a tying arrangement may be found unlawful under the rule of reason. The rule of reason requires proof of an actual unreasonable restraint of trade in the market for the tied product. Accordingly, in deciding the Motion for Summary Judgment, the Court will consider Chrysler's sales practice under each of these standards.

A. *Per Se Rule*

HN9[] In order to establish a tying arrangement as *per se* unlawful, the plaintiff **[**7]** must prove the following three elements: (1) the tie links two separate products with distinct markets; (2) the tie affects a not insubstantial amount of interstate commerce; and (3) the seller has market power over the tying product. *See generally* *Jefferson Parish 466 U.S. at 13-22*; *see also* *Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792(1st Cir. 1988)* ("Grappone") .

For purposes of this Motion, the parties agree that Chrysler is selling separate products in separate markets and that Chrysler's sale of automotive sound equipment affects a not insubstantial amount of interstate commerce. That leaves for determination the question whether there is any evidence that Chrysler has market power over the tying product. Chrysler contends that it has no such market power in any plausibly defined market, and the Court agrees.

1. The Tying Product Market

In order to determine whether Chrysler has market power over the tying product, it is essential to define the tying product market. *See, e.g.,* *Drs. Steuer & Latham, P.A. v. National Medical Enterprises 672 F. Supp. 1489 (D.S.C. 1987)*. HN10[] The product market has been defined in antitrust cases not involving tying arrangements **[**8]** as the "areas of effective competition" within which a seller operates. *Standard Oil Co. of California v. United States, 337 U.S. 293, 299 n. 5,* **[*357]** *93 L. Ed. 1371, 69 S. Ct. 1051 (1949)*. Specifically, a product market is "composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." *United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 404, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *see also SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063* (3d Cir.), *cert. denied*, *439 U.S. 838, 58 L. Ed. 2d 134, 99 S. Ct. 123 (1978)*. These same principles of market definition have been relied on by courts when defining product markets for purposes of a tying analysis. *See, e.g., Allen-Myland, Inc. v. IBM Corp., 693 F. Supp. 262 (E.D.Pa. 1988)* (court rejected plaintiffs' proposed tying product market limited to IBM's own product line); *see also A.I. Root Co. v. Computer/Dynamics, Inc. 806 F.2d 673 (6th Cir. 1986)* (same); *Will v. Comprehensive Accounting Corp. 776 F.2d 665 (7th Cir. 1985)* (same); *Hudson's Bay Co. v. American Legend Cooperative 651 F. Supp. 819 (D.N.J. 1986)* (same).

Chrysler argues that the tying product **[**9]** market is all automobile manufacturers which compete with Chrysler for the sale of automobiles in the United States. In support of its market definition, Chrysler has provided the Court with uncontroverted affidavits demonstrating that Chrysler automobiles are reasonably interchangeable with, and compete against, the automobiles produced by other manufacturers. Chrysler's submissions on that issue are not directly addressed or contested by plaintiffs [4] and may be summarized as follows:

First, consumers perceive Chrysler automobiles as reasonably interchangeable with other automobile makes. Market studies submitted by Chrysler state that prospective new buyers commonly compare Chrysler's product offerings with the offerings of other manufactures. [5] A wide range of factors -- including price, features, aesthetic appeal, reputation, and comfort -- enter into such comparisons, and Chrysler's sales depend directly upon its ability to impress consumers favorably with respect to these factors. [6]

[10]** Second, Chrysler's advertising stresses the price and qualities of its vehicles in comparison to those of its competitors. [7] Furthermore, the automotive media -- which consumers often consult before purchasing motor vehicles -- perceive Chrylser vehicles as competing against comparable vehicles made by other manufacturers. The automotive media routinely evaluate Chrysler's vehicles in comparison to those of other manufacturers. [8]

Third, Chrysler is constrained in pricing its vehicles by the prices its competitors charge for comparable vehicles. [9] This pricing constraint reflects the cross-elasticity of demand that exists between Chrysler vehicles and the vehicles produced by its competitors. [10]

[11]** Fourth, the business and financial communities and government agencies view Chrysler as competing for sales against other automobile manufacturers. Market studies by these groups analyze the different automobile producers, including Chrysler, as competing in the same market. [11]

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[4] *See* Section IV, *infra.*

[5] Affidavit of Jack L. Warren, para. 7.

[6] *Id*. para. 6.

[7] *Id* para. 9.

[8] *Id* para. 12.

[9] Affidavit of Franklin M. Fisher, para. 15.

[10] Two goods exist in the same market if there is a relatively high cross-elasticity of demand between the goods. Two goods have a relatively high cross-elasticity of demand if an increase in the price of one good results in an increase in consumption of the other good. *See, e.g. Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*.

[11] Affidavit of Franklin M. Fisher para. 9.

Based on the foregoing, the Court defines the tying product market as all automobile manufacturers which compete with Chrysler for the sale of automobiles in the United States.

[*358] 2. Definition of Market Power

HN11[] For purposes of a tying violation, market power has a precise meaning. In *Jefferson Parish*, the Supreme Court defines market power in a tying case as follows: "As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market." *See* *Jefferson Parish 466 U.S. at 26, n. 46*. *See also* *United States Steel Corp v. Fortner Enterprises Inc.* ***[**12]*** *429 U.S. 610, 620, n. 13, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)* (market power is defined as "power over price"). In *Jefferson Parish*, the Supreme Court also stated that evidence of market power may be shown by: (1) exclusive control over the market through a patent or copyright; (2) domination of the market as evidenced by a high market share; or (3) a unique product that competitors are not able to offer. *See* *Jefferson Parish 466 U.S. at 16-17*.

In this case, Chrysler argues that it does not have market power because Chrysler cannot raise prices above competitive levels in the automobile market and profitably sustain prices at that level. [12] Chrysler has provided the Court with uncontroverted affidavits demonstrating that Chrysler is a "price-follower" in the automobile market and plaintiffs' submissions do not directly address or contest these submissions. [13] As a "price-follower", Chrysler increases the prices of its vehicles following an increase in prices throughout the automobile industry. If Chrysler were to unilaterally raise its prices, other automobile manufacturers would not follow suit and Chrysler would lose sales. [14] Accordingly, the Court finds that Chrysler does not have "power over price" **[**13]** in the tying product market.

The Court must also address the other market conditions set forth in *Jefferson Parish* which may provide evidence of market power. A review of all submissions by the parties discloses no evidence of market power by Chrysler based on these market conditions. First, this case does not involve control over a market through a patent or copyright. Although Chrysler may have patents on individual parts of its automobiles, Chrysler does not have, and plaintiffs do not **[**14]** allege, control by Chrysler over a market through such patents.

Second, in terms of market share, Chrysler does not have the level of market share in the tying product market associated with market power. From 1983 to the present, the time period relevant to this litigation, Chrysler has sold 10 to 12 percent of the new cars sold in the United States. [15] General Motors, by contrast, has sold 35 to 45 percent of the new cars sold, and Ford has sold 17 to 20 percent of the market. Furthermore, several foreign manufacturers, Honda, Toyota, and Nissan, each have 5 to 7 percent of the market. [16]

Although there is no fixed threshold of market share required for market power and market share is but one measure of a seller's market power, Chrysler's 10 to 12 percentage share of the automobile market is considerably below the level of market share associated with market power. *See, e.g.,* *Jefferson Parish, 466 U.S. at 26-27* **[**15]** (30 percent market share insufficient for market power); *Times-Picayune Publishing Co. v. United States, 345 U.S. 594 at 611-613, 97 L. Ed. 1277, 73 S. Ct. 872* (30 to 40 percent market share insufficient for market power); *Allen-Myland 693 F. Supp. at 278* (20 to 30 percent market share insufficient for market power).

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[12] Although not expressly stated in *Jefferson Parish*, market power exists whenever the seller can raise prices above competitive levels in the marketplace and profitably sustain prices at that level.

[13] *See* Section IV, *infra.*

[14] Affidavit of Franklin M. Fisher, para. 15 ("Chrysler's pricing is significantly constrained by its . . . competitors. The marketplace would quickly defeat any attempt by Chrysler to unilaterally raise prices to supracompetitive levels."); *see also* Affidavit of Omar Matt, para. 9.

[15] Affidavit of Franklin M. Fisher, Appendix B (*citing Ward's Automotive Yearbook 1988*, p.161).

[16] *Id*.

[*359] Furthermore, even if the Court defined a tying product market based on subsections of the automobile market, such as geographic regions or automobile types, Chrysler does not have the level of market share required for market power in any such subsection. On the contrary, Chrysler maintains a similar 10 to 12 percentage share of the automobile market across various geographic regions and vehicle lines. [17] *See also* Grappone, supra, 858 F.2d at 797.

Third, **HN12**[] for a showing of "uniqueness", the emphasis is not on whether the seller is selling a factually unique product; rather, the emphasis is on whether the seller has some advantage not shared by its competitors in the marketplace. *See* Fortner 429 U.S. at 620 **[**16]** (1977). This advantage has been defined by the courts in terms of barriers to entry into the marketplace. "If competitors can design and offer a package similar to defendant's product for a similar cost, there is no barrier and no market power, and hence no special advantage for purposes of establishing 'uniqueness.'" Allen-Myland 693 F. Supp. at 281; Will v. Comprehensive Accounting Corp. 776 F.2d 665 (7th Cir. 1985). [18]

In this case, plaintiffs do not suggest that Chrysler has market power through barriers to entry into the marketplace. Rather, plaintiffs' theory on uniqueness is that Chrysler has market power through its unique and well-known trademark. **HN13**[] The **[**17]** fact that Chrysler's vehicles bear a "unique" trademark does not raise an issue of fact as to market power. Although, at one time, some courts viewed the existence of a trademark as sufficient for market power, *see, e.g.* Warriner Hermetics v. Copeland Refrigeration Corp., 463 F.2d 1002 (5th Cir.), *cert. denied*, *409 U.S. 1086, 34 L. Ed. 2d 673, 93 S. Ct. 688 (1972)*, no cases since *Jefferson Parish* have held that a trademark alone establishes market power. *See, e.g.* Mozart Co. v. Mercedes-Benz of North America, Inc. 833 F.2d 1342, 1346 (9th Cir. 1987); Will v. Comprehensive Accounting Corp. 776 F.2d 665, 673 n. 4 (7th Cir. 1985), *cert. denied*, *475 U.S. 1129, 90 L. Ed. 2d 201, 106 S. Ct. 1659 (1986)*. Accordingly, the Court finds that Chrysler's trademark does not raise an issue of fact as to Chrysler's market power.

For all the foregoing reasons, the Court finds that Chrysler does not have market power in the tying product market. Accordingly, plaintiffs are unable to sustain their *per se* tying claim.

B. *Rule of Reason*

HN14[] To establish a tying violation under the "rule of reason", plaintiffs -- at a minimum -- have to demonstrate that the alleged tying arrangement actually forecloses competition in the market for the tied product **[**18]** or is anticompetitive in the tied product market. *See* Jefferson Parish 466 U.S. at 17-18; *see also* Grappone 858 F.2d at 799.

1. Market Effect in the Tied Product Market

The first question before the Court is to define the tied product market. In defining this market, the Court will rely on the same principles of market definition adhered to by the Court in defining the tying product market. Chrysler argues that the tied product market is all sound equipment sold in the United States for installation in automobiles. Chrysler's uncontroverted facts on that issue may be summarized as follows:

Many of the automobile manufacturers -- *e.g.* Chrysler, General Motors, and Ford -- manufacture sound equipment for installation in automobiles. Furthermore, many independent firms -- *e.g.* Sony, Pioneer, Kenwood, Audiovox -- also manufacture **[*360]** sound equipment for automobiles. [19] Chrysler's automotive sound equipment is not unique. Most of the manufacturers of automotive sound equipment produce systems that are *capable* of use in

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[17] Affidavit of Franklin M. Fisher, para. 12, 13.

[18] "The use of barriers to entry as a proxy for market power is familiar in the law of mergers. Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power." (citations omitted) Will v. Comprehensive Accounting Corp. 776 F.2d 665, 672, n. 3 (1985).

[19] *See* Affidavit of Joseph Clifton Mathis.

Chrysler vehicles and the vehicles of every other automobile manufacturer. Thus, systems designed by Chrysler for installation in Chrysler vehicles **[**19]** compete -- either actually or *potentially* -- against the systems manufactured by other automotive sound equipment manufacturers for installation in other vehicles. *See* SmithKline 575 F.2d at 1063 (product market defined to include all relevant sources of supply, including *potential* as well as actual rivals).

Based on the foregoing, the Court defines the tied product market as all sound equipment sold in the United States for installation in automobiles.

In the tied product market -- *i.e.* the market for automotive sound equipment -- Chrysler's share of the market is limited. There are over 70 distributors of automotive sound equipment in the United States, and most distributors, including Chrysler, have less than a 10 percent share of the automotive sound equipment market. [20] During the time period relevant to this litigation, Chrysler's share of the automotive sound equipment market has ranged from approximately 3 to 7 percent of the market. [21] Chrysler's limited share of **[**20]** the tied product market is such that Chrysler is not in a position to restrain trade or foreclose competition in the market.

Although plaintiffs offer depositions alleging that certain individual distributors of automotive sound equipment have lost sales, [22] these depositions do not demonstrate that Chrysler has either foreclosed competition or restrained trade in the market for automotive sound equipment. Under the antitrust laws, the concern is with maintaining the level of competition in the marketplace, not in ensuring that every individual competitor is protected. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977).

[21]** In the record before the Court, plaintiffs have not demonstrated an actual restraint of trade in the market for automotive sound equipment. Accordingly, without any evidence of a restraint of trade in the tied product market by Chrysler, plaintiffs are unable to sustain a tying violation under the rule of reason.

2. Market Power over Tying Product for Rule of Reason Violation

Although the majority opinion in *Jefferson Parish* states that a rule of reason violation may be established without the same "degree or kind" of market power that is required for a *per se* violation, *see* Jefferson Parish, 466 U.S. at 19, the majority opinion nowhere states or implies that market power over the tying product is not required under the rule of reason.

The requirement of market power over the tying product is consistent with the elements of a tying violation. Market power over the tying product is what makes possible an adverse effect on competition in the tied product market. Unless the seller has market power over the tying product, the seller is not able to restrain competition in the market for the tied product. Both the concurrence in *Jefferson Parish*, and decisions subsequent **[**22]** to *Jefferson Parish*, have held that market power over the tying product is a required element under either the *per se* rule or rule of reason. *See Jefferson Parish* (O'Connor, concurring); *see also* Hand v. Central Transport, Inc., 779 F.2d 8, 11 (6th Cir. 1985) (market power required under rule-of-reason tying analysis); *see also* Hudson's Bay Co. Fur Sales v. American Legend Co-Op, 651 F. Supp. 819, 841 (D.N.J. 1986) (same).

As set forth above, Chrysler does not have market power in the tying product **[*361]** market; in fact, Chrysler faces severe competition in the tying product market from several other automobile manufacturers. Thus, in addition to there being no evidence that Chrysler has restrained trade in the tied product market, there is no evidence that Chrysler has such market power over the tying product that Chrysler can actually restrain trade or foreclose competition in the market for the tied product.

C. *Plaintiffs' Tying Theories*

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[20] Affidavit of Franklin M. Fisher (*citing* Venture Development Corporation, *Automobile Stereo Equipment III, A Strategic Analysis*, September, 1986).

[21] *Id.*

[22] Dep. Daniel M. McGrath, at p. 101.

Plaintiffs seek to redefine the elements of a tying violation, and their submissions are predicated on these theories. Plaintiffs raise the following arguments: (1) market power is not required for a tying claim under *Section **[**23]** 3* of the Clayton Act, as distinguished from *Section 1* of the Sherman Act; (2) the definition of the market and market power cannot be determined on summary judgment; and (3) Chrysler has market power in a market limited to Chrysler products. The Court rejects plaintiffs' arguments for the reasons set forth below.

1. Requirement of Market Power

Plaintiffs concede that ***HN15***[] market power over the tying product is an essential element of a tying claim under *Section 1* of the Sherman Act. ***HN16***[] [23] However, plaintiffs contend that such market power is not required for a tying claim under *Section 3* of the Clayton Act. ***HN17***[] [24] The Court disagrees.

[24]** Plaintiffs argue that, under *Section 3* of the Clayton Act, market power is not required for a tying claim and such a claim only requires proof that the tying arrangement affects a substantial volume of commerce in the market for the tied product. In making this argument, plaintiffs principally rely on the following passage from *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*:

> "When the seller enjoys a monopolistic position in the market for the tying product, or if a substantial volume of commerce in the tied product is restrained, a tying arrangement violates the narrower standards expressed in *§ 3* of the Clayton Act. . . ." *Times-Picayune at 608-609*.

Plaintiffs' reliance on *Times-Picayune* is misplaced. First, *Section 3* of the Clayton Act was not at issue in *Times-Picayue;* that case was decided under *Section 1* of the Sherman Act. Furthermore, cases subsequent to *Times-Picayune* set forth the same tying analysis whether a claim is brought under *Section 1* of the Sherman Act or *Section 3* of the Clayton Act. *See, e.g. Summerwood Corp v. CADO Systems*, No. 85-0827 **[**25]** slip op. at 5 (E.D.Pa. March 25, 1986) (Pollak, J.) ("Although tying arrangements can be challenged either under Sherman 1 or Clayton 3, it is now generally agreed that the elements relating to tying violations of either provision are identical", and market power is a required element under both provisions of the ***antitrust law***). *See Grappone 858 F.2d at 794*; *Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342, 1352 (9th Cir. 1987)*; *Airweld Inc. v. Airco, Inc., 742 F.2d 1184, 1189 n. 2 (9th Cir. 1984)*; *Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 428 (5th Cir. 1978)*, *cert. denied 444 U.S. 831, 62 L. Ed. 2d 39, 100 S. Ct. 59 (1979)*; *Tominaga v. Shepherd, 682 F. Supp. 1489, 1493 (C.D.Cal. 1988)*; *Klo-Zik v. General Motors Corp. 677 F. Supp. 499, 505 (E.D.Tex. 1987)*. *See generally*, 4 E. Kintner, *Federal* ***Antitrust Law***, § 32.57 at 96-97 (1984).

Based on the foregoing, the Court rejects plaintiffs' argument that *Section 3* of the **[*362]** Clayton Act does not require proof of the seller's market power to sustain a tying claim.

2. Defining the Market

Plaintiffs argue that the determination of the market is a question of fact which cannot be resolved on summary judgment. The Court disagrees. ***HN18***[]

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[23] *Section 1* of the Sherman Act, *15 U.S.C. § 1*, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

[24] *Section 3* of the Clayton Act, *15 U.S.C. § 14*, provides in relevant part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . where the effect of such lease, sale or contract for sale or such condition agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[26]** A court is not required to submit the determination of the market to the jury. On the contrary, a court may define the product market as a matter of law. *See, e.g.* *Mogul v. General Motors Corp., 391 F. Supp. 1305 (E.D.Pa. 1975)*, *aff'd* *527 F.2d 645 (3rd Cir. 1976)*; *Mary Ann Pensiero, Inc. v. Lingle*, No. 86-0144, slip. op. (M.D.Pa. June 5, 1986), *aff'd 810 F.2d 1163 (3d Cir. 1987)*. *See also* *Drs. Steuer & Latham, P.A. v. National Medical Enterprises, Inc., 672 F. Supp. 1489, 1504 (D.S.C. 1987)*.

Furthermore, the cases relied on by plaintiffs, *Joe Westbrook, Inc. v. Chrysler Corp. 419 F. Supp. 824 (N.D.Ga. 1976)* and *Wm. Cohen & Son v. All American Hero, Inc., 693 F. Supp. 201 (D.N.J. 1988)*, are not contrary authority. Although in each case the court chose not to define the market on summary judgment, the decisions were predicated on the evidence before the court and not, as plaintiffs argue, an opposition to a determination of the market on summary judgment.

Plaintiffs also argue that the Court should adopt a relevant market limited to Chrysler's products. Although a one-manufacturer market is possible, this is not such as case. First, plaintiffs' tying claim **[**27]** is not analogous to the so-called "franchise cases" in which courts have adopted a one-manufacturer market. *See, e.g.,* *Metrix Warehouse Inc. v. Daimler-Benz Aktiengesellschaft, 828 F.2d 1033 (4th Cir. 1987)*, *cert. denied*, *486 U.S. 1017, 108 S. Ct. 1753, 100 L. Ed. 2d 215 (1988)*; *Mozart Co. v. Mercedes-Benz of North America, Inc. 833 F.2d 1342 (9th Cir. 1987)*; *Heatransfer Corp. v. Volkswagenwerk, A.G. 553 F.2d 964 (5th Cir. 1977)*, *cert. denied*, *434 U.S. 1087, 55 L. Ed. 2d 792, 98 S. Ct. 1282 (1978)*. In such cases, courts have adopted a one-manufacturer market because of a substantial investment made by consumers which would become worthless if the consumers did not also purchase the tied product. Typically, these cases involve a franchiser requiring a franchisee to purchase an unwanted product after the franchisee has made a substantial investment in the franchise. Based on the franchisee's investment in the franchise (the tying product), courts have found that there is no "reasonable interchangeability" between the tying product and other products and have limited the market to the tying product.

In this case, Chrysler's customers are not at risk of losing any investment if they decide not to purchase Chrysler's automotive sound equipment **[**28]** (the tied product). Even if the Court assumed some Chrysler customers make a mental commitment to buying a Chrysler (and only later discover that the automotive sound equipment is standard), the mental commitment of the Chrysler customer is not comparable to an investment in a franchise and, as such, does not raise an issue of fact as to a Chrysler-only market.

Plaintiffs' reliance on *Digidyne Corp. v. Data General Corp. 734 F.2d 1336 (9th Cir. 1984)*, *cert. denied*, *473 U.S. 908, 87 L. Ed. 2d 657, 105 S. Ct. 3534 (1985)* is similarly misplaced. Plaintiffs rely on *Digidyne* for the proposition that market power may be established for a tying violation without reference to a tying product market. Although the court in *Digidyne* found market power without defining the tying product market, *Digidyne* is not persuasive authority. First, the facts of *Digidyne* are readily distinguishable from this case. In *Digidyne*, the tying product, a computer operating system, was not only copyrighted, but buyers of the system had made investments of millions of dollars which would be useless without the system. This case involves neither a copyright nor an investment.

Furthermore, the statement in *Digidyne* that a defined **[**29]** tying product market is not required to sustain a tying claim has been roundly criticized in subsequent decisions. *See, e.g.* *Allen-Myland, 693 F. Supp at 281, n. 42*; **[*363]** *Mozart Co. v. Mercedes-Benz of North America, Inc. 833 F.2d 1342, 1346, n. 4 (9th Cir. 1987)*; *Will v. Comprehensive Accounting Corp., 776 F.2d 665, 6773 n. 4 (7th Cir. 1985)*; *Tominaga v. Shepherd, 682 F. Supp. 1489, 1495 (C.D.Cal. 1988)* (Ninth Circuit in *Mozart* "suggested that the *Digidyne* panel erred in failing to engage in market analysis").

Accordingly, the Court rejects plaintiffs' argument that market power may be inferred in a tying claim without reference to a defined tying product market.

3. Plaintiffs' Submissions

Plaintiffs offer the Court numerous submissions which are predicated on their tying theories. In many instances, plaintiffs contend that their submissions demonstrate that Chrysler has "market power" over Chrysler automobiles without reference to a defined tying product market or the proper definition of market power. Market power is not, as plaintiffs would have it, another term for the preference that *some* buyers have for the products of a particular seller.

In reviewing **[**30]** plaintiffs' submissions, the relevant issue before the Court is whether there is a genuine issue of material fact as to a market limited to Chrysler products or market power by Chrysler in a properly defined tying product market. The Court finds that plaintiffs have not raised a genuine issue of material fact as to market definition or market power.

a. *Consumer Polls*

Plaintiffs submit consumer surveys which, according to plaintiffs, demonstrate that Chrysler sells its automotive sound equipment in a "captive market". The surveys do not support plaintiffs' conclusion. At most, the surveys demonstrate that some Chrysler customers decide to buy a Chrysler vehicle before considering the type of automotive sound equipment they want. [25] The surveys do not demonstrate that Chrysler's customers commit to buying a Chrysler, even before they discover the options and prices of a Chrysler. The possibility that some Chrysler customers may tentatively select a Chrysler vehicle before focusing on the type of automotive sound equipment does not mean that they are committed to purchasing the Chrysler vehicle, if, when they eventually focus on the automotive sound equipment, they find it unsatisfactory. **[**31]** [26]

Plaintiffs' surveys do not address the relevant considerations of market definition or market power. Accordingly, the Court finds that plaintiffs' surveys do not raise an issue of fact as to a Chrysler-only market or market power by Chrysler in a properly defined tying product market.

b. *Market Research* ***[**32]*** *Studies*

Plaintiffs submit market research which compare the buying behaviors of Chrysler's customers to the buying behaviors of customers of other automobile manufacturers. [27] Plaintiffs suggest that these studies demonstrate Chrysler has a unique control over its customers. However, the studies do not support plaintiffs' conclusory allegations. In fact, the studies submitted by plaintiffs support Chrysler's contention that Chrysler competes against other automobile manufacturers. The studies show that Chrysler's potential customers will freely substitute another automobile make for a Chrysler automobile if a desired type of Chrysler vehicle is not readily available [28] **[*364]** or if they are dissatisfied with Chrysler's options. [29]

Based on the foregoing, the Court finds that the market **[**33]** research studies submitted by plaintiffs do not raise an issue of fact as to a Chrysler-only market or market power by Chrysler in a properly defined tying product market.

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[25] Exhibit B attached to Plaintiffs' Response to Defendant's Reply Memorandum in Support of its Motion for Summary Judgment. One of the survey questions relied on by plaintiffs appears as follows:

> "Q.17 Items you decided you first wanted: First decided on make and model [before] Type of sound equipment: Chrysler 42.3 percent."

In the best light for plaintiffs, the question may be read as 42.3 percent of Chrysler's consumers decide on a Chrysler vehicle before considering the type of automotive sound equipment they wanted. The survey question addresses the order of purchase, not whether Chrysler customers will buy a Chrysler vehicle, even if the options and price of the options are undesirable.

[26] *Id.*

[27] *See* Exhibits Submitted by Plaintiffs in Opposition to Chrysler's Motion for Summary Judgment; *see, e.g.* Report of Booz, Allen & Hamilton, Inc. (September 19, 1983) (Exhibit B).

[28] ***Id. at 192-193***.

[29] *Id. at 362*.

c. *Testimony of Chrysler Personnel*

Plaintiffs argue that the testimony of Chrysler personnel support a Chrysler-only market. [30] Plaintiffs contend that Chrysler personnel have stated Chrysler competes in a "market" consisting of Chrysler products. In ordinary speech, the term "market" is used in many different ways. However, the definition of the product market is a term of art. As set forth above, the product market includes all "reasonably interchangeable" products from actual and potential sources of supply. *See, e.g. SmithKline; Allen-Myland*. Accordingly, the testimony of Chrysler's personnel is not relevant to defining a product market.

d. *Affidavit of F. Gerard Adams*

Plaintiffs offer the affidavit of F. **[**34]** Gerard Adams, Professor of Economics at the University of Pennsylvania, as support for their tying claim. Dr. Adams states that Chrysler has market power in a market limited to the installation of automotive sound equipment in new Chryslers. [31] Although Dr. Adams' statement is correct, it is of no assistance to plaintiffs. It is a given that Chrysler has complete control in a market in which Chrysler is the only seller.

Dr. Adams states that his opinion is predicated on plaintiffs' submissions -- *i.e.* the market research studies, consumer surveys, and testimony of Chrysler personnel. Dr. Adams does not offer an independent basis for his opinion. Since the Court has found that none of plaintiffs' submissions raise an issue of fact as to a Chrysler-only market or market power by Chrysler in a properly defined tying product, the Court, likewise, finds that Dr. Adams' affidavit (which is predicated on these same submissions) **[**35]** does not raise an issue of fact as to market definition or market power. *See, e.g., Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333 (7th Cir. 1989)* (expert opinion which does not establish an issue of fact does not defeat a motion for summary judgment); *Richardson v. Richardson-Merrell, Inc., 273 App. D.C. 32, 857 F.2d 823, 829-832 (D.C.Cir. 1988)* (expert's declaration, full of assertions but empty of facts and reasons, is insufficient to get a case past a motion for summary judgment).

HN19[] On a motion for summary judgment, the party seeking to avert summary judgment has to set forth specific facts showing that there is a genuine issue for trial. *See, e.g. Celotex Corp. v. Catrett, 477 U.S. at 322-323*. For the reasons set forth above, the Court finds that plaintiffs have not raised any genuine issues of material fact in support of their claim of a tying violation by Chrysler. Accordingly, the Court will grant Defendant's Motion for Summary Judgment.

An appropriate order follows.

ORDER

AND NOW, to wit, this 2nd day of July, 1990, upon consideration of the Motion of defendant, Chrysler Motors Corporation, for Summary Judgment, the Answer of plaintiffs, and the subsequent **[**36]** submissions of the parties, and good cause appearing, IT IS ORDERED that the Motion of defendant, Chrysler Motors Corporation, for Summary Judgment is granted. Judgment is entered in favor of defendant, Chrysler Motors Corporation, and against plaintiffs.

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[30] *See, e.g.* Dep. of Jack W. Apple, Jr. at 52-54; Dep. of Robert Gonzalez, at 92-94; Dep. of John Mattioli, at 54-55.

[31] Declaration in Further Opposition to Chrysler's Motion for Summary Judgment (F. Gerard Adams).

United States v. Baker Hughes, Inc.

United States Court of Appeals for the District of Columbia Circuit

May 16, 1990, Argued ; July 6, 1990, Decided

No. 90-5060

Reporter

908 F.2d 981 *; 1990 U.S. App. LEXIS 11233 **; 285 U.S. App. D.C. 222; 1990-1 Trade Cas. (CCH) P69,084

United States of America, Appellant v. Baker Hughes Inc., Eimco Secoma, S.A., and Oy Tampella AB, Appellees

Prior History: **[**1]** Appeal from the United States District Court for the District of Columbia; Civil Action No. 89-03333.

Core Terms

prima facie case, rebut, effective, factors, merger, concentration, district court, acquisition, anticompetitive, competitors, statistics, market share, ease, substantially lessen, rebuttal, probabilities, barriers, prices, firms, non-entry, relevant market, lessening, produce evidence, ultimate burden, supracompetitive, sophistication, inaccurately, defendants', predictions, persuasion

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN1[] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, prohibits mergers and acquisitions the effect of which may be substantially to lessen competition, or to tend to create a monopoly.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Standards of Review, De Novo Review**

The court reviews de novo an issue that is a pure question of law.

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Governments > Courts > Court Records

HN3[] **Procedural Matters, Rulings on Evidence**

An appellate court affirm a district court's decision on a basis not relied on by the district court where that ground finds support in the record.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Evidence > Inferences & Presumptions > General Overview

HN4[] **Antitrust & Trade Law, Clayton Act**

Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness. A defendant seeking to rebut a prima facie case is not restricted to producing evidence of ease of entry.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Mergers > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

A transaction must be functionally viewed, in the context of its particular industry. Whether the consolidation is to take place in an industry that is fragmented rather than concentrated, that has seen a recent trend toward domination by a few leaders or has remained fairly consistent in its distribution of market shares among the participating companies, that has experienced easy access to markets by suppliers and easy access to suppliers by buyers or has witnessed foreclosure of business, that has witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account. All these factors are relevant in determining whether a transaction is likely to substantially lessen competition, but none is invariably dispositive.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Evidence > Inferences & Presumptions > General Overview

HN6[] **Antitrust & Trade Law, Clayton Act**

The existence and significance of barriers to entry are frequently crucial considerations in a rebuttal analysis.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Evidence > Inferences & Presumptions > General Overview

HN7[] **Antitrust & Trade Law, Clayton Act**

That a defendant may successfully rebut a prima facie case by showing quick and effective entry does not mean that successful rebuttal requires such a showing.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > Inferences & Presumptions > General Overview

HN8[] **Antitrust & Trade Law, Clayton Act**

A defendant cannot realistically be expected to prove that new competitors will "quickly" or "effectively" enter unless it produces evidence regarding specific competitors and their plans.

Antitrust & Trade Law > Clayton Act > General Overview

Evidence > Inferences & Presumptions > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN9[] **Antitrust & Trade Law, Clayton Act**

In evaluating entry barriers a court should focus on whether significant entry barriers would exist after the merged firm had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant.

Antitrust & Trade Law > Clayton Act > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Evidence > Inferences & Presumptions > General Overview

HN10[] **Antitrust & Trade Law, Clayton Act**

A defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition. A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor.

Antitrust & Trade Law > Clayton Act > General Overview

Evidence > Inferences & Presumptions > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

HN11[] **Antitrust & Trade Law, Clayton Act**

A defendant required to produce evidence "clearly" disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case - whether a transaction is likely to substantially lessen competition. Absent express instructions to the contrary, the court is loath to depart from settled principles and impose such a heavy burden.

Counsel: David Seidman, Attorney, Department of Justice, with whom James F. Rill, Assistant Attorney General, Michael Boudin and Judy L. Whalley, Deputy Assistant Attorneys General, and Catherine G. O'Sullivan, Robert B. Nicholson and Andrea Limmer, Attorneys, Department of Justice, were on the brief, for Appellant.

David Marx, Jr., with whom Ronald A. Bloch, Lizbeth R. Levinson and Amy E. Hancock, for Oy Tampella AB and Eimco Secoma, S.A., and Randal M. Shaheen, for Baker Hughes Inc., were on the joint brief, for Appellees.

Judges: Ruth B. Ginsburg, Sentelle, and Thomas, Circuit Judges. Opinion for the Court filed by Circuit Judge Thomas.

Opinion by: THOMAS

Opinion

[*982] Appellee Oy Tampella AB, a Finnish corporation, through its subsidiary Tamrock AG, manufactures and sells hardrock hydraulic underground drilling rigs (HHUDRs) in the United States and throughout the world. Appellee Baker Hughes Inc., a corporation based in Houston, Texas, owned a French subsidiary, Eimco Secoma, S.A. (Secoma), that was similarly involved in the HHUDR industry. In 1989, Tamrock proposed **[**2]** to acquire Secoma.

The United States challenged the proposed acquisition, charging that it would substantially lessen competition in the United States HHUDR market in violation of section 7 of the Clayton Act, *15 U.S.C. § 18*. [1] In December 1989, the government sought and obtained a temporary restraining order blocking the transaction. *See* Temporary Restraining Order, *United States v. Baker Hughes Inc.*, No. 89-03333 (D.D.C. Dec. 15, 1989). In February 1990, the district court held a bench trial and issued a decision rejecting the government's request for a permanent injunction and dismissing the section 7 claim. *See* *United States v. Baker Hughes Inc., 731 F. Supp. 3 (D.D.C. 1990)*. The government immediately appealed to this court, requesting expedited proceedings and an injunction pending appeal. We granted the motion for expedited briefing and argument, but denied the motion for an injunction pending appeal. The appellees consummated the acquisition shortly thereafter.

[3]** The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, [2] the government establishes a presumption that the transaction will substantially lessen competition. *See* *United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 120-22, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975)*; *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. The burden of producing evidence to rebut this presumption then shifts to the defendant. *See, e.g.,* *United States v. Marine Bancorporation, 418 U.S. 602, 631, 41 L. Ed. 2d 978, 94 S. Ct. 2856 (1974)*; **[*983]** *United States v. General Dynamics Corp., 415 U.S. 486, 496-504, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974)*; *Philadelphia Bank, 374 U.S. at 363*. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government **[**4]** at all times. *See* *Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1340 & n. 12 (7th Cir. 1981)*.

[5]** By presenting statistics showing that combining the market shares of Tamrock and Secoma would significantly increase concentration in the already highly concentrated United States HHUDR market, the government established a prima facie case of anticompetitive effect. [3] The district court, however, found sufficient evidence that the merger would not substantially lessen competition to conclude that the defendants had rebutted this prima facie case. The government did not produce any additional evidence showing a probability of substantially lessened competition, and thus failed to carry its ultimate burden of persuasion.

[6]** In this appeal, the government assails the court's conclusion that the defendants rebutted the prima facie case. Doubtless aware that this court will set aside the district court's findings of fact only if they are clearly erroneous, *see* *Fed.R.Civ.P. 52(a)*, the government frames the ***HN2***[] issue as a pure question of law, which we

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[1] Section 7 ***HN1***[] prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*.

[2] The parties in this case do not seriously contest the district court's definition of the relevant markets. The court defined the geographic market as the entire United States, *see* *731 F. Supp. at 5-6*, and the relevant product as three types of HHUDRS: face drills ("jumbos"), long-hole drills, and roof-bolting drills, as well as associated spare parts, components, and accessories, and used drills. *See* *id. at 4, 6-8*.

Although the appellees quibble with the court's product market definition, they conclude that "the [district] court's product market definition *presages* its finding that the extent of present competition and ease of entry preclude finding a violation of Section 7." Brief for Appellees at 10 (emphasis added). If the appellees believe that the court's product market definition contributed to their victory, we see no reason to address their halfhearted and contradictory challenges to that definition.

[3] From 1986 through 1988, Tamrock had an average 40.8% share of the United States HHUDR market, while Secoma's share averaged 17.5%. *731 F. Supp. at 6*. In 1988 alone, the two firms enjoyed a combined share of 76% of the market. (The district court inaccurately calculated this figure as 66%. *See* *id. at 10*; Brief for Appellant at 10 n. 10; Brief for Appellees att. A.) The acquisition thus has brought about a dramatic increase in the Herfindahl-Hirschman Index (HHI) -- a yardstick of concentration -- for this market. The Department of Justice's Merger Guidelines characterize as "highly concentrated" any market in which the HHI exceeds 1800. *See* United States Dep't of Justice, Merger Guidelines § 3.1 (June 14, 1984), *reprinted in* 4Trade Reg.Rep. (CCH) P. 13,103, at 20,561-64 (1988). Using the 1986-1988 figures, this acquisition has increased the HHI in this market from 2878 to 4303. Brief for Appellant at 5 n. 3, 12 (computed from *731 F. Supp. at 6*).

review de novo. The government's key contention is that the district court, which did not expressly state the legal standard that it applied in its analysis of rebuttal evidence, failed to apply a sufficiently stringent standard. The government argues that, as a matter of law, section 7 defendants can rebut a prima facie case *only by a clear showing that entry into the market by competitors would be quick and effective*. Because the district court failed to apply this standard, the government submits, the court erred in concluding that the proposed acquisition would not substantially lessen future competition in the United States HHUDR market.

We find no merit in the legal standard propounded by the government. It is devoid of support in the statute, in the case **[**7]** law, and in the government's own Merger Guidelines. Moreover, it is flawed on its merits in three fundamental respects. First, it assumes that ease of entry by competitors is the *only* consideration relevant to a section 7 defendant's rebuttal. Second, it requires that a defendant who seeks to show ease of entry bear the onerous burden of proving that entry will be "quick and effective." Finally, by stating that the defendant can rebut a prima facie case only by a *clear* showing, the standard in effect shifts the government's ultimate burden of persuasion to the defendant. Although the district court in this case did not expressly set forth a legal standard when it evaluated the defendants' rebuttal, we have carefully reviewed the court's thorough analysis of competitive conditions in the United States HHUDR market, and we are satisfied that the court effectively applied a standard faithful to section 7. [4] **[*984]** Concluding that the court applied this legal standard to factual findings that are not clearly erroneous, we affirm the court's denial of a permanent injunction and its dismissal of the government's section 7 claim.

[8]** I.

It is a foundation of section 7 doctrine, disputed by no authority cited by the government, that evidence on a variety of factors can rebut a prima facie case. These factors include, but are not limited to, the absence of significant entry barriers in the relevant market. In this appeal, however, the government inexplicably imbues the entry factor with talismanic significance. If, to successfully rebut a prima facie case, a defendant *must* show that entry by competitors will be quick and effective, then other factors bearing on future competitiveness are all but irrelevant. The district court in this case considered at least two factors in addition to entry: the misleading nature of the statistics underlying the government's prima facie case and the sophistication of HHUDR consumers. These non-entry factors provide compelling support for the court's holding that Tamrock's acquisition of Secoma was not likely to lessen competition substantially. We have concluded that the court's consideration of these factors was crucial, and that the government's fixation on ease of entry is misplaced.

Section 7 involves *probabilities*, not certainties or possibilities. [5] The Supreme **[**9]** Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition. That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. ***HN4***[] Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness; the Supreme Court has never indicated that a defendant seeking to rebut a prima facie case is restricted to producing evidence of ease of entry. Indeed, in numerous cases, defendants have relied entirely on non-entry factors in successfully rebutting a prima facie case.

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[4] Even if we found more impressive the argument that the district court did not clearly articulate the legal standard applicable to a section 7 rebuttal, it would remain open to us to affirm that court's judgment. *Cf.* *Nelson v. United States, 267 U.S. App. D.C. 330, 838 F.2d 1280, 1285 (D.C.Cir. 1988)* ("We ***HN3***[] may affirm a trial court's decision on a basis not relied on by the district court where that ground finds support in the record.") (citation omitted).

[5] *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 323, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* ("Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a *probable* anticompetitive effect were to be proscribed by this Act.") (footnote omitted) (emphasis added).

[10]** In *United States v. General Dynamics Corp., 415 U.S. 486, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974)*, for instance, the Supreme Court rejected the government's argument that a merger between two leading coal producers would violate section 7. Although the transaction would result in the two largest firms controlling about half of all sales in an industry that was already highly concentrated because of a rapid decline in the number of competitors, the defendants produced considerable evidence that the merger would not substantially lessen competition. One of the parties to the merger owned only minimal reserves of coal, an irreplaceable raw material, and had already committed these reserves through long-term contracts. This evidence led the Court to conclude that the government's statistics regarding concentration in the wake of the merger inaccurately portrayed the post-merger company's weak competitive stature, and that the defendants had therefore rebutted the prima facie case. *Id. at 503-04*. Nowhere did the Court consider barriers to entry.

Indeed, the Court in *General Dynamics* emphasized the comprehensive nature of a section 7 inquiry, quoting **[**11]** at length from its decision a decade earlier in *Brown Shoe Co. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. *See* *General Dynamics, 415 U.S. at 498*. In *Brown Shoe*, the Court applied section 7 stringently, holding that a merger that created a company with a 5% share of a highly fragmented market violated the statute. In arriving at this result, however, **[*985]** the Court stressed that ***HN5***[] a transaction must

> be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in **[**12]** importance with the merger under consideration, which would properly be taken into account.

370 U.S. at 321-22 (footnote omitted). [6] All these factors are relevant in determining whether a transaction is likely to substantially lessen competition, but none is invariably dispositive. *See* Note, *Horizontal Mergers After* United States v. General Dynamics Corp., 92 Harv.L.Rev. 491, 500 (1978).

In the wake of *General Dynamics*, the Supreme Court and lower courts have found section 7 defendants to have successfully rebutted the government's prima facie case by presenting **[**13]** evidence on a variety of factors other than ease of entry. *See, e.g.,* *Citizens & Southern, 422 U.S. at 121-23* (no lessening of competition, and thus no violation of section 7, where acquired banks were already associated with acquiring bank; no discussion of ease of entry); *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7th Cir. 1981)* (acquired company's deteriorating market position both before and after acquisition rebutted prima facie case), *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*; *FTC v. National Tea Co., 603 F.2d 694, 699-700 (8th Cir. 1979)* (weak market position of acquiring company made substantial lessening of competition unlikely); *United States v. International Harvester Co., 564 F.2d 769, 773-79 (7th Cir. 1977)* (company successfully rebutted prima facie case by showing, inter alia, financial weakness of acquired company, de facto independence of acquired company from acquiring company, strong level of competition in relevant market, and tendency of the market toward even stronger levels of competition).

Indeed, that a variety of factors other than **[**14]** ease of entry can rebut a prima facie case has become hornbook law. *See, e.g.*, P. Areeda & H. Hovenkamp, ***Antitrust Law*** paras. 919', 920.1, 921', 925', 934', 935', 939', at 813-23 (Supp. 1989) (other factors include significance of market shares and concentration, likelihood of express collusion or tacit coordination, and prospect of efficiencies from merger); H. Hovenkamp, *Economics and Federal **Antitrust***

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[6] *See also* *id. at 322 n. 38* ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market -- its structure, history and probable future -- can provide the appropriate setting for judging the probable anticompetitive effect of the merger.").

Law § 11.6, at 307-11 (1985) (other factors include supply of irreplaceable raw materials, excess capacity, degree of product homogeneity, marketing and sales methods, and absence of a trend toward concentration); L. Sullivan, *Handbook of the Law of Antitrust* § 204, at 622-25 (1977) (other factors include industry structure, weakness of data underlying prima facie case, elasticity of industry demand, inter-industry cross-elasticities of demand and supply, product differentiation, and efficiency). *See generally* Antitrust Section, ABA, *Horizontal Mergers: Law and Policy* 162-75, 201-04, 219-63 (Monograph No. 12, 1986).

It is not surprising, then, that the Department of Justice's own Merger Guidelines contain a detailed discussion of non-entry factors that can **[**15]** overcome a presumption of illegality established by market share statistics. *See* United States Dep't of Justice, Merger Guidelines (June 14, 1984) [hereinafter Guidelines], *reprinted in* 4Trade Reg.Rep. (CCH) P. 13,103, at 20,561-64 (1988). According to the Guidelines, these factors include changing market **[*986]** conditions (§ 3.21), the financial condition of firms in the relevant market (§ 3.22), special factors affecting foreign firms (§ 3.23), the nature of the product and the terms of sale (§ 3.41), information about specific transactions and buyer market characteristics (§ 3.42), the conduct of firms in the market (§ 3.44), market performance (§ 3.45), and efficiencies (§ 3.5).

Given this acknowledged multiplicity of relevant factors, we are at a loss to understand on what basis the government has decided that "to rebut the government's prima facie case, the defendants were *required* to show that *entry* would be both quick and effective in preventing supracompetitive prices." Brief for Appellants at 11-12 (emphasis added). If the district court in this case had focused exclusively on entry, it might be understandable that the government would mirror **[**16]** that focus in attacking the court's conclusion. The district court, however, canvassed a number of non-entry factors that contributed to its conclusion that the defendants had rebutted the prima facie case. By ignoring these factors, the government's arguments against that conclusion fall wide of the mark.

The district court's analysis of this case is fully consonant with precedent and logic. The court reviewed the evidence proffered by the defendants as part of its overall assessment of future competitiveness in the United States HHUDR market. As noted above, the court gave particular weight to two non-entry factors: the flawed underpinnings of the government's prima facie case and the sophistication of HHUDR consumers. The court's consideration of these factors was not only appropriate, but imperative, because in this case these factors significantly affected the probability that the acquisition would have anticompetitive effects.

With respect to the first factor, the statistical basis of the prima facie case, the court accepted the defendants' argument that the government's statistics were misleading. Because the United States HHUDR market is minuscule, market share statistics **[**17]** are "volatile and shifting," *731 F. Supp. at 11*, and easily skewed. In 1986, for instance, only 22 HHUDRs were sold in the United States. In 1987, the number rose to 43, and in 1988 it fell to 38. Every HHUDR sold during this period, thus, increased the seller's market share by two to five percent. A contract to provide multiple HHUDRs could catapult a firm from last to first place. The district court found that, in this unusual market, "at any given point in time an individual seller's future competitive strength may not be accurately reflected." *Id. at 9*. While acknowledging that the HHUDR market would be highly concentrated after Tamrock acquired Secoma, the court found that such concentration in and of itself would not doom competition. High concentration has long been the norm in this market. For example, only four firms sold HHUDRs in the United States between 1986 and 1989. *Id. at 5-6*. [7] Nor is concentration surprising where, as here, a product is esoteric and its market small. Indeed, the trial judge found that "concentration has existed for some time [in the United States HHUDR market] but there is no proof of overpricing, **[**18]** excessive profit or any decline in quality, service or diminishing innovation." *Id. at 12*.

The second non-entry factor that the district court considered was the sophistication of HHUDR consumers. HHUDRs currently cost hundreds of thousands of dollars, and orders can exceed $ 1 million. *Id. at 8*. These products are hardly trinkets sold to small consumers who may possess imperfect information and limited bargaining

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[7] *See also supra* note 3 (HHI of United States HHUDR market before merger was 2878; Department of Justice regards any market in which HHI exceeds 1800 as "highly concentrated").

power. HHUDR buyers closely examine available options and typically insist on receiving multiple, confidential bids for each order. *Id.* This sophistication, the court found, was likely to promote competition even in a highly concentrated market. *Id. at 11*.

[*987] The government has not provided us with any reason to suppose that these findings of fact **[**19]** are unsupported in the record or clearly erroneous, *see* *Fed.R.Civ.P. 52(a)*. We thus accept them as correct. These findings provide considerable support for the district court's conclusion that the defendants successfully rebutted the government's prima facie case. Because the defendants also provided compelling evidence on ease of entry into this market, we need not decide whether these findings, without more, are sufficient to rebut the government's prima facie case. The foregoing analysis of non-entry factors is intended merely to underscore that, contrary to the government's assumption, these factors are relevant, and can even be dispositive, in a section 7 rebuttal analysis.

II.

HN6[] The existence and significance of barriers to entry are frequently, of course, crucial considerations in a rebuttal analysis. In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time. *See, e.g., United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-33, 35 L. Ed. 2d 475, 93 S. Ct. 1096 (1973)*; *United States v. Syufy Enters., 903 F.2d 659*, **[**20]** slip op. 4523, 4532-33 (9th Cir. 1990); *California v. American Stores Co., 872 F.2d 837, 842 (9th Cir. 1989)*, *rev'd on other grounds*, *495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*; *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1335-36 (7th Cir. 1986)*. The district court in this case reviewed the prospects for future entry into the United States HHUDR market and concluded that, overall, entry was likely, particularly if Tamrock's acquisition of Secoma were to lead to supracompetitive pricing. The government attacks this conclusion, asserting that, as a matter of law, the court should have required the defendants to show clearly that entry would be "quick and effective." We reject this novel and unduly onerous standard. The district court's factual findings amply support its determination that future entry into the United States HHUDR market is likely. This determination, in turn, supports the court's conclusion that the defendants successfully rebutted the government's prima facie case.

As authority for its "quick and effective" entry test, the government relies primarily on *United States v. Waste Management, Inc., 743 F.2d 976, 981-84 (2d Cir. 1984)*. **[**21]** This reliance is misplaced. Neither *Waste Management* nor any other case purports to establish a categorical "quick and effective" entry requirement. The Second Circuit in *Waste Management* simply noted that the defendant had successfully rebutted the government's prima facie case by showing that entry into the Dallas/Fort Worth trash collection market was "easy." *Id. at 983*. ***HN7***[] That a defendant *may* successfully rebut a prima facie case by showing quick and effective entry does not mean that successful rebuttal *requires* such a showing. We are at a loss to understand how the government derived from *Waste Management* (where, lest the irony be missed, the government lost) the proposition that "a defendant arguing supposed ease of entry can rebut the government's prima facie case *only* by clearly showing that entry will be both quick and effective at preventing supracompetitive pricing." Brief for Appellant at 14 (emphasis added).

That the "quick and effective" standard lacks support in precedent is not surprising, for it would require of defendants a degree **[**22]** of clairvoyance alien to section 7, which, as noted above, deals with probabilities, not certainties. Although the government disclaims any attempt to impose upon defendants the burden of proving that entry actually will occur, *see* Reply Brief for Appellant at 13 n. 13, we believe that an inflexible "quick and effective" entry requirement would tend to impose precisely such a burden. ***HN8***[] A defendant cannot realistically be expected to prove that new competitors will "quickly" or "effectively" enter unless it produces evidence regarding specific competitors and their plans. Such evidence is rarely available; potential competitors have a strong interest in downplaying the likelihood that they will enter a given market. When the government sarcastically "wonders how slow and ineffective **[*988]** entry rebuts a prima facie case," *id. at 12*, it misses a crucial point. If the totality of a defendant's evidence suggests that entry will be slow and ineffective, then the district court is unlikely to find the prima facie case rebutted. This is a far cry, however, from insisting that the defendant **[**23]** must *invariably* show that new competitors will enter quickly and effectively.

Furthermore, the supposed "quick and effective" entry requirement overlooks the point that a firm that *never* enters a given market can nevertheless exert competitive pressure on that market. If barriers to entry are insignificant, the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs. *See* Falstaff Brewing, 410 U.S. at 532-33 (potential for defendant Falstaff to enter the market might induce brewers in the Northeast to maintain competitive prices); FTC v. Procter & Gamble Co., 386 U.S. 568, 581, 18 L. Ed. 2d 303, 87 S. Ct. 1224 (1967) ("It is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market. . . . [The] industry was influenced by each firm's predictions of the market behavior of its competitors, actual *and potential*.") (emphasis added); *cf.* Byars v. Bluff City News Co., 609 F.2d 843, 851 n. 19 (6th Cir. 1979) ("If entry barriers are low, the threat of potential competition operates as a significant check on monopoly **[**24]** power since competitors will quickly enter the market if prices are raised significantly."). If a firm that *never* enters a market can keep that market competitive, a defendant seeking to rebut a prima facie case certainly need not show that any firm *will* enter the relevant market.

The final flaw in the proposed "quick and effective" standard is its manipulability. The adjectives "quick" and "effective" are hardly self-defining, and have not traditionally been used in the section 7 context. The government's Merger Guidelines do not use the words when discussing entry, noting only that

> if entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Department is unlikely to challenge mergers in that market. . . . In assessing the ease of entry into a market, the Department will consider the likelihood and probable magnitude of entry in response to a "small but significant and nontransitory" increase in price.

Guidelines § 3.3, *reprinted in* 4Trade Reg.Rep. (CCH) at 20,562. In its brief, moreover, the government fails to state its own standard consistently, insisting at one point that **[**25]** a defendant show that entry will be "sure, swift, and substantial." Brief for Appellant at 16. Our uncertainty over the meaning and implications of "quick and effective" entry makes us all the more resistant to the imposition of such a requirement. Nor has the government shown that current section 7 law is so confused as to warrant the invention of a new standard.

The government's insistence on a "quick and effective" entry standard only reaffirms our doubts, raised in section I of this opinion, about the government's approach to section 7 analysis. Predicting future competitive conditions in a given market, as the statute and precedents require, calls for a comprehensive inquiry. The government's standard would improperly narrow the section 7 inquiry, channelling what should be an overall analysis of competitiveness into a determination of whether a defendant has shown particular facts.

Having rejected the "quick and effective" entry standard itself, we turn briefly to the government's more general argument that the district court's findings regarding ease of entry failed to support its conclusion that the defendants had rebutted the prima facie case. The district court in this **[**26]** case discussed a number of considerations that led it to conclude that entry barriers to the United States HHUDR market were not high enough to impede future entry should Tamrock's acquisition of Secoma lead to supracompetitive pricing. First, the court noted that at least two companies, Cannon and Ingersoll-Rand, had entered the United States HHUDR market in 1989, and were poised **[*989]** for future expansion. [8] 731 F. Supp. at 9, 10, 11. Second, the court stressed that a number of firms competing in Canada and other countries had not penetrated the United States market, but could be expected to do so if Tamrock's acquisition of Secoma led to higher prices. Id. at 10-11. [9] **[**28]** Because the market is small, "it is inexpensive to develop a separate sales and service network in the United States." Id. at 8. Third, these firms would

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[8] As the Guidelines note, "'Entry' may occur as firms outside the market enter for the first time *or as fringe firms currently in the market greatly expand their current capacity*." Guidelines § 3.3, *reprinted in* 4Trade Reg.Rep. (CCH) at 20,562 n. 20 (emphasis added).

[9] Some of these firms have already tried, but failed, to penetrate the United States HHUDR market. As the district court correctly noted, however, failed entry in the past does not necessarily imply failed entry in the future: if prices reach supracompetitive levels, a company that has failed to enter in the past could become competitive. *See* 731 F. Supp. at 11; *cf.* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 119, 107 S. Ct. 484, 93 L. Ed. 2d 427 n. 15 (1986) **HN9**[] ("In evaluating entry barriers . . . a court should focus on whether significant entry barriers would exist *after* the merged firm had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant.").

exert competitive pressure on the United States HHUDR market even if they never actually entered the market. *Id. at 10-11*. Finally, the court noted that there had been tremendous turnover in the United States HHUDR market in the 1980s. Secoma, for example, did not sell a single HHUDR in **[**27]** the United States in 1983 or 1984, but then lowered its price and improved its service, becoming market leader by 1989. *Id. at 9, 10*. Secoma's growth suggests that competitors not only can, but probably will, enter or expand if this acquisition leads to higher prices. The district court, to be sure, also found some facts suggesting difficulty of entry, [10] but these findings do not negate its ultimate finding to the contrary.

In sum, we see no error -- legal or factual -- in the district court's determination that entry into the United States HHUDR market would likely avert anticompetitive effects from Tamrock's acquisition of Secoma. The court's determination on entry, considered along with the findings discussed in section I of this opinion, suffices to rebut the government's prima facie case.

III.

Finally, we consider the strength of the showing that a section 7 defendant must make to rebut a prima facie case. The district court simply reviewed the evidence that the defendants presented **[**29]** and concluded that the acquisition was not likely to substantially lessen competition. The government argues that the court erred by failing to require the defendants to make a "clear" showing. *See* Brief for Appellant at 13. The relevant precedents, however, suggest that this formulation overstates the defendants' burden. We conclude that a "clear" showing is unnecessary, and we are satisfied that the district court required the defendants to produce sufficient evidence.

The government's "clear showing" language is by no means unsupported in the case law. In the mid-1960s, the Supreme Court construed section 7 to prohibit virtually any horizontal merger or acquisition. At the time, the Court envisioned an ideal market as one composed of many small competitors, each enjoying only a small market share; the more closely a given market approximated this ideal, the more competitive it was presumed to be. *See United States v. Aluminum Co. of Am., 377 U.S. 271, 280, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964)* ("It is the basic premise of [section 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.'") (quoting **[**30]** *United States v. Philadelphia **[*990]** Nat'l Bank, 374 U.S. 321, 363, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963))*.

This perspective animated a series of decisions in which the Court stated that a section 7 defendant's market share measures its market power, that statistics alone establish a prima facie case, and that a defendant carries a heavy burden in seeking to rebut the presumption established by such a prima facie case. The Court most clearly articulated this approach in *Philadelphia Bank*:

> Th[e] intense congressional concern with the trend toward concentration [underlying section 7] warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence *clearly showing* that the merger is not likely to have such anticompetitive effects.

374 U.S. at 363 **[**31]** (emphasis added). *Philadelphia Bank* involved a proposed merger that would have created a bank commanding over 30% of a highly concentrated market. While acknowledging that the banks could in

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[10] The court, for instance, noted that HHUDRs are custom-made, and thus are not readily interchangeable or replaceable. Buyers, therefore, tend to return to sellers from whom they have purchased in the past. *731 F. Supp. at 8*. The court also found that HHUDR customers typically place great importance on assurances of product quality and reliable future service -- considerations that may handicap new entrants. *Id.* It also noted the significant economies of scale involved in manufacturing HHUDRs. *Id.*

principle rebut the government's prima facie case, the Court found unpersuasive the banks' evidence challenging the alleged anticompetitive effect of the merger. *See id. at 366-72*.

In *United States v. Von's Grocery Co., 384 U.S. 270, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966)*, the Court further emphasized the weight of a defendant's burden. Despite evidence that a post-merger company had only a 7.5% share of the Los Angeles retail grocery market, the Court, citing anticompetitive "trends" in that market, ordered the merger undone. The Court summarily dismissed the defendants' contention that the post-merger market was highly competitive. *Id. at 277-78*. [11] Noting that the market was "marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers," the *Von's Grocery* Court predicted that, if the merger were not undone, the market "would slowly but inevitably gravitate from a market of **[**32]** many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed." *Id. at 278*; *see also United States v. Pabst Brewing Co., 384 U.S. 546, 550-52, 16 L. Ed. 2d 765, 86 S. Ct. 1665 (1966)* (acquisition producing brewer accounting for 4.49% of nationwide beer sales violates section 7; brewer's rebuttal evidence virtually ignored).

Although the Supreme Court has not overruled these section 7 precedents, it has cut them back sharply. In *General Dynamics, 415 U.S. at 498-504*, the Court affirmed a district court determination that, by presenting evidence that undermined the government's statistics, section 7 defendants had successfully rebutted a prima facie case. In so holding, the Court did not expressly reaffirm or disavow **[**33]** *Philadelphia* Bank's statement that a company must "clearly" show that a transaction is not likely to have substantial anticompetitive effects. The Court simply held that the district court was justified, based on all the evidence, in finding that "no substantial lessening of competition occurred or was threatened by the acquisition." *General Dynamics, 415 U.S. at 498*.

General Dynamics began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s. Instead of accepting a firm's market share as virtually conclusive proof of its market power, the Court carefully analyzed defendants' rebuttal evidence. [12] These cases discarded **[*991]** *Philadelphia* Bank's insistence that a defendant "clearly" disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of a "showing." *See, e.g., United States v. Marine Bancorporation, 418 U.S. 602, 631, 41 L. Ed. 2d 978, 94 S. Ct. 2856 (1974)* (after government established prima facie case, "the burden was then upon appellees *to show* that the concentration ratios, which can be unreliable indicators of actual market behavior, did **[**34]** not accurately depict the economic characteristics of the [relevant] market") (citation omitted) (emphasis added); *United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 120, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975)* (after government established prima facie case, "it was . . . incumbent upon [the defendant] *to show* that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition") (emphasis added). Without overruling *Philadelphia Bank*, then, the Supreme Court has at the very least lightened the evidentiary burden on a

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[11] Justice Stewart, in dissent, emphasized the considerable amount of evidence in the record indicating the market's competitiveness. *384 U.S. at 290-301* (Stewart, J., dissenting).

[12] Judge Posner has elucidated this point:

> The most important developments that cast doubt on the continued vitality of such cases as *Brown Shoe* and *Von's* are found in other cases, where the Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act. . . . Applied to cases brought under Section 7, this principle requires the district court . . . to make a judgment whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.

Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied*, ***481 U.S. 1038, 107 S. Ct. 1975, 95 L. Ed. 2d 815 (1987)***.

section 7 defendant. *See generally* Note, 92 Harv. L. Rev. at 491 (describing impact of *General Dynamics* on section 7 jurisprudence).

[35]** In the aftermath of *General Dynamics* and its progeny, ***HN10***[] a defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition. *See* *American Stores, 872 F.2d at 842* (defendant can rebut prima facie case "through evidence *demonstrating* that statistics on market share, market concentration, and market concentration trends portray inaccurately the merger's probable effects on competition") (emphasis added); *cf.* *Waste Management, 743 F.2d at 981* (defendant can rebut prima facie case "by *a demonstration* that the merger will not have anticompetitive effects") (emphasis added). The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully. A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor.

By focusing **[**36]** on the future, section 7 gives a court the uncertain task of assessing probabilities. In this setting, allocation of the burdens of proof assumes particular importance. By shifting the burden of producing evidence, present law allows both sides to make competing predictions about a transaction's effects. If the burden of production imposed on a defendant is unduly onerous, the distinction between that burden and the ultimate burden of persuasion -- always an elusive distinction in practice -- disintegrates completely. ***HN11***[] A defendant required to produce evidence "clearly" disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case - whether a transaction is likely to substantially lessen competition. Absent express instructions to the contrary, we are loath to depart from settled principles and impose such a heavy burden. *See* *Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1340 & n. 12 (7th Cir. 1981)*; *cf.* *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-56, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)* **[**37]** (applying similar production-burden-shifting analysis to employment discrimination suits under title VII, and noting that "the ultimate burden of persuading the trier of fact . . . remains at all times with the plaintiff," *id. at 253*); 9 J. Wigmore, *Evidence* § 2489, at 300 (J. Chadbourn rev. 1981) (burden of persuasion "never shifts" away from plaintiff).

[*992] Imposing a heavy burden of production on a defendant would be particularly anomalous where, as here, it is easy to establish a prima facie case. The government, after all, can carry its initial burden of production simply by presenting market concentration statistics. To allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7. The Herfindahl-Hirschman Index cannot guarantee litigation victories. [13] *Cf.* *Ball Memorial Hosp., 784 F.2d at 1336* (explaining that "market share is just a way of estimating market power, which is the ultimate consideration," and noting that "when there are better ways to estimate market power, the court should use them"). Requiring **[**38]** a "clear showing" in this setting would move far toward forcing a defendant to rebut a probability with a certainty.

[39]** * * *

The appellees in this case presented the district court with considerable evidence regarding the United States HHUDR market. The court credited the evidence concerning the sophistication of HHUDR consumers and the insignificance of entry barriers, as well as the argument that the statistics underlying the government's prima facie case were misleading. This evidence amply justified the court's conclusion that the prima facie case inaccurately

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[13] We refer the government to its own Merger Guidelines, which recognize that "in a variety of situations, market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market." Guidelines § 3.2, *reprinted in* 4Trade Reg.Rep. (CCH) at 20,561. Although the Guidelines disclaim "slavish[] adherence" to such data, *id.*, statement, *reprinted in* 4Trade Reg.Rep. (CCH) at 20,552, we fear that the Department of Justice has ignored its own admonition. The government hardly maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery. *Cf.* *Syufy Enters., 903 F.2d 659 at 672* ("It is a tribute to the state of competition in America that the Antitrust Division of the Department of Justice has found no worthier target than this paper tiger on which to expend limited taxpayer resources.").

depicted the probable anticompetitive effect of Tamrock's acquisition of Secoma. Because the government did not produce sufficient evidence to overcome this successful rebuttal, the district court concluded that "it is not likely that the acquisition will substantially lessen competition in the United States either immediately or long-term." *731 F. Supp. at 12*. The government has given us no reason to reverse that conclusion.

For the foregoing reasons, the judgment of the district court is

Affirmed.

Market Force, Inc. v. Wauwatosa Realty Co.

United States Court of Appeals for the Seventh Circuit

September 25, 1989, Argued ; July 11, 1990, Decided

No. 89-1674

Reporter

906 F.2d 1167 *; 1990 U.S. App. LEXIS 11753 **; 1990-2 Trade Cas. (CCH) P69,094

MARKET FORCE INCORPORATED, Plaintiff-Appellant, v. WAUWATOSA REALTY COMPANY, COLDWELL BANKER BRUCE BARRY & GLEYSTEEN, INCORPORATED, FOUR SEASONS REALTY, INCORPORATED, and CENTURY 21 PROPERTIES LIMITED, [1] Defendants-Appellees

Prior History: [1]** On Appeal from the United States District Court for the Eastern District of Wisconsin. No. 88-C-167 -- Terence T. Evans, Judge.

Disposition: AFFIRMED.

Core Terms

brokers, buyers', conspiracy, district court, firms, tends, independent action, reasons, commissions, policies, selling agent, mailed, summary judgment, antitrust, listing, summary judgment motion, referral, alleged conspiracy, act independently, hostile, selling, sales

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

[1] Subsequent to oral argument, an original defendant, Grace Ciesielski (doing business as Raven Realty), settled with the appellant and is no longer a party to this suit.

In order to find antitrust liability on the part of the defendants, a jury would have to find that the defendants had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

Proof of conspiracy requires parallel behavior plus additional facts or circumstances that raise the inference of agreement. Furthermore, to defeat a motion for summary judgment, the plaintiff must come forward with evidence that dispels the possibility that the defendants were acting for independent business reasons.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

Coincidence does not a conspiracy make.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Sherman Act, Claims**

On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the defendants, that is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN6[] **Remedies, Damages**

To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of the Sherman Act, *15 U.S.C.S. § 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. A movant must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed respondents.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

In antitrust cases, the analysis permits a defendant to rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Once a defendant has met this initial burden, a plaintiff must provide specific factual support for its allegations of conspiracy tending to show that the defendant was not acting independently.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

When a defendant puts forward denials of conspiracy in an antitrust action, plaintiffs must come forward with some significant probative evidence that suggests that conscious parallelism is the result of an unlawful agreement. Defendant must assert that action was against economic self-interest, and must come forward with some "plus" factor that tends to indicate the absence of independent action.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Evidence of informal communications among several parties does not unambiguously support an inference of a conspiracy, and evidence of meetings among the defendants is ambiguous at best and does not help to exclude the possibility of independent action.

Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Defenses > Illegal Bargains

HN10[] **Antitrust & Trade Law, Sherman Act**

If the exchange of information regarding the commissions that firms would pay is not unreasonable business behavior, then it is not an illegal agreement, and competitors may exchange price information for legitimate business reasons.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

Where the evidence of the existence of a conspiracy is ambiguous, the plaintiff may survive summary judgment only by putting forth evidence that tends to exclude the possibility that the defendants were pursuing independent interests.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

A defendant is entitled to summary judgment in an antitrust action when it provides a plausible and justifiable alternative interpretation of its conduct that rebuts the alleged conspiracy.

Counsel: For Plaintiff-Appellant: Edwin J. Hughes, Stafford, Rosenbaum, Rieser & Hansen, Madison, Wisconsin.

For Defendants-Appellees: Walter F. Schmidt, Kent A. Tess-Mattner, Schmidt & Rupke, Milwaukee, Wisconsin, Marcia R. Rimai, Richard J. Sankovitz, Whyte & Hirschboeck, Milwaukee, Wisconsin, Warren S. Blumenthal, Blumenthal, Jacquart, Blumenthal & Leib, Milwaukee, Wisconsin.

Judges: Bauer, Chief Judge, and Ripple and Manion, Circuit Judges.

Opinion by: RIPPLE

Opinion

[*1168] RIPPLE, Circuit Judge.

Market Force began operations in 1986 as a real estate buyers' broker. In this case, it alleged that a group of realtors had conspired to drive it out of business in violation of Section 4 of the Clayton Act (*15 U.S.C. § 15*) and *Section 1* of the Sherman Act (*15 U.S.C. § 1*).

Market Force's motion for a preliminary injunction was denied by the district court. Subsequently, the defendants individually filed motions for summary judgment. The district court granted these motions. Market Force now **[**2]** appeals the grant of summary judgment to the defendants. For the following reasons, we affirm.

I

BACKGROUND

A. *Facts*

1. Market Force and the Real Estate Business

According to the record, residential real estate sales generally begin when a homeowner signs an exclusive marketing contract with a broker. The broker ("listing broker") then lists the property on a local "multiple listing service" (MLS). By listing on the MLS, the broker is making a general offer of subagency to any salesperson who can find a buyer to complete the sale. Other salespeople can show the house and try to arrange a sale with a prospective buyer. These individuals are called "selling brokers" or "selling agents" and, while working primarily with the buyer, are considered to be agents of the seller. In fact, their duty of loyalty lies with the seller. While commissions may vary, the traditional commission is 6% of the cost of the house, split so that the listing broker receives 60% (or 3.6% of the cost of the house) and the selling agent receives 40% (or 2.4% of the cost of the house).

Market Force began operations in 1986 as a "buyers' broker." It differed from traditional real estate firms **[**3]** in that it signed exclusive contracts with individuals seeking to purchase a house. The Market Force agent would find houses that the agent believed might interest clients, and show the houses to them. Most significantly, Market Force agents owed their duty of loyalty to the buyers. The contract between Market Force and the buyers specified that Market Force would receive a fee equal to 40% of the sales commission, or 2.4% of the selling price. The contract further anticipated that, at the time of sale, the buyer would request that the listing broker pay Market Force this commission. If the broker cooperated, the buyer would owe no further obligation to Market Force.

2. The Real Estate Community's Reaction to Market Force

For some time after Market Force began operation, other real estate firms treated Market Force in an inconsistent manner with respect to splitting commissions. Some firms paid a full 40% commission and others paid nothing. Mayfair Homes was the first real estate firm to adopt a concrete policy, deciding in September 1987 not to share any part of its sales commissions with Market Force. At the same time, Wauwatosa Realty Company (Wauwatosa), a large real estate **[**4]** firm in Milwaukee and throughout Wisconsin, occasionally split commissions and occasionally refused entirely to enter into sales contracts with Market Force buyers.

Before formulating a policy about splitting commissions with buyers' brokers, Joann Glawe, Wauwatosa's general sales manager, contacted Mayfair Homes and inquired about its policy. Wauwatosa subsequently issued its policy on October 23, 1987. Its policy was to pay a buyers' broker the same fee it paid to out-of-state or non-MLS brokers who refer a buyer to Wauwatosa. The district court noted that:

> **[*1169]** According to her affidavit, Ms. Glawe wrote the Wauwatosa policy with specific business reasons in mind: (1) Wauwatosa was paying the same 20% referral fee to out-of-state and non-MLS brokers who referred buyers to Wauwatosa; (2) Wauwatosa might have to pay a selling agent in a transaction even though a buyers' agent was involved, where, for example, a selling agent held an open house and the buyer represented by a buyers' agent toured the home; (3) Wauwatosa pays its listing agents more when a buyers' agent but not a selling agent is involved, on the theory that the listing agent must take on some of the duties **[**5]** of a selling agent, such as answering questions on behalf of the seller; and (4) buyers' agents have lower costs than selling agents because they do not list homes in the MLS.

The Market Force, Inc. v. Wauwatosa Realty Co., 706 F. Supp. 1387, 1390-91 (D.Wis. 1989). Wauwatosa mailed a sheet describing its policy to all brokers listed in the MLS book -- about 250 firms. Ms. Glawe testified at a deposition that she undertook this mailing following a conversation with Peter Shuttleworth, director of the MLS, who told her that "other brokers other than just buyer brokers were [acting as buyers' brokers] and it might be well to let everyone know." *Id.*

Coldwell Banker, which lists the second highest quantity of homes in Milwaukee after Wauwatosa, issued its policy on November 11, 1987, after reviewing Wauwatosa's policy. It set its commission rate at 20% of the total commission, a figure its chief operating officer may have believed mistakenly was the same as Wauwatosa's. [2] It also mailed its policy to all MLS brokers. In subsequent months, several other firms issued policy statements about sharing commissions with buyers' brokers. The rates were the **[**6]** same as those offered by Wauwatosa or Coldwell -- either 10% or 20% of the total sales commission. All the firms that eventually adopted commission policies for buyers' brokers together represented about 31% of the annual listings of homes for sale in the Milwaukee MLS.

Market Force had several negative experiences with other brokers. Several sales were lost due to intransigence about sharing commissions. R.52 at 2; R.54 at 7. One Market Force buyer was told not to work with Market Force and that she would not get the home she was viewing unless she worked with a sales broker instead of Market **[**7]** Force's agent. R.87 Ex. 15 (McGrew Affidavit). At one closing, an agent for Four Seasons Realty told the president of Market Force that "everyone is against you" and that Market Force should quit business. R.54 at 10.

Market Force advertised in local television and print media. In November 1986, as a result of other real estate firms' complaints, the editor of a magazine wanted to remove Market Force's advertisement. The other firms apparently threatened to remove their own advertisements from the magazine if Market Force's advertisement was not removed. R.54 at 5. [3] Several complaints also were made to the executive director of the MLS.

[8]** Market Force decided not to enforce its contracts with buyers-clients that would entitle Market Force to collect from them the difference between the amount actually paid as commissions by other brokers and 2.4% of the sale price (the amount guaranteed to Market Force in its contract with its buyers-clients). However, it paid its **[*1170]** agents the fee they would have received if Market Force had received 2.4% of the sale price. Despite the fact that Market Force absorbed this difference, all of its agents eventually left. The company ceased operations in the fall of 1988.

B. *The District Court Opinion*

Market Force sued under section 4 of the Clayton Act, which permits parties to seek redress for violations of the antitrust laws. Specifically, Market Force alleged that the defendants violated *section 1* of the Sherman Antitrust Act. *15 U.S.C. § 1*. [4]

[9]** As an initial matter, the district court noted that, ***HN2***[] in order to find antitrust liability on the part of the defendants, a jury would have to find that the defendants "'had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. . . .'" *706 F. Supp. at 1393* (quoting *American Tobacco Co. v. United States, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946))*. ***HN3***[] Proof of conspiracy, the district court noted, "requires parallel behavior plus additional facts or circumstances that raise the inference of agreement." *Id.* Furthermore, to defeat a motion for summary judgment, the court observed, the plaintiff must come forward with evidence that dispels the possibility that the defendants were acting for independent business reasons. *Id. at 1394*.

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[2] It appears that Coldwell Banker's chief operating officer may have attempted to set its commission to be the same as Wauwatosa's. He testified in a deposition that he thought that Wauwatosa was paying 20% of the total commission, and that he set Coldwell Banker's rate at that level. R.87 Ex. 7 at 32. In fact, Wauwatosa paid 20% of the *selling agent's* commission, which was generally 40% of the total commission.

[3] Roy Lemke, president of Market Force, stated in an affidavit that a sixty-second segment prepared by him for a local television show was moved to a less desirable position in the show because of complaints to the producer by other real estate brokers. R.54 at 6. The producer of the show denied that he had received any such complaints, and claimed that the decision to move the Market Force segment was "based on a long-standing policy of the show, which had nothing to do with the feelings of any other real estate agencies." R.63 at 2.

[4] ***HN1***[] *Section 1* provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*.

Applying these standards, the district court concluded that Market Force had not put forward evidence that would permit a jury to conclude that the defendants had engaged **[**10]** in a conspiracy in restraint of trade. The evidence of any agreement presented was circumstantial. Notably, the action of the defendants was not totally parallel [5] and involved no more than a third of all properties in the MLS computer. The district court determined that the evidence presented by Market Force of several instances of "hostility" failed to exclude the possibility that the defendants did not conspire. *Id. at 1395*. Moreover, several defendants had put forward evidence of independent business reasons for adopting a policy regarding buyers' brokers. The district court summarized its reasoning as follows:

> ***HN4***[] Simply stated, coincidence does not a conspiracy make. And even drawing the inferences in favor of Market Force, a conspiracy is not the "compelling, if not exclusive, rational inference" from the record.

Id. (quoting *Weit v. Continental Illinois Nat'l Bank & Trust Co., 641 F.2d 457, 463 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 988, 71 L. Ed. 2d 847, 102 S. Ct. 1610 (1982))*.

[11]** II

ANALYSIS

A. *Standard of Review*

Two recent pronouncements of the Supreme Court of the United States establish the applicable rule of decision in this case: *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, and *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*.

Monsanto presented the Court with a question of the sufficiency of proof of a Sherman Act *§ 1* claim. The Court expressed concern that independent action improperly may be used as evidence of a conspiracy. ***HN5***[] "On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement." *465 U.S. at 763*. The Court then set the evidentiary standard that a plaintiff must meet:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [defendants]. That is, there must be direct **[*1171]** or circumstantial evidence **[**12]** that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Id. at 768. This standard was further refined in *Matsushita*, which, like the present case, involved the grant of the defendants' motion for summary judgment:

> ***HN6***[] To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* [of the Sherman Act] must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. [*Monsanto*,] *465 U.S. at 764*. Respondents in this case, in other

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[5] For example, Wauwatosa paid Market Force 0.6% of the sale price as commission, Coldwell Banker paid 1.2%, and some firms paid nothing.

> words, must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed respondents.

475 U.S. at 588.

These two cases suggest a two-part inquiry to determine whether summary judgment is appropriate in an antitrust conspiracy case:

> (1) is the plaintiff's evidence of conspiracy ambiguous, **[**13]** *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.

Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987); *see also* *Riverview Invs., Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474, 483 (6th Cir. 1990)*; *Dreiling v. Peugeot Motors of America, Inc., 850 F.2d 1373, 1380 (10th Cir. 1988)*; P. Areeda & H. Hovencamp, ***Antitrust Law*** § 316.1b, at 281-82 (1989 Supp.) (approving *Gibson* two-part inquiry). The Ninth Circuit adopted a similar two-part inquiry in *Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)*:

> ***HN7***[] In antitrust cases, the analysis . . . permits a defendant to rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. Once a defendant has met this initial burden, a plaintiff must **[**14]** provide specific factual support for its allegations of conspiracy tending to show that the defendant was not acting independently.

Id. at 902 (citations omitted). The Second Circuit has also articulated the test as a shift in burdens. When the defendants establish that their conduct is consistent with independent action, the plaintiffs are required to come forward with evidence that tends to exclude the possibility of independent action. *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Sys., Inc., 879 F.2d 1005, 1014 (2nd Cir. 1989)*. This court has enunciated a similar formulation in *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 660-61* (7th Cir.), *cert. denied*, *484 U.S. 977, 98 L. Ed. 2d 486, 108 S. Ct. 488 (1987)*, in which Judge Wood, writing for the court, held that the plaintiff failed to overcome a summary judgment motion because "it has not provided evidence tending to exclude the possibility that [the defendants] acted independently, or that would show that the inference of conspiracy to fix prices is reasonable in light of the competing inference of independent action. **[**15]** " *See also* *Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 536-37 (7th Cir. 1986)*.

B. *Application of the Standard to this Case*

Following the analytical model used in *Gibson, Richards, H.L. Hayden* and *Valley Liquors*, we shall examine the evidence of record to determine if Market Force's case can survive a motion for summary judgment. Accordingly, we shall first examine Market Force's evidence of a conspiracy among the defendants. Second, we shall examine whether the defendants have offered evidence tending to show that the conduct of which Market Force complains is as compatible with the defendants' legitimate business activities as it is with illegal conspiracy. Finally, if we conclude that the foregoing analysis leaves the evidence of conspiracy ambiguous, we shall then determine whether Market Force can point to any evidence that tends to exclude the possibility **[*1172]** that the defendants were pursuing their legitimate independent interests.

1. Evidence of a Conspiracy

In its effort to establish a conspiracy, Market Force submitted evidence of a) the defendant companies' mutual awareness of each others' policies; and b) hostile **[**16]** comments allegedly made about Market Force.

a) the circulation of policy statements

Market Force submitted evidence that some defendants had circulated buyers' broker commission rates and other firms had adopted policies regarding buyers' brokers after receiving the circulations. In late October 1987, Wauwatosa mailed to all members of the Milwaukee MLS copies of its policy expressing its intention to pay 20% of the selling agent's commission to buyers' brokers. After James Bruce, Coldwell Banker's chief operating officer, received a copy of the Wauwatosa policy, Coldwell Banker issued its own policy, setting the amount given as a commission at 20% of the total commission -- half of the normal selling agent commission. [6] Other firms subsequently adopted similar policies. Equitable/Stefaniak Realty issued a policy identical to Wauwatosa's that became effective December 15, 1987. A copy of the policy was mailed to all Milwaukee MLS members. On December 16, 1987, Realty World-Bloomfield Realty mailed its policy statement. Its policy was identical to the higher Coldwell Banker rates. Copies of the policy were mailed to all MLS members.

[17]** There is evidence that these mailings prompted at least one real estate broker to adopt such a policy. Andrew Dean, president of Realty World-Dean Realty, adopted a buyers' broker policy on December 24, 1987. He testified at a deposition that he knew of no buyers' brokers operating in Milwaukee. Nevertheless, he wanted "to be one of the brokers in the area doing what everyone else is doing." R.87 Ex. 8 at 23.

Market Force characterizes Wauwatosa's circulation as "an implicit invitation to their competitors to adopt similar policies." Appellant's Br. at 32. [7] **[**18]** However, evidence that brokers were aware of other brokers' policies regarding buyers' brokers before enacting their own policy is nothing more than a restatement of conscious parallelism. Since conscious parallelism by itself is not enough to support an antitrust conspiracy case, [8] Market Force cannot rest only on examples of conscious parallelism to support its case.

[19]** **[*1173]** Moreover, ***HN9***[] it is well established that evidence of informal communications among several parties does not unambiguously support an inference of a conspiracy. *See Riverview Invs., Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474, 484 (6th Cir. 1990)*; *Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 827* (11th Cir.) ("That the defendants might have talked among themselves about [the plaintiff's business difficulties] is also insufficient to permit an inference of conspiracy."), *cert. denied*, *495 U.S. 924, 110 S. Ct. 1960,*

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[6] *See supra* note 2.

[7] To support this argument, Market Force cites a Fourth Circuit criminal antitrust case, *United States v. Foley, 598 F.2d 1323 (4th Cir. 1979)*, *cert. denied*, ***444 U.S. 1043, 100 S. Ct. 727, 62 L. Ed. 2d 728 (1980)***. In *Foley*, a leading real estate broker had a dinner party and announced that he would raise his commissions. The other realtors soon followed suit. But the *Foley* court does not rely on the dinner party and announcement to find a conspiracy. There was other strong evidence: letters and phone calls among the realtors exhorting each other to charge the higher rate and fearing that deviation would ruin the plan. Based on *that* evidence, the court had little trouble affirming the conviction.

[8] *See Weit v. Continental Illinois Nat'l Bank & Trust Co., 641 F.2d 457, 462 (7th Cir. 1981)* ***HN8***[] (when defendant puts forward denials of conspiracy, "plaintiffs must come forward with some significant probative evidence which suggests that conscious parallelism is the result of an unlawful agreement"), *cert. denied*, ***455 U.S. 988, 71 L. Ed. 2d 847, 102 S. Ct. 1610 (1982)***; *see also Cayman Exploration Corp. v. United Gas Pipe Line, Co., 873 F.2d 1357, 1361 (10th Cir. 1989)* (plaintiff asserting conscious parallelism also needs to assert that action was against economic self-interest); *Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1583 (11th Cir. 1988)* (plaintiff asserting conscious parallelism must come forward with "some 'plus' factor which tends to indicate the absence of independent action"); *Royal Drug Co. v. Group Life and Health Ins. Co., 737 F.2d 1433, 1437 (5th Cir. 1984)* (in order to survive summary judgment, "significant probative evidence of conscious parallelism is required, 'with . . . some "plus" factor which tends to indicate that the asserted unilateral behavior was not such in fact. . . .'") (quoting *Paul Kadair, Inc. v. Sony Corp. of Am., 694 F.2d 1017, 1027 n. 27 (5th Cir. 1983))*, *cert. denied*, ***469 U.S. 1160, 105 S. Ct. 912, 83 L. Ed. 2d 925 (1985)***; *Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1487 (D.C.Cir. 1984)* (proof of conspiracy requires more than parallel acts).

109 L. Ed. 2d 322 (1990); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801, 805-06 (4th Cir. 1989)* (evidence that dealers agreed with a ban on discounters not sufficient to support the inference of a conspiracy); *cf.* *Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 662* (7th Cir.) (evidence of meetings among the defendants "is ambiguous at best and does not help to exclude the possibility" of independent **[**20]** action), *cert. denied*, *484 U.S. 977, 98 L. Ed. 2d 486, 108 S. Ct. 488 (1987)*.

b) hostile statements by defendants

As further evidence of conspiracy, Market Force also points to hostile statements attacking Market Force that were made by the defendants to home buyers, Market Force agents, and the MLS. The district court determined that the evidence put forward was insufficient to avoid summary judgment. We agree. The evidence before the district court suggests that there were several incidents in which harsh words were spoken. However, the incidents do not foreclose the conclusion that the competitors were not engaged in a conspiracy. The evidence of hostility appears as likely as not to be isolated incidents or merely "sales hype." [9]

[21]** 2. Legitimate Business Justification for Actions

The defendants also offered legitimate business reasons for the actions that Market Force suggested were evidence of an illegal conspiracy. Coldwell Banker submits that the reason it sent out its policy was to inform other brokers that it would pay a lower fee to buyers' brokers. R.59 at 2. Wauwatosa asserts that the executive vice-president of the MLS told Joann Glawe that firms other than Market Force were acting as buyers' brokers, and that an appropriate way to inform them was to send the policy to all brokers. R.67 at 10-11. ***HN10***[] If the exchange of information regarding the commissions that the firms would pay is not unreasonable business behavior, then it is not an illegal agreement. *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1407 (9th Cir. 1986)*; *cf.* *City of Long Beach v. Standard Oil Co., 872 F.2d 1401, 1406 (9th Cir. 1989)* (noting that competitors may exchange price information for legitimate business reasons), *cert. denied*, *493 U.S. 1076, 110 S. Ct. 1126, 107 L. Ed. 2d 1032 (1990)*. **[**22]**

3. Evidence Tending to Exclude Possibility of Independent Action

Because the evidence of the existence of a conspiracy among the brokers in Milwaukee is ambiguous, ***HN11***[] the plaintiff may survive summary judgment only by putting forth "evidence that tends to exclude the possibility that the defendants were pursuing . . . independent interests." *Gibson v. **[*1174]** Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987)*.

According to Market Force, "the lame nature of the excuses the companies muster for their referral policies is circumstantial evidence that the policies were adopted for other reasons. The reasonable inference is that the companies' real motivation was their predatory intent to drive buyers' brokers from the market before they could establish a foothold." Appellant's Br. at 43. However, in her affidavit, Joann Glawe of Wauwatosa enumerated several specific reasons for adopting a referral policy regarding buyers' brokers, including (1) that Wauwatosa paid the listing sales associate a greater commission in a sale involving Market Force, or allocated **[**23]** the gross commission among the listing and selling brokers and paid a referral fee to Market Force; (2) that a selling broker may still be involved in the transaction, as in the case of a sale generated from an open house; and (3) that a listing

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[9] We do not decide that hostile actions can never make out circumstantial evidence of a conspiracy. At least two other courts have determined that such actions may constitute proof of a conspiracy. *See* *Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1059-61 (5th Cir. 1985)* (conspiracy found when hostile comments combined with predatory economic coercion and refusals to deal), *cert. denied*, ***474 U.S. 1102, 88 L. Ed. 2d 919, 106 S. Ct. 884 (1986)***; *Penne v. Greater Minneapolis Area Bd. of Realtors, 604 F.2d 1143, 1148-49 (8th Cir. 1979)* (summary judgment should not have been granted where evidence of conspiracy included allegation of hostile comments, blacklisting, and punitive commission shares). *But see* *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1406, 1407 (9th Cir. 1986)* (confronted with evidence that real estate brokers made disparaging comments to potential home buyers about the plaintiff discount brokers, including that plaintiff was "no good, unethical, worthless and of generally bad repute," the court concluded that this conduct did not "add up to a conspiracy by the [defendants] to restrain trade").

sales associate must do more work when there is no selling broker. [10] R.67 at 4-7. The district court concluded that there were plausible reasons for the firms each to adopt a policy about buyers' brokers. The court noted that Wauwatosa and Coldwell Banker put forth "independent business reasons . . . [which were] not economically irrational." *706 F. Supp. at 1394*. We agree. Market Force has not met its burden of providing "specific factual support for its allegations of conspiracy tending to show that the defendant was not acting independently." *Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)*. Accordingly, we cannot say that there is any genuine issue of triable fact requiring the reversal of summary judgment.

[24]** Conclusion

The teaching of *Monsanto* and *Matsushita* is that, in order to survive a summary judgment motion, a plaintiff must put forward evidence that tends to exclude the possibility of independent action. ***HN12***[] A defendant is entitled to summary judgment when it "provides a plausible and justifiable alternative interpretation of its conduct that rebuts the alleged conspiracy." *City of Long Beach v. Standard Oil Co., 872 F.2d 1401, 1406 (9th Cir. 1989)*, *cert. denied*, *493 U.S. 1076, 110 S. Ct. 1126, 107 L. Ed. 2d 1032 (1990)*. There is no evidence suggested by the plaintiff that sufficiently refutes the possibility that each defendant, acting independently, decided that the difference in services provided by buyers' brokers required a different referral policy than for standard seller brokers. We thus conclude that the district court correctly decided that the evidence left open the possibility of independent action despite the plaintiff's assertion that the defendants did not have a rational economic reason to adopt referral policies. Accordingly, **[**25]** the judgment of the district court is affirmed.

AFFIRMED.

End of Document

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[10] "Because the buyer's broker represents only the buyer, the listing broker or some other representative of the seller must be present to represent the seller when a buyer tours a house. The buyer's broker is unable to demonstrate the house on behalf of the seller. The buyer's broker is unable to answer, on behalf of the seller, questions the buyer may have about the condition of the property, financing concessions, closing and occupancy dates, and the like. The listing broker is unable to give a lockbox combination to a buyer's broker. The Wauwatosa Realty Company listing agent is forced to fulfill many of the functions of the traditional selling agent in such transactions." R.67 at 7 (Glawe Affidavit).

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Redwood Theatres, Inc. v. Festival Enterprises, Inc.

United States Court of Appeals for the Ninth Circuit

June 4, 1990, San Francisco, California, Argued and Submitted ; July 11, 1990, Filed

No. 89-15638

Reporter
908 F.2d 477 *; 1990 U.S. App. LEXIS 11491 **; 1990-2 Trade Cas. (CCH) P69,099

Redwood Theatres, Incorporated, Plaintiff-Appellant, v. Festival Enterprises, Inc.; Paramount Pictures Corporation; Gulf Western, Inc.; Mann Theatres Corporation of California, Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Northern District of California; Samuel Conti, District Judge, Presiding; D.C. No. CV-88-4054-SC.

Disposition: Reversed.

Core Terms

theatres, removal, Cartwright Act, antitrust, interstate commerce, district court, anti trust law, regulation, federal court, licensed, motion picture, res judicata, impermissible, invoking, cases

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

HN1[] **Specific Cases Removed, Federal Questions**

Removal based on federal question jurisdiction is improper unless a federal claim appears on the face of a well-pleaded complaint. The burden of establishing jurisdiction falls on the party invoking the removal statute, 28 U.S.C.S. § 1441(a), which is strictly construed against removal.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN2[] **Specific Cases Removed, Federal Questions**

The party who brings a suit is master to decide what law he will rely upon, and if he can maintain his claim on both state and federal grounds, he may ignore the federal question and assert only a state law claim and defeat removal.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN3[] **Removal, Specific Cases Removed**

There are, however, certain limited situations in which a court may look beyond the face of a plaintiff's complaint. Under the "artful pleading" doctrine, which the courts have termed a narrow exception to the straightforward rules of removal jurisdiction, a court may recharacterize a plaintiff's claims as federal if the particular conduct complained of is governed exclusively by federal law. Nevertheless, this court invokes the doctrine only in exceptional circumstances, because doing so raises difficult issues of state and federal relationships and often yields unsatisfactory results.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN4[] **Jurisdiction, Exclusive Jurisdiction**

The U.S. Supreme Court consistently recognizes that Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies, and the courts have observed that state antitrust laws retain vitality in dealing with matters which significantly affect local interests, even if they also have interstate aspects. Also, California courts have held that the Cartwright Act, *Cal. Bus. & Prof. Code § 16720*, applies to transactions in interstate commerce.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN5[] **Removal, Specific Cases Removed**

If a state claim is found upon removal to be an artfully pleaded federal claim which was previously before a federal court and dismissed, then res judicata is to be applied and the case dismissed again, with prejudice.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN6[] **Removal, Specific Cases Removed**

Unless applied with circumspection, the artful pleading doctrine may raise difficult issues of federal-state relations. An expansive application of the doctrine could effectively abrogate the rule that a plaintiff is master of his or her complaint.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN7[] **Removal, Specific Cases Removed**

A plaintiff's state law complaint is "artfully pleaded" when it is drafted to avoid stating allegations or claims already resolved against the plaintiff by a prior federal judgment.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Transportation Law > Interstate Commerce > Balancing Tests

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Federal Powers

HN8[] **Interstate Commerce, State Powers**

Even without implementing legislation, the *Commerce Clause of the U.S. Constitution* operates as a limitation upon the power of the states. But not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] **Regulated Industries, Sports**

The Cartwright Act, *Cal. Bus. & Prof. Code § 16720*, forbids combinations in restraint of trade and grants a cause of action to any person injured by such a combination. Thus, the federal and California antitrust laws have identical objectives and are harmonious with each other.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10[] **Antitrust & Trade Law, Sherman Act**

The Cartwright Act, Cal. Bus. & Prof. Code § 16720, is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Federal Powers

HN11[] **Interstate Commerce, State Powers**

Absent evidence that the challenged state regulations impede the flow of interstate commerce, the courts cannot find that they impermissibly encroach on the Commerce Clause of the U.S. Constitution.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN12[] **Removal, Specific Cases Removed**

The well-pleaded complaint rule is well grounded in principles of federalism. It would do violence to state autonomy were defendants able to remove state claims to federal court merely because the plaintiff could have asserted a federal claim based on the same set of facts underlying his state claim.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN13[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

The parties cannot by consent, waiver or estoppel obtain federal subject matter jurisdiction.

Counsel: Lawrence Alioto, Alioto and Alioto, San Francisco, California, for the Plaintiff-Appellant.

Judith Z. Gold, and Gregory Gilchrist, Heller, Ehrman, White & McAuliffe, San Francisco, California, for the Defendants-Appellees.

Judges: Alfred T. Goodwin, Chief Judge, William C. Canby, Jr. and Pamela Ann Rymer, Circuit Judges. Opinion by Chief Judge Goodwin.

Opinion by: GOODWIN

Opinion

[*478] GOODWIN, Chief Judge.

OPINION

Redwood Theatres appeals the denial of its motion to remand this case to state court. Redwood originally filed its action in California Superior Court, alleging violations of the Cartwright Act, *Cal. Bus. & Prof. Code § 16720*. Appellees removed the case to federal district court, contending that Redwood's complaint, properly construed, advanced claims implicating federal ***antitrust law*** and that the nationwide character of its motion picture distribution system warranted review of this case in a federal forum.

Concluding that haphazard state antitrust regulation could impose an impermissible **[**2]** burden upon the national licensing practices of the movie distribution industry, the district court denied Redwood's subsequent motion to remand, citing as authority its prior decision in *TOC, Inc. v. United Artists Theatre Circuit, 631 F. Supp. 832 (N.D. Cal. 1986)*. Redwood argues in this interlocutory appeal that the district court improperly invoked the "artful pleading" doctrine to recharacterize its claims as federal in nature and, accordingly, that federal subject matter jurisdiction does not exist in this case. We agree and reverse.

Redwood Theatres is a Nevada corporation which owns and operates a seven-screen motion-picture theatre in Modesto, California, and other theatres in various northern California towns. Festival Enterprises is a California corporation which, during the period of time relevant to this appeal, owned and operated a six-screen theatre in Modesto, as well as theatres in other parts of northern California. The Redwood and Festival theatres directly compete with each other, both for the films they show on their screens and the patronage of Modesto movie-goers.

[*479] Paramount Pictures is a major distributor of motion-picture films **[**3]** in the United States. Its parent corporation, Gulf Western, acquired the Festival circuit of theatres in 1986. Also that year, Gulf Western acquired the 384 screens operated by Mann Theatres. Gulf Western subsequently placed the Festival chain under Mann's management.

Redwood contends that Paramount has entered into unwritten agreements with Festival and Festival's successors, pursuant to which substantially all of the Paramount first-run product is licensed to the Festival theatres in northern California, including Modesto. Redwood argues that these agreements effectively foreclose it from showing a significant number of the better first-run pictures, thereby threatening the viability of its business and substantial elimination of competition in the exhibition of first-run motion pictures in Modesto.

In 1985, Redwood filed a complaint against appellees in California Superior Court alleging Cartwright Act violations in connection with films licensed between 1981-85 [1] similar to those at issue here. That action was dismissed on summary judgment but reinstated on appeal by the California Court of Appeal, which held that the allegations raised in Redwood's complaint, if proved, **[**4]** presented a triable issue of an unreasonable restraint of trade under the Cartwright Act and therefore remanded the case for trial. *Redwood Theatres, Inc. v. Festival Enterprises, Inc., et al.*, ("Redwood I"), *200 Cal. App. 3d 687, 248 Cal. Rptr. 189 (1988)*. Appellees never sought removal of Redwood's first suit, but, after the decision in *Redwood I* was rendered against them, they petitioned for removal of this action to federal court.

ARTFUL PLEADING DOCTRINE

In general, ***HN1***[] removal based on federal question jurisdiction is improper unless a federal claim appears on the face of a well-pleaded complaint. *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)*; *Gully v. First Nat'l Bank, 299 U.S. 109, 113, 81 L. Ed. 70, 57 S. Ct. 96 (1936)*. **[**5]** "The burden of establishing jurisdiction falls on the party invoking the removal statute [*28 U.S.C. § 1441(a)*], *Hunter v. United Van Lines, 746 F.2d 635, 639 (9th Cir. 1984)*, *cert. denied*, [*474 U.S. 863,] 106 S. Ct. 180, 88 L. Ed. 2d 150 (1985)*, which is strictly construed against removal." *Sullivan v. First Affiliated Securities, 813 F.2d 1368, 1371* (9th Cir.), *cert. denied*, *484 U.S. 850, 108 S. Ct. 150, 98 L. Ed. 2d 106 (1987)*.

[1] The complaint involved in this appeal alleges Cartwright Act violations with regard to films licensed by appellees from 1985-88. Gulf Western was not a named party in *Redwood I*.

It is well established that **HN2**[] "the party who brings a suit is master to decide what law he will rely upon," *The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 57 L. Ed. 716, 33 S. Ct. 410 (1913)*, and "if he can maintain his claim on both state and federal grounds, he may ignore the federal question and assert only a state law claim and defeat removal." *Sullivan, 813 F.2d at 1372* (citing, *inter alia*, 1 A.J. Moore & B. Ringle, *Moore's Federal Practice*, para. 0.160 [3.-3], at 231-32 (2d ed. 1986)).

HN3[] There are, however, certain limited situations in which a court may look beyond the face of a plaintiff's complaint. **[**6]** Under the "artful pleading" doctrine, which this court has termed "a narrow exception to the straightforward rules of removal jurisdiction," *Sullivan, 813 F.2d at 1372*, a court may recharacterize a plaintiff's claims as federal if "the particular conduct complained of [is] governed exclusively by federal law." *Hunter, 746 F.2d at 640*; *see also* *Ultramar Am. Ltd v. Dwelle, 900 F.2d 1412, 1415 (9th Cir. 1990)*. Nevertheless, this court invokes the doctrine "only in *exceptional circumstances*," because doing so "raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1427 (9th Cir. 1984)* (emphasis added).

All the claims appearing on the face of Redwood's complaint involve alleged violations of California's antitrust statute, the **[*480]** Cartwright Act. While not contending that the Sherman Act preempts the Cartwright Act *in toto*, appellees argue that where an industry is primarily engaged in interstate commerce and would benefit from a national uniformity of ***antitrust law***, then restraints upon that interstate **[**7]** trade fall within the exclusive jurisdiction of the Sherman Act and federal courts. **HN4**[] The Supreme Court, however, has consistently held that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies," *California v. ARC Am. Corp., 490 U.S. 93, 109 S. Ct. 1661, 1665, 104 L. Ed. 2d 86 (1989)*; *Watson v. Buck, 313 U.S. 387, 403, 85 L. Ed. 1416, 61 S. Ct. 962 (1941)*, and this court has observed that "state antitrust laws retain vitality in dealing with matters which significantly affect local interests, even if they also have interstate aspects." *Salveson, 731 F.2d at 1427*. Also, notwithstanding appellees' assertions, California courts have held that the Cartwright Act applies to transactions in interstate commerce. *Id., citing* *Younger v. Jensen, 26 Cal. 3d 397, 405, 605 P.2d 813, 818, 161 Cal.Rptr. 905, 910 (1980)*.

In arguing their position, appellees cite *Federated Dept. Stores v. Moitie, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981)*, and *Salveson* as authority for the exercise of federal jurisdiction over antitrust actions despite a plaintiff's **[**8]** decision to file his complaint in state court and rely wholly on state-law provisions. Both cases are distinguishable from the facts presented here.

In *Moitie*, seven private antitrust actions were brought by plaintiff retail customers charging the owners of various department stores with price-fixing. The actions were consolidated in federal district court and subsequently dismissed for failure to state a claim under the Clayton Act. Plaintiffs in two of the actions attempted to refile their complaints in state court, making allegations similar to those made in the previous cases, but invoking only state-law remedies. The department store owners promptly removed the two cases to federal court, where they were dismissed on res judicata grounds. The Supreme Court approved the district court's dismissal of the plaintiffs' refiled claims and concluded that removal was proper where it appeared that the plaintiffs had "artfully" recast their claims under state law in order to gain a second shot at recovery. *452 U.S. at 397*.

In *Salveson*, this court held that **HN5**[] if a state claim is found upon removal to be an artfully pleaded federal claim *which was previously before* **[**9]** *a federal court and dismissed*, then res judicata is to be applied and the case dismissed again, with prejudice. *731 F.2d at 1432*. Unlike the situations in *Moitie* and *Salveson*, Redwood has never previously filed an antitrust action in federal court and no res judicata defense is available to appellees.

In subsequent cases this court has emphasized that it will construe the holdings in *Moitie* and *Salveson* narrowly, out of respect for the purposes underlying the removal statute and plaintiffs' prerogatives to choose the forum and legal principles governing their complaints. *See* *Sullivan, 813 F.2d at 1376*; *see also* *United Jersey Banks v. Parell, 783 F.2d 360, 368* (3d Cir.), *cert. denied*, *476 U.S. 1170, 106 S. Ct. 2892, 90 L. Ed. 2d 979 (1986)* **HN6**[] ("unless applied with circumspection, the artful pleading doctrine may raise difficult issues of federal-state relations. An expansive application of the doctrine could effectively abrogate the rule that a plaintiff is master of his or her complaint") (citing Hunter, 746 F.2d at 640).

In *Sullivan*, for example, we interpreted *Moitie* "as **[**10]** limited to removal of state claims precluded by the res judicata effect of a federal judgment," emphasizing that such a construction "squares our decisions in *Salveson*, permitting removal in the res judicata context, with *Sugar Antitrust Litigation* [In re Sugar Antitrust Litigation, 588 F.2d 1270 (9th Cir. 1978), *cert. denied*, *441 U.S. 932, 99 S. Ct. 2052, 60 L. Ed. 2d 660 (1979)]*, denying removal in the context of parallel state and federal litigation, and comports with our policy of invoking the artful pleading doctrine 'only in exceptional circumstances.'" 813 F.2d at 1376 (quoting Salveson, 731 F.2d at 1427); *see also* Ultramar, 900 F.2d at 1415 (reiterating **[*481]** this court's interpretation of *Moitie* in *Sullivan* and *Salveson*); Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1403 (9th Cir. 1988)("we concluded in *Sullivan* that ***HN7***[] a plaintiff's state law complaint is 'artfully pleaded' when it is drafted to avoid stating allegations or claims already resolved against the plaintiff by a prior federal judgment").

Our holding in *Sullivan* controls **[**11]** the result here. As in that case the plaintiff's claims here were framed under state law, are not barred by res judicata nor preempted by federal law, and would only have been in the district court's jurisdiction if they had been joined with federal claims. 813 F.2d at 1376. [2]

[12]** *COMMERCE CLAUSE CONSIDERATIONS*

In denying Redwood's motion to remand, the district court relied upon, and appellees urge this court to follow, its prior decision in TOC, Inc. v. United Artists Theatre Circuit, 631 F. Supp. 832 (N.D. Cal. 1986). The facts in that case were substantially the same as those presented here: the plaintiff independent theatre owners brought suit under the Cartwright Act, claiming that the defendants' methods of distributing and exhibiting motion pictures amounted to an unreasonable restraint of trade, and the defendants removed the case to federal court. The district court denied TOC's motion to remand, concluding that the defendants were "unquestionably involved in interstate commerce," and that subjecting them to the possibility of non-uniform state antitrust regulations would be inconsistent with its constitutional duty to strike down impermissible burdens on interstate commerce. 631 F. Supp. at 834.

The decision in *TOC* was never appealed and appears never to have been cited in a subsequent, published case. In fact, it appears that it was the dearth of approving authority that prompted the district court's **[**13]** decision to permit Redwood's interlocutory appeal to this court.

The outcome we reach today requires us to disapprove the holding in *TOC*. The Supreme Court has made clear that, ***HN8***[] even without implementing legislation, the Commerce Clause operates as a limitation upon the power of the states. Edgar v. Mite Corp., 457 U.S. 624, 640, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976). But "not every exercise of state power with some impact on interstate commerce is invalid." Edgar, 457 U.S. at 640. "A state statute must be upheld if it 'regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id., quoting* Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).

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[2] *See also* Price v. PSA, Inc., 829 F.2d 871, 876 n. 4 (9th Cir. 1987)(describing *Sullivan* as limiting the artful pleading doctrine to cases "where a plaintiff is seeking to circumvent the res judicata impact of a federal judgment"), *cert. denied*, ***486 U.S. 1006, 108 S. Ct. 1732, 100 L. Ed. 2d 196 (1988)***. As this court's opinion in *Ultramar* points out, "in *Price* no prior federal judgment even existed, and the court only described *Sullivan* to stress that this fact rendered application of the artful pleading doctrine inappropriate." 900 F.2d at 1416 n. 7; *accord,* United Jersey Banks, 783 F.2d at 368 (case in which five state banks sought under New Jersey statutes to block merger of two nationally chartered banks. Defendants removed the case to federal court, claiming that the complaint raised questions of federal law, and the district court denied the plaintiffs' motion to remand. The Third Circuit reversed, finding that "this is not a case . . . in which the plaintiff first filed a lawsuit containing federal claims and then, after dismissal, sought to recast those claims under state law [;] here, plaintiff *has consistently sought to litigate state claims in state court*") (emphasis added).

HN9[] The Cartwright Act "forbids combinations in restraint of trade and grants a cause of action to any person injured by such a combination." *Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 42, 172 P.2d 867, 872 (1946)*. **[**14]** Thus, as the court in *TOC* recognized, "'the federal and California antitrust laws . . . [have] identical objectives [and] are harmonious with each other.'" *631 F. Supp. at 834* (quoting *Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378, 382, **[*482]** 668 P.2d 674, 194 Cal. Rptr 367 (1983))*. Appellees contend that allowing Redwood to proceed in state court raises the spectre of their being subject to differing state regulation of their licensing and exhibition practices and hurt financially by the predicted inconsistencies. We are not persuaded.

In the first place we note that Paramount's fears are belied by the decision in *Redwood I*: although the outcome was adverse to Paramount's interests, the California Court of Appeal relied primarily upon principles enunciated in *federal* antitrust cases to reverse the lower court's grant of summary judgment. [3]

[15]** Secondly, we are aware that at least one other circuit has upheld against a *commerce-clause* challenge state regulation of motion-picture licensing practices far more intrusive and idiosyncratic than the possible outcome of a California court's interpretation of the Cartwright Act, informed by federal precedents, presents here. In *Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408 (S.D. Ohio 1980)*, the district court rejected the plaintiff movie producers' and distributors' challenge to the constitutionality of an Ohio statute regulating the procedures by which motion pictures were to be licensed to theatre owners within the state. As is the situation here, the producers and distributors in *Allied Artists* contended that "since the motion picture industry is national in scope, its business and product are of such a nature that their regulation, if any, must be prescribed by a single [federal] authority." *496 F. Supp. at 436*. Observing that after *Exxon Corp. v. Governor of Md.* [4], "it is not open to plaintiffs to argue that simply because the economic market for motion pictures is nationwide, no state has the power to regulate that market, **[**16]** " the district court concluded that *HN11*[] "absent evidence that [the challenged regulations] . . . impede the flow of interstate commerce, this Court cannot find that [they] impermissibly encroach[] on the *Commerce Clause*." *496 F. Supp. at 437*.

The Sixth Circuit upheld the district court's finding of "no federal constitutional or statutory infirmity in [the Ohio] guidelines." *679 F.2d 656, 663 (6th Cir. 1982)*. In a passage applicable to the facts of this case, it concluded that:

> if the distributor chooses to use [the method of competitive bidding], the process should be fair, and that is what the guidelines are designed to insure. **[**17]** The . . . provisions are not burdensome and are designed to counteract deception and unfair manipulation of the bidding process.

Id. Beyond a contention of the kind disapproved by the Supreme Court in *Exxon*, appellees have failed to explain how California's application of the Cartwright Act provisions proscribing unreasonable restraints of trade threatens to impose an impermissible burden on interstate commerce, especially when such conduct is also illegal under federal law.

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[3] *See 200 Cal. App. 3d at 694*, where the court observed that:

> '[a] long line of California cases has concluded that *HN10*[] the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.'

Id., quoting Marin County Bd. of Realtors v. Palsson, 16 Cal. 3d 920, 925, 130 Cal. Rptr. 1, 549 P.2d 833 (1976). Accordingly, the court stated that "since the relevant case law under the Cartwright Act is comparatively sparse, we will also rely chiefly on federal decisions" to evaluate Redwood's antitrust claims. *Id.*

[4] In *Exxon*, the Supreme Court rejected the appellant oil companies' "novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas," and upheld the state regulation at issue. *437 U.S. 117, 128, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978)*.

Finally, appellees' argument neglects the point that California courts are perfectly capable of handling *commerce-clause* challenges to state antitrust laws. In fact, in one case cited approvingly in appellees' brief, the California Supreme Court reversed a treble damages award under the Cartwright Act assessed against an NFL team in a suit by one of its players, holding that the application of state ***antitrust law*** **[*483]** to the interstate activities of professional football would impermissibly burden interstate commerce. *Partee, 34 Cal. 3d at 384*; [5] *see also* *United Jersey Banks, 783 F.2d at 369* (in response to contention that New Jersey Antitrust Act **[**18]** did not extend to claim made in plaintiffs' complaint and that therefore remand after removal was improper, court concluded that "in such a case, it should be for the New Jersey courts, in the first instance, to determine whether the count alleging violation of state ***antitrust law*** is without any facial validity.")

Given the absence of a prior federal judgment and the strong bias against permitting removal where a plaintiff has chosen to proceed solely on state-law grounds, we find that the district court erred in denying Redwood's motion to remand. [6] As Justice Brennan observed in *Moitie* **[**19]** , ***HN12***[] "[the well-pleaded complaint rule] is well grounded in principles of federalism . . . It would do violence to state autonomy were defendants able to remove state claims to federal court merely because the plaintiff *could have* asserted a federal claim based on the same set of facts underlying his state claim." *452 U.S. at 407* (Brennan, J., dissenting) (emphasis in original).

REVERSED.

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[5] The result in *Partee* does not undermine the substantive analysis of appellees' *commerce-clause* claim, *supra*: the Supreme Court based its decision on the fact that the Cartwright Act previously had been held inapplicable to professional baseball and basketball and that "no case has been found applying state antitrust laws to the interstate activities of professional sports." *34 Cal. 3d at 384*.

[6] In the alternative appellees urge us to find that Redwood has acceded to federal jurisdiction. They offer no compelling reasons, however, for us to disregard "the traditional rule that ***HN13***[] the parties cannot by consent, waiver or estoppel obtain federal subject matter jurisdiction," and we therefore reject their suggestion. *Sullivan, 813 F.2d at 1374*.

New England Motor Rate Bureau v. FTC

United States Court of Appeals for the First Circuit

July 20, 1990

No. 89-1963

Reporter
908 F.2d 1064 *; 1990 U.S. App. LEXIS 12173 **; 1990-2 Trade Cas. (CCH) P69,108

NEW ENGLAND MOTOR RATE BUREAU, INC., Petitioner, v. FEDERAL TRADE COMMISSION, Respondent

Prior History: [1]** On Petition for Review of an Order of The Federal Trade Commission.

Core Terms

rates, supervision, immunity, tariff, state action, carrier, regulation, anticompetitive, analyst, filings, prong, state policy, stipulations, regulatory scheme, common carrier, suspend, motor carrier, rate-making, antitrust, prices, state action doctrine, motor vehicle, disapprove, qualify, state official, proposed rate, slip opinion, authorities, hearings, factors

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

State action immunity exists if (1) the private parties' conduct was undertaken pursuant to clearly articulated and affirmatively expressed state policies to displace competition, and (2) the anticompetitive activity was actively supervised by the respective states.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

A state must engage in substantive oversight of the challenged conduct before active supervision can be found. The purpose of such review, however, is to ascertain its consistency with state policy, and not necessarily to determine the activity's anticompetitive consequences.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN3[] **Exemptions & Immunities, Filed Rate Doctrine**

See *Mass. Gen. Laws ch. 159B, § 6* (1986).

Counsel: Bryce Rea, Jr., with whom Patrick McEligot, William E. Kenworthy, Leo C. Franey and Rea, Cross & Auchincloss were on brief for Petitioner.

Frederick E. Dooley with whom Jay C. Shaffer, Acting General Counsel, and Ernest J. Isenstadt, Assistant General Counsel, were on brief for Respondent.

Judges: Campbell, Chief Judge, Coffin and Bownes, Senior Circuit Judges.

Opinion by: CAMPBELL

Opinion

[*1064] CAMPBELL, Chief Judge.

New England Motor Rate Bureau, Inc. ("NEMRB") petitions this court for review of a cease and desist order of the Federal Trade Commission ("FTC"). The opinion of **[*1065]** the FTC in this case appears as *New England Motor Rate Bureau, Inc.*, 112 F.T.C. __, Docket No. 9170, slip op. (Aug. 18, 1989). Our jurisdiction over this petition derives from *15 U.S.C. § 45(c)*.

At issue is whether Massachusetts' supervision of motor carrier rates is sufficiently active to immunize NEMRB -- the motor carriers' private rate-making bureau -- from the federal antitrust laws.

Massachusetts, like other states and federal agencies, regulates rates through a so-called **[**2]** negative option process, *viz.* rates are required to be formulated and published by the carriers or their agent (i.e., here, NEMRB) and filed with a regulatory agency having ultimate rate-setting powers (here, the Massachusetts Department of Public Utilities ("MDPU")). The filed rates become legally binding unless rejected or suspended within a period of time by the agency. Under Massachusetts law, motor carrier rates must be non-discriminatory and "just and reasonable," and the MDPU is charged by law with enforcing compliance with these criteria. To this end, it has extensive power to suspend, reject or modify rates using hearing, investigatory and complaint procedures. However, the MDPU has not in recent history rejected any of the rates filed by NEMRB nor held hearings or investigations. Because of this, the FTC ruled that Massachusetts failed the "active supervision" prong of the Supreme Court's two-prong test for determining whether a regulated activity qualifies for "state action" immunity. NEMRB now challenges the FTC's finding, contending that Massachusetts' comprehensive regulatory scheme and MDPU's regulatory activities meet the "active supervision" requirement.

PROCEEDINGS **[**3]** BELOW

On October 24, 1983, the FTC issued a complaint alleging that NEMRB, its members, officers, and directors, had engaged in a conspiracy to fix prices in violation of *15 U.S.C. § 45* by collectively formulating and filing rates for the transportation by motor carrier of commodities moving within the states of Massachusetts, New Hampshire, Rhode Island, and Vermont. This conspiracy and these activities were alleged to have deprived motor carriers, shippers and consumers in the four states of the benefits of free and open competition. Petitioner raised various defenses, including that its collective rate-making activity was "state action," immune from federal antitrust challenges under the state action doctrine first enunciated in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. The Administrative Law Judge (ALJ) who heard the case disallowed all defenses except the state action defense, which he held in abeyance until this court could hand down a decision in a pending appeal, *Mass. Furniture & Piano Movers Association v. FTC, 773 F.2d 391 (1st Cir. 1985)*. In *Mass. Furniture*, we ruled that because **[**4]** Mass.Gen.L. ch. 159B (1986) "clearly establishes Massachusetts' intent to countenance collective rate setting among motor carriers," the relevant carrier trade association satisfied the first prong of the test for *Parker* immunity set out in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*: namely, that a private party's conduct be undertaken pursuant to "clearly articulated and affirmatively expressed" state policies to displace competition. While upholding the state action defense thus far, we noted that the Association need also meet Midcal's second prong, *viz.* "that the anticompetitive activity was 'actively supervised' by the state." *Mass. Furniture, 773 F.2d at 397*. We remanded to the FTC for findings on the active supervision requirement. *Id.*

Following the decision in *Mass. Furniture*, the ALJ in the FTC proceeding below disallowed NEMRB's defense that its collective rate filing activity in Massachusetts was state action, hence immune from the federal antitrust laws. While he accepted *Mass. Furniture's* ruling that the governing state law **[**5]** met Midcal's first prong, *supra*, he found that Massachusetts' regulation of the filed rates was, in practice, too passive to satisfy Midcal's "active supervision" requirement. The ALJ also disallowed the state action defense in New **[*1066]** Hampshire as well, finding that rate regulation by New Hampshire authorities failed both aspects of the *Midcal* test. In Rhode Island, however, the ALJ upheld NEMRB's rate-making activities as immune. He concluded that Rhode Island's regulatory supervision was active enough to make NEMRB's collective rate filings with the Rhode Island Public Utilities Commission a form of protected state action. [1] **[**6]** The FTC adopted the ALJ's findings, with one Commissioner dissenting as to the finding that NEMRB's Massachusetts rate filings were not entitled to "state action" immunity. NEMRB now seeks our review of the FTC's holding that Massachusetts state regulation is, in practice, too passive to immunize NEMRB's rate filings under the state action doctrine. [2]

FACTS

1. *The Nature and Functioning of NEMRB*

Petitioner NEMRB is a Massachusetts nonprofit organization composed of competing common (motor) carriers that service customers in New England. It develops and files collective tariffs and tariff supplements governing interstate and intrastate rates and commodity classifications within Massachusetts, New Hampshire, Rhode Island, and, formerly, Vermont. Collective tariffs are initiated and developed by NEMRB's General Rate and **[**7]** Classification Committee, consisting of officers or employees of the carrier members of NEMRB. Tariff proposals approved by the Committee are filed with the official regulatory agencies of each of the four states and sent to all members of NEMRB. [3] The carrier members of NEMRB ratify its tariff proposals at annual meetings, and formally acquiesce in such tariffs by granting to NEMRB a power of attorney with respect to such filings.

In neither Massachusetts, New Hampshire, nor Rhode Island are common carriers *required* to file joint tariffs or to cooperate in their establishment. A carrier may, if it wishes, file its own proposed rates. However, in each jurisdiction, carriers are permitted to utilize a filing agent and to **[**8]** adopt and participate in a tariff filed by an agent or another carrier. If a carrier does elect to participate in a tariff filed by another carrier or by an agent such as NEMRB, the carrier is obliged by law to adhere to the specified rates once the tariff becomes effective.

2. *The Nature and Functioning of Massachusetts' Regulatory System*

As explained in greater detail later in this opinion, Massachusetts regulates common carriers by motor vehicle, and their rates, according to a comprehensive regulatory scheme that gives to the MDPU authority, *inter alia*, to license

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[1] After the complaint was issued, the state of Vermont deregulated the intrastate transportation of freight, and NEMRB ceased to formulate and file rates applicable to Vermont. Complaint counsel moved to dismiss the complaint with respect to NEMRB's activities in Vermont, and the Administrative Law Judge granted that motion.

[2] The decision of the FTC with regard to New Hampshire is not being appealed. The New Hampshire statute at the time of the FTC decision required carriers to file their rates; and such rates were to be nondiscriminatory, but the statute did not require that they be just and reasonable. Subsequently, the statute was amended to require the rates of motor carriers of property to be just and reasonable. The state is also now engaged in establishing policies and procedures to implement the revised statutory framework. NEMRB says that it may seek revision of the FTC order as soon as the new regulatory framework is in place.

[3] Rates are also filed with the federal Interstate Commerce Commission with respect to interstate shipments. Federal law recognizes the right of rate bureaus to formulate and file collective rates for members, exempt from antitrust laws. *49 U.S.C. § 10706(b)*.

common carriers and to prescribe and alter their rates. Carriers are required to adhere to their filed rates, which Massachusetts law provides must be nondiscriminatory, just and reasonable. The MDPU is controlled by three full-time commissioners appointed by the Governor. Mass.Gen.L. ch. 25, § 2 (1986). The Massachusetts motor carrier statute, including its rate provisions, is enforced by the MDPU's transportation division headed by a director. *Id.* § 12F.

[*1067] The following picture of the Massachusetts regulatory apparatus was provided by stipulations the ALJ accepted for purposes of this **[**9]** proceeding. The MDPU employs one rate analyst to review NEMRB rate filings. [4] The rate analyst has never requested financial information to support a tariff nor rejected a rate because it was too high or too low. However, if confronted with a tariff containing rates that in his judgment were out of line with the average rates that have been established in a particular pricing zone or seem extraordinarily high -- such as a 20 percent to 50 percent increase -- the Massachusetts rate analyst would recommend suspension and investigation of the tariff by the MDPU Commissioners. The same would hold true if the tariff appeared to contain discriminatory provisions. Moreover, the law provides for the MDPU to hold a hearing upon the complaint of any common carrier by motor vehicle or of any other person or upon the MDPU's own motion. The MDPU will investigate any complaint alleging a violation of the statute or any order, rule or regulation issued thereunder, and will take action that is warranted in response to a violation. Rates go into effect automatically 30 days after they are filed unless the rate analyst has recommended rejection or suspension before the end of the 30-day period. It **[**10]** is the stipulated opinion of the rate analyst that whenever tariffs become effective without rejection, suspension or a hearing, that action results from a determination that the proposed rates meet the regulatory criteria of the Massachusetts statute and regulations pertaining to motor carriers of property (i.e., that such rates be just and reasonable, *infra*).

In Massachusetts, NEMRB files general rate restructures, general rate increases, and supplements thereto that have been previously filed with the federal Interstate Commerce Commission (ICC). NEMRB accompanies such filings with a justification statement that has been filed with the ICC. If the ICC suspends the proposal, NEMRB requests the MDPU to postpone the effective date of the **[**11]** proposal in Massachusetts pending the outcome of the ICC investigation. At the conclusion of the ICC investigation, NEMRB requests the MDPU to take the same action with respect to the intrastate Massachusetts proposal. The ICC has traditionally regulated rates under a (now-superceded) federal statutory directive that they be "just and reasonable," 49 U.S.C. § 316 (1963) [5], language identical to that used in the Massachusetts law. *See* Mass.Gen.L. ch. 159B § 6, para. 2 (1986). Generally, the MDPU relies on the fact that the ICC has already conducted an investigation and reached a conclusion as to the justness and reasonableness of the NEMRB proposals.

[12]** Aside from its role in reviewing proposed rates, MDPU does not monitor economic conditions in the intrastate trucking industry. It has never conducted a study of the industry nor of the effects of state regulatory policy upon it, nor does anyone at the MDPU look behind the filed rates to determine whether they accurately reflect a carrier's profit and costs.

FTC HOLDING

In finding that NEMRB's collective filings in Massachusetts were not immunized from federal antitrust liability under the "state action" doctrine, the FTC majority concluded that the MDPU's past record of regulatory activity had been too passive. Thus, even though NEMRB's collective rate-setting activities on behalf of motor carriers were an authorized and accepted part of the Massachusetts scheme, the FTC concluded that they were just another instance of forbidden private, anti-competitive conduct. It reached a different result in Rhode Island, however, because it found that regulatory action in Rhode Island was somewhat more aggressive.

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[4] MDPU also employs 12 inspectors who have police power to enforce Massachusetts' motor carrier statutes. One of their duties is to spot check carriers to investigate complaints that they are not charging the rates they have filed. Stipulation 72 of August 28, 1986.

[5] In 1978 the language of the federal statute was changed from "just and reasonable" to "reasonable" for clarity, consistency, and to conform to modern usage. *See* 49 U.S.C. § 10701(a) (1990) and accompanying "Historical and Statutory Notes." No change in the meaning of the statutory language was intended. *Id.*

[*1068] In Massachusetts, the FTC noted the absence of specific rate hearings and other active rate review proceedings conducted by the state relative to the rates filed **[**13]** by NEMRB. Only where clerical errors had been found had the MDPU actually rejected rate filings. The MDPU did not audit carriers' records or monitor economic conditions in the industry; had never requested financial data from carriers to support collectively set rates; and had never rejected a filing because of the price to be charged. The Commission concluded from this that the MPDU [sic] allowed tariffs to go into effect automatically, without inquiring into their substance, ensuring only that "the collective tariffs satisfied formalistic format requirements." 112 F.T.C. __, Docket No. 9170, slip op. at 20 (Aug. 18, 1989). Such purely "ministerial" review, the FTC found, did not amount to active supervision. Because, under the second prong of the *Midcal* test, the state action defense cannot apply in the absence of active state supervision, the FTC held that NEMRB's activities in Massachusetts, as well as in New Hampshire, were unfair methods of competition in violation of *15 U.S.C. § 45* (i.e., collective price-setting by horizontal competitors). On the basis of these findings, the FTC issued a cease and desist order.

COMMISSIONER AZCUENAGA'S **[**14]** DISSENT

The dissenting commissioner disagreed that the MDPU's regulatory activity was too slight to qualify as active state supervision. She noted that the FTC had found NEMRB rate-making activities in Rhode Island to qualify for application of the state action defense, and reasoned that similar NEMRB activities in Massachusetts should also have been found to qualify because the facts relating to active supervision were virtually identical in the two states. She saw few factual differences between the rate regulatory systems in Massachusetts and Rhode Island, and thought that the differences that did exist were not significant. One purported difference mentioned by the FTC was that the Rhode Island agency had on one occasion actually held a hearing on a proposed tariff before approving it, while Massachusetts has never held any. According to the dissent, however, the significance of the Rhode Island hearing is diminished by the fact that it took place only once and by the further fact that it took place more than two and one-half years after the FTC had first issued its complaint. Another purported difference was that in Rhode Island, tariffs go into effect only after the regulatory **[**15]** agency issues an order *approving* a proposed tariff, whereas under Massachusetts law, tariffs filed by the NEMRB go into effect automatically after 30 days have gone by, unless they are disapproved. In the view of the dissent, this difference, likewise, has no substantive importance. Further, according to the dissent, the stipulated facts show that most of the other differences in the rate review systems of the two states pointed to by the FTC majority as justifications for the different outcomes for the two states were not actual differences. For example, the stipulations show that the rate analysts in both states believe that rates allowed to become effective without challenge in fact meet the applicable statutory standards of "just and reasonable" and that this fact implies a review on the merits in both states. The dissent concludes,

> Given the stipulated record here, the only reasonable conclusion is that the degree of active supervision in Massachusetts and Rhode Island is virtually the same and that the decision concerning NEMRB's liability should be the same in both states. In both states, the record shows that the state agency reviews NEMRB's collective ratemaking **[**16]** on the merits, that is, to ascertain consistency with state policy. This review, in turn, shows that the agencies in both states engage in active supervision and, therefore, the complaint allegations of violations in Massachusetts . . . should be dismissed.

112 F.T.C. at __, slip op. at 12 (dissent).

THE ACTIVE SUPERVISION REQUIREMENT

We begin by looking briefly at the "state action" doctrine under which **[*1069]** NEMRB seeks immunity in Massachusetts from federal antitrust regulation. The doctrine first appeared in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. The Supreme Court held in *Parker* that the Sherman Act was not intended to prohibit the sovereign states from "acts of government" that imposed restraints on competition within their borders. A state's own "action or official action directed by a state" was declared immune from the federal antitrust laws. However, the Court made it plain that a state could not simply authorize private actors to violate the Sherman Act. *Parker, 317 U.S. at 351*.

A major issue since *Parker* has been drawing the line between state programs that fail legally **[**17]** to immunize private participants being viewed by the Court as simply forbidden attempts by a state to authorize antitrust violations and state schemes like that in *Parker* which involve enough overall state control so as to immunize private-actor participants.

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*, the Court laid down the general test which all parties agree is the guiding standard here. Under *Midcal*, ***HN1***[] state action immunity exists if (1) the private parties' conduct was undertaken pursuant to "clearly articulated and affirmatively expressed" state policies to displace competition, and (2) the anticompetitive activity was "actively supervised" by the respective states. The Supreme Court later applied this test to a collective ratemaking arrangement much like the present, in *Southern Motor Carriers Rate Conference, Inc., et al. v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*, [6] **[**19]** and we likewise applied it in *Mass. Furniture Piano Movers Association v. FTC, 773 F.2d 391*, **[**18]** *supra*. In *Midcal*, the Supreme Court struck down under the active supervision prong a retail price maintenance system for wine enacted into law by California. Under the scheme considered in *Midcal*, California required wholesalers to adhere to prices set by another wholesaler even though the state itself neither controlled nor reviewed the reasonableness of such prices. *445 U.S. at 100*. The Court concluded that California had simply authorized members of the industry to set prices and had then enforced the prices these private individuals had established. "The State neither (1) establishes prices nor (2) reviews the reasonableness of the price schedules; . . . . The State does not (3) monitor market conditions nor (4) engage in any 'pointed reexamination' [7] of the program." *Id. at 105-06* (numbers added). "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id. at 106*.

The Court subsequently struck down another liquor pricing program under the active supervision prong of the *Midcal* test. *324 Liquor Corp. v. Duffy, 479 U.S. 335, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987)*. There as in *Midcal*, prices were set by private operators, without state review.

Most recently, in *Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)*, the Supreme Court upheld the imposition of federal antitrust liability upon physicians who had terminated the hospital privileges of another physician after a purported peer review proceeding. The Court rejected the physicians' claim to state action **[**20]** immunity. While acknowledging that Oregon, by statute, required all hospitals to establish peer review procedures, the Court found there was no state agency that "reviews -- or even could review -- private [physicians'] **[*1070]** decisions regarding hospital privileges." *486 U.S. at 101*. The Court stated that "the active supervision prong of the *Midcal* test requires that state officials *have and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id. at 101* (emphasis added). "Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Id.*

Following *Patrick's* restatement of the active supervision prong in *Midcal*, we must ask here (1) whether the MDPU "*has* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy, and (2) whether it sufficiently *exercises* that power. We shall discuss each of these questions in turn.

1. *Whether Massachusetts* **[**21]** *Has Power to Review and Disapprove Anticompetitive Acts That Fail to Accord with State Policy*

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[6] While the Court upheld the collective rate making arrangements in *Southern Motor Carriers*, it did not address the "active supervision" component of the *Midcal* formula, as active supervision was conceded.

[7] "Pointed re-examination of the program" is apparently derived from a statement in an opinion of the California Supreme Court in which that court referred to "'pointed re-examination' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." *Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal. 3d 431, 445, 579 P.2d 476, 486, 146 Cal. Rptr. 585 (1978)*.

In sharp contrast to the relevant state law in *Patrick, Duffy* and *Midcal*, there is no doubt here that Massachusetts officials possess plenary power under state law to review and disapprove the filed rates set by carriers, and their agents like NEMRB, should they fail to accord with state policy. *Patrick, 486 U.S. at 101*. This is plainly not a situation, as was true in all three of those cases, where private individuals from an industry or profession are authorized to engage in anticompetitive actions, with little or no power vested in state authorities to oversee and regulate them.

Massachusetts has enacted into law a comprehensive regulatory scheme over common carriers by motor vehicle. Mass.Gen.L. ch. 159B, §§ 1-22 (1986 and Supp. 1988), not only gives the MDPU absolute authority to "allow or disallow any filed or existing rates" "upon complaint of any common carrier by motor vehicle or of any other person" and to "alter or prescribe the rates of common carriers . . . in accordance with the legal standards provided in this chapter," *id.* at *§ 6*, para. **[**22]** 5, but the state also has full licensing authority over both common and contract carriers, including the authority to assign routes, *id.* at §§ 3-4 and § 11, power to establish rules and regulations for the protection of shippers by motor vehicle, *id.* at § 5(c), authority to inspect cargo and papers relating to cargo, *id.* at § 14A, authority to examine accounts, reports, books and records of both carriers and brokers upon demand, *id.* at § 5(d), § 16A, and § 17, authority to enforce maximum hour limits for drivers, *id.* at § 18, and authority to enforce statutory requirements in regard to billing and credit arrangements, *id.* at § 19A. The statute sets out clearly the state policy to be achieved by the regulatory program, [8] **[**23]** *id.* at *§ 1*, and it delineates in detail the considerations to be taken into account in the process of rate review [9], the activity of greatest **[*1071]** importance for purposes of the present inquiry, *id.* at *§ 6*, para. 6.

The Massachusetts statute, thus, provides for comprehensive regulation of the operations of common carriers by motor vehicle -- from rates charged to the licensing of routes -- and, in the specific area of rate-setting, sets out clearly the considerations that must be taken into account when prescribing or disallowing rates, *see* note 8. Rates are to be reviewed, **[**24]** in a hearing, upon the complaint of any common carrier by motor vehicle or of any other person or upon the MDPU's own motion; and they may be allowed or disallowed in accordance with the legal standards provided in the statute.

The comprehensive scheme outlined in the statute, therefore, clearly gives to the MDPU the authority to "review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." Massachusetts, accordingly, meets one of Patrick's two requirements for "active supervision." We turn next to Patrick's other requirement -- a sufficient showing that the state *exercises* the power it has.

2. *Whether Massachusetts Exercises its Power*

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[8] It is hereby declared to be the policy of the commonwealth to regulate transportation of property by motor carriers upon its ways in such manner as to recognize and preserve the inherent advantages of such transportation, and to foster sound economic conditions in such transportation and among carriers engaged therein in the public interest; and in connection therewith to: (1) Promote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations undue preferences or advantages or unfair or destructive competitive practices, (2) improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers, (3) develop and preserve a highway transportation system properly adapted to the needs of the commerce of the commonwealth, and (4) promote safety upon its ways in the interests of its citizens.

Mass.Gen.L. ch. 159B, § 1 (1986).

[9] In the exercise of the power to prescribe just and reasonable rates for the transportation of property by common carriers by motor vehicle and to disallow rates filed by any such carrier, the department *shall give due consideration*, among other factors, to the inherent advantages of transportation by such carrier, to the effect of any rates under consideration upon the movement of traffic by such carriers, to the need in the public interest of adequate and efficient transportation service by such carriers, to the cost of service and to the need of revenues sufficient to enable such carriers under honest, economical and efficient management to provide such service.

Mass.Gen.L. ch. 159B, § 6, para. 6 (1986) (emphasis added).

In stating that states must "exercise" as well as "have" power to review and disapprove anticompetitive acts of private parties, the *Patrick* Court nowhere indicated the extent to which actual exercise must be shown. *Patrick, Midcal* and *Duffy* provide little guidance as to "exercise" since none of them had to reach that question. In all three cases, the legislatures had failed to give state authorities the power, to begin with, to meet the "active supervision" standard. **[**25]** Here, however, there is no lack of power: the question is only whether Massachusetts authorities are deficient in the exercise of that power. Thus, in seeking to determine what showing of actual exercise of power is needed, both the FTC and ourselves are proceeding in uncharted waters.

In the following pages, we shall analyze the evidence of the MDPU's actual operations as well as the state mandate which it is supposed to fulfill. We conclude that, for purposes of the state action doctrine, the showing Massachusetts has made of the exercise of its regulatory power is adequate.

We believe the FTC's contrary analysis is defective in two respects. First, as Commissioner Azcuenaga points out in impressive detail in her dissent, it seems quite arbitrary: the difference between Massachusetts' showing as to regulatory action, and Rhode Island's, is trivial. Yet, the FTC would immunize NEMRB's rate-making activities in Rhode Island but not immunize essentially the same activities in Massachusetts. Second, bearing in mind that the state action doctrine involves principles of federalism and comity, we think the FTC is too demanding in the showing it would require as to the rigor and efficiency **[**26]** of a particular state's regulatory program. Where as here the state's program is in place, is staffed and funded, grants to state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state's own action, it would become a means for federal oversight of state officials and their programs.

Before proceeding, we make two further points.

We do not agree with the FTC that the question of state action is one on which this court should defer to that agency, either because of its expertise or its statutory fact-finding authority. *See* *15 U.S.C. § 45(c)* ("The findings of the Commission as to the facts, if supported by the evidence, shall be conclusive.") The FTC is not here interpreting the statute it has been charged with administering (i.e., the **[*1072]** Federal Trade **[**27]** Commission Act, 38 Stat. 717 (1914), as amended, *15 U.S.C. §§ 41-77 (1990)*) but instead is resolving a judicially-created principle of immunity that, if applicable, bars the FTC's jurisdiction. *Cf.* *Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. The underlying facts, consisting of state statutes and the stipulations accepted by the ALJ, are not in dispute. How these facts meld into the state action concept -the issue now before us- is a legal issue which the courts have plenary authority to decide. To be sure, the FTC's experience may arguably give it some insight into the effectiveness of a state's regulatory apparatus. However, state action immunity is a threshold issue that must be decided before the FTC's own jurisdiction attaches. Rather than an outgrowth of the statute the FTC administers, the state action doctrine was developed by the Supreme Court to give expression to considerations of federalism and comity; the FTC's authoritative role commences only after it has been decided that the challenged activities are *not* immune. Thus, in determining the sufficiency **[**28]** of Massachusetts' regulatory program for purposes of the state action doctrine, the FTC is not in the same position it would occupy had it already been determined that the doctrine did not shield the activities in question from the federal antitrust laws enforced by the FTC. We see the "active supervision" issue, therefore, as one for de novo judicial determination.

Second, the very existence of a comprehensive regulatory scheme like the one we have already seen is in place in Massachusetts is some evidence that regulatory control is actually exercised. *Cf.* *Capital Telephone Co. v. New York Telephone Co., 750 F.2d 1154 (2d Cir. 1984)* (a pre-Patrick opinion holding that it would be inconsistent with the broad regulatory scheme in issue to find that the particular activities in question were subject to antitrust liability where the legislature so clearly intended to allow the Public Service Corporation to control all activities which were a reasonable part of the regulatory scheme). A far-ranging state regulatory scheme like the Massachusetts statute implies the exercise (as well as the mere existence) of power because it imposes legally enforceable duties on state **[**29]** officials -- duties which a federal court may not, under normal principles of federalism, assume they will disregard. [10] The Massachusetts statute, as noted, requires officials to maintain just and reasonable rates, to act on complaints, to correct discriminatory rates, to consider various specified factors, and so on. It is a statute which gives to Massachusetts officials, under designated standards, a duty as well as mere authority with respect to the ultimate choice and setting of the rates. Thus, in respect to *Patrick's* requirement that the state *exercise* (as well as *have*) power, the comprehensive Massachusetts statute provides, by itself, some indicia that power is being exercised.

[30]** We do not, however, rest on inferences from the statute alone, but turn to the stipulations in the record to determine current levels of regulatory activity in Massachusetts.

An initial approach is to ask to what degree the four types of regulatory oversight whose total absence was decried in *Midcal* and *Duffy* are being exercised by Massachusetts -and to compare Massachusetts' actions in this respect with Rhode Island's, which the FTC approved. The facts in the instant case are not in dispute, **[*1073]** and the stipulations by the parties establish that the first two of the four factors absent in *Midcal* and *Duffy* are clearly present in Massachusetts: (1) Massachusetts has the last word in setting the rates, which must be filed with its officials and take effect only if not suspended or rejected by them; [11] **[**31]** and (2) Massachusetts reviews the reasonableness of the rates. [12] **[**32]** The stipulations do not indicate, however, that Massachusetts (3) monitors

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[10] Such duties are enforceable by mandamus and other legal remedies in state courts. They are not mere precatory maxims. *See* *Lutheran Serv. Ass'n of New England, Inc. v. Metropolitan Dist. Comm'n, 397 Mass. 341, 344, 491 N.E.2d 255, 257 (Mass. 1986)* ("In the absence of an alternative remedy, relief in the nature of mandamus is appropriate to compel a public official to perform an act which the official has a legal duty to perform."); *Restivo v. Town of Swansea, 398 Mass. 1002, 1003, 495 N.E.2d 838, 839 (Mass. 1986)* (quoting *Bancroft v. Building Comm'r of Boston, 257 Mass. 82, 84, 153 N.E. 319, 320 (Mass. 1926)* ("when the question is one of public right and the purpose is to procure the performance of a public duty, and no other remedy is open, a petitioner need not show that he has any special interest in the result [in order to seek relief in the nature of mandamus]: it is sufficient that as a citizen he is interested in the due execution of the laws")).

[11] Stipulation 55 of August 28, 1986 reads: "The MDPU is authorized to reject or suspend proposed rates which are not consistent with the statute or the MDPU's orders, rules and regulations." *See also* Mass.Gen.L. ch. 159B, § 6, paras. 1, 2 (1986) ("The department may reject any tariff filed with it which is not consistent with this section and with its orders, rules and regulations under this chapter.")

Stipulation 61 reads: "The MDPU, upon complaint of any motor common carrier of property or any other person, or upon its own motion, after hearing, may allow or disallow any filed or existing rates and may alter or prescribe rates in accordance with the legal standards provided." *See* Mass.Gen.L. ch. 159B, § 6, para. 5 (1986).

[12] Stipulation 51 of August 28, 1986 provides:

> A carrier has the right to seek whatever rate it desires. No one at the MDPU looks behind the filed rates to determine whether they accurately reflect a carrier's profits and costs. The rate analyst has never requested financial information to support a tariff nor has he rejected a rate because of the price to be charged. *However, if confronted with a tariff containing rates that in his judgment are out of line with the average rates that have been established in the involved pricing zone, or seem extraordinarily high, such as a 20% to 50% increase, he would recommend suspension and investigation of the tariff by the MDPU Commissioners*. (emphasis added)

Stipulation 62 of August 28, 1986 provides:

> It is the opinion of the rate analyst that whenever tariffs become effective without rejection, suspension or hearing, that action results from *a determination that the proposed rates meet the regulatory criteria of the statute, orders, rules and regulations pertaining to motor carriers of property*. (emphasis added)

There is a rate analyst and one clerk who is responsible for processing filed motor carrier rates. Stipulations 44 and 45, August 28, 1986. There are 12 field inspectors who have police power to enforce the Massachusetts motor carrier statute; among other duties they spot check for rate violations. Stipulation 72.

Stipulation 75 of August 28, 1986 provides:

market conditions, [13] or (4) has engaged in any "pointed reexamination" of the program. Nonetheless, as later discussed, we do not find the absence of these two latter factors to be fatal.

If we turn to Rhode Island, which has a regulatory scheme that the FTC found sufficient for "state action" immunity, we note that the last two factors are also absent. If there is a difference between Massachusetts and Rhode Island as to the four factors, it would be in regard to factor two, where -instead of a stipulation that the rate analyst would reject any rates he felt to be out of line with past average rates or extraordinarily high- it was affirmatively stipulated that in Rhode Island:

> The rate analyst also examines tariffs to ascertain whether the rates are within a "zone of reasonableness." The "zone of reasonableness," which is a measure developed by the rate analyst, consists of a range between the maximum and minimum industry averages of previously approved rates for each category of motor carrier. Those rates that fall within the "zone of reasonableness" are approved **[**33]** without a hearing. In determining the reasonableness of a proposed tariff, the rate analyst may also consider the percentage of the rate increase as well as the date of the carrier's last request for a price increase.

Stipulations 103-06 of August 28, 1986.

As indicated above, rates filed by NEMRB in Massachusetts go into effect automatically after a 30-day waiting period unless rejected or suspended by the MDPU, whereas in Rhode Island, rates do **[*1074]** not go into effect until an affirmative written order has been issued by the state. Whereas Massachusetts has held no public hearings during the past six years either to investigate or to suspend a motor carrier's rate, Rhode Island has had one such hearing (after the start of the FTC's investigation), at the conclusion of which it approved the proposed rates.

In the FTC's view, the contrast in these last two factors qualifies Rhode Island under the "active supervision" prong, but is fatal to Massachusetts's ability to qualify. The FTC likewise referred prominently to Massachusetts' failure, but overlooked Rhode Island's failure, to show that it engages "in a 'pointed reexamination' of rates resulting from NEMRB's **[**34]** ratemaking activities." 112 F.T.C. at __, slip op. at 17.

The FTC held that:

> the *Midcal* and *Patrick* decisions indicate that a state official or agency must engage in a substantive review of the challenged conduct before active supervision can be found. Such a review ensures that the state agency *has consciously considered the anticompetitive consequences of the activity* for which private parties seek approval. No clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency's passive acceptance or non-substantive review of rate filings. Thus, we hold that the active supervision requirement is satisfied only where the state agency has reviewed the proposed tariffs or rates on the merits.

112 F.T.C. at __, slip op. at 14-15 (emphasis added).

We agree with the FTC that *Midcal, 445 U.S. at 105-06*, and *Patrick, 486 U.S. at 101*, require ***HN2***[] a state to engage in substantive oversight of the challenged conduct before active supervision can be found. 112 **[**35]** F.T.C. at __, slip op. at 14-15. The purpose of such review, however, is to ascertain *its consistency with state policy, Patrick, 486 U.S. at 101*, and not necessarily to determine the activity's anticompetitive consequences. We also

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> If a complaint alleges a violation of Chapter 159B [the motor carrier laws, including those pertaining to rates] or any order, rule or regulation adopted thereunder, it will be investigated and appropriate action taken if warranted.

Private complaints may be filed with the MDPU and are required by law to be investigated by the agency. Violations of the Massachusetts motor carrier statute are punishable by fine and may be enjoined in the Massachusetts courts at the instance of private parties as well as of the MDPU. Stipulation 76.

[13] Stipulation 78 of August 28, 1986 provides:

> Aside from its role in reviewing proposed rates, MDPU does not monitor economic conditions in the intrastate trucking industry of Massachusetts.

disagree with the conclusion of the FTC that a state need always undertake a "pointed reexamination" in which it "consciously considers the anticompetitive consequences of the activity for which private parties seek approval." 112 F.T.C. at __, slip op. at 17, 15. There is nothing in the state action doctrine, as formulated, that turns on the economic philosophy of a state's regulatory program, the mind-set of its administrators, or the degree its goals mesh with the FTC's view of good regulatory policy. Rather, state action immunity is based on the Supreme Court's determination that Congress, in enacting the federal antitrust laws, meant *not* to preempt state programs and policies that are the genuine products of state governmental action. It is immaterial whether the policies guiding the state's actions are or are not consistent with federal antitrust aims.

The Court in *Midcal* and *Duffy* did not, moreover, **[**36]** indicate that the four above-mentioned elements -- the complete absence of which it criticized in those cases -- *all* needed to coexist for active supervision to be found. It would appear that the presence of any one or two of those elements would have sufficed, depending on the facts and circumstances. Other factors not mentioned might also have tipped the scales. We think the FTC has gone well beyond anything said by the Court in suggesting that active supervision is absent unless a state agency actively monitors market conditions or pointedly reexamines anticompetitive consequences. The FTC implicitly recognized this when it found that Rhode Island engages in active supervision of the NEMRB collective rate filings, even though Rhode Island does not monitor market conditions [14] nor engage in any "pointed reexamination" of the anticompetitive consequences of its regulatory program.

[37]** **[*1075]** State authorities in Massachusetts could reasonably believe that by undertaking, as stipulated, to investigate any and all complaints; by relying on their analyst's expertise and his stipulated intention to review any extreme deviations in filed rates; and by looking at information from other sources, [15] they will meet their statutory mandate to prescribe just, reasonable, and nondiscriminatory rates. Especially is this so where the federal ICC shares oversight duties as to many of these same filed rates, and the ICC's views as to the justness and reasonableness of the rates are known to, and relied upon by, the MDPU.

The FTC's position, at bottom, seems to be that the "active supervision" prong necessitates an inquiry by the FTC into whether a **[**38]** particular state's regulatory operation demonstrates satisfactory zeal and aggressiveness. The FTC would, in effect, try the state regulator. We think this goes too far. As already noted, Massachusetts regulators are subject to a detailed set of statutory duties aimed at causing the filed rates to meet defined criteria. These duties and requirements are enforceable administratively and in the state courts, where administrative nonfeasance can be challenged and, if need be, corrected. For example, upon complaint of any person the MDPU is legally required to hold a hearing and determine the lawful rate of charge. [16] In our federal system, a state

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[14] Stipulation 120 of August 28, 1986 reads:

> Aside from its role in reviewing proposed rates, [the Division of Public Utilities and Carriers] does not monitor economic conditions in the intrastate trucking industry of Rhode Island.

[15] For example, the MDPU receives rate justification data from NEMRB which the latter provides to the ICC. It is also advised as to the ICC's actions as to such filings, and presumably would learn of actions by regulatory agencies of other states.

[16]

> The department, upon complaint of any common carrier . . . or any other person, or upon its own motion, *after hearing*, may allow or disallow any filed or existing rates. . . . Whenever, upon complaint or in an investigation on its own initiative, the department, *after hearing*, shall be of the opinion that any rate or charge demanded, charged or collected by any common carrier by motor vehicle . . . is or will be unjust or prejudicial, it *shall* determine and prescribe the lawful rate of charge . . . thereafter to be made effective.

HN3[]

Mass.Gen.L. ch. 159B, § 6, para. 5 (1986) (emphasis added).

See also id. para. 6, quoted in note 8 *supra*, for the guidelines the MDPU must follow in the exercise of its duty to overrule unjust or prejudicial rates.

regulatory scheme like this carries with it the presumption that the relevant state officials are faithfully carrying out their duties under the state's law. Such a presumption could perhaps be rebutted by a showing of some major state default -- as might occur, for example, if the state had ceased to fund and staff the MDPU. Nothing of this type, however, has been shown here. In fact, implicit in the evidence that hearings have not been held is the recognition that there have been no complaints that would trigger such hearings. The absence **[**39]** of complaints in the face of an available procedure to resolve them supports an inference that the state is actively supervising. Moreover, there is evidence of the existence of an ongoing regulatory mechanism, and of significant activity. Stipulations 51 and 62 of August 28, 1986, [17] already discussed above, indicate that Massachusetts exercises its power to review and disapprove joint rate filings of common carriers by motor vehicle. It is stipulated that the rate analyst would suspend rates that were out of line with established rates or extraordinarily high or that appeared to contain discriminatory provisions. It is also stipulated that the rate analyst believes that failure to reject or suspend proposed rates results from a determination that the proposed **[*1076]** rates meet the regulatory criteria of the statute, orders, rules and regulations. This inference is supported by Stipulations 61 and 76, which establish that hearings are required where there is a complaint. The absence of hearings in the past years, rather than indicating that the rate analyst is not doing his job, instead indicate that the rates taking effect have been acceptable to affected third-parties, who **[**40]** need only complain to trigger a hearing.

[41]** In a similar vein, it is stipulated that if a complaint alleges a violation of the statute or any order or regulation adopted thereunder, "it will be investigated and appropriate action taken if warranted." It is also stipulated that many of the general rate structures, general rate increases, etc. filed in Massachusetts have previously been filed with and approved by the ICC, and that if the ICC suspends or rejects any rate, NEMRB requests the MDPU to take the same action with respect to the intrastate Massachusetts proposal. The stipulations establish that the MDPU generally relies on the fact that the ICC has already conducted an investigation and reached a conclusion as to the justness and reasonableness of the rates.

It follows from all of the above that NEMRB is at the far pole from the liquor dealers in *Midcal* and *Duffy*, who were allowed a free hand to set rates with no state review mechanism extant. NEMRB's proposed rates are under continuing scrutiny, with the threat of suspension and investigation if a complaint is registered or the MDPU thinks they are unreasonable or discriminatory.

The principles of federalism embodied in *Parker* dictate the sufficiency **[**42]** of a degree of scrutiny on this level. [18] It is not the province of the federal courts nor of federal regulatory agencies to sit in judgment upon the degree of

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[17] Stipulation 51 of August 28, 1986 reads:

> If confronted with a tariff containing rates that in his judgment are out of line with the average rates that have been established in the involved pricing zone, or seem extraordinarily high, such as a 20% to 50% increase, [the rate analyst] would recommend suspension and investigation of the tariff by the MDPU Commissioners. Likewise, if a tariff appeared to contain discriminatory provisions, such as being applicable only for the account of a named shipper or shippers rather than being available to the general public, the [Commercial Motor Vehicle Division] would recommend suspension and investigation.

Stipulation 62 of August 28, 1986 reads:

> It is the opinion of the rate analyst that whenever tariffs become effective without rejection, suspension or hearing, that action results from a determination that the proposed rates meet the regulatory criteria of the statute, orders, rules and regulations pertaining to motor carriers of property.

[18] We agree with commentators who state that a court (and, by analogy, the FTC in its adjudicatory capacity) should not scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma. P. Areeda & D. Turner, ***Antitrust Law***, § 213c, at 75 (1978). Instead, for many of the same reasons that the Supreme Court refuses strictly to scrutinize state economic regulation under the *Fourteenth Amendment*, the antitrust adjudicatory body must accept the state's apparent supervision on its face. P. Areeda & D. Turner, ***Antitrust Law***, § 213c, at 75 (1978).

> There simply is no way to tell if the state has "looked" hard enough at the data, and there certainly are no manageable judicial standards by which a court may weigh the various elements of a "public interest" judgment in order to determine

strictness or *effectiveness* with which a state carries out its own statutes. It is sufficient that a meaningful scheme of regulation is in existence and that there are sufficient indications that active regulation under this scheme is taking place.

> A state's antitrust immunity springs from an essential principle of federalism, the necessity to respect a sovereign capacity **[*1077]** in the several states. *Hoover v. Ronwin, 466 U.S. 558, 567-68, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984)*. Given this purpose, it follows that *actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law.*

Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985) (emphasis added).

[43]** In summary, the statute here clearly calls for the active supervision of the rates filed. We know, further, that a regulatory agency has been established and funded to carry out that statutory mandate, and that state officials are positioned to carry out their statutory duties. Furthermore, the stipulations in the case indicate that unreasonable rates will be rejected and that the failure to suspend or reject a rate indicates a determination that the rate has been found to meet the regulatory criteria of the statute, orders, rules, and regulations. There is an administrative mechanism in place for aggrieved parties to register their complaints and be heard. Further, the Massachusetts courts are available and are empowered to force the regulators to act at the suit of aggrieved parties. In addition, the majority of the rates in question have been previously filed with and investigated by the ICC.

We hold that a showing of this magnitude is sufficient, without more, to meet the "active supervision" prong of the *Midcal* test for qualifying to invoke the "state action" defense of *Parker*. Specifically, Massachusetts both *has* and *exercises* relevant regulatory power. **[**44]** *Patrick, 486 U.S. at 101*. The FTC commissioners erred by trying to

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> whether the legislature or agency decision was correct. Those are political judgments and ought to be made by the legislature and its delegates.

Id.

See also *United States v. Topco Associates, 405 U.S. 596, 611-12, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)* (Brennan, J., concurring) ("To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would [] be brought to bear on [] decisions" to sacrifice competition in one portion of the economy for greater competition in another portion, "and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required." "Courts are ill-equipped and ill-situated for such decision-making."); ***Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1063 (C.D.Cal. 1971)*** ("The primary disadvantages of the 'rule of reason' are that it requires difficult and lengthy factual inquiries and very subjective policy decisions which are in many ways essentially legislative and ill-suited to the judicial process.").

Areeda and Turner believe that "an allegation that state officials customarily 'rubber stamp' the self-interested decisions or recommendations of the private parties involved should not ordinarily oust *Parker* immunity." P. Areeda & D. Turner, § 213c, at 75 (1978).

See also *Llewellyn v. Crothers, 765 F.2d 769 (9th Cir. 1985)*:

> The availability of *Parker* immunity . . . does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it. This must be so if the state action exemption is to remain faithful to *its foundations in federalism and state sovereignty*.

Id. at 774 (emphasis added).

gauge in too particular a way the degree of actual effectiveness or ineffectiveness exhibited by the Massachusetts regulators.

CONCLUSION

Pursuant to our holding that Massachusetts regulatory scheme qualifies for the invocation of the *Parker* "state action" defense to antitrust liability by satisfying not only the first but also the second ("active supervision") prong of the *Midcal* test, we direct the FTC to modify its final order issued August 18, 1989, by deleting the references to Massachusetts that appear at the end of the "Provided" limiting provisos in Paragraphs I and II, and by making such further modifications, if any, as may be necessary to conform the order in all respects with this opinion. As so modified, the order is enforced.

So ordered.

Rafferty v. NYNEX Corp.

United States District Court for the District of Columbia

July 23, 1990 ; July 23, 1990, Filed

Civil Action No. 87-1521 (HHG)

Reporter

744 F. Supp. 324 *; 1990 U.S. Dist. LEXIS 9357 **; 118 Lab. Cas. (CCH) P56,589; 1990-2 Trade Cas. (CCH) P69,114

Scott J. RAFFERTY, Plaintiff, v. NYNEX CORPORATION, et al., Defendants

Core Terms

decree, termination, consent decree, asserts, third-party, antitrust, punitive damages, misrepresentations, summary judgment motion, anti trust law, Clayton Act, defendants', consulting, employees, purposes, alleges

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

HN1[] **Settlements, Consent Judgments**

The Clayton Act § 4(a), grants a private right of action to persons injured by anything forbidden by the antitrust laws. Section 1 of the Act, *15 U.S.C.S. § 12*, contains a specific definition of "antitrust laws" for purposes of § 4(a), and that definition is "exclusive." "Antitrust laws" means specific statutes listed in Clayton Act § 1. There is no support for the proposition that violation of a consent decree violates the Clayton Act § 4. Obviously, a judicial consent decree is not an "***antitrust law***." It has been specifically established that a private party cannot premise a treble damage action under § 4 upon violations of a government consent decree.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Private Actions, Standing**

The weight of authority holds that employees do not have standing under the Clayton Act § 4.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN3[] **Private Actions, Standing**

Only harm stemming from a reduction in competition qualifies as an injury cognizable under the antitrust laws.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN4[] **Settlements, Consent Judgments**

It is well established that a private party cannot sue as a third-party beneficiary of a government consent decree.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > Statute of Frauds > General Overview

HN5[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Admitting that there was, indeed, a contract, a party waives any application of the statute of frauds. To waive application of the statute of frauds, the admission need not include all of the terms of the contract, but only those sufficient to conclude that an agreement existed.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Contracts Law > ... > Affirmative Defenses > Estoppel > Statute of Frauds

Contracts Law > Statute of Frauds > General Overview

HN6[] Affirmative Defenses, Fraud & Misrepresentation

Equitable estoppel bars a party from asserting the statute of frauds when its own fraud is responsible for the absence of a written agreement. A party's alleged promise to reduce the contract to writing "as soon as possible" and his subsequent failure to do so brings the contract within the doctrine for purposes of a motion for summary judgment.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Labor & Employment Law > Employment Relationships > At Will Employment > Duration of Employment

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN7[] Types of Contracts, Oral Agreements

Under Tennessee law, the rule is that an oral contract for lifetime, permanent, or indefinite employment is a hiring terminable at will when the employee furnishes no consideration other than the services required in the agreement.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Labor & Employment Law > Wrongful Termination > Remedies > General Overview

Torts > Remedies > Damages > General Overview

HN8[] Summary Judgment, Entitlement as Matter of Law

While a plaintiff need not, at the summary judgment stage, show the amount of the damages, he is obligated to show that they exist and are not entirely speculative.

Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Labor & Employment Law > Wrongful Termination > Public Policy

HN9[] Wrongful Termination, Whistleblower Protection Act

In Tennessee, an exception to the at-will termination doctrine for retaliatory discharges appears to be recognized at the present time although only with respect to certain relatively narrow situations. On the other hand, the District of Columbia does not currently recognize a public policy exception to the at-will termination doctrine.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Labor & Employment Law > Wrongful Termination > Public Policy

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > Defenses > Public Policy Violations

Labor & Employment Law > ... > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN10[] **Affirmative Defenses, Fraud & Misrepresentation**

There is no question but that punitive damages may be awarded in egregious circumstances, in cases of fraud, malice, oppression, reckless disregard for the rights of others, or indifference to the consequences, where a contract claim merges with one for tort or violation of public policy.

Judges: [1]** Harold H. Greene, United States District Judge.

Opinion by: GREENE

Opinion

[*326] MEMORANDUM

HAROLD H. GREENE, UNITED STATES DISTRICT JUDGE.

Pending before the Court is the summary judgment motion of defendants NYNEX Corp. and Telco Research Corp. (a NYNEX subsidiary), seeking the dismissal of a number of antitrust, contract, and tort claims relating to plaintiff's termination as a senior vice president of Telco. Plaintiff, a lawyer who is proceeding *pro se,* asserts that he was fired as a result of inquiries he made to determine whether Telco was violating the consent decree entered in *United States v. American Tel. & Tel., 552 F. Supp. 131 (D.D.C. 1982)*, *aff'd sub nom. Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983)*. Upon its consideration of the parties' voluminous papers, the Court grants the motion in part and denies it in part.

I *Facts*

In April 1986, NYNEX acquired Telco and recruited Rafferty to serve as its second senior officer and the head of its consulting division. NYNEX is a Regional Company subject to the consent decree entered on August 24, 1982 in the *AT & T* antitrust case, which bars the Regional Companies from certain lines of business -- long distance telephone services, telecommunications manufacturing, and **[**2]** information services. [1] Telco markets telecommunications management software and consulting services.

Rafferty has alleged that Theodore Engkvist, a NYNEX executive and chairman of Telco's board, informed him that the company had obtained a waiver to perform, *inter alia,* non-software consulting, although the company had obtained only a "software waiver" to provide and market software and associated services which did not cover its non-software consulting operations. [2] Plaintiff was concerned whether the activities of his division complied with the decree, and he asked NYNEX's attorneys on October 20 and 22, 1986 to provide an opinion letter confirming

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[1] *AT & T,* 552 F. Supp. at 226-34. Rafferty's description of the decree as purportedly restricting the Regional Companies to three lines of business (Opposition at 1) is incorrect.

[2] NYNEX disputes Rafferty's account of the scope of the waiver and of what he was told about the legality of Telco's consulting operation under the consent decree. The Court, however, must accept Rafferty's account of these events for purposes of the motion for summary judgment.

Engkvist's representations that the activities were within the scope of the waiver. [3] On November 10, 1986, Telco's management discharged Rafferty for what it asserts are legitimate **[**3]** reasons, and it closed the consulting division he had been hired to head. Eventually, plaintiff brought this action, which consists of six separate claims.

The Court analyzes below each of these claims in light of the facts and the law adduced by the parties. This task has been complicated by the fact that the plaintiff who, although a lawyer, appears to have limited familiarity with several of the legal issues and principles involved. Additionally, the basis for plaintiff's reasoning and his conclusions are not always easy to follow, *see, e.g.,* notes 6 and 9, *infra,* **[**4]** and, as the Court occasionally notes at appropriate places, he sometimes misrepresents the law, the facts, and the position of his opponents, [4] **[**5]** and he quotes statements from **[*327]** court decisions out of context. [5] Because plaintiff is proceeding *pro se,* the Court has attempted to ascertain or construct what he meant where the rationale of his assertions is confusing, and on that basis some of his claims are upheld. However, greater exactitude and less verbosity [6] will be required hereafter.

II *First Claim: Antitrust*

Plaintiff's first claim seeks redress for what he broadly describes as a violation of the antitrust laws. As best as the Court can tell, [7] Rafferty alleges that his termination for seeking legal advice [8] and for refusing to acquiesce in

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[3] Plaintiff also asserts that on several other occasions he brought to NYNEX's attention activities involving Telco that he believed to be violative of the decree.

[4] For example, and simply for purposes of illustration of a wider phenomenon, plaintiff contends that it is defendants' claim that the Court is barred as a matter of law from allowing a jury to disbelieve his witnesses (Opposition at 11); that there is no genuine dispute as to the evidence on the wrongful hire and employment theory (Opposition at 23); that with respect to the second claim NYNEX "relies exclusively on [the] *Control Data* [case]" (Opposition at 24); and that all but one of defendants' antitrust precedents deal only with the admissibility of consent decrees at trial (Opposition at 17). None of these statements is true. *See also,* note 18, *infra,* and the litany of plaintiff's false or unsupported statements in defendants' Reply at 32-35.

Inasmuch as Rafferty is a member of the bar who apparently could afford to hire competent counsel but refuses to do so, the Court will in the future hold him to the same standard as other members of the bar. Accordingly, misrepresentations or misstatements of law or fact may, in appropriate circumstances, lead to sanctions.

[5] *See, e.g.,* p. 329, *infra.*

[6] In addition to his thirty-nine page memorandum, plaintiff has filed a "concise" statement of issues consisting of sixty-one pages. That statement fails to comply with Rule 108(h) of the Rules of this Court, in that it includes pages upon pages or facts that are entirely irrelevant to the motion for summary judgment. In part, this may be due to inexperience *(see* p. 326, *supra),* but the filing is also consistent with plaintiff's practice of sometimes inundating the Court and the opposing party with materials in large volume, some of them relevant, many of them irrelevant, and some of them relevant to other pleadings or lawsuits plaintiff may have pending, so as to lay the groundwork for later complaints that not everything had been controverted or decided. Another effect of this practice is to compel the opposing party and the Court to refine the issues on their own so as to permit them to make presentations or judgments on the question whether there are genuine issues of material fact. That is, of course, improper. *See Frito-Lay v. Willoughby, 274 U.S. App. D.C. 340, 863 F.2d 1029, 1034 (D.C.Cir. 1988). See also,* note 39, *infra.*

Nevertheless, the Court has waded through this material on this occasion (although it could have deemed defendants' proposed facts to be admitted on account of plaintiff's failure to comply with Rule 108(h)). *See Simpson v. WMATA, 688 F. Supp. 765, 768 (D.D.C. 1988)*. However, hereafter it will require this plaintiff, like all litigants, to comply with the rules of procedure. *See also,* note 4, *supra.*

[6]**

[7] Rafferty's description of his first claim is headed "Antitrust Whistleblowing" -- a non-existent legal category. His legal argument on this claim is divided into various sections that are inappropriate for a summary judgment brief.

violations of the consent decree, as well as other actions taken by Telco and NYNEX, violated the decree and therefore also Section 4 of the Clayton Act. [9] There are several flaws to this claim of a violation of Section 4.

First. ***HN1***[] Section 4(a) of the Clayton Act grants a private right of action to persons injured "by anything forbidden by the antitrust laws." Section 1 of the Act, *15 U.S.C. § 12*, contains a specific definition of "antitrust laws" for purposes of Section 4(a), and that definition is "exclusive." *Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375-76, 2 L. Ed. 2d 340, 78 S. Ct. 352 (1958)*. *See also, New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 350 (3rd Cir. 1964)*, *aff'd, 381 U.S. 311, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965)* ("antitrust laws" means specific statutes listed in Clayton Act Section 1; other statutes not included). There is no support for the proposition that violation of a consent decree **[*328]** violates Section 4 of the Clayton Act. [10]

Indeed, it has been specifically established that a private party cannot premise a treble damage action under Section 4 upon violations of a government **[**8]** consent decree. *Paul M. Harrod Co. v. A.B. Dick Co., 194 F. Supp. 502, 504 (N.D. Ohio 1961)*; [11] *See also, Sound, Inc. v. American Tel. & Tel. Co.,* [1979-2] Trade Cas. para. 62,974, at 79,547-48 (S.D. Iowa 1979, *aff'd, 631 F.2d 1324 (8th Cir. 1980))*; *Cinema Service Corp. v. Twentieth Century-Fox Film Corp., 477 F. Supp. 174, 177-78 (W.D.Pa. 1979)*; *Control Data Corp. v. International Business Machines Corp., 306 F. Supp. 839, 846 (D.Minn. 1969)*, *aff'd, 430 F.2d 1277, 1278 (8th Cir. 1970)*.

[9]** Second. ***HN2***[] The weight of authority holds that employees do not have standing under Section 4. *See, e.g., Adams v. Pan American World Airways, Inc., 264 U.S. App. D.C. 174, 828 F.2d 24 (D.C.Cir. 1987)*. Plaintiff relies on *Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 744 (9th Cir. 1984)*, and *Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1423, 1429-30 (S.D.N.Y. 1986)*, which create an exception for "whistleblowers," but most of the courts which have considered the issue have rejected the holding of these cases. *See Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209, 210 (6th Cir. 1989)*; *Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982)*; *Boisjoly v. Morton Thiokol, 706 F. Supp. 795, 804-05 (D.Utah 1988)*; *Thomason v. Mitsubishi Electric Sales of America, Inc., 701 F. Supp. 1563, 1570 (N.D.Ga. 1988)*; *Reitz v. Canon USA Inc., 695 F. Supp. 552, 553-54 (S.D.Fla. 1988)*, and *Haigh v. Matsushita Electric Corp., 676 F. Supp. 1332, 1346 (E.D.Va. 1987)*. [12] In any event, Rafferty has testified

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[8] Defendants argue at length (Memorandum at 31-38) that the facts do not support plaintiff's claim that he was terminated, *inter alia,* because he sought legal advice. It is not necessary to decide the factual dispute underlying this antitrust claim, and the Court does not do so.

[9] The claim fails to provide an explanation of the statutes and theories which support it. In answers to interrogatories Rafferty asserts that Count Two refers to a violation of Section 4 of the Clayton Act, and that there is no evidence of violations of Sections 1 and 2 of the Sherman Act. Response to Interrogatories 1-3. In his Opposition to the motion for summary judgment, however, Rafferty suggests that "defendants cannot establish at summary judgment that there is no relevant violation of Sherman Sections 1 or 2." Opposition at 19 & n. 14. Even if the issue were open in view of the interrogatory answers, plaintiff could not possibly establish either market power in the consulting market or the requisite combination or conspiracy for a Sherman Act claim. *See, e.g., Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 759-77, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. Further, there are no citations to the discovery record and no explanation of the theories that lead plaintiff to his conclusion. Such unsupported and conclusory statements are insufficient to withstand a motion for summary judgment. *See Rule 56(e), Fed. R. Civ. P.*

[7]**

[10] Obviously, a judicial consent decree is not an "***antitrust law***."

[11] Plaintiff attempts to distinguish *Paul M. Harrod* by suggesting that it turns on the fact that references to the consent decree would prejudice the jury and that references to it were readily excisable. The explanation is patently false. The court in that case flatly decided that to "permit a private party to recover damages for violation of any provision of [a government antitrust decree] is so obviously beyond the scope of the term 'antitrust laws,' as used in the statute, as to require no further discussion." *194 F. Supp. at 504*. And the court went on to say that in view of its dismissal of the counts in the complaint referring to the antitrust decree that these counts would be ordered stricken.

that he is not a whistleblower. Rafferty Deposition at 1088-89. Accordingly, the Court can find no basis for extending the holding of *Ostrofe* **[**10]** and *Donahue* [13] to the circumstances here.

Third. Plaintiff asserts that he suffered the requisite "antitrust injury" because he lost his job at Telco and has not secured comparable employment. However, "only ***HN3***[] harm stemming from a reduction in competition qualifies as **[**11]** an injury cognizable under the antitrust laws." *Adams, 828 F.2d at 26*. [14] Rafferty does maintain that he was an "arguable beneficiary" of the allegedly illegal conduct while employed by Telco, Opposition at 20-21, but he does not -- indeed he cannot -- contend that his injury resulted from a reduction in competition. [15]

For these reasons, it is the Court's conclusion that Count One must be dismissed.

III *Second Claim: Third-Party Beneficiary*

Plaintiff alleges next that the consent decree is a contract binding on NYNEX, **[*329]** and that NYNEX employees are third-party beneficiaries of that contract. He further claims **[**12]** that his termination violated the decree because it resulted from his efforts to clarify and rectify NYNEX's breaches of the decree, and that as a third-party beneficiary he is entitled to recover. That claim, too, must fail.

First. Plaintiff's claims to third-party beneficiary status rest on a provision of the consent decree (Section V) requiring the Regional Companies to advise employees on their obligations under the decree. This provision is one of a number intended to ensure compliance with the decree. While it requires employees to comply with the decree, there is nothing in Section V, anywhere else in the decree, or in the Court's explanations of the decree, [16] to provide, or even to suggest, that employees of the Regional Companies were intended to benefit from it, as distinguished from being required to comply with it. [17]

Second. Even if there were some merit to the decree analysis, plaintiff could still not prevail, for ***HN4***[] it is well established that a private party cannot sue as a third-party beneficiary of a government consent decree. *Control Data Corp. v. IBM Corp., 306 F. Supp. 839, 846-48 (D.Minn. 1969)*, *aff'd sub nom.* *Data Processing Financial & General Corp. v. IBM Corp., 430 F.2d 1277, 1278 (8th Cir. 1970)*; *Cinema Service Corp. v. Twentieth Century-Fox Film Corp., 477 F. Supp. 174, 178 (W.D.Pa. 1979)*; *May Department Stores Co. v. First Hartford Corp., 435 F. Supp. 849, 852-53 (D.Conn. 1977)*; *National Union Electric v. Emerson Electric Co.,* [1981-82] Trade Cas. para. 64,274 (N.D.Ill. 1981). *See also,* *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975)*; *Federal Trade Commission v. Owens-Corning Fiberglas, 853 F.2d 458, 464 (6th Cir. 1988)* (Clayton Act does not create a private enforcement remedy).

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[12] Plaintiff misconstrues *Thomason* and *Haigh* by claiming that they distinguish *Ostrofe* on the facts without rejecting its holdings (Opposition at 23 n. 16). *See* *Thomason, 701 F. Supp. at 1570* ("if Thomason is correct in his allegations [that defendant fired him for refusal to engage in illegal conduct] he has suffered injury; but that harm cannot be redressed under the Sherman and Clayton Acts"); *Haigh, 676 F. Supp. at 1346* ("again, this Court must reject the *Ostrofe* analysis").

[13] In *Ostrofe,* the plaintiff was an essential participant in a scheme to fix prices and allocate customers; in *Donahue,* the plaintiff was likewise the means by which the defendant had imposed the illegal resale price maintenance scheme.

[14] The loss of employment by plaintiffs in *Adams* satisfied this standard because it was directly caused by the predatory destruction of their employer by competitors. 828 F.2d at 17.

[15] It appears to be plaintiff's theory that his termination was carried out in connection with the cessation of a business that was violating the *AT & T* decree. Even if true, that is not an "antitrust injury."

[16] *See* *552 F. Supp. at 143*.

[17] There is not the slightest support for plaintiff's flat statement that the "intent of the AT & T consent decree specifically to benefit management employees is beyond cavil" (Opposition at 24).

- - - - - - - - - - - - - - - - -End **[**13]** Footnotes- - - - - - - - - - - - - - - - -

Plaintiff's arguments to the contrary misrepresent the law and are otherwise unpersuasive. Thus, plaintiff quotes *Control Data* as declining to express an opinion on the issue of whether **[**14]** the decree conferred rights on third-party beneficiaries. Not only is the language plaintiff purports to quote (Opposition at 24) taken wholly out of context, but *Control Data* categorically rejected the third-party beneficiary theory after discussing it thoughtfully and at some length. [18]

Equally unhelpful are plaintiff's citations to third-party beneficiary cases involving consent agreements under the civil rights statutes and other areas of the law, given the ample authority in the antitrust area itself. Indeed, several of the cited cases expressly recognize the well-settled law in the antitrust area and do not contest that authority. *See, e.g., Coca-Cola Bottling Co. v. Coca-Cola Co., **[**15]** 654 F. Supp. 1419, 1437-39 (D. Del. 1987)* ("cases involving antitrust consent decrees have hewed closely to the *Blue Chip* rule barring any person not directly participating in the consent decree from suing to enforce its terms"); *Virgo v. Local Union 580, 107 F.R.D. 84, 91 (S.D.N.Y. 1985)*.

The second count will be dismissed.

IV *Third Claim: Written Employment Contract*

Plaintiff claims next that he entered an oral two-year non-cancellable employment contract with the defendants which they breached by terminating him without cause. Defendants argue that the claim should be dismissed because there is no written contract or memorandum satisfying the Statute of Frauds.

For purposes of this motion, it is undisputed that the plaintiff and James Jewett, **[*330]** president of Telco, entered an oral employment contract on April 30, 1986 that specified a $ 70,000 salary plus bonuses and required Rafferty not to compete with Telco for at least three years if he left the company. In a deposition, Jewett acknowledged that there was a contract, but he disagreed with Rafferty about its terms. Specifically, he maintained that the contract was terminable at will, [19] while Rafferty asserts that for **[**16]** the first two years he could not be terminated except for cause.

HN5[] Jewett's deposition testimony waives any application of the Statute of Frauds by admitting that there was, indeed, a contract. *Wemhoff v. Investors Management Corp., 455 A.2d 897, 899 (D.C. App. 1983)*; *Hackney v. Morelite Construction, 418 A.2d 1062 (D.C. App. 1980)*. To waive application of the Statute of Frauds, the admission need not include all of the terms of the contract, but only those sufficient to conclude that an agreement existed. *Wemhoff v. Investors Management Corp., 528 A.2d 1205, 1207-08 (D.C. App. 1987)*. [20]

[17]** Even without that admission, defendants could not assert the Statute of Frauds because of the doctrine of equitable estoppel. *Tauber v. District of Columbia, 511 A.2d 23, 27 (D.C. 1986)*. ***HN6***[] Equitable estoppel bars a party from asserting the Statute of Frauds when its own fraud is responsible for the absence of a written agreement. Jewett's alleged promise to reduce the contract to writing "as soon as possible" and his subsequent failure to do so, brings the contract within the doctrine for purposes of a motion for summary judgment. [21]

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[18] In view of the lengthy discussion supporting the *Control Data* court's conclusion that antitrust consent decrees may not be enforced by third parties, it is difficult to ascribe Rafferty's assertion that the court declined to "express an opinion" on that issue (Opposition at 24) entirely to inexperience.

[19] Jewett Deposition at 186, 191, 202.

[20] Defendants' argument that because Jewett denied plaintiff's claim to a two-year contract, the *Wemhoff* rule does not apply (Reply at 15-16) is contradicted both by the *Wemhoff* decisions themselves and by *Hackney* which expressly states that the Statute of Frauds is waived if the defendant as much as admits to the existence of the contract. *Id. at 1067*.

[21] Whether Jewett had the intent to commit a fraud when he apparently made the promise is a matter which, of course, must be left for trial.

For these reasons, the Court will deny defendants' summary judgment motion with respect to the claim for breach of employment contract.

V *Fourth Claim: Oral Contract Modification*

Plaintiff's next claim is based upon an alleged modification of the oral contract discussed *supra.* Plaintiff alleges that Engkvist promised him in an August **[**18]** 29, 1986 telephone conversation that if his division were ever closed, he would be offered employment with another NYNEX company, but that when Telco was later closed no such offer was forthcoming.

Even if these assertions are factually correct -- which the Court will assume for purposes of the motion -- they fail to state a claim cognizable at law. Plaintiff does not contend that there was a bargained-for exchange. [22] Engkvist did not ask Rafferty to do anything in return for the promise, and Rafferty made no offer to do so. At most, Engkvist made a gratuitous promise, and it is therefore not enforceable. *See Price v. Mercury Supply Co., 682 S.W.2d 924, 932 (Tenn.App. 1984)*; *Murray v. Lichtman, 119 U.S. App. D.C. 250, 339 F.2d 749, 751-52 (D.C.Cir. 1964)*. [23] ***HN7***[] Under Tennessee law, the rule is that an oral contract for lifetime, permanent, or indefinite employment is a hiring terminable at will when the employee furnishes no consideration other than the services required in the agreement. *Savage v. Spur Distributing Co., 33 Tenn. App. 27,* ***[*331]*** *228 S.W.2d 122, 124 (1950)*. [24]

The fourth count will be dismissed.

VI *Fifth Claim: Misrepresentation*

Rafferty alleges that NYNEX and Telco made two misrepresentations to him: (1) Engkvist told him that the Department of Justice had approved and authorized the NYNEX's acquisition of Telco; and (2) Jewett told him through an executive recruiter that Telco's consulting division had revenues of $ 1 million a year. [25] The claim based on these alleged misrepresentations must likewise be dismissed.

[20]** In the first place, plaintiff's memorandum in opposition to the motion for summary judgment offers no rebuttal to defendants' assertion that the claim should be dismissed because it fails to state any legally cognizable injury. On that basis, plaintiff may be deemed to have conceded the issue, and since there was therefore a failure to assert an injury recognized by law, the claim may be deemed to be fatally defective. [26]

However, in order not to penalize plaintiff for his inexperience *(see* pp. 326-327, *supra),* the Court has examined the complaint to determine whether the claim **[**21]** could survive defendants' motion. This examination reveals that

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[22] The complaint alleges that defendants' commitment was given "in consideration for [his] continued efforts to develop Telco consulting" (Complaint, para. 37). However, plaintiff was already obligated to advance that objective.

[23] **[**19]** Rafferty relies on *Barger v. General Electric Co., 599 F. Supp. 1154, 1161 (W.D.Va. 1984)*, for the proposition that his continued service constituted consideration. However, not only did *Barger* involve special facts (the existence and distribution of a handbook to govern layoffs) but it applied only Virginia law, recognizing that on the broad issue the jurisdictions are severely split.

[24] In his deposition testimony, plaintiff stated that he "had a commitment of employment for the indefinite future." Rafferty Deposition at 857.

[25] There is considerable dispute between the parties about exactly what was said to whom. It appears, however, that ambiguous statements were made that could have left Rafferty with the impression upon which he now relies.

[26] Both in Tennessee and in the District of Columbia, ***HN8***[] while a plaintiff need not, at this stage, show the amount of the damages, he is obligated to show that they exist and are not entirely speculative. *See, e.g., Haynes v. Cumberland Builders, Inc., 546 S.W.2d 228, 233 (Tenn. App. 1977)*; *Naartex Consulting Corp. v. Watt, 232 U.S. App. D.C. 293, 722 F.2d 779, 793 n. 22 (D.C.Cir. 1983)*; W. Prosser & W. P. Keaton, *Torts* § 110 (5th ed. 1984).

nothing in that complaint or in plaintiff's other voluminous filings supports the notion of a legally-recoverable injury. [27]

The complaint does allege that the misrepresentations exposed him to potential criminal liability, resulted in his precipitous termination, damaged his professional reputation, and violated his principles. Amended Complaint, paras. 47, 48.

The claim for exposure to criminal liability is plainly too uncertain and too speculative for recovery; Rafferty has never been charged with anything related to this case, and there is not the slightest indication that he ever will be. [28] Similarly, nothing in the record support Rafferty's claim of damage to reputation; indeed, the record refutes the assertion. [29] The claim that these misrepresentations caused his termination founders on the fact that the dismissal left Rafferty exactly where he asserts **[**22]** he would have been without the misrepresentation: without a job at Telco. Finally, as concerns the claim of injury to his principles, which plaintiff characterizes as "most important" of all, it is of course, not an injury cognizable at law.

VII *Sixth Claim: Wrongful Discharge*

Plaintiff finally asserts that NYNEX officials caused Jewett to discharge him because he sought legal advice as to the application of the decree and because they knew that he would not conduct or participate in unlawful activities for which he was an essential participant. He further maintains that the manner **[**23]** of his termination constituted retaliation for his refusal to participate in these illegal activities or to conceal them from the Department of Justice. Defendants argue that these allegations do not state a claim upon which **[*332]** relief may be granted. [30]

Wrongful discharge is an evolving tort, and the status of the law varies substantially from state to state. [31] **[**25]** ***HN9***[] In Tennessee, an exception to the at-will termination doctrine for retaliatory discharges appears to be recognized at the present time (although only with respect to certain relatively narrow situations). *Chism v. Mid-South Milling Co., 762 S.W.2d 552 (Tenn. 1988)*. *See also, Watson* ***[**24]*** *v. Cleveland Chair Co.,* *1 BNA IER CAS 1780, 122 L.R.R.M. 2076, 2078* (Tenn. App. 1985). On the other hand, "the District of Columbia does not currently recognize a public policy exception to the at-will termination doctrine." *Hall v. Ford, 272 U.S. App. D.C. 301, 856 F.2d 255, 267 (D.C. Cir. 1988)*. [32] *But see, Buttell v. American Podiatric Medical Ass'n, 700 F. Supp. 592, 600 (D.D.C. 1988)*; *Alder v. Columbia Historical Soc., 690 F. Supp. 9, 16 (D.D.C. 1987)*; *Wemhoff v. Investors Management Corp., supra, 528 A.2d at 1208 n. 3*; *and see Edwards v. Habib, 130 U.S. App. D.C. 126, 397 F.2d 687 (D.C.Cir. 1968)*.

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[27] It is therefore not necessary to explore defendants' several other defenses to this claim.

[28] NYNEX, on the other hand, has been indicted for alleged violations of the decree. *See United States v. NYNEX Corporation,* Criminal No. 90-0238 (D.D.C. 1990).

[29] Rafferty testified that several of Telco's customers have either recommended him for other positions or are willing to do so, Deposition at 1047, 1103-04, and that he was able to secure a comparable consulting position at the Diebold Group. *Id.* at 1501.

[30] In addition to arguing that no cause of action for wrongful discharge is recognized in either Tennessee or the District of Columbia, defendants maintain that this claim should be dismissed because plaintiff was fired for business reasons and not as a consequence of his actions under the decree. But that is an issue of fact not amenable to resolution on the instant motion.

[31] Both parties have taken positions on the law applicable to this claim that are at odds with those they have taken elsewhere in these filings. Plaintiff argues elsewhere that District of Columbia law governs this case, Opposition at 29 n. 24; but with respect to this count he suggests variously that New York, District of Columbia, and Tennessee law are applicable. Opposition at 36 n. 29. Defendants, meanwhile, have asserted elsewhere that the case is governed by Tennessee law, Motion at 52, while relying here principally upon District of Columbia law.

[32] Plaintiff distorts the *Hall* decision, claiming that it deals only with the political rights of public employees (Opposition at 35) when that was but one of the questions considered by the court. His further attempt to denigrate the Court of Appeals opinion by characterizing it as dictum and as relying on a D.C. Court of Appeals *en banc* decision without precedential value must likewise fail, for this Court is certainly bound by plain language of the U.S. Court of Appeals.

In view of the failure of the parties to take unequivocal stands on and properly to brief the choice of law issue which may govern resolution of the substantive question (which is itself not entirely clear in either of the two jurisdictions), the Court will deny the motion for summary judgment, without prejudice to its renewal on the basis of further briefing.

VIII *Punitive Damages*

The complaint asks for punitive damages [33] under the second, fifth, and sixth claims. [34] The issue needs to be considered only with respect to Count Six, the wrongful discharge claim, since the other relevant claims are being dismissed. **[**26]**

HN10[] There is no question but that punitive damages may be awarded in egregious circumstances, in cases of fraud, malice, oppression, reckless disregard for the rights of others, or indifference to the consequences, [35] **[**27]** where a contract claim merges with one for tort or violation of public policy. [36] While the Court has not rendered a final decision with respect to the wrongful discharge claim since both the proper choice of law and the appropriate substantive standard to be applied are still in doubt *(see* Part VII, *supra),* at least for present purposes it is clear that the punitive damage claim should not be dismissed.

Plaintiff has alleged that various officials connected with defendants saw to **[*333]** it that he was discharged because he would not participate in or cover-up activities which violated the *AT & T* decree or were otherwise unlawful. He also claims that retaliatory measures were taken when he would not cooperate in these unlawful activities. These steps by defendants, if they can be proved, would be sufficiently egregious as well as oppressive of the rights of others [37] that a jury might be justified in awarding punitive damages therefor.

To be sure, punitive damages are not automatically available in every wrongful discharge case, or even in every case where the discharge is effected as retaliation for the exercise of lawful activities; however, assuming that plaintiff's claims in that respect are supported by **[**28]** the facts, the Court will not rule out such damages at the summary judgment stage. [38]

Order

For the reasons stated, [39] it is hereby

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[33] In the original complaint, the demand was for $ 1 million; that demand has now been increased, without explanation, to $ 2 million.

[34] In his opposition to the summary judgment motion, plaintiff also discusses the third and fourth claims, but that opposition cannot enlarge upon the complaint.

[35] *Nepera Chemical, Inc. v. Sea-Land Service, Inc., 253 U.S. App. D.C. 394, 794 F.2d 688 (D.C.Cir. 1986)*; *Price v. Griffin, 359 A.2d 582, 589 (D.C.App. 1976)*; *Washington Garage Co. v. Klare, 248 A.2d 681, 684 (D.C.App. 1968)*. *Irving Pulp & Paper v. Dunbar Transfer, 732 F.2d 511, 516-17 (6th Cir. 1984)*; *National Polymer Products v. Borg-Warner Corp., 660 F.2d 171, 183 (6th Cir. 1981)*; *Inland Container Corp. v. March, 529 S.W.2d 43, 44 (Tenn. 1975)*; Prosser & Keeton on Torts § 2 at 9-10 (5th ed. 1984).

[36] *Bedell v. Inver Housing, Inc., 506 A.2d 202, 206 (D.C. App.1986)*.

[37] ***Nepera Chemical, supra, 794 F.2d at 689***.

[38] NYNEX is subject to punitive damages only if its officers ordered, participated, or ratified the outrageous conduct. *See* *Hammerman v. Peacock, 607 F. Supp. 911, 919 (D.D.C. 1985)*. Decision on that issue may have to await the production at trial of plaintiff's evidence.

[29]** ORDERED that the first, second, fourth, and fifth claims be and they are hereby dismissed; and it is further

ORDERED that defendants' motion for summary judgment be and it is hereby denied with respect to the third and sixth claims; and it is further

ORDERED that defendants' request for a dismissal of the claim for punitive damages be and it is hereby denied.

[39] In line with his not unusual practice in this Court, in the Court of Appeals, and before the Magistrate, of seeking, somehow, to tie together all of his disparate disputes, claims, and procedural involvements wherever they may be pending, plaintiff attempts to reserve the right to supplement the facts for purposes of the summary judgment motion pending the resolution of such matters as disputes over discovery orders, discovery sanctions, and what are claimed to be improper *Fifth Amendment* claims by defendants' employees. Opposition at 39 n. 35. The Court denies the request insofar as it seeks a unilateral right to adduce more facts following an advisory opinion to plaintiff regarding the sufficiency of the facts he has adduced thus far. However, the Court will consider a stay of the remainder of the summary judgment issues, as well as of other proceedings, pending the resolution of discovery or other matters, should either party so request.

New York v. Cedar Park Concrete Corp.

United States District Court for the Southern District of New York

July 24, 1990, Decided ; July 24, 1990, Filed

Nos. 85 CIV 1887 (LBS), 86 CIV. 8128 (LBS)

Reporter

741 F. Supp. 494 *; 1990 U.S. Dist. LEXIS 9161 **; 1990-2 Trade Cas. (CCH) P69,115

STATE OF NEW YORK, Plaintiff, v. CEDAR PARK CONCRETE CORP., et al., Defendants. STATE OF NEW YORK, Plaintiff, v. CENTURY MAXIM CONSTRUCTION CORP., et al., Defendants

Core Terms

purchasers, indirect, anti trust law, antitrust, oral argument, amend, claim for damages, asserted claim, complaints

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] **Antitrust & Trade Law, Clayton Act**

"Indirect purchasers," who are downstream buyers who allege that they absorbed at least part of the "cost" of an antitrust violation, can not recover from the alleged violator under § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN2[] **Amendment of Pleadings, Leave of Court**

Fed. R. Civ. P. 15(a) provides that a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. At the same time, leave may be denied where there has been undue delay, the movant has acted in bad faith or with a dilatory motive, the opposing party would be unduly prejudiced, or the amendment would be futile. Similarly, where plaintiff has already had a sufficient opportunity to plead, leave may be denied. While a change in the governing law can justify granting leave to amend despite the passage of a significant amount of time, mere ignorance of the law cannot.

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Gerald Lefcourt, Esq., Attorney, for Defendant Marine Pollution Service, Inc. d/b/a Certified Concrete Co., New York, New York.

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Gerald L. Shargel, Esq., New York, New York.

Judges: Leonard B. Sand, United States District Judge.

Opinion by: SAND

Opinion

[*495] LEONARD B. SAND, UNITED STATES DISTRICT JUDGE

These cases arise out of an alleged bid rigging/market allocation scheme in the New York City market for reinforced-concrete superstructure construction work. The State of New York seeks to amend its complaint to include claims for damages under New York's antitrust statute on behalf of government entities which were apparently indirect purchasers of the concrete work.

Background

In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, the United States Supreme Court held that ***HN1***[] "indirect purchasers," downstream buyers who allege that they absorbed at least part of the "cost" of an antitrust violation, could not recover from the alleged violator under § 4 of the Clayton Act, *15 U.S.C. § 15*. The Court described its decision as one of "statutory construction," *id. at 736*, and found that:

> the legislative purpose in creating a group of "'private attorneys general'" to enforce the antitrust laws under **[**3]** § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

Id. at 746 (citation omitted).

Plaintiff, the State of New York, commenced these actions on March 20, 1985 and October 22, 1986 respectively, against more than thirty named defendants, all alleged participants in a continuing collusive bid rigging and market allocation scheme directed at the New York City market for "major reinforced-concrete superstructure construction work." *Cedar Park* Amended Complaint, Preliminary Statement. Although plaintiff sought treble damages under section 4 of the Clayton Act, *15 U.S.C. § 15*, and sections 340 and 342-b of the New York General Business Law (the "Donnelly Act") for injuries allegedly sustained by the State and its political subdivisions, the only state subdivision actually named by plaintiff in its initial complaint was the New York Convention Center Development Corporation, a subsidiary of the New York State Urban Development Corporation ("UDC"). Plaintiff also sought an injunction against further violations and the imposition **[**4]** of civil penalties under the Donnelly Act.

In 1987, various of the defendants moved to dismiss all or portions of the complaints. In *State of N.Y. v. Cedar Park Concrete Corp., 665 F. Supp. 238* (S.D.N.Y. June 25, 1987), this Court held that:

> In view of the need early in the litigation to identify State-affiliated purchasers, we believe the complaints should be dismissed insofar as they purport to state treble damages claims on behalf of unidentified state subdivisions. Accordingly, we hold that insofar as the complaints allege federal and state antitrust damages claims on behalf of State subdivisions other than the UDC, they are dismissed **[*496]** without prejudice to repleading within 60 days.

Id. at 242. Having dismissed plaintiff's claims to the extent they asserted damages claims on behalf of State entities other than the State itself and the UDC, we turned our attention to the implications of *Illinois Brick*, which we described as stating a "principle of federal ***antitrust law***." *Id.* We found that the treble damages claims asserted by the State and the UDC could withstand the motions to dismiss because the complaints contained "the required allegations of direct **[**5]** injury to both the State of New York and the UDC." *Id.* Pursuant to our opinion, the State later notified the Court and all parties that it would not assert any additional damage claims. *See* Letters of September 15 and September 22, 1987 from Alice McInerney, Assistant Attorney General. [1]

In *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86* (April 18, 1989), the Supreme Court held in a unanimous opinion joined in by seven justices that claims by indirect purchasers under state antitrust provisions providing such purchasers with a cause of action for damages were not pre-empted by § 4 of the Clayton Act. The Court stressed that it had "made clear" in *Illinois Brick* that the issue in that case was "strictly a question of statutory interpretation" and observed **[**6]** that nothing in that case "suggest[ed] that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws." *Id. 109 S. Ct. at 1666*.

On October 3, 1989, plaintiff moved for "an order reconsidering the Court's earlier decision . . . and granting plaintiff the right to pursue its indirect purchaser damage claims under state ***antitrust law*** against defendants." Notice of Motion dated October 2, 1989. Plaintiff described this Court's earlier decision as "holding that it was a settled principle of ***antitrust law*** that 'only one who directly purchases products from an alleged antitrust violator may sue for treble damages'" and "effectively barr[ing] repleading state affiliated downstream purchasers" on the basis of *Illinois Brick*. Plaintiff's Memorandum in Support of Motion to Reconsider at 3. At oral argument, we denied plaintiff's motion without prejudice to the filing of a motion for leave to file an Amended Complaint. Transcript of Oral Argument dated November 16, 1989 at 29.

On December 19, 1989, plaintiff moved for an order granting it leave to file an amended complaint seeking damages on behalf of five government entities **[**7]** which were apparently indirect purchasers of major reinforced concrete superstructure work for eight construction projects. Plaintiff continued to argue that this Court had, "relying on *Illinois Brick*, effectively dismissed plaintiff's indirect damage claims, including claims based on state ***antitrust***

[1] In *State of N.Y. v. Cedar Park Concrete Corp., 684 F. Supp. 1229 (S.D.N.Y. 1988)*, we dismissed without prejudice portions of plaintiff's complaints seeking damages and penalties for claims arising after the applicable statute of limitations had run.

law." Plaintiff's Memorandum in Support of Motion to Amend Complaints at 2. At oral argument, we noted that we were having "difficulty recognizing [our earlier] opinion from the plaintiff's characterization of it." Transcript of Oral Argument dated January 18, 1990 at 5-6.

Discussion

HN2[] *Fed. R. Civ. P. 15(a)* provides that:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

At the same time, leave may be denied where there has been undue delay, the movant has acted in bad faith or with a dilatory motive, the opposing party would be unduly prejudiced, or the amendment would be futile. *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)*. Similarly, **[**8]** where plaintiff has already had a sufficient opportunity to plead, leave may be denied. *Kaster v. Modification **[*497]** Sys., Inc., 731 F.2d 1014, 1018 (2d Cir. 1984)* (citing *Denny v. Barber, 576 F.2d 465, 471 (2d Cir. 1978))*. While a change in the governing law can justify granting leave to amend despite the passage of a significant amount of time, *Ellis v. Blum, 643 F.2d 68, 85 (2d Cir. 1981)*; *Boileau v. Bethlehem Steel Corp., 730 F.2d 929, 937-38* (3d Cir.), *cert. denied*, *469 U.S. 871, 83 L. Ed. 2d 150, 105 S. Ct. 221 (1984)*, mere ignorance of the law cannot. *Goss v. Revlon Inc., 548 F.2d 405, 407 (2d Cir. 1976)*.

In this case, plaintiff again seeks to assert damage claims on behalf of state subdivisions a full two years after this Court dismissed the damages claims asserted by plaintiff on behalf of all unidentified state subdivisions without prejudice to repleading within 60 days. Though plaintiff discusses *ARC America* at great length, it is not arguing that the law changed during this two year period, that the law was unsettled or uncertain, that it misunderstood the law, or even that it misconstrued this Court's earlier decision. Instead, plaintiff argues that this Court "effectively" barred **[**9]** it from asserting claims under the Donnelly Act on behalf of indirect purchasers.

In no sense can this Court's earlier decision be construed as plaintiff suggests. In *State of N.Y. v. Cedar Park Concrete Corp.*, we dismissed the claims asserted on behalf of unidentified state subdivisions because they were not identified. Under a separate section heading, we then considered the claims asserted by the State on behalf of itself and the UDC. In this section of the opinion, we first observed that *Illinois Brick* stated a "settled principle of *federal* ***antitrust law***." *665 F. Supp. at 242* (emphasis added). We then found that the complaint asserted claims on behalf of the State and the UDC as direct purchasers and thus did not dismiss the claims. We neither reached nor were asked to reach the question whether plaintiff could assert damage claims under the Donnelly Act on behalf of state subdivisions which were indirect purchasers.

The most plaintiff could argue is that it was not certain until *ARC America* that claims could be asserted on behalf of indirect purchasers under state antitrust statutes. [2] As plaintiff itself concedes, however, whether indirect purchasers could recover **[**10]** under state antitrust laws was not resolved by *Illinois Brick* and remained an open question until *ARC America. See* Transcript of Oral Argument dated November 16, 1990 at 10. At the time of our first decision, it had already been the subject of ongoing litigation, legislative activity, and academic discussion. In 1985, a New York State judge had written:

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[2] We note in passing that it is by no means even clear that the Donnelly Act by its own terms permits claims by indirect purchasers. Unlike all but one of the statutes at issue in *ARC America*, the Donnelly Act does not "expressly allow indirect purchasers to sue." *109 S. Ct. at 1663-64 n. 3*. The only court to apparently consider the issue denied recovery to indirect purchasers under the Donnelly Act. *See* *Russo & Dubin v. Allied Maintenance Corp., 95 Misc. 2d 344, 407 N.Y.S.2d 617 (Sup. Ct. N.Y. Co. 1978)*. The Court reached its decision not upon preemption grounds but rather by citing *Illinois Brick* and analogizing the Donnelly Act to the Clayton Act. *Id. 407 N.Y.S.2d at 620*. We express no opinion as to this issue of New York ***antitrust law***.

> Clearly, Congress has not preempted the field of ***antitrust law*** by passage of the Federal antitrust statutes . . . A State remains free to regulate in the area of antitrust despite the existence of the Federal antitrust provisions, so long as the State statutes do not conflict with the Federal law. Several states have antitrust laws that provide a remedy for indirect purchasers (*see, e.g.*, *Ala.Code § 6-5-60[a]*; *Cal. Business and Professions Code § 16750*; *Hawaii Rev.Stat. § 480-14[c]*; Illinois Ann. Stat. ch. 38, § 60-7[2]; *Miss.Code Ann. § 75-21-9*; *Wis.Stat.Ann. § 133.18[1]*), but the validity of these statutes remains a matter of debate (*compare* *State of California v. California & Hawaiian Sugar Co., 9th Cir., 588 F.2d 1270, 1273*, *cert. denied 441 U.S. 932, 99 S. Ct. 2052, 60 L. Ed. 2d 660*, with *Russo & Dubin **[**11]** v. Allied Maintenance Corp., 95 Misc. 2d 344, 347, 407 N.Y.S.2d 617* *and* *Matter of Wiring Device Antitrust Litigation, 498 F. Supp. 79*; **[*498]** *see*, Note, State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick, *62 BUL Rev 1241*; Note, Indirect Purchaser Suits Under State Laws: A Detour Around the *Illinois Brick* Wall, 34 Stan L Rev 203 [1981]; Cavanagh, The *Illinois Brick* Dilemma: Is There a Legislative Solution?, 48 Alb L Rev 273, 309-310 [1984]).

Tip Top Farms, Inc. v. Dairylea Co-op, Inc., 114 A.D.2d 12, 497 N.Y.S.2d 99, 109 (2d Dep't 1985) (Lazer, J., concurring in part and dissenting in part). Thus, plaintiff must still explain why it chose not to raise the issue earlier.

[12]** At oral argument on the Reconsideration Motion, counsel for plaintiff appeared to concede that they only became aware of the issue after *ARC America* and that it was only then that they "looked extremely closely at the [Donnelly Act's] legislative history and . . . the legislative intent." Transcript of Oral Argument dated November 16, 1990 at 10. This explanation suggests that plaintiff was simply unaware of the law and does not offer a legally sufficient excuse for the delay.

Conclusion

For the reasons stated above, plaintiff's motion to amend its complaint is denied.

The parties are to inform the Court by letter of the status of these cases by August 31, 1990.

SO ORDERED.

[Bi-Rite Oil Co. v. Indiana Farm Bureau Coop. Ass'n](#)

United States Court of Appeals for the Seventh Circuit

May 17, 1990, Argued ; July 26, 1990, Decided

No. 89-2864

Reporter

908 F.2d 200 *; 1990 U.S. App. LEXIS 12487 **; 1990-2 Trade Cas. (CCH) P69,121

BI-RITE OIL COMPANY, INC., Plaintiff-Appellant, v. INDIANA FARM BUREAU COOPERATIVE ASSOCIATION, INC., DECATUR COUNTY FARM BUREAU COOPERATIVE ASSOCIATION, INC., NOBLE-WHITLEY FARM BUREAU COOPERATIVE ASSOCIATION, INC., Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 84 C 259-Sarah E. Barker, Judge.

Disposition: Judgment affirmed.

Core Terms

Sherman Act, prices, terminate, retail, summary judgment, Cooperative, conspired, gasoline, refinery, dealer, defendants', monopolize, customers

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN1[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Apart from a narrow band of price-fixing conduct which has been held to be per se illegal, in order to establish liability under *section 1* of the Sherman Act plaintiff must demonstrate that defendants conspired to achieve an unlawful objective and that the resulting restraint of trade was unreasonable. *15 U.S.C.S. § 1*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Standards of Review, De Novo Review**

The appellate court reviews the summary judgment determination de novo.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > General Overview

HN3[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A vertical agreement between a manufacturer and a dealer to terminate a second dealer could not be per se illegal without a further agreement on the price or price levels to be charged by the remaining dealer.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under a rule of reason analysis, plaintiff must show that the challenged restraint has an adverse impact on competition in the relevant market.

Counsel: Corinne Finnerty, McConnell & Finnerty, North Vernon, Indiana, Plaintiff-Appellant.

Thomas L. Davis, Locke, Reynolds, Boyd & Weisell, Indianapolis, Indiana, Dean Dobbins, Greenfield, Indiana, Richard M. Hardy, Fishers, Indiana, for Defendant-Appellee.

Judges: Cummings and Kanne, Circuit Judges, and Sneed, Senior Circuit Judge. *

Opinion by: CUMMINGS

Opinion

[*201] CUMMINGS, Circuit Judge.

Plaintiff Bi-Rite Oil Company ("Bi-Rite") operates seven gasoline service stations in various Indiana cities. Defendant Indiana Farm Bureau Cooperative Association, Inc. ("Farm Bureau") is owned by a number of cooperatives including defendants Decatur County Farm Bureau Cooperative Association ("Decatur") and Noble-Whitley Farm Bureau Cooperative Association ("Noble-Whitley").

Farm Bureau owns and operates a petroleum refinery in Mt. Vernon, Indiana. In 1983, the last year Farm Bureau and Bi-Rite did business **[**2]** together, Farm Bureau's refinery produced 21,600 barrels per day compared to the total refinery capacity in Indiana of 466,000 barrels per day. The principal purpose of the Farm Bureau refinery **[*202]** is to ensure a steady supply of fuel for its farmer-members. In 1981 Farm Bureau was looking for outside customers to purchase its surplus product. In July 1982 Farm Bureau agreed to sell blended gasoline, which included 10% alcohol, to Bi-Rite at a discount. Rather than giving Bi-Rite a long-term agreement, in November 1982 Farm Bureau executed a 30-day memorandum of understanding with Bi-Rite concerning price, quantity, and terms. This memorandum was extended and continued in effect until March 1983, when Bi-Rite refused to pay for $

* The Honorable Joseph T. Sneed, Senior Circuit Judge of the Ninth Circuit, is sitting by designation.

632,000 worth of gasoline that it had ordered and accepted from Farm Bureau. Shortly thereafter Farm Bureau stopped supplying gasoline to Bi-Rite. Bi-Rite admitted that the unpaid $ 632,000 was the reason for the stoppage. App. 116, 140. Nevertheless in October 1983 Bi-Rite filed a federal complaint against Farm Bureau, Decatur, and Huntington County Cooperative Association, Inc., alleging violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* **[**3]** and *2*, and similar Indiana law provisions and seeking damages and injunctive relief. Noble-Whitley was substituted for Huntington as a defendant in December 1983. A second amended complaint was filed in October 1987.

According to the final complaint Bi-Rite was cut off by Farm Bureau because it was a price-cutter not willing to maintain the higher consumer prices charged by Decatur and Noble-Whitley. Bi-Rite alleged that those defendants were in a conspiracy with Farm Bureau to stabilize the retail price of gasoline in violation of *Section 1* of the Sherman Act and equivalent Indiana law provisions. Bi-Rite also alleged that the defendants had conspired to monopolize the pertinent market in violation of *Section 2* of the Sherman Act and similar Indiana Code sections. Finally, Bi-Rite alleged that the defendants conspired to compel it to cease doing business in violation of *Indiana Code Section 24-1-4-1*.

The district judge handed down a well-reasoned 13-page opinion in July 1989, holding that defendants were entitled to summary judgment. *720 F. Supp. 1363 (S.D. Ind. 1989)*. We affirm because any vertical price restraint here was not *per se* illegal or in any event **[**4]** unreasonable under *Section 1* of the Sherman Act and because no violation of other statutory provisions was shown.

Price-Fixing

HN1[] Apart from a narrow band of price-fixing conduct which has been held to be *per se* illegal, in order to establish liability under *Section 1* of the Sherman Act a plaintiff must demonstrate that the defendants conspired to achieve an unlawful objective and that the resulting restraint of trade was unreasonable. *15 U.S.C. § 1*; *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464*; *Business Electronics v. Sharp Electronics, 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515*. As to the first of these elements, Bi-Rite conceded that Farm Bureau decided to terminate its relationship with Bi-Rite because of the unpaid $ 632,000 debt and not because of a conspiracy among the defendants. Nevertheless, Judge Barker held that the plaintiff's allegations that Decatur and Noble-Whitley had complained to Farm Bureau about Bi-Rite's retail prices coupled with various other **[**5]** allegations raised sufficient evidence of concerted activity to withstand a motion for summary judgment on this element. [1] On the second element, the unreasonableness of the restraint, Judge Barker found that Bi-Rite was unable to present a genuine issue of material fact. She therefore granted summary judgment in favor of the defendants. ***HN2***[] We review this determination *de novo. McMillian v. Svetanoff, 878 F.2d 186, 188 (7th Cir. 1989)*.

The plaintiff contends on appeal that it should not be required to demonstrate the unreasonableness of the defendants' actions since the defendants allegedly engaged in a vertical price restraint that is *per se* illegal under *Section 1* of the Sherman Act. This theory was recently rejected in *Business Electronics*, where it was alleged that Sharp Electronics and its **[*203]** retail **[**6]** customer Hardwell engaged in an agreement to terminate Business Electronics in favor of another dealer because Business Electronics was a price-cutter. The Supreme Court held that such an agreement was not *per se* illegal. [2] The Court affirmed the Fifth Circuit's holding that ***HN3***[] a vertical agreement between a manufacturer and a dealer to terminate a second dealer could not be *per se* illegal "without a further agreement on the price or price levels to be charged by the remaining dealer." *Business Electronics, 485*

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[1] The propriety of that holding is not before us and we express no opinion on it.

[2] *World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 (10th Cir. 1985)*, certiorari denied, *474 U.S. 823, 88 L. Ed. 2d 63, 106 S. Ct. 77*, on which Bi-Rite heavily relies (Br. 28, 29, 31, 32; Reply Br. 10, 11, 12) antedated *Business Electronics* and is no longer followed in the Tenth Circuit in cases involving refusal to deal with a distributor. See *Westman Commission Co. v. Hobart International, Inc., 796 F.2d 1216, 1223-1224 (10th Cir. 1986)*, certiorari denied, *486 U.S. 1005, 100 L. Ed. 2d 192, 108 S. Ct. 1728*, which adopted the rule later followed in *Business Electronics*.

U.S. at 726-727. Here, as in *Business Electronics*, no evidence was adduced to show that the three defendants had agreed on the prices to be charged by Decatur and Noble-Whitley. Bi-Rite's reliance on Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775, is misplaced since in that case there was substantial direct evidence of price agreements, id. at 765, as well as evidence that the defendants in that case had "an understanding that prices could be maintained, and that price-cutters would be **[**7]** terminated." Id. at 768 n. 13.

While Bi-Rite acknowledges that Farm Bureau did not suggest retail prices to its members, it contends that an attempt to stabilize prices violates Section 1 of the Sherman Act, and it relies on four arguments to show that Farm Bureau and its members agreed to stabilize prices. Each of these arguments was correctly **[**8]** rejected below. First, the district court found that a July 1982 telephone conversation between a representative of Farm Bureau and a representative of Bi-Rite failed to "show that [Farm Bureau] demanded that Bi-Rite charge a certain price or that [Farm Bureau] even suggested a certain price to Bi-Rite and it certainly does not reflect any agreement between [Farm Bureau] and the other defendants." 720 F. Supp. at 1374. Second, it found that member cooperatives' complaints to Farm Bureau about Bi-Rite's prices were "not indicative of an * * * agreement to set prices." *Id.* Third, the court rejected Bi-Rite's attempt to distinguish *Business Electronics*. Bi-Rite argued that the Court in *Business Electronics* was concerned to protect the ability of dealers to terminate retailers who were expected to provide services to customers but who chose to "free-ride" on the services of the dealers' other retailers to support their price cuts. Business Electronics, 485 U.S. at 728. Since Farm Bureau did not require any of its members to provide services to customers, Bi-Rite argued, the concern that led the Court to reject *per se* illegality in **[**9]** *Business Electronics* was absent. The district judge correctly noted that many legitimate factors may lead to a decision to terminate a price-cutter. 720 F. Supp. at 1374. Thus the absence of a potential free-rider problem in this case is not determinative. Finally, the court found that there was insufficient evidence to support Bi-Rite's assertion that the defendants engaged in resale price maintenance. Id. at 1374-1375.

Having rejected Bi-Rite's contention that the defendants' actions were *per se* illegal, Judge Barker applied a rule of reason analysis to determine whether the defendants' actions imposed an unreasonable restraint on competition. ***HN4***[] Under that analysis the plaintiff must show that the challenged restraint has an adverse impact on competition in the relevant market. Monsanto, 465 U.S. at 762. Bi-Rite has made no effort to satisfy the rule of reason, relying entirely on its *per se* argument. All parties agree that the relevant product market consists of petroleum products sold at the retail service station level. While **[**10]** Bi-Rite alleges that the geographic market is essentially local, the defendants have defined the geographic market as the petroleum product market of Indiana. Because of its all or **[*204]** nothing reliance on a *per se* analysis Bi-Rite has not offered any evidence that the geographic market is not statewide. Farm Bureau's refinery had a capacity of 21,670 barrels a day compared to a statewide capacity of 466,000 barrels. Its refinery was one of five in the state. Decatur sold at retail only 167 gallons per day during the July 1982-March 1983 period and Noble-Whitley even less. Accordingly, the district court correctly concluded that the defendants did not have the market power to control output, prices, or competition. 720 F. Supp. at 1376. It follows that any restraint on competition was reasonable and that summary judgment was therefore appropriate under Section 1 of the Sherman Act and the like Indiana law provisions.

Monopolization

In addition to the Sherman Act Section 1 charge, Bi-Rite has claimed that the defendants conspired to monopolize the sales of gasoline in the area in question in violation of Section 2 of the Sherman Act and the Indiana **[**11]** Code. [3] Although Bi-Rite terminated its relationship with its prior suppliers when it commenced to do business with Farm Bureau, the district court found Bi-Rite had resumed its relationship with those suppliers after the cut-off by Farm Bureau for failure to pay. Since no long-term contract existed between Farm Bureau and Bi-Rite, there was nothing illegal in Farm Bureau's refusal to continue sales to Bi-Rite after it stopped payment. The court further found that there was nothing illegitimate in Farm Bureau's obtaining a state court judgment ordering Bi-Rite to pay its overdue account to Farm Bureau. That judgment was affirmed by the Indiana Court of Appeals, with the Indiana Supreme Court declining to review it. When Farm Bureau sought execution on the judgment, Bi-Rite filed a Chapter

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[3] Plaintiff has abandoned its charge that defendants *attempted* to monopolize the relevant market.

11 petition in bankruptcy in another state court action, where the Indiana court found there was never a long-term agreement between Bi-Rite and Farm Bureau. This judgment was also affirmed by the Indiana Court of Appeals, again showing the worthlessness of Bi-Rite's position that such an agreement had been breached for monopolistic reasons.

[12]** As the court below held, there was no evidence of defendants' intent to monopolize, nor was there evidence that the defendants' activities had a substantial effect on commerce. Bi-Rite simply failed to show that "the defendants conduct was without legitimate business justification." *720 F. Supp. at 1378*. Because the evidence did not permit an inference of an intent to monopolize, summary judgment for the defendants under *Section 2* of the Sherman Act and the corresponding portion of the Indiana Code was appropriate.

Conspiracy to Close Down Bi-Rite

In addition to the federal and state ***antitrust law*** claims discussed above, Bi-Rite also asserted that the defendants conspired to compel it to cease business in violation of *Indiana Code 24-1-4-1*. We agree with the district court that there was no evidence that the defendants conspired to compel Bi-Rite to go out of business. Indeed after Farm Bureau terminated Bi-Rite as a customer for non-payment of debt, Bi-Rite recommenced business with its former suppliers. There has been no showing that the defendants caused Bi-Rite to file for bankruptcy. As with the other alleged statutory violations, summary judgment for the **[**13]** defendants was warranted on this charge.

Judgment Affirmed.

[Cheshire v. Coca-Cola Bottling Affiliated, Inc.](#)

United States District Court for the District of South Carolina, Greenville Division

July 30, 1990 ; July 30, 1990, Filed

C/A No. 6:89-2618-17

Reporter

758 F. Supp. 1098 *; 1990 U.S. Dist. LEXIS 12565 **; 1990-2 Trade Cas. (CCH) P69,168

Allan Cheshire, d/b/a Breaktime Distributing Company, Plaintiff, v. Coca-Cola Bottling Affiliated, Inc.; Beverage South, Inc., d/b/a Pepsi-Cola/7-Up Bottling Company of Greenville S.C.; Coca-Cola Bottling Company of Anderson, S.C.; Pepsi Cola Company of Anderson, S.C.; Pepsico, Inc., Bi-Lo, Inc.; Fast Fare, Inc., and The Pantry, Inc., Defendants

Core Terms

antitrust, interstate commerce, practices, anti trust law, unfair, federal question, state law, defendants', multi-state, courts

Judges: [1]** Joseph F. Anderson, Jr., United States District Judge.

Opinion by: ANDERSON

Opinion

[*1099] ORDER

JOSEPH F. ANDERSON, JR., UNITED STATES DISTRICT JUDGE

In this case, plaintiff is a distributor of soft drinks including Buffalo Rock Gingerale, Snapple, Grapico, and Cajun Cola in seven South Carolina counties designed in the complaint as "plaintiff's distribution area". These counties include Anderson, Greenville, and the surrounding counties of Oconee, Pickens, Laurens, Abbeville and Greenwood. The defendants include the distributors of Coca-Cola and Pepsi-Cola in Anderson and Greenville, together with the Coca-Cola and Pepsi-Cola parent companies. Also included as defendants are three chain stores, Bi-Lo, Fast Fare and Pantry, selling Coke and Pepsi products in the Anderson-Greenville area.

Plaintiff filed his complaint in Greenville County Court of Common Pleas on October 4, 1989, stating two causes of action under state law. Included in the complaint were allegations of various anti-competitive marketing and distribution practices and agreements between and among the defendants which were allegedly undertaken by defendants pursuant to a conspiracy "to eliminate competition within Plaintiff's distribution area and throughout the southeastern United States." Complaint, **[**2]** para. 15. Also included were allegations of a price-fixing conspiracy within plaintiff's distribution area as evidenced by guilty pleas entered by some defendants in federal court. Complaint, para. 20.

For a first cause of action, plaintiff contends that defendants' acts constitute unfair trade practices and unfair methods of competition under the South Carolina Unfair Trade Practices Act, [S.C. Code Ann. § 39-5-10 et seq](#). (Law. Co-op. 1988) ("UTPA"). The second count of plaintiff's complaint alleges a common law civil conspiracy. No federal claim was expressly pleaded. Defendants, relying on the "artful pleading doctrine," noticed removal on the basis of federal question jurisdiction, contending that the claims asserted, although pleaded under state law, were essentially federal in nature and hence removable under *28 U.S.C. §§ 1441(a)* and *(b)*. Specifically, defendants contend that the claims asserted in the complaint, if they are legally cognizable at all, should properly be brought *only* under the federal antitrust laws and must be judged under federal antitrust standards. The matter is now before the court on plaintiff's motion to remand for lack of federal subject matter **[**3]** jurisdiction.

Although plaintiff is the moving party in this request for remand, it is elementary that defendants retain the burden of establishing that the underlying action is properly removed. 14A Wright, Miller & Cooper, Federal Practice and Procedure § 3721 (1985) (hereinafter "Wright & Miller"); *Baucom v. Pilot Life Ins. Co., 674 F. Supp. 1175 (M.D.N.C. 1987)*.

The sole basis for removal in this case is federal question jurisdiction, as there is not complete diversity between the parties. The existence of a federal question sufficient to support removal normally turns on the well-pleaded allegations of the **[*1100]** complaint. *Great Northern Railway Co. v. Alexander, 246 U.S. 276, 62 L. Ed. 713, 38 S. Ct. 237 (1918)*. Where plaintiff alleges facts that will support claims arising under both state and federal law, plaintiff normally is free to ignore the claims arising under federal law and "pitch his claim" on state grounds, thereby precluding removal on the basis of federal question jurisdiction. *Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 22, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)*. However, this "master of the complaint" rule must be balanced with the fact that courts must be cautious in denying defendants **[**4]** access to a federal forum since under *28 U.S.C. § 1447(d)*, remand orders are generally not reviewable. 14A Wright & Miller, § 3721. To this end, the "artful pleading" doctrine has developed as an exception to the rule limiting the court's examination to the face of the complaint when it appears the plaintiff seeks to conceal the federal nature of his claim by fraud or obfuscation. *Salveson v. Western States Bankcard Ass'n., 525 F. Supp. 566, 572 (N.D. Calif. 1981)*. In determining whether a complaint is "artfully pleaded," the court may look behind it, or "peek," to ascertain facts that would appear in a well-pleaded complaint. *In re Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980)*.

Application of the artful pleading doctrine is most appropriate in cases where federal law altogether preempts and supplants state law, but plaintiff seeks to avoid the effect of preemption by pleading only state causes of action. *See, Avco Corp. v. Aero Lodge No. 735, International Association of Machinists, 390 U.S. 557, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968)*. In the area of antitrust and unfair trade practices, Congress has never expressed any intent to occupy the regulated area exclusively, and the courts **[**5]** have inferred none. On the contrary, the Fourth Circuit has clearly rejected the idea that federal ***antitrust law*** preempts application of the South Carolina UTPA. *Bostick Oil Co. v. Michelin Tire Corp., Com. Div., 702 F.2d 1207, 1219* (4th Cir.) *cert. denied*, *464 U.S. 894, 78 L. Ed. 2d 232, 104 S. Ct. 242 (1983)*; *Itco Corporation v. Michelin Tire Corp., Com. Div., 722 F.2d 42, 48, n. 9* (4th Cir.) *cert. denied*, *469 U.S. 1215, 84 L. Ed. 2d 337, 105 S. Ct. 1191 (1983)*. The court therefore rejects defendants' argument that the complaint's repeated use of antitrust conspiracy terminology and the fact that the practices at issue have traditionally been the subject of federal antitrust challenges reflect the essentially federal nature of plaintiff's claims. By the express terms of the statute, UTPA prohibits both unfair or deceptive acts or practices (consumer protection) *and* anticompetitive conduct (antitrust proscription). [1] The fact that antitrust elements and concepts may be involved does not necessarily make it a federal antitrust case. Federal question does not exist simply because the subject matter of the action could give rise to a federal law claims as well as a state law claim. *Salveson, supra.*

[6]** The artful pleading doctrine has also been applied in the antitrust area where plaintiff first files a lawsuit alleging federal claims and then, after dismissal, seeks to recast those claims under state law, *Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* and where plaintiff, by

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[1] South Carolina adopted Alternative Form Number 1 of the Unfair Trade Practices and Consumer Protection Act. Day, *The South Carolina Unfair Trade Practices Act: Sleeping Giant Or Illusive Panacea*?, 33 S.C.L.Rev. 479 (1982) (hereinafter "*Panacea*"). As noted by Professor Day, comments to the model legislation explain that this alternative "enables the enforcement official to reach not only deceptive practices that prey upon consumers, but also unfair methods that injure competition. This form will reach price fixing arrangements, boycotts by suppliers, coercion of retailers, and other trade restraints which tend to create monopolies and enhance prices." (citation omitted) The other two alternatives in the model act are limited to consumer protection. *Id*., p. 480, n. 7.

failing to seek remand, has acquiesced in defendant's characterization of its claims as federal, *Three J Farms, Inc. v. Alton Box Board Co*., 1979-1 CCH Trade Cas. para. 62,423 (D.S.C. 1978), *rev'd. and remanded on other grounds*, 609 F.2d 112 (4th Cir. 1979), *cert.* **[*1101]** *denied*, *445 U.S. 911, 63 L. Ed. 2d 327, 100 S. Ct. 1090 (1980)*. In both of these instances, the claims were made federal by plaintiff's own conduct and the courts refused to allow plaintiff to escape the consequences of that conduct to defendant's prejudice. *See,* Salveson, 525 F. Supp. at 577. In the present case, plaintiff has taken no such circuitous action nor has plaintiff failed to timely move to remand his case.

More troublesome is defendants' argument that the involvement of interstate commerce in this action precludes application of the State UTPA. Defendants argue that while plaintiff's business may be intrastate in scope, the defendants' **[**7]** business operations are either regional or national in scope, and where a complaint challenges marketing practices and techniques which are utilized on a multi-state basis, it is important that federal antitrust concepts be applied to achieve uniformity, otherwise:

> differing state regulation, although not conflicting, (would require) the enterprise to comply with the strictest standard of several states, (and this) extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce.

Flood v. Kuhn, 443 F.2d 264, 267 (2d Cir.), *aff'd*., *407 U.S. 258, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972)*.

Defendants rely on two cases filed under South Carolina's ***antitrust law*** where the courts held that plaintiff's antitrust claims based on transactions involving interstate commerce were federal in nature. *In re Wiring Device, Three J Farms, Inc., supra*. Both of these cases are based on an earlier state case which limited the application of South Carolina's state ***antitrust law*** to solely intrastate activity. *State v. Virginia-Carolina Chemical Co., 71 S.C. 544, 51 S.E. 455, 461 (1905)* (state ***antitrust law*** **[**8]** cannot regulate imported goods). Defendants contend that the scope of UTPA should be subject to the same limitation and governed by the same rules applicable to antitrust claims.

While the court notes that a state statute may not impose an undue burden on interstate commerce, the court does not find defendants' arguments in this instance persuasive. First, these two cases, which involve the scope of state ***antitrust law*** and not the scope of state UTPA, have been criticized by at least one commentator as misreading the holding of *Virginia-Carolina Chem. Co. See, Panacea*, p. 503, fn. 159.

More on point and specifically addressing the scope of UTPA, the Fourth Circuit in *Itco* rejected defendant's suggestion that application of North Carolina's UTPA to defendant's multi-state conduct offended the *commerce clause*. [2] The *Itco* court stated:

> Absent some reason to believe that the North Carolina act is an attempt directly to regulate interstate commerce, and is not an act designed to address primarily local concerns which happens to have an occasional incidental, but not excessive effect upon interstate commerce, we perceive no cause for constitutional concern.

Itco, 722 F.2d at 48, n. 9. **[**9]** As the *Itco* court recognized, only where the burden imposed on interstate commerce is excessive in relation to the local interests served by the state will the *commerce clause* be offended. Following *Itco's* lead, a federal court in North Carolina upheld application of that state's UTPA to concerted multi-state conduct which resulted in injury to North Carolina residents. *American Rockwool, Inc. v. Owens-Corning Fiberglas, 640 F. Supp. 1411 (E.D.N.C. 1986)*. The court's reasoning bears repeating:

> Section 75-1.1 is designed, in part, to address the very real local concern that North Carolina businesses not be victimized by unfair methods of competition. When applied to concerted multi-state conduct resulting in injury to North Carolina residents, the statute may have an **[*1102]** incidental interstate effect, but that effect certainly is not excessive in light of the local interests served and its minimal burden upon other states . . . . Any time a single state's law is applied to multi-state conduct, there is *some* effect on interstate commerce in

[2] South Carolina's UTPA closely parallels North Carolina's Act and has been interpreted interchangeably by the courts.

> the broadest sense, but that effect rarely burdens interstate conduct to a constitutionally impermissible extent. In the **[**10]** instant case, § 75-1.1 only incidentally affects interstate commerce while serving substantial local interests.

Id., at 1428.

South Carolina's UTPA is not limited to in-state conduct by its own terms nor does it contain on its face any undue burdens on interstate commerce. The court believes that it's purpose and intent is to hold parties causing injury in South Carolina accountable in the courts of this state, insofar as possible. The court further determines that, under the facts of the present action, application of the state UTPA does not run afoul of the *commerce clause*.

If federal jurisdiction is in doubt, such doubt must be resolved in favor of state court jurisdiction and the case remanded. *Baucom, supra*; *Lawyers Title Insurance Corp. v. Pioneer National Title Insurance Corp., 600 F. Supp. 402 (D.S.C. 1984)*. Plaintiff has apparently chosen to forego his federal remedies to pursue **[**11]** relief in state court. He is so entitled, and the case is hereby remanded for lack of subject matter jurisdiction pursuant to *28 U.S.C. § 1447(c)*.

IT IS SO ORDERED.

End of Document

[In re Beef Industry Antitrust Litigation](#)

United States Court of Appeals for the Fifth Circuit

August 1, 1990

No. 89-1483

Reporter
907 F.2d 510 *; 1990 U.S. App. LEXIS 12647 **; 1990-2 Trade Cas. (CCH) P69,122

In re BEEF INDUSTRY ANTITRUST LITIGATION MDL DOCKET NO. 248. MEAT PRICE INVESTIGATORS ASSOCIATION, an Iowa unincorporated association and trust, et al., Plaintiffs-Appellants, v. IOWA BEEF PROCESSORS, INC. (now known as IBP, Inc.), a Delaware Corporation, et al., Defendants-Appellees

Subsequent History: [1]** As Corrected.

Prior History: Appeal from the United States District Court for the Northern District of Texas. No. MDL 248; George P. Kazen (V.J.).

Disposition: AFFIRMED.

Core Terms

prices, cattlemen, packers, cattle, beef, retailers, procurement, depress, factors, oligopsonist, processed, collusion, summary judgment, predatory, price-fixing, allegations, conspiring, antitrust, purchases, market share, no evidence, conspiracy, monopsony, costs

LexisNexis® Headnotes

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN1[ ] **Preclusion of Judgments, Law of the Case**

A decision of a factual or legal issue by an appellate court establishes the law of the case and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN2[ ] **Sherman Act, Claims**

When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a claim under *§1* of the Sherman Anti-Trust Act, *15 U.S.C.S. §1*, he must first demonstrate that the defendants' actions were parallel.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN3[] **Monopolies & Monopolization, Actual Monopolization**

"Monopoly" is the term used to describe the situation where there is only one seller of a product, monopsony where there is only one buyer.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN4[] **Actual Monopolization, Anticompetitive & Predatory Practices**

An "oligopsony" is a market situation in which each of a limited number of buyers is strong enough to influence the market but not strong enough to ignore the reaction to such influence by his competitors. An oligopsonist is one of such dominant buyers.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Whereas a monopsonist has an incentive to limit his purchases in order to reduce his input costs and thereby increase his profits, an oligopsonist that is attempting to increase its position in the market would, like an oligopolist in a seller's market, initiate a competitive, or perhaps predatory, campaign of price and/or non-price competition. Alternatively, an oligopsonist that is satisfied with its market share could form an alliance with other oligopsonists in the relevant market and attempt to depress prices and increase profits.

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For IBP, Inc.: Schopf & Weiss, Patrick J. Heneghan, William G. Schopf, Jr., Jonathan A. Backman, Chicago, Illinois.

For Excel, Inc.: Shook, Hardy & Bacon, John C. Dodge, James T. Newsom, Kansas City, Missouri.

For the National Provisioner, Inc.: George T. Frampton, Univ. of Illinois Law School, Champaign, Illinois.

Judges: Clark, Chief Judge, and Garwood, and Smith, Circuit Judges.

Opinion by: CLARK

Opinion

[*511] CLARK, Chief Judge

I. Introduction

Meat Price Investigators Association and several individual cattlemen **[**2]** (collectively "the cattlemen") appeal the district court's grant of summary judgment in favor of IBP, Inc. (formerly Iowa Beef Processors, Inc.), and Excel Corporation (collectively "the packers"), and the National Provisioner, Inc. (the "Yellow Sheet"). On appeal, the cattlemen assert that material questions of fact remain unresolved regarding their claims under *§§ 1* and *2* of the Sherman Anti-Trust Act, *15 U.S.C. §§ 1* and *2*. We affirm.

II. Facts

Because the history of this case has been published in part four times, *see In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979)*, *cert. denied*, *449 U.S. 905, 101 S. Ct. 280, 66 L. Ed. 2d 137, 101 S. Ct. 281 (1980) (BIAL I); In re Beef Industry Antitrust Litigation, 542 F. Supp. 1122 (N.D.Tex. 1982)* (Higginbotham, J.), *aff'd*, *710 F.2d 216 (5th Cir. 1983)*, *cert. denied*, *465 U.S. 1052, 104 S. Ct. 1326, 79 L. Ed. 2d 721 (1984) (BIAL II); In re Beef Industry Antitrust Litigation, 713 F. Supp. 971 (N.D.Tex. 1989)* (Kazen, J.), a summary of the facts is sufficient here. In 1977 this suit was filed **[**3]** by various sellers of "fed cattle" against major beef packers, beef retailers, and the publisher of a commodities price reporting service. Fed cattle are steers and heifers which are raised and prepared specially for human consumption, usually as "U.S.D.A. choice or good" beef. The cattlemen sell most of their fed cattle to packers. Most packers slaughter and fabricate the beef, while some packers buy preslaughtered beef for fabrication. The packers then sell the beef, either as entire carcasses or as "boxed beef", collections of various beef cuts, to retail marketers such as grocery **[*512]** stores and hotel chains. The suit alleges that the retailers and packers conspired in a vertical and horizontal restraint of trade which stabilized and depressed fed cattle prices.

The cattlemen allege that this restraint took the form of the following price-fixing scheme: The National Provisioner publishes a daily price for beef products and other commodities in its publication, the Yellow Sheet. The Yellow Sheet bases the price it publishes upon reports of recent commodity sales, although the published price is not strictly an average of all reported sales. The packers use the Yellow Sheet **[**4]** price to determine the price they offer the cattlemen for fed cattle. At the same time, retailers use the Yellow Sheet price to compute the price they will pay packers for fabricated beef. By common use of the Yellow Sheet price, packers are able to stabilize and depress the price of live beef while retaining a healthy profit margin because they know the retailers also use the Yellow Sheet price as a price base. In this way the depressed beef prices are actually "passed on" from the retailers to the packers to the cattlemen in a reversal of the more common situation where price increases are passed on from wholesalers to retailers to consumers. The cattlemen relied on this pass-on theory for standing to sue the retailers, with whom they had no direct business dealings. The district court, Higginbotham, J., rejected this theory, *citing Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* and *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1976)*, and entered summary judgment for the retailers. *See 542 F. Supp. 1122*. We affirmed in *BIAL II, 710 F.2d 216*. **[**5]**

This appeal involves the packer phase of the identical price-fixing allegation. The cattlemen allege that the packers violated *§ 1* of the Sherman Act by using an information exchange (the Yellow Sheet) and consciously parallel pricing to depress live cattle prices. They also allege that IBP violated *§ 2* of the Sherman Act by attempting to monopolize both the market for live cattle and the market for processed beef and that IBP and Excel conspired to monopolize the fed cattle market.

III. The *§ 1* Claim

A. The Contentions

Central to the cattlemen's *§ 1* claim is the allegation that IBP and Excel used the daily Yellow Sheet reported price as the basis for their live cattle purchasing price. The existence of the Yellow Sheet, the cattlemen contend, allows the packers to eliminate competition between themselves in buying cattle. They assert that the information exchange is illegal under *United States v. Container Corp. of America, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d*

526 (1969), and that by use of the Yellow Sheet IBP and Excel, which hold significant market shares in the cattle procurement market, are able to depress live cattle prices through tacit **[**6]** collusion.

The packers respond that, as the district court found, Container Corp. does not apply here because the information given to the Yellow Sheet was public information which could be purchased by subscription and used by cattlemen, packers, and retailers alike. They also contend that the cattlemen have offered no evidence of parallel pricing on the part of IBP and Excel which cannot be explained as independent business activity. Because the cattlemen adduced no evidence that "'tended to exclude the possibility' that the alleged conspirators acted independently," *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*, *quoting* *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1470-71, 79 L. Ed. 2d 775 (1984)*, the packers and the National Provisioner assert that the district court properly entered summary judgment on their behalf.

B. The Law of the Case

We have stated: ***HN1***[] "a decision of a factual or legal issue by an appellate court establishes **[**7]** the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a **[*513]** later appeal in the appellate court." *Goodpasture, Inc. v. M/V Pollux, 688 F.2d 1003, 1005 (5th Cir. 1982)*, *cert. denied*, *460 U.S. 1084, 103 S. Ct. 1775, 76 L. Ed. 2d 347 (1983)*, *quoting* *White v. Murtha, 377 F.2d 428 (5th Cir. 1967)*; *see* *Lyons v. Fisher, 888 F.2d 1071, 1074 (5th Cir. 1989)*, *cert. denied*, *495 U.S. 948, 110 S. Ct. 2209, 109 L. Ed. 2d 535 (1990)*. In *BIAL II*, the appeal of the summary judgment entered on behalf of the retailers in this litigation, the use of the Yellow Sheet price by the packers was a key issue. In determining that the Yellow Sheet was only one of several factors influencing the packers' pricing activity, we stated:

> The defendant's overwhelming proof demonstrates that other factors beyond the Yellow Sheet quotations influenced the packers' pricing decision. Specifically, the proof showed that the following factors influenced packers' pricing decisions:
>
> (1) The packers' individual needs in regard to obtaining a minimum **[**8]** amount of cattle each week. This was necessitated by labor contracts which required that if the packers opened their doors on Monday, they had to pay their employees for the week, regardless of whether they worked.
> (2) Temporary local market conditions such as the weather or an over or undersupply of beef. This forced the packers to bid over or under the Yellow Sheet price.
>
> (3) Price competition among the packers.
>
> (4) The beef by-product market (i.e. the sale of hides and nonedible parts of cattle). This market was highly competitive and forced the packers to pay prices over and under the Yellow Sheet Price.

710 F.2d at 219-220. The extent of the packers' reliance on the Yellow Sheet in pricing was critical to the claim that the retailers were part of a pass-along price-fixing scheme in which the corresponding packer violations were pivotal. Likewise, proof that the Yellow Sheet has been used by the packers as a price-fixing mechanism is essential to the *§ 1* claim before us now. This is true whether the cattlemen rely on a theory of illegal information exchange or conscious parallelism in pricing, for the elements of the scheme presented in *BIAL* **[**9]** *II* are merely the vertical correspondents of the horizontal price-fixing scheme alleged here. See *713 F. Supp. at 974*. We are bound by the finding of the *BIAL II* panel that the Yellow Sheet was only one of a number of constantly varying factors used by the packers to establish their daily price for fed cattle. Standing alone, the information provided by the Yellow Sheet is not the type of determinative pricing information which enables price-fixing. *Cf.* *United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)* (The prices exchanged were current actual prices offered to specific customers.); *Container Corp., 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969)* (The prices exchanged were the latest actual prices offered.); *Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563, 45 S. Ct. 578, 69 L. Ed. 1093 (1924)* (The prices exchanged were the average costs of goods categorized by size.) Thus, to warrant a reasonable inference of tacit collusion or conscious parallelism from circumstantial evidence alone, *see* *Matsushita, 475 U.S. at 587-88, 106 S. Ct. at 1356-57*, **[**10]** it became necessary not only for the cattlemen to produce evidence that the pricing activity of the packers was consciously parallel, but also that the other pricing factors established by the *BIAL II* panel were considered in and controlled by the packers' tacit collusion. The cattlemen fail on both points.

The cattlemen presented insufficient evidence to have persuaded a reasonable jury that the common use of the Yellow Sheet caused the prices paid by IBP and Excel for fed cattle to be substantially identical. The cattlemen point us to no comparison of pricing activity which demonstrates a three-way correlation between the prices quoted by the Yellow Sheet, those paid to cattlemen by IBP, and those paid to cattlemen by Excel. Instead, they attempt to show that both packers used the Yellow Sheet price when selling beef to each other, **[*514]** for individual corporate bookkeeping purposes when making intracorporate transfers of beef from a packer's slaughtering division to its fabrication division, and for assessing the job performance of its cattle buyers. These pricing activities do not reflect the prices actually paid to cattlemen.

The cattlemen do cite a report by Dr. **[**11]** Richard Hoyt, an economic consultant, which states that the prices paid by IBP for fed cattle and the prices reported by the Yellow Sheet for choice, yield-three steers, six to seven hundred pounds, showed a 97% correlation between 1975 and 1978. This report is inconsequential for two reasons. First, the report merely shows that when IBP raised or lowered its live cattle prices, the Yellow Sheet correspondingly reported a higher or lower market price for processed beef. Only if the Yellow Sheet was incorrect in its reporting or IBP was asking a price for processed beef which was inconsistent with the market as a whole would any different situation arise. Such pricing activity is not evidence of price fixing. Rather, it shows that the pricing activity of a major packer such as IBP affected the market as one would expect. Second, the figures compared by Hoyt were weekly carcass costs for IBP and weekly averages of the Yellow Sheet prices, not individual sales records of IBP or daily Yellow Sheet prices. Such gross price averaging is not significant in a market where, as the cattlemen assert, a two cent per pound difference in price can make a large difference in profits and losses to **[**12]** both cattlemen and packers. Hoyt's method of comparison could show a strict price correlation even for weeks in which the IBP processed beef price and the Yellow Sheet price differed markedly on given days. The report, therefore, constitutes no evidence of a correlation between the Yellow Sheet quotes and IBP prices for individual transactions. The statistics in the report do not purport to consider any contemporaneous pricing activity of Excel.

The cattlemen's evidence was also insufficient to have persuaded a reasonable trier of fact that the packers' responses to additional pricing factors were ever collusive. The cattlemen present no appellate argument regarding the effects on the packers' daily pricing activity of the competitive by-product market, labor contracts, or local market conditions such as weather and accessibility.

C. Conclusion

HN2[] When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a *§ 1* claim, he must first demonstrate that the defendants' actions were parallel. *See, e.g.,* *Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1060 (5th Cir. 1985)*, **[**13]** *cert. denied*, *474 U.S. 1102, 106 S. Ct. 884, 88 L. Ed. 2d 919 (1986)*. The cattlemen have not done this. Nor have they shown that the prices of IBP and Excel were identical, or nearly so, for any series of individual transactions. The failure of the cattlemen to account for the additional pricing factors in their theory of conscious parallelism is also fatal. The existence of other significant pricing factors, concerning which there is not even the contention of collusion, shows that the pricing activity of the packers was "as consistent with permissible competition as with illegal conspiracy." *Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356*. Our prior decision that these factors influenced packer pricing and the cattlemen's failure to produce any different substantial evidence on these factors during the present summary judgment proceedings, *see* *Lyons, 888 F.2d at 1074*, confirm the correctness of the district court's summary judgment order in favor of all defendants as to the *§ 1* claim.

IV. The *§ 2* Claim

The cattlemen claim that IBP has illegally acquired monopoly power in the boxed beef sales market and monopsony power in **[**14]** the fed cattle procurement market. [1] Antithetically, the cattlemen also claim that **[*515]** IBP and Excel have misused their power as oligopsonists [2] in a conspiracy to control the procurement market. The contradictions of theory and proof between these claims and the lack of evidence supporting the cattlemen's allegations make all of their *§ 2* allegations untenable.

[15]** First, the cattlemen fail to recognize that IBP cannot be a monopsonist and an oligopsonist at the same time. Either IBP is the only significant buyer of fed cattle or it is not. More importantly, the cattlemen fail to account for the fact that the reactions of a monopsonist to market forces are likely to be very different from the reactions of an oligopsonist in a similar situation. ***HN5***[] Whereas a monopsonist "has an incentive to limit his purchases in order to reduce his input costs and thereby increase his profits," Posner & Easterbrook at 148, an oligopsonist that is attempting to increase its position in the market would, like an oligopolist in a seller's market, [3] initiate a competitive, or perhaps predatory, campaign of price and/or non-price competition. Alternatively, an oligopsonist that is satisfied with its market share could form an alliance with other oligopsonists in the relevant market and attempt to depress prices and increase profits. *See* R. Posner, ***Antitrust Law****: An Economic Perspective* 39-53 (1976) (afterwards "*Economic Perspective*"). *See generally* *Interstate Circuit v. United States, 306 U.S. 208, 223, 59 S. Ct. 467, 472-73, 83 L. Ed. 610 (1939)* **[**16]** (emphasizing a parallel change in the business procedure of competitors as evidence of collusion); Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, *75 Va.L.Rev. 1221 (1989)*; Sullivan, *The Viability of the Current Law on Horizontal Restraints*, *75 Calif.L.Rev. 835 (1987)*.

Under these alternative possibilities, in order to demonstrate that IBP had obtained monopsony power or had become an oligopsonist conspiring with Excel to depress prices, the cattlemen would have had to show that IBP reduced its purchases of and its prices for fed cattle in order to take illegal advantage of this position. See **[**17]** H. Hovenkamp, *Economics and Federal* ***Antitrust Law*** 17-18 (1985); Posner & Easterbrook at 148-150. This approach would be consistent with the tack taken by the cattlemen in their *§ 1* claim. On the other hand, to demonstrate that IBP was a predatory oligopsonist seeking to increase its market share through an illegal form of competition, the cattlemen would be required to show predatory or exclusionary conduct on the part of IBP.

The cattlemen do contend that IBP attempted to drive its competitors out of the fed cattle procurement market by paying a higher price for fed cattle than the market suggested. The cattlemen cite statements by Bagley, a former assistant head cattle buyer of IBP, to the effect that IBP at one time planned to cut processing costs so that it could pay higher prices for live cattle. According to Bagley, this predatory pricing would result in IBP's domination of the cattle procurement market. The case against IBP as a predatory oligopsonist is completely undercut, however, by the cattlemen's own evidence, cited on numerous occasions, that fed cattle prices over the past ten years have remained stable at a depressed level. The cattlemen presented no evidence **[**18]** that IBP ever paid a predatory price (in this case, a price higher than that which would allow the packer to make a profit) for fed cattle. Thus, the cattlemen's allegations of predatory activity by IBP in the cattle procurement market was not supported.

[*516] The evidence that live cattle prices have remained stable at a low level does fit the cattlemen's alternative allegations that IBP either has monopsony power or is a conspiring oligopsonist seeking to depress prices and retain its current market share. But other factors make these allegations untenable. If IBP had monopsony power, it

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[1] ***HN3***[] "Monopoly is the term used to describe the situation where there is only one seller of a product, monopsony where there is only one buyer." R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 148 (2d ed. 1981) (afterwards "Posner & Easterbrook").

[2] ***HN4***[] An oligopsony is "a market situation in which each of a limited number of buyers is strong enough to influence the market but not strong enough to ignore the reaction to such influence by his competitors." An oligopsonist is one of such dominant buyers. WEBSTER'S THIRD INTERNATIONAL DICTIONARY (UNABRIDGED) 1572 (1966).

[3] An oligopoly is "a market situation in which each of a limited number of producers is strong enough to influence the market but not strong enough to disregard the reaction of his competitors." An oligopolist is one of such dominant producers. WEBSTER'S THIRD INTERNATIONAL DICTIONARY (UNABRIDGED) 1572 (1966).

would take illegal advantage of that situation by reducing its purchases of fed cattle in order to reduce its costs and make a higher profit on each head of cattle processed. See Hovenkamp at 17-18; Posner & Easterbrook at 148-49. This would especially be true if, as the cattlemen assert, IBP also held an oligopolist's position as a seller of processed beef. IBP would then have been able to compound its monopoly profits by reducing its purchases of fed cattle, and thus its procurement costs, while also reducing its output in the processed beef market. The lowered output would again decrease **[**19]** IBP's marginal cost and permit an increase in the price IBP could charge for its processed beef. The amount of any additional price IBP could charge would depend on the market share it commanded. See Hovenkamp § 4.2; Posner, *Economic Perspective* 39-77. The difficulty in proving this theory is that the cattlemen produced no evidence that IBP actually has monopsony power. Indeed, their expert, Marion, stated that the cattle procurement market is shared by four major packers. Nor have the cattlemen shown that IBP ever significantly reduced its purchases of fed cattle or its output of processed beef.

The possibility remains that IBP and Excel acted as conspiring oligopolists to stabilize and depress prices in the cattle procurement market. The cattlemen rely on their *§ 1* evidence of pricing collusion and information exchange to establish a conspiracy between IBP and Excel to monopolize (or oligopsonize) the procurement market. In our discussion of the *§ 1* claim, however, we noted that the cattlemen's evidence of pricing collusion between IBP and Excel does not carry the summary judgment burden placed on an antitrust plaintiff by *Matsushita*. Additionally, viewing the fed cattle **[**20]** procurement market as a whole, this allegation is economically unfeasible in light of Marion's statement that as of 1982 the market contained four major packers and 471 smaller packers. Any attempt at conspiracy between only two of those packers to depress fed cattle prices could not succeed, because the other packers, especially the other two major competitors, could raise their own fed cattle prices a small amount, effectively buy away the fed cattle that had previously been the source of sales to IBP and Excel, and leave IBP and Excel with a smaller market share. This would actually spur competition by forcing IBP and Excel to respond by raising their own prices for fed cattle. This occurrence would fit the standard model of cartelization and cartel cheating which apparently destroyed many cartels even before the antitrust laws were enforced. See Posner, *Economic Perspective* at 52-55; Page at 1248-49.

The cattlemen's *§ 2* claims against IBP and Excel are inconsistent and unsupported by any summary judgment evidence. Much of the evidence produced by the cattlemen to support the theory of one claim defeats their alternative claim. Based on the entire summary judgment record, **[**21]** the conduct of IBP and Excel is at least "as consistent with permissible competition as with illegal conspiracy." *Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356*. The district court's grant of summary judgment as to the *§ 2* claim was proper.

V. Conclusion

Because we affirm the district court's summary judgment order, we do not reach the cattlemen's appeal of the denial of class certification.

The judgment of the district court is

AFFIRMED.

End of Document

In re Wyoming Tight Sands Antitrust Cases

United States District Court for the District of Kansas

August 2, 1990, Decided ; August 2, 1990, Filed

Case No. 85-2349 and Cases Nos. 85-2438, 85-2511, 85-2605, 86-2351

Reporter
1990 U.S. Dist. LEXIS 12165 *; 1990-2 Trade Cas. (CCH) P69,219

IN RE: WYOMING TIGHT SANDS ANTITRUST CASES

Core Terms

defendants', Pipeline, summary judgment motion, summary judgment, plaintiffs', limited partnership, partnership, contracts, antitrust, cases, contract of purchase, antitrust claim, anti trust law, natural gas, defraud, tortious interference, Sherman Act, concealment, conspiracy, fraudulent, prices, amend, issue of material fact, discovering, affiliate, vertical, genuine

LexisNexis® Headnotes

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Governments > Local Governments > Claims By & Against

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN1[] **Jury Trials, Province of Court & Jury**

Where there is a dispute as to the existence of fraudulent concealment, the question is one for the jury.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

Summary judgment should be used sparingly in antitrust cases.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Antitrust & Trade Law, Sherman Act**

Missouri requires construction of its ***antitrust law*** in accordance with federal cases interpreting sections 1 and 2 of the Sherman Act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

International Trade Law > Forfeitures & Penalties > General Overview

HN4[] **Public Enforcement, State Civil Actions**

Kan. Stat. Ann. § 50-112 makes unlawful all arrangements, contracts, agreements, trusts, or combinations which tend to prevent full and free competition in the importation, transportation or sale of articles imported into the state.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Public Enforcement, State Civil Actions**

By its clear language, *Kan. Stat. Ann. § 50-112* clearly contemplates enforcement in the interstate context.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN6[] **Intentional Interference, Elements**

To establish a cause of action for tortious interference with a contract, a plaintiff must demonstrate (1) the existence of a contract; (2) knowledge of that contract on the part of the defendant; (3) that defendant intentionally induced or caused the breach of the contract; (4) that the defendant's act were without justification; and (5) resulting damage to plaintiff.

Business & Corporate Law > Limited Partnerships > Dissolution & Winding Up

Business & Corporate Law > Limited Partnerships > General Overview

HN7[] **Limited Partnerships, Dissolution & Winding Up**

The dissolution of a limited partnership operates to terminate the partnership with respect to all transactions occurring in the future. The partnership continues to exist as to outstanding matters, however, until they are resolved. Included in this period of "winding up" are the performance of existing contracts, the collection of debts or claims due, and the payment of existing debts. A partnership may therefore sue or be sued in its own name following dissolution, but prior to termination, on claims which existed prior to dissolution.

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Judges: Earl E. O'Connor, Chief United States District Judge.

Opinion by: O'CONNOR

Opinion

MEMORANDUM AND ORDER

In these consolidated actions, three public utilities, the Kansas Power and Light Company (KPL), the Kansas Gas and Electric Company (KGE), and Utilicorp United, Inc. (Utilicorp), along with the states of Kansas and Missouri and an industrial user of natural gas, Farmland Industries (Farmland), have filed complaints against five natural gas producers, Amoco Production Company (Amoco), Cities Service Oil and Gas Corporation (Cities), CSG Exploration Company (Exploration), The Moxa Limited Partnership (Moxa) and The Wamsutter Limited **[*4]** Partnership (Wamsutter), and one pipeline, Williams Natural Gas Company (Pipeline).

One or more plaintiffs assert claims against one or more defendants for: (1) violations of the Sherman Antitrust Act; (2) violations of the Racketeer Influenced and Corrupt Organizations Act (RICO); (3) violation of the Kansas Antitrust laws; (4) violations of the Missouri antitrust laws; (5) fraud and conspiracy to defraud; (6) breach of contact; and (7) tortious interference with contract. Now before the court are: (1) motions of KPL and Utilicorp to amend; (2)

defendants' motions for summary judgment; (3) plaintiffs' motions for partial summary judgment; and (4) defendants' motion for summary judgment dismissing the Moxa and Wamsutter limited partnerships.

The court has thoroughly considered the voluminous material submitted by both sides on each motion and is now prepared to rule. Due to the existing constraints of time, however, the court will announce its rulings only in abbreviated form. Should it ultimately become necessary, the court will follow this order with a formal opinion that will include the court's detailed reasoning and analysis on each issue.

MOTIONS TO AMEND

KPL's motion to **[*5]** amend its Third Amended Complaint to (1) include resale contracts in the breach of contract claim and (2) seek relief against all defendants on its federal and state monopolization claims is granted in its entirety. The court finds defendants have not demonstrated sufficient prejudice to preclude the amendment.

Utilicorp's motion to amend its First Amended Complaint, to seek relief against all defendants on its federal and state monopolization claims, and Utilicorp's supplemental motion to amend its First Amended Complaint and its proposed Second Amended Complaint, to delete the phrase "for power plants and other industrial purposes," are granted in their entirety. The court finds defendants have not demonstrated sufficient prejudice to preclude the amendments.

The court orders additional discovery of expert witness Jeffrey Leitzinger be allowed for the limited purpose of discovering his opinion on the section 2, Sherman Act, claims against all defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Statute of Limitations

Defendants' motion for summary judgment on all plaintiffs' sections 1 and 2, Sherman Act, claims on this ground is denied in its entirety. First, the court **[*6]** finds plaintiffs have raised genuine issues of material fact regarding the tolling of the statute by defendants' alleged affirmative acts of fraudulent concealment until the facts underlying these claims were disclosed to plaintiffs KPL, Kansas, Missouri, and Farmland on or about January 1983, during the Midwest Gas Users Association proceeding, to plaintiff KG&E on or about March 1985, and to plaintiff Utilicorp on or about November 1983. Under this analysis, the court also finds KPL and KGE's claims against Cities timely. Further, plaintiffs have established triable issues regarding whether they exercised the requisite due diligence in discovering the claims. ***HN1***[] "[W]here there is a dispute as to the existence of fraudulent concealment, the question is one for the jury," *King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1156 (10th Cir.1981)*, cert. denied, *454 U.S. 1164 (1982)*.

Second, the court finds plaintiffs have raised sufficient facts with respect to the timeliness of these claims under the "revival" exception applicable to accrual of antitrust claims, because when the acts in question occurred, the plaintiffs' damages were arguably speculative or unprovable. **[*7]** See *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 339-40 (1971)*; *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 295-96 (2d Cir.1979)*, cert. denied, *444 U.S. 1093 (1980)*. See also *Kaw Valley Elec. Co-op v. Kansas Elec. Power, 872 F.2d 931, 933 n.4 (10th Cir. 1989)*. [1]

Applying the court's reasoning, with respect to the tolling of the statute of limitations because of defendants' alleged fraudulent concealment, to all other claims of plaintiffs, we rule that: Defendants' motion for summary judgment on KPL, Missouri and Utilicorp's Missouri antitrust claims is denied.

[1] The court further finds that whether plaintiff's recovery may, with respect to certain claims, be limited to acts occurring within four years of the filing of the relevant complaints cannot be decided on the record now before the court and must await elaboration at trial.

Defendants' motion for summary judgment on KPL, KG&E, Kansas, and Farmland's Kansas antitrust claims is denied.

Defendants' motion for summary **[*8]** judgment on Utilicorp's Kansas antitrust claims is granted, Utilicorp having filed more than three years after arguably discovering the cause of action.

Defendants' motion for summary judgment on Missouri's RICO claim is denied.

Defendants' motion for summary judgment on KPL and KG&E's tortious interference claim is denied.

Defendants' motion for summary judgment on Utilicorp's tortious interference claims is granted, this plaintiff having filed more than two years after arguably discovering the claim.

Defendants' motion for summary judgment on KPL and KG&E's claims for fraud and conspiracy to defraud is denied.

Defendants' motion for summary judgment on Missouri and Utilicorp's claims for fraud and conspiracy to defraud is granted, both plaintiffs having filed more than two years after arguably discovering the claim. [2]

Finally, finding that the doctrines of fraudulent concealment and equitable estoppel apply **[*9]** to claims brought pursuant to the Uniform Commercial Code, defendants' motion for summary judgment on plaintiffs' breach of contract claims is denied. See *K.S.A. 84-1-103*; K.S.A. 84-725(1), (2) and (4).

II. Jurisdictional Defenses

Defendants' motion for summary judgment based on the doctrine of exclusive jurisdiction is denied. The court, agreeing with Chief Judge Scott O. Wright of the Western District of Missouri, finds no congressional intent, express or implied, to immunize practices in the natural gas industry from antitrust scrutiny, and further finds that nothing in the FERC regulatory authority over prices creates a repugnancy to this court's authority under the antitrust laws. See *Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 217-18 (1966)* (quoting *United States v. Philadelphia National Bank, 374 U.S. 321, 350-51* [1963]).

Defendants' motion for summary judgment and/or motion for stay based on the doctrine of primary jurisdiction is denied. The court rejects the contention that the expertise of the FERC is essential for proper resolution of these antitrust cases or that their resolution would be enhanced by agency expertise. See, e.g., *Nader **[*10]** v. Allegheny Airlines, Inc., 426 U.S. 290, 303-4 (1976)*.

Defendants' motion for summary judgment based on the filed-rate doctrine is denied. The court finds this doctrine inapplicable to the category of gas at issue in these cases. See *FERC v. Martin Exploration Management Co., 486 U.S. 204, 212 (1988)*. Finally, defendants' motion for summary judgment on plaintiffs' pendent state law claims based on the doctrine of federal preemption is denied.

III. Federal Antitrust Claims

Standards for granting summary judgment are well known and need not be repeated here. Generally, however, ***HN2***[↑] summary judgment should be used sparingly in antitrust cases. See, e.g., *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)*. The court finds this admonition particularly apt in these cases due to the existence of factors unique to the natural gas industry in the late 1970's and early 1980's. Further, the lack of precedent bearing upon such a factual scenario makes summary judgment particularly inappropriate. Although the court is impressed with a number of defendants' arguments, the dearth of cases with economic and competitive conditions sufficiently analogous to those present **[*11]** here leads the court to the conclusion that the issues can only be resolved effectively by development at trial.

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[2] The court rejects defendants' argument that the Missouri five-year statute of limitations applies here.

KPL, Missouri and Utilicorp have brought section 2, Sherman Act, claims against all defendants. [3] All plaintiffs have brought section 1, Sherman Act, claims against all defendants. Generally, plaintiffs allege that defendants combined and conspired to exercise monopoly power in the relevant market with intent to use Pipeline's position as a vertically integrated natural monopoly in order to (1) fix the price of gas sold to Pipeline and Pipeline's customers; (2) extract monopoly profits from Pipeline's customers; (3) suppress and/or exclude competition from non-affiliated producers for low-cost gas; and (3) evade regulatory control over affiliate transactions.

In support of these allegations, the court finds plaintiffs have established genuine issues of material fact as to whether or not from 1979 to 1982 (1) defendants Amoco, Cities and Exploration **[*12]** controlled and supplied a majority of the total gas volumes purchased by Pipeline in the relevant market; (2) defendants combined to increase their joint production of expensive Wyoming gas, to increase the price of this gas to maximum incentive levels under the NGPA, and to decrease production of cheaper Kansas Hugoton gas; (3) defendants took such action in the face of the existence of a surplus of reserves and declining resale demand in order to maximize their own joint profits; (4) defendants utilized Pipeline's market power as a vertically integrated regulated monopoly to pass on the inflated gas costs to Pipeline's locked-in customers, despite regulatory controls, thereby exacting a competitive advantage for all defendants unattainable in the absence of concerted action; and (5) defendants combined to maximize Pipeline's purchases of gas from its affiliate to the potential disadvantage of independent producers. At this stage of the litigation, the court finds these factual issues exist and are sufficient to withstand summary judgment on both the section 1 and 2 claims under the standards set forth in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)*, **[*13]** and *Gibson v. Greater Park City Co., 818 F.2d 722 (10th Cir. 1987)*. [4]

IV. State Antitrust Claims

KPL, Utilicorp and Missouri have brought claims under the Missouri ***Antitrust Law***, *Mo. Rev. Stat. §§ 416.011-.161* (1988), which closely parallel their sections 1 and 2, Sherman Act, claims. Since ***HN3***[] Missouri requires construction of its ***antitrust law*** in accordance with federal cases interpreting sections 1 and 2 of the Sherman Act, *Missouri v. NOW, Inc., 620 F.2d 1301, 1316* (8th Cir.), cert. denied, *449 U.S. 842 (1980)*; *Stensto v. Sunset Memorial Park, Inc., 759 S.W.2d 261, 266 (Mo. Ct. App. 1988)*, defendants' motion on plaintiffs' Missouri antitrust claims is denied for the same reasons articulated in Section III above.

Kansas, KPL, KG&E, Farmland and Utilicorp have brought claims under the Kansas antitrust laws, K.S.A. 50-101-157. Defendants **[*14]** contend they are entitled to summary judgment because the Kansas antitrust laws regulate activities solely in intrastate and opposed to interstate commerce. We disagree.

First, ***HN4***[] *K.S.A. 50-112* clearly makes unlawful "all arrangements, contracts, agreements, trusts, or combinations . . . which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state. . . ." (Emphasis added.) ***HN5***[] By its clear language, the statute clearly contemplates enforcement in the interstate context. Second, the court disagrees that *State v. Phipps, 50 Kan. 609, 31 P. 1097 (1893)*, *State v. Jack, 89 Kan. 387, 78 P. 811 (1904)*, and the other early Kansas cases cited by defendants mandate a contrary result. Rather, these and subsequent cases demonstrate that when a challenged course of conduct has implicated both inter- and intrastate commerce, the courts have applied Kansas antitrust statutes. See, e.g., *United Artists Corp. v. Mills, 135 Kan. 655, 11 P.2d 1025 (1932)*. Here, plaintiffs have raised a genuine issue of material fact as to whether defendants' alleged combination produced an anticompetitive effect on intrastate commerce sufficient **[*15]** to invoke the Kansas statute. Accordingly, defendants' motion is denied.

V. RICO

Missouri alone has brought a RICO claim against all defendants pursuant to *18 U.S.C. § 1961 et seq.*, alleging violations of 1962(c) and (d). Although the court does not agree with the majority of the challenges raised by

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[3] See the court's ruling on *Motions to Amend, supra.*

[4] Despite serious doubts as to its viability, the court reserves ruling at this time on plaintiffs' (Kansas, Missouri and Farmland) "Section 104" damage theory.

defendants to this claim, the court has serious reservations with respect to plaintiff's ability to establish for each defendant the requisite elements of a RICO claim under *Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)*. In particular, the court notes the paucity of evidence regarding the element of causation and evidence establishing that use of the mails was an integral part of defendants' fraudulent scheme. See generally the court's reasoning in *Bumgarner v. Blue Cross & Blue Shield of Kansas, 716 F.Supp. 493 (D.Kan. 1988)*.

Despite these reservations, the court declines to grant defendants' motion for summary judgment on the record presently before us. Whether or not the claim remains viable at trial is another matter.

PENDENT *CLAIMS*

I. Fraud and Conspiracy to Defraud

KG&E and KPL have brought claims for fraud against Pipeline and conspiracy to defraud **[*16]** against all defendants. [5] These plaintiffs argue that Pipeline defrauded them by affirmatively misrepresenting and actively concealing the true reasons for the increase in gas prices. Plaintiffs also assert that the rates filed with the FERC (PGA's) and the subsequent invoices sent to customers were fraudulent, because they impliedly represented that the charged prices were properly incurred.

Although the court questions plaintiffs' implied fraud theory, insofar as it relies upon the PGA filings and invoices, we conclude that sufficient evidence has been presented regarding defendant Pipeline's alleged affirmative misrepresentations and active concealment of the grounds for the price increases of gas in the relevant time period to withstand summary judgment. [6] In addition, the court finds that there is sufficient evidence to support the conspiracy to defraud claim against all defendants. **[*17]** [7]

II. Breach of Contract

All six plaintiffs have brought claims for breach of contract, contending Pipeline breached its common-law and statutory (Uniform Commercial Code) duties of good faith and fair dealing in the performance of gas purchase contracts by purchasing gas from its affiliates and Amoco on higher-than-market terms and by agreeing, on **[*18]** March 17, 1981, to amend its gas purchase contracts with Amoco and Pipeline's affiliates to increase artificially the price of natural gas already committed for sale to Pipeline. The contracts at issue were: (1) "resale" contracts in which plaintiffs KPL, Missouri and Utilicorp purchased gas from Pipeline to sell to local gas distribution systems (LDC's); (2) "direct sale" contracts between the Pipeline and all plaintiffs; and (3) Missouri's claims on behalf of its state agencies and governmental entities as a third-party beneficiary of the Pipeline - LDC contracts.

The court rejects defendants' arguments that their evidence of compliance with FERC and KCC regulatory pricing procedures supports summary judgment on this claim. Here, where it is undisputed that all the contracts at issue included the obligation to act in good faith, the court finds that plaintiffs have raised issues of genuine material fact regarding defendants' conduct sufficient to preclude summary judgment.

The court agrees with defendants, however, that summary judgment on Missouri's third-party beneficiary claim is warranted. Although Missouri might be entitled to claim incidental benefit as a downstream purchaser, **[*19]** this does not rise to the type of benefit that would entitle Missouri to enforce the contracts as a third-party beneficiary.

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[5] The court has ruled supra that the fraud claims of Missouri and Utilicorp are barred by the applicable statute of limitations.

[6] Whether these are affirmative misstatements or acts of fraudulent concealment is here a distinction without a difference. Although there is authority for the proposition that acts of concealment of material facts may only be actionable where there is a duty to communicate the truth, see e.g. *Du Shane v. Union Nat'l Bank, 223 Kan. 755, 759, 576 P.2d 674, 678 (1978)*, here Pipeline arguably assumed that duty by voluntarily stating it would keep plaintiffs "apprised" of the factors causing the increase in gas costs.

[7] Although far from convinced with respect to the viability of plaintiffs' fraud damage theory, the court will reserve ruling on this issue.

See generally *Kansas City N.O. Nelson Co. v. Mid-Western Construction Co. of Mo., Inc., 782 S.W.2d 672 (Mo. Ct. App. 1989)*; *Fasse v . Lower Heating and Air Conditioning, Inc., 241 Kan. 387, 736 P.2d 930 (1987)*.

III. Tortious Interference with Contract

KPL and KG&E have brought claims for tortious interference with contract against all defendants except Pipeline. [8] Plaintiffs claim that defendants tortiously interfered with each of the gas purchase contracts executed by plaintiffs with Pipeline by causing Pipeline, Exploration's affiliate, to breach its duty of good faith and fair dealing by artificially increasing the price of gas.

HN6[] To establish a cause of action for tortious interference with a contract, plaintiffs must demonstrate (1) the existence of a contract; (2) knowledge of that **[*20]** contract on the part of the defendant; (3) that defendant intentionally induced or caused the breach of the contract; (4) that the defendant's act were without justification; and (5) resulting damage to plaintiffs. See e.g., *Turner v. Halliburton Co., 240 Kan. 1, 12, 722 P.2d 1106, 1115 (1986)*.

Here, plaintiffs have not presented sufficient evidence to support the allegations that Cities, Exploration and/or Amoco intentionally induced or caused Pipeline to breach its contracts with plaintiffs. Notably, plaintiffs' other claims are based on the alleged concerted action by Amoco and the Cities defendants, including Pipeline. Although plaintiffs are clearly entitled to bring claims grounded on alternate theories of recovery, the court agrees with defendants that here, plaintiffs have raised no issues of material fact which would support an inference that Pipeline was the "victim" of tortious action by the other defendants.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Motion of Missouri, Kansas and Farmland

Plaintiffs Missouri, Kansas and Farmland have moved for partial summary judgment contending that (1) defendants' affirmative defense that federal regulation **[*21]** of the natural gas industry immunizes their conduct from antitrust scrutiny fails as a matter of law and (2) the antitrust agreements that are the subject of this suit are horizontal in nature (between competitors) and not vertical (between entities at different levels of distribution). Regarding the first contention, the court has already ruled, supra, that FERC regulation of tight sands pricing does not immunize defendants from antitrust scrutiny.

Regarding the plaintiffs' second argument, the court declines at this juncture to label the alleged anticompetitive combination at issue here as either horizontal or vertical. The court does, however, reject plaintiffs' argument that the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)*, compels such a conclusion.

More importantly, the court finds this motion premature. The issue of whether the alleged restraints on trade in this case were horizontal or vertical, as well as the proper analysis to apply to the alleged restraint on trade, must await further development at trial of the relevant factors pertaining to the economic and competitive conditions in the industry.

II. Motion of **[*22]** KPL and KG&E

KPL and KG&E have moved for partial summary judgment urging the court to reject defendants' "contractual obligation defense," which is based on defendants' assertion that Pipeline was bound by a pre-1980 contractual obligation to pay the "maximum permissible price" allowed under the NGPA, [here, the NGPA Section 107(c)(5) tight sands prices] and, therefore, was contractually bound to execute the March 1981 amendments to the Wyoming gas purchase contracts with Amoco, Wamsutter and Moxa.

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[8] The court has ruled supra that Utilicorp's claim is barred by the statute of limitations.

In its response, Pipeline urges the court to find that pre-1980 gas purchase contracts between Pipeline and the producers demonstrate an unequivocal intent by all parties to pay the maximum permissible or tight sands incentive price, therefore obligating Pipeline to execute the 1981 amendments.

After examining in detail the evidence submitted by both sides on this issue (including the E&D agreements, the 1974 Principals of Gas Purchase Contract, the Articles of Limited Partnership forming the Wamsutter and Moxa Limited Partnerships, the Principles of Gas Purchase Contracts governing each limited partnership, and the letter agreements as well as the deposition testimony), the court finds **[*23]** that the evidence raises a genuine issue of material fact as to the parties' intent to pay the tight sands incentive price. [9] Accordingly, at this stage of litigation, the court denies KPL and KG&E's motion on this issue and, insofar as the Pipeline's response can be considered a cross motion, it is similarly denied.

DEFENDANTS' MOTION DISMISSING THE LIMITED PARTNERSHIPS

Defendants move for summary judgment dismissing the Wyoming Moxa and Wamsutter Limited Partnerships or, in the alternative, to set aside entries of default against these partnerships. Defendants' motion is based on the contentions that the Wamsutter Partnership (formed in 1975) and the Moxa Partnership (formed in 1976) were terminated retroactive to April 3, 1983, by letter agreement entered into **[*24]** on November 16, 1983, or, at the latest, by execution of a certificate of cancellation on December 20, 1983.

It is undisputed that under general principles of partnership law, ***HN7***[] the dissolution of a limited partnership operates to terminate the partnership with respect to all transactions occurring in the future. The partnership continues to exist as to outstanding matters, however, until they are resolved. Included in this period of "winding up" are the performance of existing contracts, the collection of debts or claims due, and the payment of existing debts. A partnership may therefore sue or be sued in its own name following dissolution, but prior to termination, on claims which existed prior to dissolution. See *59A Am. Jur. 2d, Partnership, §§ 706*, *886*, 906 (1987).

Here, the court finds that since the claims in this case were brought subsequent to the filing of a certificate of cancellation of the limited partnership certificates and did not concern outstanding partnership obligations, these claims do not fall into the category of claims which could be litigated during the winding-up period.

The court also rejects plaintiffs' additional contention that Moxa and Wamsutter **[*25]** continued to exist as limited partnerships even after the letter agreements and certificate of cancellation were executed. The court has carefully examined the evidence and finds that the partnerships continued to exist solely for winding-up purposes, and that any post-cancellation business activity concerning Moxa and Wamsutter stemmed from operating agreements entered into between Amoco and Cities to run the Moxa and Wamsutter properties after the dissolution of the partnerships. Accordingly, the court grants defendants' motion to dismiss and further sets aside the court's prior entries of default against each partnership. The court notes that this ruling in no way prejudices whatever rights plaintiffs may have against the general partners who remain as parties in this lawsuit.

DAMAGES

As stated, supra, the court has reserved ruling on both plaintiffs' "Section 104" theory of antitrust damages and plaintiffs' fraud damage theory. The court plans to announce its ruling regarding the "Section 104" theory in a supplemental opinion prior to trial. No ruling on the fraud theory will be made until trial. The court wishes to emphasize that, at trial, any attempt by plaintiffs **[*26]** to recover what, in essence, are duplicative damages, will be thoroughly scrutinized.

IT IS SO ORDERED

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[9] The court notes that even if the intent to pay the maximum permissible price had existed prior to 1980, it is not clear that this intent would have sufficed to bind the parties to pay tight sands incentive prices after the promulgation of Order No. 99.

Dated this 2nd day of August, 1990, at Kansas City, Kansas.

J.F. Feeser, Inc. v. Serv-A-Portion, Inc.

United States Court of Appeals for the Third Circuit

February 1, 1990, Argued ; August 2, 1990, Filed

No. 89-5729

Reporter
909 F.2d 1524 *; 1990 U.S. App. LEXIS 12925 **; 1990-2 Trade Cas. (CCH) P69,124

J.F. FEESER, INC., AND JUNIATA FOODS, INC., Appellants v. SERV-A-PORTION, INC.; HUNT-WESSON FOODS, INC.; and WEIS MARKETS, INC.; MARK CRANE, MEDIATOR, SKY BROTHERS, Movants

Prior History: [1]** Appeal from the United States District Court for the Middle District of Pennsylvania; D.C. Civil No. 85-00684.

Core Terms

products, prices, competitors, district court, price discrimination, Sherman Act, Markets, Foods, customers, competitive injury, lost sales, Robinson-Patman Act, summary judgment, conspiracy, discovery, purchaser, favored, sales, depositions, distributors, disfavored, buyer, relevant market, profits, discriminatory, Clayton Act, portion-controlled, differential, wholesalers, supplier

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

As a general rule, if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, then summary judgment is appropriate. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] **Summary Judgment, Burdens of Proof**

Although the moving party has the initial burden of identifying the evidence that demonstrates the absence of a genuine issue of material fact, the non-movant must establish the existence of each element on which it bears the burden of proof. The non-movant is entitled to all reasonable inferences in its favor. Credibility determinations are not the function of the judge; instead the non-movant's evidence must be credited at this stage.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN3[] Antitrust & Trade Law, Robinson-Patman Act

See *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

HN4[] Robinson-Patman Act, Claims

In order to establish a prima facie violation of § 2(a) of the Robinson-Patman Act (Act), *15 U.S.C.S. § 13(a)*, a plaintiff must demonstrate a reasonable possibility that a price difference may harm competition. In keeping with the Act's prophylactic purpose, which is designed to prevent the occurrence of price discrimination rather than to provide a remedy for its effects, § 2(a) does not require that the discrimination must in fact have harmed competition. Instead, a reasonable possibility of harm, often referred to as competitive injury, must be shown.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Injunctions

HN5[] Remedies, Damages

Demonstrating competitive injury as part of a prima facie case suffices to support injunctive relief and implicates further examination of a plaintiff's entitlement to treble damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*. To recover treble damages a plaintiff must prove more than a violation of § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*; it must show the extent of actual injury attributable to the harm to competition.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

***HN6*[]** **Robinson-Patman Act, Claims**

Price discrimination within the meaning of § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, is merely a price difference.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

***HN7*[]** **Robinson-Patman Act, Claims**

Since price differences constitute only one element of a violation under § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, all price discriminations are not illegal per se. Rather, in order for a price difference to be illegal under the statute, the difference must have the proscribed anti-competitive effect.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

***HN8*[]** **Robinson-Patman Act, Claims**

Section 2(a) of the Robinson-Patman Act specifies three possible consequences of price discrimination which will satisfy its proviso that the discrimination in price had an adverse "effect" on competition. Although in § 2(a) the first two of these effects refer specifically to discriminatory practices which lessen competition or tend towards monopoly, i.e., broad competitive impacts, the third makes price discrimination illegal where it adversely affects the ability of individual companies to compete. Thus, § 2(a) makes it unlawful to discriminate in price where the effect may be to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN9[] **Robinson-Patman Act, Claims**

The United States Supreme Court has read § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, in accordance with its language and legislative history, holding that the provision was intended to justify a finding of injury to competition by a showing of injury to a competitor victimized by the discrimination. Harm to competition may be inferred from evidence that some purchasers had to pay their supplier substantially more for their goods than their competitors had to pay.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN10[] **Price Discrimination, Competitive Injuries**

In order to establish the requisite competitive injury in a secondary line case, the plaintiffs must prove that, as a disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential. The competitive nexus requirement is satisfied where there is a showing of competitive contact between the recipients of the price differential.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN11[] **Price Discrimination, Competitive Injuries**

Injury to competition is usually shown in either of two ways: proof of lost sales or profits, or under the Morton Salt test, proof of a substantial price discrimination between competitors over time. Under this test, a showing that price discrimination influenced resale prices is itself adequate to show competitive injury.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN12[] **Robinson-Patman Act, Claims**

The presumption of the requisite adverse competitive effects contemplated by § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, is most likely to arise when the price differential is (1) substantial enough to influence a disfavored customer's resale prices; or (2) occurs in a market with low profit margins and intensive competitive conditions.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN13[] **Price Discrimination, Competitive Injuries**

In determining competitive injury at the customer level, the duration of the price discrimination is a compelling factor. Generally, the longer the duration, the more likely injury will be found.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Evidence > Burdens of Proof > Allocation

HN14[] **Clayton Act, Claims**

While injury to competition dominates concern in demonstrating a violation of § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, to recover damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, a plaintiff must prove a causal connection between the price discrimination and actual damage suffered. This actual damage requirement has been construed to impose a burden of proof greater than for a § 2 violation, since under that preventative section, evidence need only establish that injury may result. The plaintiff's proof of damages is facilitated by the rule that once the plaintiff has met its burden of proving the fact of damage, some uncertainty with respect to the amount of damages will not preclude recovery.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN15[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, provides that every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is declared to be illegal.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Robinson-Patman Act, Claims**

For activity to be actionable under the Sherman Act it must result in the type of injury the antitrust laws were intended to prevent and must flow from that which marks the defendant's acts as unlawful. As distinguished from the Robinson-Patman Act, the target of this ***antitrust law*** is the protection of competition, not competitors.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN17[] **Sherman Act, Claims**

The following four elements are necessary to sustain a successful Sherman Act violation: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse anti-competitive effects within the relevant product and geographic markets; (3) that the objects of the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN18[] **Remedies, Damages**

If the antitrust defendant's conduct is consistent both with permissible competition and illegal conspiracy, evidence of such conduct does not, standing alone, support an inference of antitrust conspiracy. In such a situation, to survive a motion for summary judgment, a plaintiff seeking damages for a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. In other words, such a plaintiff must show that the inference of illegal conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed the plaintiff.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Evidence > Types of Evidence > Documentary Evidence > Affidavits

HN19[] **Supporting Materials, Affidavits**

Hearsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant can later present the evidence through direct testimony, i.e., in a form that would be admissible at trial.

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Judges: Stapleton and Mansmann, Circuit Judges, and Ackerman, District Judge. [*] Stapleton, Circuit Judge, concurring and dissenting.

Opinion by: MANSMANN

Opinion

[*1526] OPINION OF THE COURT

MANSMANN, Circuit Judge.

[2]** In this antitrust matter involving the highly competitive food distribution business, we are asked to review a grant of summary judgment in favor of the defendants, a supplier and a wholesaler, and against the plaintiff wholesalers. The litigation primarily involves allegations of secondary line price discrimination in violation of sections 2(a) and 4 of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. §§ 13(a)*, *15 (1936)*. Secondary line injury cases are characterized by price discrimination by a seller in sales to competing buyers.

Also at issue are whether the plaintiffs presented sufficient and relevant material facts to defeat the entry of summary judgment on a Sherman Act claim, i.e., did a conspiracy exist between the supplier and a competing wholesaler to discriminate in price to the detriment of the plaintiff-wholesalers, and whether one of the plaintiffs had the standing to bring this lawsuit. The plaintiffs allege that the district court usurped the function of the jury by improperly resolving disputed questions of fact and by evaluating the credibility of the testimony.

On review de novo, we conclude first, with respect to the **[**3]** Robinson-Patman Act claim, that the plaintiff has presented sufficient evidence supporting its position that, over a four year period of time, the defendant supplier discriminated against it in the prices charged for portion-controlled products. Genuine issues of material fact exist concerning whether the discrimination caused competitive injury (i.e., a reasonable possibility of harm to competition) which resulted in actual damage to the plaintiff. We will, therefore, vacate the district court's grant of summary judgment on this claim and remand for trial.

As to the Sherman Act claim, the present record does not reflect sufficient evidence of either the conspiracy or arrangement to exclude the plaintiff from the food distribution market to sustain a Sherman Act violation. We are aware, however, that the district court limited discovery to the issues of competitive impact and injury in the context of the Robinson-Patman claim. Since the plaintiffs alleged, in an affidavit filed pursuant to *Fed. R. Civ. P. 56(f)*, that further discovery will uncover evidence of the conspiracy, we will vacate the dismissal of this count and remand for further discovery.

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[*] Honorable Harold A. Ackerman of the United States District Court for the District of New Jersey, sitting by designation.

Finally, we find that the district **[**4]** court erred in deciding that Plaintiff Juniata Foods, Inc., does not have standing to proceed in the action. In conflict with other evidence, an affidavit indicates that Juniata was a wholesaler who directly purchased from Serv-A-Portion. Once again questions of material fact remain for the factfinder. Juniata, at this stage, will remain in the lawsuit.

I.

The plaintiffs, J.F. Feeser, Inc., now known as Feesers, Inc., and Juniata Foods, Inc., commonly-owned corporations, are wholesale distributors of food products and related items to institutional purchasers (e.g., schools, nursing homes, hospitals, caterers and restaurants). Defendant Weis Markets, Inc., is engaged in the business of distributing food and related products to the same type of institutional customers to whom Feeser and Juniata distribute and is, therefore, in direct competition with them. Defendant Serv-A-Portion, Inc., is a manufacturer **[*1527]** and packager of food products which it sells to distributors. Serv-A-Portion is a leading supplier of portion-controlled food products, such as individual servings of ketchup, jelly, syrup and dressings. Serv-A-Portion has sold, and its successor, DiGiorgio Foods, **[**5]** [1] has continued to sell, a variety of portion-controlled products to Feeser, Weis Markets and other competitors, including Tartan Foods and Sky Brothers, in interstate commerce. The claims against Hunt-Wesson Foods, Inc., also a manufacturer and packager of the portion-controlled products, have been settled.

[6]** It is undisputed that food distribution is a highly competitive business. Since portion-controlled products are primarily "give away" items, [2] the end user (i.e., the final institutional purchaser) is sensitive to minute price differences between the competing wholesalers. In addition, these particular products are considered "bellwether" items which are customarily utilized as a gauge by the distributor's customers to evaluate a company's overall pricing. Accordingly, it is contended by Feeser and Juniata that its inability to offer competitive prices on Serv-A-Portion products not only impacted on its overall business goodwill but also caused the loss of other business.

The impact of these price differences prompted Feeser and Juniata [3] in 1985 to file a complaint contending that Serv-A-Portion discriminated against **[**7]** them in the prices it charged for its portion-controlled products and in favor of its competitors, Weis Markets, Tartan Foods and Sky Brothers. The alleged discrimination primarily involved the manner in which Serv-A-Portion conducted its pricing policies. According to Feeser, Serv-A-Portion had two general categories of pricing: truckload and bidding. It is Serv-A-Portion's bid pricing which Feeser contends operated in a discriminatory fashion. Products purchased through Serv-A-Portion's bidding process, available at lower prices, were offered to Serv-A-Portion's customers (the wholesalers) only on a case-by-case basis after submission of a formal and specific bid and on condition that they could be resold only to certain end users. It is not contested by Serv-A-Portion that its bidding requirements were not rigidly followed nor that Weis Markets used Serv-A-Portion's failure to enforce its procedures to Weis Markets' advantage by selling products purchased by bid to *any* of its customers.

[8]** It is also contended by Feeser that Serv-A-Portion utilized other pricing mechanisms to camouflage price discrimination, such as affording special allowances and permitting deductions. Feeser claims that although Tartan

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[1] Serv-A-Portion argues mootness by contending that the lawsuit is automatically terminated by the sale of DiGiorgio's Serv-a-Portion division on May 31, 1988. Feeser counters that the action continues under the authority of *Fed. R. Civ. P. 25(c)* which states:

> In the case of a transfer of interest, the action may be continued against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Although neither party has filed the appropriate motion, Feeser has made known its intention to present a *Rule 25(c)* motion to enforce its rights against Serv-A-Portion's successor. This appeal appropriately continues against Serv-A-Portion.

[2] Give-away items are provided to consumers, such as diners in restaurants, at no cost. These products thus do not yield a direct return to the institution providing the items. App. at 2759.

[3] We refer to the plaintiffs collectively as "Feeser."

Foods and Sky Brothers derived benefits from Serv-A-Portion's deviation from established business practices, it was not granted similar advantages. As a direct result, Feeser alleges that it lost sales when its customers took advantage of the more favorable prices of Serv-A-Portion products offered by Feeser's competitors, Weis Markets, Tartan Foods and Sky Brothers. Feeser claims also that its revenues declined when it was forced to reduce its margins to attempt to meet the prices offered by the favored competitors. In addition to losing sales and incurring reduced profits, Feeser's inability to match Weis Markets' prices resulted in a loss of goodwill among its customers, so that **[*1528]** Feeser was not asked to service them on other products.

Feeser requested injunctive relief and treble damages for violations of sections 2(a) and 2(f) of the Robinson-Patman Act and *section 1* of the Sherman Act. Feeser also averred that the activity engaged in by the defendants **[**9]** represented unfair competition which violates the common law of Pennsylvania.

In September of 1985, four months after the complaint was filed, Serv-A-Portion asked the district court to require Feeser to identify and document as a threshold matter all the details of Serv-A-Portion's price discrimination and to cut off all discovery requested by Feeser relating to Serv-A-Portion's sales to competitors other than Weis Markets. On April 29, 1986, the district court entered a discovery order permitting Feeser to review only certain records maintained by Hunt and Serv-A-Portion for a one-year period to be selected by Feeser; requiring that Feeser's expert provide all parties with a price comparison report, supported by documentation, of transactions between Hunt, Serv-A-Portion and Weis Markets; and mandating that Feeser's expert provide all parties with a pricing report comparing transactions between Hunt and Serv-A-Portion and their customers.

Discovery continued in this prescribed manner. Feeser's expert economist, Dr. Robert Larner, prepared a pricing analysis that, *inter alia*, compared Serv-A-Portion's sales of identical products: (a) to Feeser and Weis Markets for the period **[**10]** January 1982 through January 1986; and (b) to Feeser, Tartan Foods and Sky Brothers for the period January 1984 through December 1984 - the year for which discovery of Serv-A-Portion's sales to those competitors was permitted.

Upon presentation of this evidence by Feeser, Serv-A-Portion contended that the report prepared by Dr. Larner did not show competitive injury and requested that discovery be focused upon the elements of competitive and actual injury. The district court then limited the next phase of discovery to competition and injury and enumerated the manner and extent of such discovery.

On June 9, 1988, Serv-A-Portion filed a motion for summary judgment directed toward the issues of competitive impact and injury. For purposes of its motion, Serv-A-Portion acknowledged a slight difference between the prices charged by Serv-A-Portion to Weis Markets and Feeser. Nonetheless, referencing primarily the overall competitive health of the institutional food industry, Serv-A-Portion contended that Feeser had not suffered any injury from any of Serv-A-Portion's pricing practices.

At the outset, the district court rejected Serv-A-Portion's position, which relied upon *Boise Cascade Corp. v. FTC, 267 U.S. App. D.C. 124, 837 F.2d 1127 (D.C. Cir. 1988),* **[**11]** that, because of the overall competitive health of Feeser and of institutional food distributors generally, there can be no competitive injury for Robinson-Patman purposes. The court disregarded this view finding *Boise Cascade* to be contrary to Supreme Court authority, *see* *Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 18 L. Ed. 2d 406, 87 S. Ct. 1326 (1967)* (a competitor's sales growth does not rule out a Robinson-Patman claim), and distinguishing it factually on several important grounds.

The district court then sought to determine whether Feeser could prove a Robinson-Patman violation under the doctrine of *Falls City Industries Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*, by showing lost sales or profits caused by the price differential. According to the district court, establishing lost sales caused by Serv-A-Portion's pricing policies was essential in order to demonstrate actual injury entitling Feeser to treble damages under section 4 of the Clayton Act. [4]

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[4] Section 4 of the Clayton Act, *15 U.S.C. § 15(a)* *as amended* 1980) (Supp. 1990) reads:

[12]** **[*1529]** In reviewing the record submitted in response to the summary judgment motion, the district court systematically excluded much of Feeser's evidence presented through depositions and affidavits. First, the district court denied consideration of depositions of a number of Feeser's salesmen, finding them to constitute hearsay. Other salesmen's depositions, the court decided, were "simply too vague, conclusory or incomplete for a reasonable jury to place reliance upon them." *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, No. 85-0684; 1989 U.S. Dist. LEXIS 9098 slip op. at 10 (E.D. Pa. Aug. 4, 1989). The court found some of the depositions probative of lost sales as indicative of better prices offered to favored competitors, yet dismissed the relative worth of these depositions on the assumption that some price differentials would normally occur given the particular nature of the food distribution industry. The district court concluded that there must be more than de minimis violations, as it characterized Feeser's evidence, of the Robinson-Patman Act in both volume and price before competitive injury could be found.

The district court then examined employee **[**13]** affidavits submitted by Feeser. The court rejected the affidavits of Feeser salesmen Fuller and Andrews and Juniata's Miller, believing that the hearsay statements of certain customers who refused to buy from them contravened the provision of *Fed. R. Civ. P. 56(e)*, that affidavits must be based on personal knowledge and on facts which would be admissible at trial.

Feeser had also submitted affidavits from some of the customers themselves. In general, these affidavits indicated that these customers did not buy from Feeser, but rather purchased from Weis Markets, Tartan Foods and Sky Brothers who offered better prices. The district court did find these affidavits admissible, but once again pointed to the de minimis nature of the evidence and declared that the affidavits were not probative of injury suffered from price discrimination.

The district court then turned to the evidence presented concerning other wholesalers who purchased from Serv-A-Portion. [5] The court accepted the testimony of Joanne Straw, who testified that her company, W.R. Straw, Inc., lost sales of Serv-A-Portion products to Pennsylvania State University because the prices Weis Markets offered to Penn State were **[**14]** lower than Straw's actual cost from Serv-A-Portion. The district court did not accept a similar affidavit from Joseph Spagnola, a buyer for R & R Provision Company, which was based upon information from Spagnola's sales personnel, finding that it constituted inadmissible hearsay. The court then characterized this evidence from competitors as "completely non-probative." *Id.* at 20.

The district court next reviewed the expert report prepared for Feeser by Dr. Robert Larner in light of the Robinson-Patman test enunciated by the Supreme Court in *FTC v. Morton Salt Co., 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)*. Under the *Morton Salt* test, a plaintiff can show injury to competition by providing either proof of a substantial price discrimination between competing purchasers over time or by providing direct proof of lost sales or profits. [6]

[15]** Although rejecting Serv-A-Portion's major objection to the expert report -- that Dr. Larner did not address what Serv-A-Portion considered the relevant economic consideration -- the overall growth of competition in the food distribution industry in general and of Feeser in particular -- the district court was critical of Dr. Larner's analysis for several other reasons. First, the district court questioned Dr. Larner's use of four-year periods in his report (1978 through 1982 and 1982 through 1986). The court agreed with Serv-A-Portion that the only apparent reason for this grouping was that it achieved the results desired by Dr. Larner. The district court did not credit **[*1530]** Dr. Larner's justification that yearly figures fluctuate for various reasons and, by using four-year periods he could establish a greater track record and eliminate unusual events or their effects in one particular year. The district court found

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> Except as provided in subsection (b) of this section, any person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained. . . .

15 U.S.C. § 15(a).

[5] These distributors are not parties to the lawsuit.

[6] Appendix A to this opinion represents a summation of the Larner Report comparing prices paid by Feeser and Weis Markets, Tartan Foods and Sky Brothers for several Serv-A-Portion portion-controlled products.

objectionable Dr. Larner's failure to elucidate these reasons or unusual events and concluded that "a reasonable jury would not accept his conclusory reasoning as a valid basis for using four-year periods. . . ." *Id.* at 24.

The district court then evaluated **[**16]** with skepticism Dr. Larner's analysis of the increasing and decreasing percentages of Feeser's purchases from Serv-A-Portion and concluded that such comparisons between Feeser's total sales and its Serv-A-Portion purchases revealed nothing about competitive injury or discriminatory pricing. With respect to the figures of the lower prices which Feeser alleged were given to favored competitors, the district court examined the numbers and determined that if Serv-A-Portion had intended to win the favor of Weis Markets, "it did not do a very good job of it." *Id.* at 29.

Finally, the district court rejected Dr. Larner's calculations for the six-month period showing differences in Weis Markets' and Feeser's profit margins on the grounds that the report utilized an insufficient number of products over an insufficient period of time.

Turning to Feeser's Sherman Act claim, the district court determined that it must sustain the same fate as the Robinson-Patman allegation because Feeser had not proven any injury to itself or to competition. The district court opined that even assuming a conspiracy between Serv-A-Portion and Weis Markets to grant Weis favorable pricing, this activity, without **[**17]** proof of an arrangement to exclude others from the buyer's market, was not actionable under the Sherman Act. In effect, the district court found that since the sale of Serv-A-Portion products at discriminatory prices is not a Sherman Act violation, a conspiracy to do so is not actionable. The district court also pointed to the lack of evidence indicating any conspiracy or agreement between Weis and Serv-A-Portion to discriminate in price. After deciding that Juniata had no standing to participate in the lawsuit because of evidence that Juniata was not a direct purchaser from Serv-A-Portion, the district court granted Serv-A-Portion's motion for summary judgment.

The district court then turned to Feeser's claims against its competitor, Weis Markets, Inc. Although Weis Markets had not moved for summary judgment, [7] the court dismissed all of Feeser's claims against Weis on the ground that such claims depended upon the validity of Feeser's claims against Serv-A-Portion. The pendent state claims were dismissed without prejudice to refiling in the appropriate state court.

[18]** Feeser has appealed this final judgment and our jurisdiction is thus premised on *28 U.S.C. § 1291*.

II.

On appeal from the grant of summary judgment we review the evidence de novo and apply the same standards applicable in the district court.

The now familiar and oft-cited trilogy of Supreme Court cases, *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986),* **[*1531]** *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* and *Matsushita Electric Industrial, Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* refocused the burden of both the movant and the non-movant in summary judgment actions. ***HN1***[] As a general rule, if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, then summary judgment is appropriate. *Fed. R. Civ. P. 56(c)*; *Anderson v. Liberty Lobby, 477 U.S. at 247.* **[**19]** ***HN2***[] Although the moving party has the initial burden of identifying the evidence that demonstrates

[7] On appeal Weis Markets submitted a brief detailing generally its position that its decisions concerning Serv-A-Portion purchases were unilateral and not dictated by another competitor's activities. It averred that there is no evidence that it knowingly induced or received lower prices in violation of section 2(f) of the Robinson-Patman Act.

In this same vein, as to the Sherman Act allegation, Weis Markets disputes that there is any evidence of conspiracy between Serv-A-Portion and Weis which would support such a violation.

Feeser does not specifically respond to any of Weis Markets' evidentiary contentions, but counters that Weis lacks standing to argue any point on appeal since it did not raise such issues before the district court. Because our decision vacating the grant of summary judgment in favor of Serv-A-Portion necessarily involves the disposition previously rendered in regard to Weis Markets, we need not address the argument premised on Weis' lack of standing to proceed.

the absence of a genuine issue of material fact, the respondent (the "non-movant") must establish the existence of each element on which it bears the burden of proof. *Celotex, 477 U.S. at 323*. The non-movant is entitled to all reasonable inferences in its favor. We are keenly aware that credibility determinations are not the function of the judge; instead the non-movant's evidence must be credited at this stage. *Anderson, 477 U.S. at 249, 255*.

When summary judgment is requested in the context of antitrust litigation, adherence to this standard is appropriate. *Miller v. Indiana Hospital, 843 F.2d 139 (3d Cir. 1988)*, *citing*, *Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

We thus turn to the substantive legal standard applicable to each count of Feeser's complaint and review the specific evidence offered by the parties in the context of the summary judgment burdens set forth by the Supreme Court.

III.

[20]** Section 2(a) of the Robinson-Patman Act, a 1936 amendment to the Clayton Act, provides, in pertinent part, as follows:

> ***HN3***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them. . . .

15 U.S.C. § 13(a).

HN4[] In order to establish a *prima facie* violation of section 2(a) of the Act, a plaintiff must demonstrate a reasonable possibility that a price difference may harm competition. *Falls City Industries, 460 U.S. at 435 (1983)*, *citing* *Corn Products Refining Co. v. FTC, 324 U.S. 726, 89 L. Ed. 1320, 65 S. Ct. 961 (1945)*. "In keeping with the Act's prophylactic **[**21]** purpose, [designed to prevent the occurrence of price discrimination rather than to provide a remedy for its effects], section 2(a) does not require that the discrimination must in fact have harmed competition." *Falls City Industries*, 460 at 435, *quoting* *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*. Instead, a reasonable possibility of harm, often referred to as competitive injury, must be shown. ***HN5***[] Demonstrating competitive injury as part of a *prima facie* case suffices to support injunctive relief and implicates further examination of a plaintiff's entitlement to treble damages under section 4 of the Clayton Act, *15 U.S.C. § 15*. To recover treble damages a plaintiff must prove more than a violation of section 2(a); it must show the extent of actual injury attributable to the harm to competition. *Hasbrouck v. Texaco, 496 U.S. 543, , 58 U.S.L.W. 4807, 4810, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (June 14, 1990)*, *citing* *J. Truett Payne, 451 U.S. at 562.* **[**22]**

Thus, to survive Serv-A-Portion's motion for summary judgment regarding Feeser's request for injunctive relief, Feeser must establish, by competent evidence, that there is a genuine issue of material fact as to whether Serv-A-Portion engaged in pricing policies that caused competitive injury in the market in which the **[*1532]** parties participate. Then, to establish entitlement to section 4 treble damages, Feeser must demonstrate a causal connection between the competitive injury and specific damage suffered by it.

Since Feeser admits that the alleged discrimination terminated in 1987, the claim for injunctive relief is moot. What must be proven then is that Serv-A-Portion violated the Robinson-Patman Act and that Feeser was, as a consequence, injured in *its* business. After proof of these elements, Feeser must show the amount of damage it was caused to suffer because of the unlawful conduct. Since the limited scope of the discovery permitted by the district court did not extend to the extent of the damages suffered, we examine whether the present record justifies an expansion of inquiry into this area; *see* *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 75 L. Ed. 544, 51 S. Ct. 248 (1931)* **[**23]** (uncertainty with respect to quantum of damages does not preclude section 4 recovery).

We begin with the threshold question of whether section 2(a) has been violated. In *Texaco v. Hasbrouck, 58 U.S.L.W. at 4810*, the Supreme Court reaffirmed the principle enunciated in *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*, that ***HN6***[] price discrimination within the meaning of section 2(a) is merely a price difference. Here, Serv-A-Portion has conceded, for summary judgment purposes, that a slight difference in price did exist between its products which were sold to Feeser and its products which were sold to Weis. [8]

[24]**

The existence of this price differential does not, however, end the inquiry. In *Anheuser-Busch*, the Court was careful to emphasize that ***HN7***[] since price differences constitute only one element of a section 2(a) violation, all price discriminations are not illegal per se. *363 U.S. at 553*. Rather, in order for a price difference to be illegal under the statute, the difference must have the proscribed anti-competitive effect. Accordingly, we now turn our attention to the element of competitive injury.

A.

At the outset, we are compelled to address a question which, although not emphasized by the defendants or the district court, is of significance here. This issue focuses on whether the protective concern of the Robinson-Patman Act is one directed towards competition in general or whether its goal reaches to protection of specific competitors. Once the scope of the competitive injury is resolved, we then reach the second step - the degree of certainty to which a plaintiff must prove that the requisite injury has occurred in order to establish entitlement to treble damages.

[25]** ***HN8***[] Section 2(a) specifies three possible consequences of price discrimination which will satisfy its "effects" proviso, i.e., that the discrimination in price had an adverse "effect" on competition. Although in section 2(a) the first two of these effects refer specifically to discriminatory practices which lessen competition or tend towards monopoly, i.e., *broad* competitive impacts, the third makes price discrimination illegal where it adversely affects the ability of individual companies to compete. Thus, section 2(a) makes it unlawful to discriminate in price where "the effect may be . . . to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." *15 U.S.C. § 13(a)*. The language of the statute reflects concern both for the preservation of competition and for the protection of individual competitors. E. Kintner, Federal ***Antitrust Law***, § 22.2 (1983).

The legislative history as well indicates that one of the factors leading to the 1936 amendment **[**26]** of the Clayton Act was the perception that the 1914 version, containing only the first two conditions, was concerned exclusively with injury to competition. **[*1533]** U.S. Representative Hubert Utterback, the congressman in charge of the Conference Report, explained the meaning of the amendments as follows:

> Effects nos. 1 and 2 above correspond to those required to be shown under the old section 2 of the Clayton Act. Generally speaking, they require a showing of effect upon competitive conditions generally in the line of commerce and market territory concerned, *as distinguished from the effect of the discrimination upon immediate competition with the grantor or grantee*. The difference may be illustrated where a nonresident concern opens a new branch beside a local concern, and with the use of discriminatory prices destroys and replaces the local concern as the competitor in the local field. Competition in the local field generally has not been lessened, since one competitor has been replaced by another; but competition with the grantor of the discrimination has been destroyed. *The present bill is, therefore, less rigorous in its provisions as to the effect required to* **[**27]** *be shown in order to bring a given discrimination within its prohibitions*.

80 Cong. Rec. H9417 (1936) (statement by Rep. Utterback) (emphasis added).

The Report of the Senate Judiciary Committee explained this portion of the proposed amendments as follows:

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[8] The only evidence in the record of the amount of the difference is Dr. Larner's report, expressed in percentages. Although it does not challenge the figures, Serv-A-Portion does contend that the dollar amounts which these percentages represent are very slight.

> This clause represents a recommended addition to the bill as referred to your committee. It tends to exclude from the bill otherwise harmless violations of its letter, but accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is the injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.

FTC v. Morton Salt Co., 334 U.S. at 49-50 n. 18 *quoting*, S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936).

This statutory language and legislative history are highly persuasive indicia of Congress' intent **[**28]** to outlaw price discrimination that tends to injure competitors, rather than competition in general, which we must follow unless the Supreme Court has construed the statute in a contrary manner.

HN9[] The Supreme Court has read § 2(a) in accordance with its language and legislative history. For example, the Court examined this precise issue in *FTC v. Morton Salt Co., 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)*. After its review of the legislative history of the Robinson-Patman Act, the Court stated that the new provision (of the Act) was intended to justify a finding of injury *to competition* by a showing of injury to a competitor victimized by the discrimination. *Id. at 47*. In so doing, the Court held that harm to competition "may be inferred from evidence that some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay.'" *Texaco v. Hasbrouck, 58 U.S.L.W. at 4810*, *quoting* *Morton Salt, 334 U.S. at 46-47*. In *Morton Salt*, the Supreme Court also explicitly stated **[**29]** that a showing that price discrimination was sufficient in amount to influence resale prices was "in itself . . . adequate" to show competitive injury. *334 U.S. at 47*. This was because "it would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and sellers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Id. at 50-51*.

In *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*, the Supreme Court held that a violation of section 2(a) of the Robinson-Patman **[*1534]** Act is proven upon a showing that the effect of such discrimination "*may be* substantially to lessen competition." *Id. at 561*. The Court subsequently held in *Falls City Industries, 460 U.S. at 434-35* that if a discriminatee shows "proof of substantial discrimination over time" or direct evidence of lost sales caused **[**30]** by the discrimination, then "a reasonable possibility that a price difference may harm competition exists." [9]

Subsequent **[**31]** decisions of the courts of appeals have advocated a wide breadth of protection afforded by the Act. In *Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578 (2d Cir. 1987)*, ***HN10***[] the Court of Appeals for the Second Circuit held that "in order to establish the requisite competitive injury in a secondary line case the plaintiffs must prove that, as a disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential." *Id. at 584*. Its rationale was based upon the Supreme Court's language in *FTC v. Anheuser-Busch, 363 U.S. 536, 546, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*, that "the existence of competition among buyers who are charged different prices by a seller is obviously important in terms of adverse effect upon secondary line competition." *Best Brands, 842 F.2d at 584*, *citing* 5 J.O. Von Kalinowski,

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[9] Although earlier decisional history of the degree of certainty needed to demonstrate actionable Robinson-Patman injury runs the semantical gambit from "reasonable possibility," *see* *Corn Products Refining, 324 U.S. at 742*, to "reasonable probability," *see* *Foremost Dairies, Inc. v. F.T.C., 348 F.2d 674, 680 n. 11 (5th Cir.)*, *cert. denied*, ***382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435 (1965)***, the 1983 Supreme Court decision in *Falls City* confirms that a reasonable possibility that the price differential may harm competition is the appropriate standard. *460 U.S. at 434-35*.

To assist in determining the meaning of reasonable possibility, one commentator suggests that "while certainty is not to be required, neither can plaintiff prove its case by mere hypothesis of competitive injury." *E. Kintner*, § 22.5.

Antitrust Laws in Trade Regulation, § 30.02[1] (1987) (and cases cited therein). The Court of Appeals for the Second Circuit concluded that "the **[**32]** competitive nexus requirement is satisfied where there is a showing of competitive contact between the recipients of the price differential." *Id. at 585*.

An expanded approach to the reach of section 2(a) liability has also been adopted in a case from the Court of Appeals for the Ninth Circuit, recently affirmed by the Supreme Court. In *Hasbrouck v. Texaco, Inc., 842 F.2d 1034 (9th Cir. 1987)*, *aff'd* *496 U.S. 543, 58 U.S.L.W. 4807, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (June 14, 1990)*, a case involving primarily the status of functional discounts in the context of the Robinson-Patman Act, the court of appeals found that the distinction between protecting competition and protecting competitors had been "misconstrued with some regularity." The court opined that the purpose of drawing a distinction between harm to competition and harm to competitors is to demonstrate that although not all acts that harm competitors harm competition, the converse is not true. The court reasoned:

> Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. **[**33]** Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct.

Id. at 1040. After a discussion of the type and the extent of harm required to demonstrate a Robinson-Patman violation, the court concluded that "in order for a plaintiff to prove competitive injury under Robinson-Patman, he need only show that a substantial price discrimination existed as between himself and his competitors over a period of time." *Id. at 1041*. [10]

[34]** **[*1535]** The Court of Appeals for the First Circuit examined this issue in *Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525 (1st Cir. 1989)*, a case brought under the Sherman Act. Although there was no allegation of a Robinson-Patman violation because of the absence of interstate dealings, the court nonetheless discussed the Act and distinguished it from the Sherman Act by stating that the Robinson-Patman Act extends its protection to competitors while the Sherman Act protects competition. It construed the Robinson-Patman Act to protect "those who compete with a favored seller, not just the overall competitive practice." *Id. at 529*. Thus, in the opinion of our sister court, the Robinson-Patman Act will forbid selective but non-predatory price competition in some circumstances. *Id.*

Therefore, we today decide that the statute and its accompanying legislative history, the Supreme Court decision in *Morton Salt* and the recent jurisprudence of Robinson-Patman secondary-line cases compel a holding that evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman **[**35]** Act. We thus turn to specific evidence of this factor and ask whether the record is sufficient at the summary judgment stage to show competitive injury.

HN11[] Injury to competition is usually shown in either of two ways: proof of lost sales or profits, *Falls City Industries, supra*; *Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381 (8th Cir. 1987)*, or under the *Morton Salt* test, proof of a substantial price discrimination between competitors over time. Under this test we keep in mind the Supreme Court's instruction that a showing that price discrimination influenced resale prices is itself adequate to show competitive injury. *334 U.S. at 47*.

B.

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[10] Unfortunately the precise issue of the intended scope of the Act in regard to the targeted effect on competition was not before the Supreme Court on certiorari. The Court, however, did reference its prior reasoning in *Falls City, 460 U.S. at 436*, that "the competitive injury component of a Robinson-Patman violation is not limited to the injury to competition between the favored and disfavored purchaser; it also encompasses the injury to competition between their customers." *Texaco v. Hasbrouck, 58 U.S.L.W. at 4814* (quoting *Falls City, 460 U.S. at 436*). Thus by inference, a showing of price discrimination between competing purchasers can suffice to satisfy the required element of injury to competition within the meaning of the Act.

Lost Sales or Profits

It is not contested by Serv-A-Portion that there is a slight difference in prices offered to Weis, Tartan Foods and Sky Brothers than to those offered to Feeser. To demonstrate how this price differential equated to proof of lost sales or profits, Feeser first proffered excerpts from depositions of its employees. [11] Our de novo analysis of the depositions reveals **[**36]** sufficient admissible evidence of lost sales and profits to meet the burden of the non-movant in a summary judgment proceeding.

[37]** Generally, the sales people testified concerning transactions with a number of their end user customers when they either lost sales of Serv-A-Portion products to Weis **[*1536]** Markets or were forced to greatly reduce their prices of the products, because of their inability to match their competitor's prices. For instance, Paul Thuss testified that after 10 years of conducting business with a Holiday Inn, he lost Serv-A-Portion product sales to Weis Markets. The manager of the institution told Thuss that the reason he switched to Weis was that Thuss' prices were "way out of line with [Serv-A-Portion] products -- I'm buying them from your competitor."

Kevin Fox discussed transactions occurring at the Arlington Diner. He testified that for a period of time he was forced to reduce his prices on Serv-A-Portion products to compete with Weis Markets and then eventually lost the sales because of his inability to match Weis Markets' prices.

Richard Miller related in his deposition that he had problems selling portion-controlled products at the Old Maine Restaurant where Juniata and Weis Markets were the main purveyors of Serv-A-Portion goods because he "got blown out of there on **[**38]** price." Miller additionally testified that his inability to match the prices on Serv-A-Portion products resulted in the loss of his business integrity with that particular customer.

Describing his dealings with a hospital in Harrisburg concerning Serv-A-Portion products, William Monteith stated that Weis Markets "just knocked our socks off as far as price on Serv."

In addition, although the sales people could not testify to the prices paid by Weis Markets for the portion-controlled products purchased from Serv-A-Portion, on a number of occasions where they were shown Weis' invoices, the paperwork revealed that Weis Markets' prices offered to the consumer were lower than Feeser's cost from Serv-A-Portion. Although this does not constitute direct testimony from the salesmen that Serv-A-Portion's pricing policies favored Weis and were detrimental to Feeser's ability to sell Serv-A-Portion's products, this is a reasonable inference which must be drawn in Feeser's favor.

Verification of the information contained in the depositions was presented through affidavits of some of the sales people which were more specific than the depositions that the reason why Feeser either lost sales **[**39]** or

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[11] Although the district court disallowed a considerable part of this testimony as hearsay, it acknowledged that some of the excluded depositions would be admissible under *Fed. R. Evid. 803(3)* if the customer's motive for not purchasing from Feeser was relevant to this action. Finding that motive was not germane, the district court disallowed the bulk of the depositions. The district court erred in this regard because the reason why a customer was not doing business with a particular seller is relevant in a lost profits/sales inquiry and its causal connection to the pricing practices of the alleged violator. If Feeser was losing sales or was being forced to cut its selling prices and thereby reducing its profits to meet Weis' price, this is directly related to actual injury. *See* *Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 914 (2d Cir. 1962)* ("statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose," *i.e.*, the purpose of proving customer motive, but not as evidence of the facts recited as furnishing the motives); *see also* *Hydrolevel Corp. v. Am. Soc. of Mech. Engineers, 635 F.2d 118, 128 (2d Cir. 1980)* (following *Schwabe*); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* para. 803[03], at 803-112 (1988).

There is contrary authority. In *Reserve Supply Corp. v. Owens Corning Fiberglas, 639 F. Supp. 1457 (N.D. Ill. 1986)*, it was held that deposition testimony relating conversations in which former customers told an official of the plaintiff's company that they had been purchasing [a product] from lower priced distributors was inadmissible hearsay. The district court cited no authority nor offered any rationale for its decision and, thus, we do not consider it persuasive.

incurred reduced profits was because of the lower prices offered to customers by Weis Markets, Tartan Foods and Sky Brothers. [12]

In his affidavit, Donald Fuller averred that while attempting to sell Serv-A-Portion products at a Holiday Inn, his prices were so divergent from those of Weis Markets that, although he initially offered to reduce the price of the products, he later did not even attempt to sell the goods because of his fear of losing credibility. He testified that a similar circumstance precluded him from selling **[**40]** Serv-A-Portion products at a Quality Inn.

Robert Andrews elaborated upon deposition testimony in his affidavit and stated that he did not get the sale of Serv-A-Portion products at the Camp Streamside account because Sky Brothers offered the products to this account at extremely low prices. Furthermore, Andrews testified that whenever he did make a sale of Serv-A-Portion products at this account it was only because he reduced his margins substantially.

Andrews also discussed his transactions at Emil's Diner where he lost sales of Serv-A-Portion products to Sky Brothers despite reducing his profit margin substantially. He related that the buyer at Emil's notified him that Feeser's prices were too high even with the markdown.

Richard Miller, in an affidavit, asserted that he was told by the buyer of Fye's Frosty Cup that Fye's would not buy Serv-A-Portion products from Miller because it received a lower price from Weis Markets.

[*1537] The evidence we find most persuasive is that of the customers of Feeser, corroborating the sales personnel's testimony, that the reason Feeser lost sales was because its prices for Serv-A-Portion products were not competitive.

For example, **[**41]** one customer-owner of a restaurant, Dean Spanos, testified that prior to 1986 it was his custom to challenge Feeser's prices on Serv-A-Portion products, by informing Feeser that Weis Markets and Sky Brothers were charging much lower prices for the same products. Spanos related that despite Feeser's sales people's efforts, they were unable to match or better the prices and Spanos decided consistently then to throw his Serv-A-Portion business the way of Weis and Sky.

Feeser also presented deposition testimony from Wilbur Blew, a buyer from one of its largest customers, M. W. Wood. Blew testified that in a five-month period in 1984 Feeser's pricing on Serv-A-Portion products was consistently out of line with the prices being offered by Tartan Foods. According to Blew, Feeser eventually reduced its prices in a substantial manner to make the sale of Serv-A-Portion products. Blew indicated that if Feeser had not effectuated this reduction, all of its business with M. W. Wood would have been jeopardized.

William Kotsalos, a buyer for Bill's Restaurant, testified in his affidavit that in the overwhelming majority of instances when he wished to purchase portion-controlled products, he would **[**42]** place his order with Sky Brothers because Feeser's prices for Serv-A-Portion products were much higher.

Examining all of these submissions, we do not conclude, as Serv-A-Portion urges, that the evidence could be summed up as demonstrating de minimis violations of the Robinson-Patman Act. [13] In a similar case, Rose

[12] Again, inadmissible hearsay was the reason advanced by the district court for refusing consideration of Feeser's sales force affidavits. The basis for exclusion echoed its reasoning concerning the depositions, i.e., that the reasons enunciated by the sales people for lost sales had to do with the customers' motive in not purchasing Serv-A-Portion goods from them and were therefore not relevant. We have already expressed our opinion that the customers' motive was indeed relevant.

[13] The cases cited by the district court to lend credence to its theory that de minimis violations are not actionable are either factually or legally distinguishable.

See Rudner v. Abbott Laboratories, 664 F. Supp. 1100 (N.D. Ohio 1987) (although court recognized that there must be more than de minimis violations in both sales and volumes, record was insufficient to analyze factual question in summary judgment motion); Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220, 224 (5th Cir. 1973), *cert. denied*, *414 U.S. 1136, 38 L. Ed. 2d 761, 94 S. Ct. 880 (1974)* (de minimis sales occurred, when as courtesy one distributor extended to another item not in

Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381 (8th Cir. 1987), the plaintiff company's president testified that his company had to reduce its prices in response to low price offers made by its competitors. As in the dispute before us, the plaintiff presented depositions from its sales force concerning the necessity to reduce prices. The Court of Appeals for the Eighth Circuit found that this type of evidence alone is sufficient to allow a reasonable jury to find competitive injury. Also, as stated by the Supreme Court in *Falls City*, where the defendant had argued that other factors may have impacted on lost sales, the Court said that "if some of [plaintiff's] injury was attributed to the price discrimination, [the defendant] is responsible to that extent." *460 U.S. at 437*. The depositions and affidavits submitted by Feeser, **[**43]** demonstrating actual instances of lost sales because of its inability to match its competitors' prices on Serv-A-Portion products, go well beyond the level of speculative injury unprotected by section 2(a). The record suffices to raise the inference, at this stage of the proceedings, that the price difference in the Serv-A-Portion products resulted in a reasonable possibility of harm to competition.

[44]** **[*1538]** The evidence proffered by Feeser, if believed by the trier of fact, would support a finding that competitive harm has occurred.

Price Difference Over Time

Although our conclusion concerning the sufficiency of this evidence of lost sales and profits alone necessitates remand to the district court on the Robinson-Patman claim, we nonetheless examine the report submitted by Feeser's expert, Dr. Robert Larner, in the context of whether it too could support a Robinson-Patman claim by invoking the *Morton Salt* inference of substantial price difference over a period of time.

HN12[] The presumption of the requisite adverse competitive effects contemplated by section 2(a) is most likely to arise when the price differential is (1) substantial enough to influence a disfavored customer's resale prices; *see FTC v. Morton Salt, 334 U.S. at 47*; or (2) occurs in a market with low profit margins and intensive competitive conditions; *see Standard Motor Products, Inc. v. FTC, 265 F.2d 674 (2d Cir.)*, *cert. denied*, *361 U.S. 826, 4 L. Ed. 2d 69, 80 S. Ct. 73 (1959).* **[**45]** The evidence presented by Feeser's sales personnel is probative of the fact that Feeser was forced to reduce its prices to compete with Weis. Also, the parties agree that the type of market in which it competes is characterized by "low profit margins and intensive competitive conditions." Thus, here the presumption of adverse competitive effects arises and poses a question of fact as to whether Feeser was injured by Serv-A-Portion's pricing policies.

We turn then to the amount and degree of the price discrimination - significant factors used to determine the substantiality of secondary line competitive injury. "A substantial price differential may not by itself be indicative of the requisite injury. Other factors such as the duration and type of the differentials and the nature of the industry may transform a discrimination which is substantial in amount into one which is insubstantial in effect." J.O. Von Kalinowski, 5 Antitrust Laws and Trade Regulation § 31.01[4] (1989).

Dr. Larner's report, which the district court found unpersuasive, [14] tabulated for the period 1982 through 1985 the percentage of times Feeser paid a higher price for Serv-A-Portion products than did Weis **[**46]** and the magnitude

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stock); *Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163 (7th Cir. 1978)* (question existed whether defendant possessed valid exclusive right to compete in certain geographic area; also, plaintiff unable to identify extent of possible customer dealings or estimate sales actually lost); *Whitaker Cable Corp. v. FTC, 239 F.2d 253 (7th Cir. 1956)*, *cert. denied*, *353 U.S. 938, 1 L. Ed. 2d 761, 77 S. Ct. 813 (1957)* (manufacturer selling to 8 1/2% of participants in market and who charged different prices to its customers without justification for differential was engaging in activity violative of the Act); *Uniroyal, Inc. v. Hoff and Thames, Inc., 511 F. Supp. 1060 (S.D. Miss. 1981)* (sales, with $ 200 combined value, to three customers were de minimis); *Dairy King, Inc. v. Kraft, Inc., 645 F. Supp. 126 (D.Md. 1986)* (lower prices offered to certain purchasers were in form of discounts offered to first time customers).

[14] In most respects, the district court dismissed the opinion of the expert. Although it did not exclude Dr. Larner's report specifically, it rejected each and every one of its contentions outright. The district court erred first, as it did not make the requisite finding as to whether or not this is the sort of data relied upon experts and Dr. Larner's field in conducting pricing analyses, *see Indian Coffee Corp. v. Proctor & Gamble Co., 752 F.2d 891 (3d Cir. 1985)*, and second, because the uncontested figures actually do indicate substantial price discrimination over time. It is clear enough from recent cases that at the summary judgment

of this price difference. Appendix A of this opinion sets out Dr. Larner's analysis in full, but we note with specificity here the year 1983 in which Feeser paid 22% more for Serv-A-Portion products than did Weis Markets. When Weis paid the higher price, it paid 9% more. In the remaining years, when Feeser received the disfavored price, it paid less than when Weis received the disfavored price; yet the number of times when Weis received the favored price were far greater than those instances in which Feeser received the favored price.

[47]** The comparisons of the Serv-A-Portion transactions in 1984 between Feeser and Tartan Foods and Feeser and Sky Brothers are more dramatic. In that year Feeser paid a higher price for Serv-A-Portion products approximately 80% more often than did Tartan and approximately 75% more often than Sky. When Sky received the favored price, it was 24% lower than the price offered Feeser. In comparison, on the few occasions when Feeser received the favored price, it was only 9% lower than the disfavored prices. Similar, though not as disparate, figures characterize the magnitude of the price difference for Serv-A-Portion products between Feeser and Tartan. *See* Appendix A.

[*1539] Another compelling factor considered by courts ***HN13***[] in determining competitive injury at the customer level is the duration of the price discrimination. Generally, the longer the duration, the more likely injury will be found. *See* *Rose Confections, Inc., 816 F.2d at 385* (seller absorbed freight costs to favored customer's plant for two years); *Hasbrouck v. Texaco, 842 F.2d at 1041* **[**48]** (price differential in effect for several years). The four-year period analyzed by Dr. Larner's report establishes the requisite duration of price discrimination to support an inference of competitive injury. [15]

[49]** We conclude that Dr. Larner's report also presents a question of material fact of competitive injury to Feeser caused by Serv-A-Portion's pricing. For four years, Weis Markets received favored pricing a significant number of times and of a magnitude in a market where the parties acknowledge that customer loyalty is compromised at two cents a case. And, for the one year in which discovery was permitted in regard to Tartan Foods and Sky Brothers, the numbers demonstrate that they too were the benefactors of favorable pricing.

Thus, under both tests, proof of lost sales or profits and substantial price difference over time, the record is adequate to defeat the summary judgment motion concerning whether section 2(a) has been violated.

IV.

Because the record evidence supports the existence of a question of harm to competition under section 2(a), we direct our inquiry to the extent of actual injury incurred under section 4. *J. Truett Payne, 451 U.S. at 562*.

HN14[] While injury to competition dominates concern in demonstrating a section 2(a) violation, to recover under section **[**50]** 4 a plaintiff must prove a causal connection between the price discrimination and actual damage suffered. *Perkins v. Standard Oil Co., 395 U.S. 642, 648, 23 L. Ed. 2d 599, 89 S. Ct. 1871 (1969)*. This actual

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stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

[15] Feeser's economist, Dr. Larner, also prepared an analysis comparing the average price paid by Weis and Feeser for six key Serv-A-Portion products for a six-month time period in 1984. The products used were identified by Weis as being particularly important in the portion control market, and the time period selected was, according to Larner, a conservative one during which he believed that the extent of the price discrimination against Feeser, and in favor of Weis, was not as great as in other relevant time periods. His analysis revealed that Weis received lower prices than Feeser on five of these six key products, and that Weis' resale prices were lower on each of the five products than were Feeser's *even though Weis had a higher margin than Feeser on four of the products*. Thus, Larner's analysis is capable of supporting the inference that, for this six-month period, Weis was passing on some of the savings it received from Serv-A-Portion, savings that allowed it to charge a lower resale price than Feeser while retaining a higher profit margin. As such, this analysis, especially when coupled with evidence that Weis' cost was the basis for its selling price to customers, is highly probative of competitive injury, *see* *Morton Salt, 334 U.S. 37, 47, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)* (a showing that price discrimination was sufficient in amount to influence resale prices was "in itself . . . adequate to show competitive injury"); and bolsters the evidentiary force of the testimony of Feeser's sales people, and Larner's own less detailed pricing analysis for years 1982-1985.

damage requirement has been construed to impose a burden of proof greater than for a section 2 violation, since under that preventative section, evidence need only establish that injury *may* result. J. Truett Payne, 451 U.S. at 562. The plaintiff's proof of damages is facilitated by the rule that once the plaintiff has met its burden of proving the fact of damage, some uncertainty with respect to the amount of damages will not preclude recovery. *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 75 L. Ed. 544, 51 S. Ct. 248 (1931)* (under Sherman Act). The Supreme Court's traditional rule concerning the exactitude required in proving damage is that antitrust plaintiffs are excused from "'an unduly rigorous standard of providing antitrust injury.'" *Texaco v. Hasbrouck, 58 U.S.L.W. at 4814*, *quoting* *J. Truett Payne, 451 U.S. at 565*.

The Supreme Court rejected the so-called **[**51]** automatic damage theory, that a jury could **[*1540]** be permitted to infer the requisite injury and damage under § 4 from a showing of substantial price discrimination, in *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. at 561*. While the Supreme Court has lessened the stringency of proof requirements under § 4 because of the difficulties of showing exactly what position the plaintiff would have been in absent the defendant's violations of the antitrust laws, *id. at 566-67*, at least some attempt to link the discrimination to harm to the plaintiff must be made. In *Hasbrouck*, the Court of Appeals for the Ninth Circuit held that damages may not be based on the amount of discrimination, but on estimates of plaintiffs' sales absent the discrimination. *842 F.2d at 1043* *quoting* *J. Truett Payne, 451 U.S. at 557* (damages awarded on plaintiff's estimate of possible sales minus the violation), *citing* *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 123-24, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*; [16] *see also* *Edward J. Sweeney and Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 118-119 n. 6* **[**52]** ("the amount of illegal discrimination can only be used to quantify damages if the plaintiff demonstrates that favored purchasers lowered their prices in an amount equivalent to the illegal benefit they received.").

The less than stringent proof requirements of § 4 are satisfied **[**53]** here by (a) the direct evidence of lost sales discussed *supra* (b) the evidence that the substantial price discrimination reflected in the resale prices of Feeser and the favored competitors directly resulted in Feeser losing certain sales and losing profits on other sales because it had to cut its margins and (c) Dr. Larner's expert report outlining the magnitude of the price difference. Although Dr. Larner's report did not take the next step and estimate the amount, in dollars and cents, of damages incurred as a result of the price difference, discovery was not extended to this point of calculation.

We recognize that an inference may be drawn, from the wording of the statute, that de minimis violations are *not* actionable: the effect of a price discrimination must be *substantially* to lessen competition. Feeser has, however, by the evidence proffered through the depositions and affidavits and Dr. Larner's report, met its burden of establishing a genuine issue of fact far above the de minimis level as to the existence of the element of the extent of injury caused by Serv-A-Portion's pricing policies to defeat the entry of summary judgment against it.

V.

Sherman Act

[54]** ***HN15***[] *Section 1* of the Sherman Act, *15 U.S.C. § 1 (1914)*, provides, in pertinent part, as follows:

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[16] To estimate its lost sales at trial, Hasbrouck's expert presented a market analysis comparing Hasbrouck's actual prices, volumes and profits to its estimated amount absent the discrimination. The expert utilized economic projections based upon various assumptions such as assuming Texaco did not offer a favored price to its competitors and assuming that Texaco lowered its price to Hasbrouck.

> On appeal, the Supreme Court decided that: even if some portion of some of the respondent's injuries may be attributable to the conduct of independent retailers, the expert testimony nevertheless provided a sufficient basis for an acceptable estimate of the amount of damages.

Hasbrouck, 58 U.S.L.W. at 4814.

> Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . is declared to be illegal. . . .

15 U.S.C. § 1. As with the Robinson-Patman Act, ***HN16***[] for activity to be actionable under the Sherman Act it must result in the type of injury the antitrust laws were intended to prevent and must flow from that which marks the defendant's acts as unlawful. *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333, 1990 U.S. LEXIS 2543 (1990)*. [17] As distinguished **[*1541]** from the Robinson-Patman Act, the target of this ***antitrust law*** is "the protection of competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 329, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. *See* *Zoslaw v. MCA Distributing Corp., 693 F.2d 870, 887 (9th Cir. 1982)* **[**55]** ("the Supreme Court has recognized that the price discrimination that results where buyers seek competitive advantage from sellers encourages the aims of the Sherman Act, a respect in which the Sherman Act is inconsistent with the aims of the Robinson-Patman Act . . . while appellants point to injury to their particular business, they do not make the necessary showing of a substantially adverse effect on competition in the record market in general" to sustain a Sherman Act claim).

In *Tunis Brothers Co. v. Ford Motor Co., 763 F.2d 1482 (3d Cir. 1985),* **[**56]** *vacated*, *475 U.S. 1105, 106 S. Ct. 1509, 89 L. Ed. 2d 909 (1986)*, *on remand*, *823 F.2d 49 (1987)*, *cert. denied*, *484 U.S. 1060, 108 S. Ct. 1013, 98 L. Ed. 2d 979 (1988)*, we found ***HN17***[] the following four elements necessary to sustain a successful Sherman Act violation:

> (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse anti-competitive effects within the relevant product and geographic markets; (3) that the objects of the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

Id. at 1489.

In *Tunis*, on remand from the Supreme Court, we addressed the standard to be employed by district courts on summary judgment motions in antitrust conspiracy cases in light of the Court's then recent decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Particularly **[**57]** relevant to us in *Tunis Brothers*, and of equal importance in the matter *sub judice*, was the Court's statement in *Matsushita* that:

> ***HN18***[] If the antitrust defendant's conduct is consistent both with permissible competition and illegal conspiracy, evidence of such conduct 'does not, standing alone, support an inference of antitrust conspiracy.' 475 U.S. at , 106 S. Ct. at 1357. In such a situation, 'to survive a motion for summary judgment . . ., a plaintiff seeking damages for a violation of [Sherman Act*] § 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.' *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775 (1984))*. In other words, such a plaintiff 'must show that the inference of [illegal] conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff].'

Tunis Brothers v. Ford Motor, 823 F.2d at 50.

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[17] The goals of the Sherman Act and the Robinson-Patman Act also do not mirror one another. In *Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 82, 83, 59 L. Ed. 2d 153, 99 S. Ct. 925 n. 16 (1979)*, the Supreme Court noted that price discrimination with advantageous results for buyers versus a competitive edge for sellers encourages the aims of the Sherman Act, and in that respect, can be viewed as inconsistent with the Robinson-Patman Act.

Thus, **[**58]** under the *Matsushita* standard, we must decide whether the record supports a reasonable inference that Serv-A-Portion's pricing policies resulted from an illegal agreement with Weis Markets rather than independent action by Weis Markets and, if so, whether this concerted activity had an adverse impact on the overall competitive process.

The portion of the record relevant to the element of conspiracy concerns Serv-A-Portion's bid pricing and the activity by Weis Markets in utilizing this system to its advantage. To render a determination as to the possible inference to be drawn from this evidence, however, whether it be consistent with independent or concerted illegal action, would constitute speculation.

The current record does not disclose the element of illegal conspiracy necessary to sustain a Sherman Act violation. We note that Feeser was instructed by the district court's order to confine its discovery request to competition and injury between itself and other food distributors. As we have recognized, proof of a Sherman Act violation requires the additional element of **[*1542]** an illegal conspiracy to exclude a competitor from the market. Feeser, to date, has not had **[**59]** an adequate opportunity to explore the possible existence of this essential element of a Sherman Act claim. [18] Discovery in this case was limited to competitive impact and injury and although we have concluded that Feeser, as the non-movant, has met its burden of producing sufficient evidence to sustain its burden of proof of these elements under the Robinson-Patman Act, we are ill-equipped to render a similar determination under the Sherman Act.

[60]** Our inquiry concerning the sufficiency of the evidence to sustain a Sherman Act violation does not end here. We must pursue the issue we found immaterial to our Robinson-Patman discussion -- has the activity under scrutiny had the requisite anti-competitive effect on the food distribution industry? In this market competition is intense and we must decide whether, within this purview, there is sufficient evidence to demonstrate a question of fact as to whether the vitality of the competition among the participants in the market has been dissipated.

The injury to Feeser has already been discussed.

In addition to the uncontested fact that Serv-A-Portion offered different prices to Feeser than it did to Weis, Tartan Foods and Sky Brothers, the record also reveals discriminatory pricing to other non-party competitors as well. Joanne Straw testified by affidavit that her company, W.R. Straw, Inc., lost sales of Serv-A-Portion products to Pennsylvania State University because Weis Markets' prices to Penn State were lower than Straw's costs from Serv-A-Portion. Joseph Spagnola, a buyer for R&R Provision Company, another participant in the relevant market, testified that he received complaints **[**61]** from his salespeople that they were losing sales of Serv-A-Portion products to Weis Markets because R& R's prices were too high. His investigation revealed that Weis' resale prices on Serv-A-Portion products were as low as R & R's costs for identical Serv-A-Portion products. We are aware that the district court rejected this testimony because it constituted hearsay based upon information from Spagnola's salespeople, but the district court erred in this regard.

In *Williams v. Borough of West Chester, 891 F.2d 458 (3d Cir. 1989)*, we noted that *Fed. R. Civ. P. 56(e)* requires the production, at the summary judgment stage, of evidence "'as would be admissible at trial' . . . and thus 'reducible to admissible evidence.'" *Id. 466 at 12*. We cited *Celotex v. Catrett*, however, in which the Supreme Court rejected the view that the non-moving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *477 U.S. at 324*. We thus concluded that ***HN19***[] hearsay evidence produced in an affidavit opposing summary **[**62]** judgment may be considered if the out-of-court declarant could later

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[18] The dissent notes that the dismissal of Feeser's Sherman Act claim could be affirmed because Feeser's *Rule 56(f)* affidavit did not adequately outline the additional evidence necessary to demonstrate the presence of the conspiracy. *Diss. Op.* at 1546 n. 2. Although the dissent correctly states the law of specificity concerning *Rule 56(f)* affidavits, it is not applicable here. At Serv-A-Portion's request, the district court limited discovery to the elements of competitive injury. Serv-A-Portion's summary judgment motion was directed only to the issue of damage to competition. It would be unfair to impose upon Feeser an obligation to specify the type of evidence it needed to uncover to substantiate the conspiracy element of its Sherman Act claim when it was without notice that the district court intended to consider and resolve the entire Sherman Act claim.

present the evidence through direct testimony, i.e., in a form that "would be admissible at trial." *Williams, 891 F.2d at 465-66 n. 12*. Here, there is no indication that Spagnola's salesforce would be unavailable to testify at trial. The averments of Spagnola's affidavit are capable of proof through admissible evidence and we will consider them now on de novo review.

Reviewing these affidavits, we conclude that Feeser has presented sufficient evidence to raise the inference that competition has been harmed by Serv-A-Portion's discriminatory pricing practices. When three participants in a limited market aver that they were unable to sell their products to customers because other favored competitors **[*1543]** were offering better prices to these customers based on lower costs from Serv-A-Portion, damage to the vitality of the market has been adequately demonstrated for summary judgment purposes. Feeser's demonstration of an overall anti-competitive impact, in combination with the limited opportunity for discovery, compels us to vacate the grant of summary judgment on this Sherman Act claim and **[**63]** to remand to permit further discovery.

VI.

As described in the complaint, Juniata Foods, Inc., is a food distribution business located in Lewistown, Pennsylvania. Juniata is commonly owned with Feeser.

The district court, in a footnote, dismissed Juniata from the lawsuit because it accepted the contention of Serv-A-Portion that Juniata never purchased products directly from Serv-A-Portion. The court determined that the law of this circuit dictates that the plaintiff be a direct purchaser before it may assert a Robinson-Patman claim.

Our controlling cases on this question of standing are *Klein v. Lionel Corp., 237 F.2d 13 (3d Cir. 1956)* and *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)*. In *Klein*, the district court granted summary judgment in favor of the defendant on the ground that because the plaintiff retailer bought the defendant's products through wholesalers and jobbers, it had no cause of action against the defendant. We affirmed, holding that a retailer who purchased electric toy trains and accessories from a middleman **[**64]** was not a "purchaser" within the meaning of the Clayton Act. *Id.* at 15. We subsequently affirmed our holding in *Klein in Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d at 122*, when we dismissed claims for damages against the seller by companies who purchased goods only from a direct buyer of the defendant-seller and not directly from the defendant itself.

Although the district court correctly stated the law of standing, we note that the record does not resolve the question of whether Feeser was in fact an indirect purchaser. Feeser points to evidence proffered by it that Juniata had for many years acquired Serv-A-Portion products with Serv-A-Portion's full knowledge and consent by consolidating its purchases with those of its sister corporation, Feeser. Feeser characterized this aspect of its relationship with Juniata as that of a purchasing agent. Specifically, Feeser refers to the affidavit of John M. Tighe, the controller of both Feeser and Juniata. [19] Tighe avers that Feeser and Juniata are managed by an identical core of senior executives ultimately responsible to a single individual, Lester Miller, the president and sole shareholder of both **[**65]** companies. Tighe then claims that in 1975, Serv-A-Portion agreed with Feeser and Juniata that in order to maximize efficiency all shipments of Serv-A-Portion products would be delivered to Feeser in Harrisburg and all invoices would be billed through a centralized selling and shipping system. Accompanying this system, according to Tighe, was an understanding that a portion of the products sent to Feeser would be redelivered by Feeser to Juniata.

Serv-A-Portion asserts that certain invoices indicate that not only did Juniata buy Serv-A-Portion products from Feeser, but that it paid a premium price for the products acquired from Feeser. Serv-A-Portion argues **[**66]** that to credit Juniata's classification as anything other than as an indirect purchaser is legally indefensible as it would result in a spread of Robinson-Patman liability throughout the distribution chain.

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[19] Serv-A-Portion moved to strike the Tighe affidavit. In its order granting summary judgment, the district court dismissed, save one, all of Serv-A-Portion's motions to strike as moot. In light of our decision that there exists material issues of fact, the findings of mootness concerning the evidentiary questions, newly viable, are necessarily dissolved.

A material fact here is the method by which Juniata acquires its portion-controlled products from Serv-A-Portion. Although the Tighe affidavit is persuasive, the record presents conflicting evidence. Thus, this question of Juniata's standing was improperly resolved at the summary **[*1544]** judgment stage and Juniata will be reinstated as a party plaintiff in this litigation.

VII.

Conclusion

The order of the district court granting summary judgment in favor of Serv-A-Portion will be vacated and the case remanded for further proceedings consistent with this opinion. The pendent state claims, dismissed because the federal question claims were resolved, will be reinstated.

(SEE TABLE IN ORIGINAL)

Concur by: STAPLETON (In Part)

Dissent by: STAPLETON (In Part)

Dissent

[*1545] STAPLETON, Circuit Judge, concurring and dissenting

I agree with the court that the defendants were not entitled to summary judgment on the plaintiffs' secondary-line Robinson-Patman Act claim. However, **[**67]** I respectfully dissent from the court's reversal of the summary judgment in favor of the defendants on plaintiffs' Sherman Act claim. Because Feeser has not met its burden of producing evidence tending to show that the challenged price discrimination affected competition in a relevant market as required under *§ 1* of the Sherman Act, *15 U.S.C. § 1*, I would affirm the summary judgment entered against Feeser on its second claim.

As the court finds, the language of § 2(a) of the Robinson-Patman Act, its legislative history, and Supreme Court precedent interpreting it compel the conclusion that a victim of secondary line price discrimination may show "competitive injury" regardless of the general health of the victim's business or the market in which the victim operated. Moreover, as the court's opinion also demonstrates, Feeser met its burden of producing evidence tending to show a reasonable possibility that Serv-A-Portion's discriminatory pricing practices are harmful to competition between Feeser and the beneficiaries of that discrimination. *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434-35, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983).* **[**68]** It did this both by presenting direct evidence of lost sales, and by producing sufficient evidence of a substantial price discrimination between itself and its competitors over time, so as to implicate the *Morton Salt* inference. *Id.* In the latter regard it is especially significant that Feeser has produced evidence indicating that Serv-A-Portion's discriminatory pricing was passed on by its favored distributors in the form of lower resale prices. *FTC v. Morton Salt, 334 U.S. 37, 47, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)* (a showing that price discrimination was sufficient in amount to influence resale prices was "in itself . . . adequate to show competitive injury"). Finally, by its evidence of lost sales alone, Feeser has produced sufficient evidence to meet its burden at the summary judgment stage of creating a genuine issue of material fact as to whether the challenged price discrimination actually injured it for purposes of § 4 of the Clayton Act. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114, 23 L. Ed. 2d 129, 89 S. Ct. 1562 n. 9 (1969)* (the "burden of proving the fact of damage under § 4 of the Clayton Act is satisfied **[**69]** by . . . proof of some damage flowing from . . . [the antitrust violation]; inquiry beyond this point goes only to the amount and not the fact of damage"); *Falls City, 460 U.S. at 437* (if some of a plaintiff's injury is attributable to price discrimination, defendant is responsible to that extent). [1] I also agree that there is a genuine dispute as to whether Juniata can be considered a "purchaser" with standing to sue under our precedent in *Klein v. Lionel Corp., 237 F.2d 13 (3d Cir. 1956)*, and *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)*, and that the district court therefore erred in entering summary judgment against Juniata on this ground.

[70]** I part company with the court, however, when it concludes that Feeser has tendered **[*1546]** sufficient evidence to raise a genuine issue of material fact as to whether the price discrimination at issue in this case caused an adverse, anticompetitive effect in a relevant market for purposes of *§ 1* of the Sherman Act. To the contrary, Feeser failed to make any significant response to Serv-A-Portion's summary judgment argument that Feeser was unable to show an injury to competition in a relevant market. In particular, Feeser introduced no market analysis of any kind purporting to show that Serv-A-Portion's discriminatory pricing arrangement with Weis (assuming such an agreement existed) [2] produced an adverse, anticompetitive effect within a relevant product and geographic market. This left the record silent with respect to an essential element of Feeser's *§ 1* claim.

[71]** A vertical restraint, such as an agreement between Serv-A-Portion and Weis to deal with each other on more favorable terms than Serv-A-Portion would deal with Feeser, is not a *per se* violation of *§ 1*, but must be dealt with under a rule of reason analysis. *See* *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)* (vertical restraints, such as an agreement between a manufacturer and a dealer to terminate another "price cutting" dealer, are not *per se* violations of *§ 1* absent an agreement between the conspiring dealer and the manufacturer as to resale prices); *Alliance Shippers v. Southern Pacific Transportation Co., 858 F.2d 567, 570 (9th Cir. 1988)* ("vertical arrangements resulting in price discrimination are not *per se* violations of the Sherman Act"); *Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 375 (3d Cir. 1985)* ("that a manufacturer may give preferential pricing and delivery terms to one distributor does not establish a *per se* violation of *section 1* of the Sherman Act even though other distributors suffer losses in sales").

Under a rule of **[**72]** reason analysis, a vertical restraint violates *§ 1* only if either its purpose or its effect is to adversely affect competition in a relevant market. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 26 (3d Cir.)* ("In the context of *§ 1*'s prohibition of conspiracies in restraint of trade, except where practices fall under a judicially created *per se* ban, a finding of illegality presupposes a determination in any

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[1] I cannot agree with the court's suggestion that there are "*de minimis* violations" of the Robinson-Patman Act that do not count as such. I acknowledge that circumstances may exist where price differentials are so *de minimis* that they could not create a reasonable possibility that competition between the favored and disfavored purchasers would be harmed. Where, however, "'the record indicates a price differential substantial enough to cut into the purchaser's profit margin . . . [or one] that, if reflected in a resale price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may be properly indulged.'" *Boise Cascade Corp. v. FTC, 267 U.S. App. D.C. 124, 837 F.2d 1127, 1153 (D.C. Cir. 1988)* (Mikva, J. dissenting) (quoting *Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir. 1965))*.

[2] As was the district court, I am willing to assume, for purposes of analyzing whether Feeser has produced sufficient evidence of adverse competitive impact under *§ 1* of the Sherman Act, that the agreement alleged in Feeser's complaint existed, i.e., a conspiracy between Serv-A-Portion and Weis whereby Weis would receive more favorable prices than Feeser. However, if an independent ground for affirmance were not available, affirmance might well be appropriately based on the lack of record evidence of a conspiracy, given that discovery in this case went on for over a year prior to the order limiting discovery to issues of competitive injury, and Feeser's *Rule 56(f)* affidavit did not indicate what additional discovery it needed to uncover evidence of an illegal agreement. *See* *Dowling v. City of Philadelphia, 855 F.2d 136 (3d Cir. 1988)* ("This court has interpreted *Rule 56(f)* as imposing a requirement that a party seeking further discovery in response to a summary judgment motion submit an affidavit specifying, for example, what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained."); *see also,* *Hancock Industries v. Schaeffer, 811 F.2d 225, 230 (3d Cir. 1987)*; *Koplove v. Ford Motor Co., 795 F.2d 15, 18 (3d Cir. 1986)*; *Mid-South Grizzlies v. National Football League, 720 F.2d 772, 781 (3d Cir. 1983)*, *cert. denied*, ***467 U.S. 1215, 104 S. Ct. 2657, 81 L. Ed. 2d 364 (1984)***. Feeser was thus well apprised of the need to produce adequate evidence on this element of its claim, and filed a, albeit inadequate, *Rule 56(f)* affidavit to respond to this portion of Serv-A-Portion's motion.

given case that the effect upon competition in the marketplace is substantially adverse.") (quotations omitted), *cert. denied*, *439 U.S. 876, 99 S. Ct. 214, 58 L. Ed. 2d 190 (1978)*; *accord* *Garshman v. Universal Resources Holding, Inc., 824 F.2d 223, 231 (3d Cir. 1987)*; *Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482, 1490 (3d Cir. 1985)*, *vacated on other grounds*, *475 U.S. 1105, 106 S. Ct. 1509, 89 L. Ed. 2d 909 (1986)*; *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979)*; *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1346 (3d Cir. 1975)*. Thus, unlike the Robinson-Patman Act, the Sherman Act **[**73]** protects competition in the marketplace and not individual competitors harmed by price discrimination. *Monahan's Marine, Inc. v. Boston **[*1547]** Whaler, Inc., 866 F.2d 525, 529 (1st Cir. 1989)*.

As a result, Feeser cannot defeat summary judgment by merely showing that Feeser and other disfavored distributors lost sales because Weis, Tartan and Sky were able to offer lower prices to end users of Serv-A-Portion portion control products as a result of the pricing advantage they received from Serv-A-Portion, and that Serv-A-Portion realized that this would occur. *Seaboard Supply Co., 770 F.2d at 375*; *Monahan's Marine, Inc., 866 F.2d at 525* (where favoritism in prices for certain dealers was not likely to concentrate the relevant market or drive smaller dealers out, the fact that a disfavored dealer was harmed did not render a price discrimination agreement unreasonable under *§ 1*); *Zoslaw v. MCA Distributing Corp., 693 F.2d 870, 887 (9th Cir. 1982)* (indicating "that the price discrimination which results where buyers seek competitive advantage from sellers encourages the aims of the Sherman Act, a respect in **[**74]** which the Sherman Act is inconsistent with the aims of the Robinson-Patman Act," and affirming a grant of summary judgment against a plaintiff victimized by price discrimination where plaintiff did not show an adverse effect on competition in the relevant market), *cert. denied*, *460 U.S. 1085, 76 L. Ed. 2d 349, 103 S. Ct. 1777 (1983)*. The Sherman Act is not offended by unfair subsidies to some competitors that result in a price war and diminished profits for some disfavored competitors, unless those subsidies lead to diminished price competition in the relevant market and higher prices for consumers. *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, 705 F.2d 1203, 1207-08 (10th Cir. 1982)* (*section 1* allows a supplier to start a "price war," and does not require suppliers to offer the same prices to customers in a given geographical area, absent a purpose to exclude disfavored buyers from the relevant market or some adverse effect on competition in that market), *cert. denied*, *461 U.S. 919, 77 L. Ed. 2d 290, 103 S. Ct. 1903 (1983)*; *cf.* *Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d at 1490 n. 13* ("In addition to **[**75]** showing the existence of a conspiracy or combination, plaintiffs must show an adverse impact on competition to prove a *section 1* claim. The termination of a dealer or rejection of a dealer application, even if done unfairly, does not by itself establish injury to competition.").

Because the Sherman Act protects competition and not competitors, Feeser had to show that the complained of price discrimination had an adverse effect on competition in a relevant market defined by product and geographic scope. [3] **[**77]** On the record before us, however, it would be impossible to rationally conclude that Serv-A-Portion's pricing practices were intended to [4] **[**78]** or were **[*1548]** likely to lead to a substantial lessening of

[3] The record is unclear as to the precise geographic area allegedly affected by the unlawful agreement alleged by Feeser. Nor is it apparent whether Feeser contends that the product market is all portion control products or whether it contends that Serv-A-Portion portion control products can in themselves constitute a product market for *§ 1* purposes. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 27 (3d Cir. 1978)*, (quoting *Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))* ("The outerbounds of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). Feeser does advance the proposition that Serv-A-Portion products occupy a unique niche in the portion control market because of their combination of moderate price and good quality. This proposition suggests that if Serv-A-Portion's distributors fail to maintain their prices at a reasonable level, end users will either switch to higher quality products (made price competitive because of Serv-A-Portion's increased prices) or considerably cheaper products (the rise in Serv-A-Portion's prices not being justified by the quality difference between its products and cheaper ones).

[4] With respect to intent, Feeser's amended complaint alleges only an agreement to engage in price discrimination, and does not allege that this agreement was designed to drive it from the portion control product market altogether. Compare *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1347 (3d Cir. 1975)* ("A combination of distributors, which through unfair practices eliminates a competitor and leaves it in such a condition that it lacks the ability to continue business as an interbrand competitor, has an adverse effect on competition.").

competition in some designated market. Indeed, there is nothing in the record indicating that the complained of price discrimination did anything other than spark a vigorous round of competition in a portion control market which was already extremely competitive. Nothing in the record indicates that disfavored distributors like Feeser could not easily transfer to another manufacturer of portion control products. The only disfavored distributor that dropped Serv-A-Portion portion **[**76]** control products was R & R, and R & R did not retreat from competition with Weis in the portion control market. Instead, it began to distribute other brands of portion control products, and thus increased interbrand competition in the relevant market. The fostering of just such competition is, of course, the "primary concern of the antitrust laws." *Business Electronics Corp., 485 U.S. at 726*. [5] Nor is this a case where a plaintiff without market power was disfavored by an agreement between a supplier and a powerful distributor who forced the agreement on the supplier so as to harm the plaintiff. There is no evidence that Feeser is smaller than Weis, or has less market power than Weis. *Monahan's Marine, 866 F.2d at 529*.

Rather, the only inference that could be drawn from this record would be that the discriminatory pricing was unlikely to have an adverse effect on the portion control market (1) because disfavored distributors like Feeser could easily begin to distribute other brands of portion control **[**79]** products; (2) because Serv-A-Portion, according to Feeser, favored not one, but three distributors of its own products and both the intrabrand competition among them and the interbrand competition in the market would prevent them from exploiting their status in a way that would hurt consumers; and (3) because there are no discernible barriers to entry to this market.

I thus conclude that the present record does not reflect a material dispute of fact as to whether the alleged agreement between Serv-A-Portion and Weis had an adverse impact on competition in a relevant market. I would affirm the judgment in favor of the defendants on the Sherman Act claim.

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In its briefs to the district court and this court, Feeser has, at best, vaguely alleged that Serv-A-Portion intended to hamper Feeser's ability to compete with Weis in sales of Serv-A-Portion's portion control products. No record evidence supports this assertion, however. Further, the proposition that Serv-A-Portion would intend to do this seems facially implausible. As Judge Breyer has explained, a "supplier himself typically has an economic interest in encouraging competition among his dealers, and thus preventing the emergence of any 'dealer monopoly.' Other things being equal, a profit-maximizing dealer monopolist would set retail prices that, from the supplier's perspective, are too high and unduly restrict the product's sales." *Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 526 (1st Cir. 1989)*; *see also* *Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 56, 53 L. Ed. 2d 568, 97 S. Ct. 2549 & n. 24 (1977)* (indicating that economists believe that once a manufacturer sets its own price, the manufacturer desires intrabrand competition among its distributors since this leads to lower retail prices and increased sales). Most important, as I discuss *infra*, even if Serv-A-Portion intended to give Weis an unfair advantage over Feeser, this would not violate *§ 1* unless it was part of a plan to cause some adverse effect on competition in a relevant market. The Sherman Act is not designed as a general prohibition on unfair business practices, it is designed to protect consumers and absent some purpose to harm them or some adverse effect upon their interests, the Act is not concerned with harm to a particular competitor.

[5] See also *Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. at 52 n. 19* ("Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of ***antitrust law***. . . . The degree of intrabrand competition is wholly independent of the level of intrabrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.").

Guthrie v. Genesee County

United States District Court for the Western District of New York

August 5, 1990

No. Civ-79-142

Reporter

494 F. Supp. 950 *; 1990 U.S. Dist. LEXIS 13186 **; 1980-81 Trade Cas. (CCH) P63,605

WILL S. GUTHRIE, WALTER C. GUTHRIE, WALTER C. GUTHRIE, JR. GUTHRIE AIRCRAFT, INC., BATAVIA AVIATION, INC., Plaintiffs v. GENESEE COUNTY, NEW YORK PRIOR AVIATION SERVICE, INC., Defendants

Core Terms

airport, plaintiffs', private remedy, Aviation, defendants', motion to dismiss, antitrust, anti trust law, individual plaintiff, state action, air carrier, county airport, landing field, anticompetitive, authorization, exemption, hangar, legislative history, allegations, terminal, lease, private cause of action, antitrust violation, decisions, factors, proviso

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

For the purposes of motions to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court must accept the plaintiffs' factual allegations as true.

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

Section 4 of the Clayton Anti-Trust Act provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

A plaintiff must allege an injury directly resulting from a violation in order to make out a claim under the anti-trust laws.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Public Contracts Law > Types of Contracts > Personal & Real Property Leases

Transportation Law > Air & Space Transportation > Airports > General Overview

Governments > Local Governments > Duties & Powers

Transportation Law > Air & Space Transportation > General Overview

HN4[] **Types of Contracts, Lease Agreements**

The county may lease, or sub-lease the real property or lease, contract or otherwise agree, on an exclusive or non-exclusive basis, for the entire operation of such airport or landing field, or of any part thereof, or for the rendering of various services, or the conduct of business activities, on or at said airport or landing field subject to the provisions of section three hundred fifty-two-a of this chapter; provided, however, that no such lease or contract shall be made until the governing body of the municipality shall have held a public hearing in respect thereto on at least ten days notice published in two newspapers having general circulation in the municipality, and provided further that any lease of an entire or portion of an airport or landing field, together with the facilities thereon, or contract for the operation of an airport or landing field or portion thereof shall be for a term not exceeding forty years and shall expressly provide that the said airport or landing field shall be used only for aviation purposes and for other purposes required for or necessary to the efficient and successful operation of an airport or landing field, upon such terms as shall require the operation of the same as a public airport or landing field for the general use of the public and for the benefit of such city, county, village or town. *N.Y. Gen. Mun. Law § 352(5)*.

Transportation Law > Air & Space Transportation > Air Traffic Control > Facilities

Transportation Law > Air & Space Transportation > Registration

HN5[] **Air Traffic Control, Facilities**

Section 308 of the Federal Aviation Act, 49 U.S.C.S. § 1349(a), provides in relevant part that there shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Governments > Legislation > Interpretation

HN6[] **Federal & State Interrelationships, Federal Common Law**

The fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Rather, whether a private remedy should be implied is a matter of statutory construction and the principal inquiry is whether Congress intended to create the private right of action asserted.

Counsel: **[**1]** DEMPSEY & DEMPSEY (JOHN M. DEMPSEY, ESQ., of Counsel), Buffalo, New York, for Plaintiffs.

PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER (ALEXANDER C. CORDES, ESQ. & PAUL K. STECKER, ESQ., of Counsel), Buffalo, New York, for Defendant Genesee County.

DIEBOLD & MILLONZI (EDWARD J. WAGNER, ESQ., of Counsel), Buffalo, New York, for Defendant Prior Aviation Service, Inc.

Judges: John T. Curtin, United States District Judge.

Opinion by: CURTIN

Opinion

[*952] This action relates to the operation of the Genesee County Airport which is located near Batavia, New York, and owned by Genesee County ["County"], one of the defendants. Presently before the court for decision are the motions to dismiss for failure to state a claim brought by the County and Prior Aviation Service, Inc. ["Prior"], the other defendant. ***HN1***[] For the purposes of these motions to dismiss under *Rule 12(b)(6)*, the court must accept the plaintiffs' factual allegations as true.

The individual plaintiffs in this case, Will S. Guthrie, Walter C. Guthrie, and Walter C. Guthrie, Jr., are the sole shareholders and officers of the two corporate plaintiffs, Guthrie Aircraft, Inc. and Batavia Aviation, Inc. On or about May 28, 1977, the County terminated Batavia Aviation as **[**2]** the fixed base operator of the airport and, on July 1, 1977, entered into an agreement with the defendant Prior pursuant to which Prior became the fixed base operator at the airport. [1] The complaint alleges that the defendants have contracted, combined and conspired to restrain trade in violation of the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2*, with the intent to eliminate the plaintiffs as competitors in the air charter business. Plaintiffs also claim that the County has granted Prior an exclusive right to use the Genesee County Airport for air carrier activity, and has otherwise discriminated against the plaintiffs, in violation of the Federal Aviation Act ["FAA"], *49 U.S.C. §§ 1301, et seq.*, and § 1349(a) in particular.

Plaintiffs' **[**3]** complaint includes six counts, all of which contain factual allegations relating to the defendants' alleged exclusion of the plaintiffs from the Genesee County Airport. A summary of the factual situation is necessary for an understanding of defendants' motions. Sometime after the County terminated its agreement with Batavia Aviation, the County solicited bids for a contract to operate the airport, an effort which was unsuccessful. The County, however, subsequently accepted an offer by Prior to lease and operate the airport and, as noted above, Prior began its operation as fixed base operator on or about July 1, 1977. The plaintiffs allege that thereafter the County, together with Prior, forced Batavia Aviation and Guthrie Aircraft out of the airport terminal building and that the defendants have refused to allow plaintiffs to have any office space or "client information" in the terminal. It is also alleged that the County, with the knowledge and consent **[*953]** of Prior, forced plaintiffs to remove their tools from the maintenance hangar at the airport, although all other parties renting hangars at the airport were allowed to continue their use of the maintenance hangar. Moreover, the County, **[**4]** with the consent of Prior, is said to have informed the individual plaintiffs on June 27, 1977 that Aprils Instrument Service, Inc. ["Aprils"], occupying the second floor of the maintenance hangar, must vacate by June 30, 1977, ultimately resulting in the removal of Aprils and the "forced sale" of the individuals' 51% controlling interest in Aprils, at a loss of $ 25,000. Plaintiffs also claim that Prior, immediately upon entering its agreement with the County, told plaintiffs that Prior would need *all* of the space at the airport for its own operations, which is allegedly untrue.

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[1] The district court in *Pinehurst Airlines, Inc. v. Resort Air Services, Inc., 476 F.Supp. 543, 553 (M.D.N.C. 1979)*, provided a description of a fixed base operator ["FBO"]: "An FBO provides services similar to those that a service station provides for those who operate automobiles."

In further steps to force plaintiffs out of the airport, plaintiffs allege that Prior, in concert with the County, raised the hangar rent 100% for plaintiffs only, and imposed an additional 100% surcharge upon the plaintiffs alone. This is said to have forced plaintiffs out of the Genesee County Airport. When, to avoid this higher rent and surcharge, the plaintiffs moved their airplanes to private property adjacent to airport runways, the defendants allegedly erected a snowfence; as a result plaintiffs' access to the airport was blocked and one airplane was "trapped" in a hangar and rendered useless to **[**5]** plaintiffs, who consequently had to sell the airplane at a loss.

The plaintiffs also claim that the County has refused to allow the Exxon Corporation to deliver any aircraft fuel to Batavia Aviation or to allow Batavia Aviation to deliver fuel on its own. Rather, the County has allegedly forced the plaintiffs to allow it to purchase fuel from Exxon under Batavia Aviation's name.

Finally, the plaintiffs allege that the County has received in the past federal funds to improve its airport pursuant to an agreement with the federal government wherein the County agreed not to discriminate between air carriers using the facility. Plaintiffs allege that the County and prior have conspired to violate that agreement and have, in fact, discriminated against Batavia Aviation with respect to rental and other rates at the Genesee county Airport. Indeed, plaintiffs allege that the County has entered into an agreement with Prior granting Prior an exclusive right to engage in air carrier activity at the airport, in violation of the FAA. The complaint also states that, at the time of its termination, Batavia Aviation was the only certified air carrier using the Genesee County Airport but that Prior **[**6]** is also a certified air carrier. The plaintiff's claim that the County and Prior have conspired to eliminate and prevent plaintiffs' air carrier business at the airport. [2]

[7]** The defendants have moved to dismiss plaintiffs' claim on the following grounds. First, the individual as opposed to the corporate plaintiffs are said to lack standing because the complaint fails to allege any direct injury from the alleged antitrust violation which they have suffered as a result of the defendants' actions. Second, the defendants contend that the Sherman Antitrust Act does not apply to conduct undertaken by a local government, like Genesee County, pursuant to state legislation which authorizes a restriction of competition. Prior argues additionally that the alleged conduct of the defendants does not violate the antitrust laws in any case. Third, the defendants argue that the plaintiffs have no **[*954]** standing under the FAA because no private right of action exists for the violation of the Act alleged in the complaint. Moreover, assuming that a private cause of action exists under the FAA, defendants assert that plaintiffs' claim is subject to the primary jurisdiction of the Federal Aviation Administration, and this court should decline to exercise its jurisdiction pending a determination by that agency. Finally, the defendants contend that since no valid federal claim is **[**8]** alleged, the state and common law claims should also be dismissed.

STANDING OF INDIVIDUAL PLAINTIFFS

The appropriate question to begin with is the standing of the individual plaintiffs. Where a statutory claim is alleged, the starting point in resolving such a question is the language of the statute. *See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)*. ***HN2***[] Section 4 of the Clayton Anti-Trust Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ." *15 U.S.C. § 15*. For the purposes of this motion, the pertinent language is "injured in his business or property." Although the language itself provides few limitations, judicial interpretations have consistently required that ***HN3***[] a plaintiff allege an injury *directly* resulting from a violation in order to make out a claim under the anti-trust laws. *Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292, 294 (2d Cir. 1958)*.

[2] The defendants have categorized the various counts in plaintiffs' complaint as setting forth only two federal claims, a Sherman Act claim in Count I and an FAA claim in Count VI, the rest being pendent state claims. Although plaintiffs' complaint could be more clearly drawn, a broad reading suggests that all of the counts are interrelated and form part of their antitrust and FAA claims. Each count clearly realleges each allegation previously made in the preceding counts. Moreover, at the very least, counts II, III, and IV elaborate and form part of the antitrust claim and Count V appears related to plaintiffs' FAA claim. To the extent that distinct state law claims are also presented *(e.g.,* defendants characterize Count V as a breach of contract claim), defendants' motion to dismiss these must fail because of the court's decision as to the antitrust claim.

Neither shareholders, whether few or many, nor officers or directors of a corporation have a cause of action where the alleged antitrust violation interferes **[**9]** with and injures solely the business conducted by that corporation. *Bookout, supra; Mendenhall v. Fleming Co., Inc., 504 F.2d 879, 881 (5th Cir. 1974)*; *Martens v. Barrett, 245 F.2d 844, 846 (5th Cir. 1957)*; *Gerli v. Silk Assoc. of America, 36 F.2d 959 (2d Cir. 1929)*; *see also Vincel v. White Motor Corp., 521 F.2d 1113, 1119 (2d Cir. 1975)*. Such an interference would be a corporate injury for which the corporation may seek redress and not the individual shareholders and officers, even though they may be the principals of the corporation and suffer an adverse economic impact. Nor may a shareholder allege as an injury that he was required to sell his corporate stock at a depressed value because of an antitrust violation, for such a loss, though a real economic harm, is indirect and is duplicative of the corporation's claim. *Bookout, supra; Mendenhall, supra; Martens, supra.* Application of these principles requires an examination of the injuries alleged in plaintiffs' complaint.

After a review of the injuries itemized in plaintiffs' complaint, I find that none alleges a direct injury to the individual plaintiffs as required by the antitrust laws. First, the forced **[**10]** sale of the plaintiffs' "majority interests in Aprils Instrument Services, Inc., at a loss of approximately 25000 dollars," para. 14(J)(a), is an injury in the form of the diminution in the value of ownership, which is not a direct injury to the individuals. Second, the plaintiffs' allegations of "defendants' failure to allow [plaintiffs] office space in the terminal facility," para. 14(J)(c); of the defendants' interference with plaintiffs' right to contract for aviation fuel with Exxon, para. 24; and of the defendants' usurpation of a gasoline contract between Exxon and Batavia Aviation, para. 27, are all interferences and injuries which may be alleged only by the corporate and not the individual plaintiffs. Third, the loss of $ 10,000 in the sale of a plane trapped in a hangar due to the conspiratorial actions of the defendants, para. 20, is similarly an injury for which only one of the companies controlled by the plaintiffs may seek redress, as the complaint reads now; there is no factual allegation that one of the individual plaintiffs owned this airplane. Finally, without reaching whether an allegation that a party has been forced to incur attorneys' fees is an injury sufficient **[**11]** to support an antitrust action, plaintiffs' allegation that they have had to incur attorneys' fees in connection with this dispute is not recognizable because it would be the claim of the corporation in any case.

[*955] Therefore, the defendants' motion to dismiss this action insofar as it is maintained by the named individuals is granted.

STATE ACTION EXEMPTION

In a series of recent decisions, the Supreme Court has considered the extent to which the federal antitrust laws are applicable to anticompetitive conduct sanctioned in some way by state authority. *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)*; *Bates v. State Bar of Arizona, 433 U.S. 350 (1977)*; *Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)*; *Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)*. These decisions have construed the earlier decision of *Parker v. Brown, 317 U.S. 341 (1943)*, in which the Supreme Court held that the antitrust laws were not intended to apply to state action. The *City of Lafayette* decision provides the most guidance in resolving whether the *Parker* doctrine of state action immunity insulates the defendants in this case.

In *City of Lafayette,* **[**12]** the Supreme Court determined that a city is not automatically entitled to the state action exemption by virtue of its status as a state governmental entity. Rather, the plurality opinion "concluded that the *Parker* doctrine exempts only anti-competitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, *pursuant to state policy to displace competition with regulation* or *monopoly public service." City of Lafayette, supra, at 413* (emphasis supplied). Further explanation was provided in the plurality opinion. In order to assert a state action defense to an antitrust suit, a municipality would not necessarily have to "be able to point to a specific, detailed legislative authorization." But,

while a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind **[**13]** of action complained of." 532 F.2d, at 434.

Id., at 415.

Thus, a court must examine the state statute which purportedly contains the authorization for the anti-competitive conduct alleged. *See, e.g.,* *Kurek v. Pleasure Driveway and Park District of Peoria, 557 F.2d 580, 590 (7th Cir. 1977)*, *remanded for reconsid., 435 U.S. 992 (1977)*, *reinstated,* *583 F.2d 378 (7th Cir. 1978)*. The County and Prior point to Sections 350 and 352 of the New York General Municipal Law as providing the state authorization for their conduct necessary to invoke the state action exemption. The state legislature has authorized the local legislative body of a county to establish and operate an airport in § 350 of the General Municipal Law (Mckinney's 1974). In § 352, the legislature has delineated the powers which the County may exercise as an airport owner. The subsection pertinent to this inquiry is § 352(5) which provides in relevant part that the County may:

HN4[] Lease, or sub-lease the real property or lease, contract or otherwise agree, on an exclusive or non-exclusive basis, for the entire operation of such airport or landing field, or of any part thereof, or for the rendering of various services, **[**14]** or the conduct of business activities, on or at said airport or landing field subject to the provisions of section three hundred fifty-two-a of this chapter; provided, however, that no such lease or contract shall be made until the governing body of the municipality shall have held a public hearing in respect thereto on at least ten days notice published in two newspapers having general circulation in the municipality, and provided further that any lease of an entire or portion of an airport or landing field, together with the facilities thereon, or contract for the operation **[*956]** of an airport or landing field or portion thereof shall be for a term not exceeding forty years and shall expressly provide that the said airport or landing field shall be used only for aviation purposes and for other purposes required for or necessary to the efficient and successful operation of an airport or landing field, upon such terms as shall require the operation of the same as a public airport or landing field for the general use of the public and for the benefit of such city, county, village or town.

Section 352(5) (McKinney's 1974). This subsection does authorize subdivisions of the state to enter **[**15]** into exclusive agreements for the operation of airports, for the rendering of various services or for the conduct of business activities at the airport. The terms of such agreements, however, must provide for the operation of the airport as a *public* airport for the *general use of the public.*

The defendants have not convinced the court that the legislature "contemplated" [3] the action allegedly engaged in by the defendants, nor that the State of New York has manifested in § 352(5) a policy to displace competition with regulation or monopoly public service. [4] **[**17]** First, no state regulatory interest has been identified by the defendants, nor does it appear that the alleged actions of the County and Prior relate to any identifiable regulatory interest. *See City of Fairfax v. Fairfax Hospital Assoc., 598 F.2d 835 (4th Cir.)*, *on remand from 435 U.S. 992 (1978)*, *vacating,* for reconsideration in light of *City of Lafayette, 562 F.2d 280 (4th Cir. 1977)*. *Section 352* certainly reflects no essential state regulatory concern, and there is certainly no indication that the State is "actively

[3] "Contemplated" is not a precise word, but the Supreme Court was not explicit in defining the criteria to be employed in determining whether the challenged municipal activity came within the intent of the state legislature. Although specific articulation of legislative intent was not required to come within the *Parker* doctrine, the court was not particularly expansive in its discussion of the level or type of legislative intent which would be required. For the instruction of the Fifth Circuit in *Lafayette, see* *532 F.2d 431, 434-35*.

[4] In *Goldfarb, supra,* the Supreme Court held that "the threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is *required* by the State acting as sovereign." *421 U.S., at 790* (emphasis supplied). *See also* *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority, 451 F.Supp. 157, 166 (S.D.N.Y. 1978)*. This so-called compulsion test may be more appropriate to defendants who are private parties rather than a municipality or state subdivision like the County, because there is usually some delegation of authority by the State to the municipality, however ambiguous. *See,* Note, ***Antitrust Law*** *- Municipal Immunity - Application of the State Action Doctrine to Municipalities,* 1979 Wis. L. Rev. 570, 590-92 (1979). It is apparent that the Supreme Court's approach and instruction in *City of Lafayette,* as set forth *supra,* is more appropriate in this case, given the status of the County.

supervising" any state policy as required by *California Retail Liquor Dealers Association* **[**16]** *v. Midcal Aluminum, Inc.,* 48 U.S.L.W. 4238, 4240 (Mar. 3, 1980). 5

Second, *§ 352* does not evince an unambiguous intent on the part of the state legislature to replace competition with monopolistic public service. *Section 352* reveals that the state legislature believed that subordinate governmental units should have substantial leeway in determining how to operate their airports. This delegation of authority, as set out in *§ 352(5)*, permits a governmental entity such as Genesee County to enter into certain exclusive agreements and contracts in connection with the operation of, and the providing of services at, its airport. Such a delegation of authority is no doubt important to the way in which various governmental and proprietary functions are carried out in a state **[*957]** system. 6 However, **[**18]** *§ 352(5)* expresses on its face the concern and direction of the State that any agreement or contract entered into by the County be subject to the proviso that the airport be operated as a public airport for the general use of the public. With this express proviso, *§ 352(5)* does not by itself show that the State contemplated anticompetitive conduct by a county like Genesee County. If anything, the subsection suggests that the State, after balancing the relevant factors, decided that its paramount concern was that the municipal airports of the State be open to use by the public and that it should limit a county's power to make exclusive agreements. Under these circumstances, antitrust scrutiny would appear proper and warranted. *Pinehurst Airlines, Inc. v. Resort Air Services, Inc., 476 F.Supp. 543 (M.D.N.C. 1979)*.

[19]** In *Pinehurst Airlines,* the plaintiff alleged *inter alia* that a county board of commissioners, the county's airport committee, and a private corporation had violated the federal antitrust laws by giving that private corporation a monopoly at the county airport as the only fixed base operator and by conspiring to prevent the plaintiff from obtaining fixed base operator status or, at the least, from expanding its own operations at the airport. Motions similar to those in this case were brought by the defendants, and the court refused to dismiss the federal antitrust claim on the grounds of the *Parker* doctrine. In *Pinehurst,* the language of the statute authorizing the county to contract for the provision of various services was not as broad apparently as *§ 352(5)*. However, the court focused on the proviso in the North Carolina statute, analogous to the proviso in *§ 352*, which guaranteed equal public use of the airport. *Id., at 554*. The court was persuaded, as I am in this cases that one can infer from such language that the state intended that substantial limits be placed on the County's authority to operate its airport, especially with regard to ensuring that the **[**20]** facilities of the airport be open to public use. *See, also Woolan v. Surtran Taxicabs, Inc., 461 F.Supp. 1025, 1039 (N.D.Tex. 1978)*. Therefore, defendants' argument that the state legislature, in giving the County in *§ 352(5)* the authority to operate an airport, contemplated the exclusive agreement and other anticompetitive conduct alleged in this case is not persuasive.

The defendants have relied on *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir.)*, *cert. denied, 385 U.S. 947 (1966)*, to support their position. That decision, however, predated the recent Supreme Court cases of *Goldfarb, Bates,* and, especially, *City of Lafayette.* The decision in *E. W. Wiggins* was based on the theory that a blanket *Parker* antitrust immunity applied to any governmental action. That is simply no longer the law.

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5 The court's most recent pronouncement in *California Retail Liquor* set forth two standards to be used in applying the *Parker* doctrine:

First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

California Retail Liquor, 48 U.S.L.W., at 4240.

6 *See City of Lafayette, supra,* at 418,421-23 (Burger, C.J., concurring). Chief Justice Burger framed the issue as "whether the Sherman Act reaches the *proprietary* enterprises of municipalities," *id., at 422* (emphasis supplied), and would hold that it does. Focusing solely on the nature of the activity, that is, whether it is governmental or proprietary, has some limitations as a tool of analysis. However, Burger's opinion is not unpersuasive insofar as it insists that a State, or municipality, be treated as any other antitrust defendant if it is engaged in an activity of a proprietary or business type nature, rather than of a regulatory governmental nature.

Even if, after a reading of § 352(5), one were to find the language of that provision to be ambiguous as to the scope of the State's authorization, the defendants have provided no explanatory legislative history which would support their interpretation of the statute. Analysis of the legislative history behind a *state* statute is difficult **[**21]** under most circumstances. In this case, where the language which purportedly authorizes the conduct complained of is subject to a limiting proviso, the failure to provide supporting legislative history is not helpful.

As noted above, the defendant Prior also urges that the alleged activity of the defendants is not a violation of the antitrust laws. At least at this stage of the litigation, this argument must fail. The court must assume that Prior has an agreement **[*958]** with the County by which it (1) has become the exclusive fixed base operator at the airport, able to allocate and price space at the facility as it wishes, and (2) has obtained the exclusive right to use the airport facilities as an air carrier. There is a tremendous potential for anticompetitive abuse with such an arrangement, *see* Pinehurst Airlines, supra, at 553, and plaintiffs' complaint alleges such abuses. Prior's argument that an exclusive lease arrangement with a governmental agency is not an antitrust violation is based largely on the *E. W. Wiggins* opinion, already distinguished by the court. The court notes as well that a conspiracy to eliminate competition in obtaining an exclusive contract may indeed be **[**22]** an antitrust violation. *See* United States v. Yellow Cab Co., 332 U.S. 218, 229 (1947). Although the facts in *Yellow Cab* are somewhat different from those revealed so far in this case, the allegations of conspiracy in plaintiffs' complaint raise the question of whether defendants have entered into an agreement with the knowledge and intent that competition be restricted at the airport, especially since, at least in their memorandum of law, plaintiffs question the competitive nature of the bidding process which resulted in Prior's contract. At least at this stage in the litigation, defendants have not shown plaintiffs' failure to state a claim under the antitrust laws.

To conclude, the connection between the legislative grant of authority to the County in § 352 and its alleged use in this case is simply too tenuous to conclude that the County's actions were within the intended scope of activity authorized by the State of New York. [7] Prior, as a private non-governmental party, has a different status than the County. However, if the County itself cannot claim to be "exempt" from the antitrust laws by virtue of its status, then *a fortiori* Prior has no greater claim to the **[**23]** state action exemption in this case, especially since it is alleged that Prior and the County have acted in concert to prevent plaintiffs from competing with Prior or, in other words, have engaged in the same activity. Therefore, defendants' motion to dismiss plaintiffs' antitrust claim is denied.

FEDERAL AVIATION ACT CLAIM

This aspect of the defendants' motions to dismiss requires the court to determine whether a private cause of action may be implied under ***HN5***[] § 308 of the Federal Aviation Act, 49 U.S.C. § 1349(a). That section provides in relevant part that "there shall be no exclusive right for the use of any landing area or air navigation facility upon **[**24]** which federal funds have been expended." The plaintiffs contend that this provision has been violated and that they have a private remedy under its terms. [8]

As in the area of the *Parker* state action exemption, the Supreme Court has recently issued a number of decisions which set forth the factors to be considered in deciding whether a private remedy should be implied when the statute is silent as to whether **[**25]** or not one exists. *See, e.g.,* Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979); Piper v. Chris-Craft Industries, Inc., 430 U.S. 462

[7] The very recent case of *California Retail Liquor, supra,* n.5, in no way changes my decision. If anything, it indicates a continuing trend of the Supreme Court to apply the *Parker* doctrine narrowly and, although no state subdivision was involved in that case, it reinforces my decision in this case that there should be no finding of antitrust immunity.

[8] It is not entirely clear from plaintiffs' complaint whether plaintiffs seek only injunctive relief for the alleged violation of § 1349(a), or damages as well. A review of 49 U.S.C. § 1487, the section which authorizes the government and, in a very limited situation, a private party, to seek enforcement of the Federal Aviation Act, suggests that only injunctive relief would be obtainable by the plaintiffs, assuming *arguendo* that a private remedy exists for a violation of 49 U.S.C. § 1349(a). A court appears authorized under § 1487 to direct only injunctive relief, and there is no mention of damages at all.

(1977); Cort v. Ash, 422 U.S. 66 (1975). These decisions emphasizes that **HN6**[] "the fact that a federal **[*959]** statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon, supra, at 688. Rather, whether a private remedy should be implied is a matter of statutory construction and the principal inquiry is "whether Congress intended to create the private right of action asserted." Touche Ross, supra, at 568, 575; *Cannon, supra,* at 588. My review of the factors to be weighed by the court, as set forth in *Cort, supra,* indicates that no private cause of action exists under 49 U.S.C. § 1349(a).

First, there is no indication that this statutory provisions was enacted for the benefit of a special class of which the plaintiffs are members, which is the threshold question under *Cort, Cannon, supra,* at 689. In contrast to the cases in which the courts have implied a cause of action where none was expressly **[**26]** provided by statute, the language of § 1349(a) does not explicitly confer a special benefit on a class of persons in plaintiffs' position. *Compare* the language of § 1349(a) with, for example, the statutory provision at issue in Cannon, supra (§ 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681) and in Allen v. State Board of Elections, 393 U.S. 544, 554-55 (1969) (§ 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c). In each of those contexts, Congress identified the class which it intended to benefit by the enactment of a law creating federal rights. Section 1349(a) however, is more in the nature of a law for the protection of the general public, a provision which is part of a statutory scheme to monitor how federal funds are spent. Although § 1349 does prohibit exclusive rights to the use of airfields upon which federal monies have been spent, this does not constitute as compelling a reason to infer a private remedy as where a class of persons has been granted certain rights by statute. Cannon, supra, at 690-94.

Second, the court has been shown no legislative history evidencing any purpose to provide a private cause of action. Although, **[**27]** typically, there will not be a significant amount of legislative history where the statute does not expressly create or deny a private remedy, *id.,* supra, at 694, the plaintiffs' position is not helped by their failure. *Compare,* id., at 694-703, in which the Supreme Court analyzed in great detail the legislative history supporting implication of a private remedy in that case. Moreover, the statutory scheme of the FAA, of which § 1349(a) is a part, reveals that Congress did create a provision by which an aggrieved private party can obtain injunctive relief against a violation of § 401(a) of the FAA, 49 U.S.C. § 1371(a), which precludes air carriers from engaging in air transportation without certification. *See* 49 U.S.C. § 1487. Thus, Congress certainly knew how to provide a private remedy when it wished to do so. Touche Ross, supra, at 571-72. Given as well the extensive government enforcement scheme, the court should be slow to expand the private enforcement remedies beyond what Congress authorized. National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974); Viking Travel, Inc. v. Air France, 462 F.Supp. 28, 37 **[**28]** (E.D.N.Y. 1978).

Where these first two factors strongly point to the lack of any Congressional intent to create a private remedy, the Supreme court has recently a suggested that the an remaining two factors of the *Cort v. Ash* analysis have little relevance to whether a court should imply such a remedy. Touche Ross, supra, at 575. Although I believe the third *Cort* factor, whether a private remedy is necessary "to effectuate the purpose of the section," *Cort, supra,* at 78, should continue to be an important inquiry in such situations, the court is not persuaded in this case that implication of a private remedy is mandated in any way by the purpose of § 1349(a). A reading of § 1349(a) in its entirety reveals that this section concerns the expenditure of federal **[*960]** funds on landing areas and the FAA's, responsibilities in determining that such landing facilities are necessary for use in commerce or in the interests of national defense. While the section also directs that no exclusive rights to use these landing areas be granted, there is no strong remedial purpose reflected in § 1349(a) analogous to, for example, enforcement of Title IX in *Cannon.* There is as well an **[**29]** extensive government enforcement scheme, *see* 49 U.S.C. § 1487, and under all these circumstances there is not any compelling need for the court to imply a remedy in this case.

Finally, the court takes note of two cases. First, the plaintiffs rely heavily on *Niswonger v. Air Aviation, Inc., 411 F.Supp. 763 (E.D.Tenn. 1975)*, *aff'd without op., 529 F.2d 526 (6th Cir. 1976)*, a case ink which the district court did find a private remedy. under § 1349(a). The relevant portion of that case, however, pre-dates *Cort v. Ash* and the more recent Supreme Court decisions as to when private remedies should be implied. It is clear that in a the *Niswonger* court did not consider whether Congress intended to provide a private remedy and the persuasiveness of *Niswonger,* therefore, is necessarily discounted. *See* Viking Travel, supra, at 35. A second case should be noted briefly. The Supreme Court has recently vacated the judgment of the United States Court of Appeals for the

Seventh Circuit in *Bratton v. Shiffrin, 585 F.2d 223 (1978)*, in which the Seventh Circuit had found that a private right of action should be implied under § 401(m)(2) of the Federal Aviation Act, 49 **[**30]** U.S.C. § 1371(n)(2). *Shiffrin v. Bratton,* 443 U.S.A 903 (1979). The Supreme Courts remanded the case for reconsideration in light of *Touche Ross, supra.* Although § 1371(n)(2) is not similar in purpose to § 1349(a), the Supreme Court's remand emphasizes that its approach in *Touche Ross* should be given careful consideration in deciding whether a private remedy should be implied under the FAA, as this court has attempted to do.

Based upon the above reasons, I find that no private remedy exists under 49 U.S.C. § 1349(a) and that defendants' motion to dismiss plaintiffs' claim under that section should be granted. Because of this decision the court will not reach the question of whether the doctrine of primary jurisdiction should apply in this case, as argued by the defendants.

CONCLUSION

The court resolves the motions to dismiss as follows:

(1) defendants' motion to dismiss the plaintiffs' claims insofar as they are brought by the individual plaintiffs, Will S. Guthrie, Walter C. Guthrie, and Walter C. Guthrie, Jr., is granted;

(2) defendants' motion to dismiss the plaintiffs' Sherman Act claims is denied; and

(3) defendants' motion to dismiss the plaintiffs' claim **[**31]** under the Federal Aviation Act is granted.

SO ORDERED.

Advanced Health-Care Servs. v. Radford Community Hosp.

United States Court of Appeals for the Fourth Circuit

December 5, 1989, Argued ; August 7, 1990, Decided

Nos. 89-2312, 89-2376, 89-2377

Reporter

910 F.2d 139 *; 1990 U.S. App. LEXIS 13530 **; 1990-2 Trade Cas. (CCH) P69,152

ADVANCED HEALTH-CARE SERVICES, INC., Plaintiff-Appellant, v. RADFORD COMMUNITY HOSPITAL; SOUTHWEST VIRGINIA HEALTH ENTERPRISES, INC; SOUTHWEST VIRGINIA HEALTH SERVICES; SOUTHWEST VIRGINIA PHARMACY & MEDICAL COMPANY, d/b/a Community Pharmacy & Medical Supply, Defendants-Appellees. ADVANCED HEALTH-CARE SERVICES, INC., Plaintiff-Appellant, v. TWIN COUNTY COMMUNITY HOSPITAL, d/b/a Twin County Community Hospital Durable Medical Equipment Supply; MEDSERV CORPORATION, Defendants-Appellees, VOLUNTARY HOSPITALS OF AMERICA, INC., Amicus Curiae. ADVANCED HEALTH-CARE SERVICES, INC., Plaintiff-Appellant, v. GILES MEMORIAL HOSPITAL; MEDSERV CORPORATION; HEALTH EAST, INC., Defendants-Appellees, VOLUNTARY HOSPITALS OF AMERICA, INC., Amicus Curiae

Prior History: **[**1]** Appeals from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief District Judge. Nos. CA-88-345-R; CA-88-344-R; CA-88-346-R.

Disposition: AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Core Terms

monopolization, alleges, patients, Sherman Act, cases, competitor, conspiracy, monopoly, district court, markets, Clayton Act, Southwest, antitrust, personnel, anticompetitive, conspire, predatory, discharged, leveraging, motion to dismiss, defendants', buyers, relevant market, anti trust law, complaints, subsidiary, suppliers, proven, essential facilities doctrine, wholly owned subsidiary

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN1[] **Motions to Dismiss, Failure to State Claim**

In assessing a dismissal for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, a court must accept the allegations of the plaintiff's complaint as true. Dismissal is not warranted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proven in support of its claim.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Sherman Act, Claims

Section 1 of the Sherman Act provides in part that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. 15 U.S.C.S. § 1. In order to prevail on its § 1 claim, plaintiff must prove that the defendants' concerted action established an unreasonable restraint of trade. In so doing, the plaintiff must show: (1) that the conspiracy produced adverse, anticompetitive effects within the relevant product and geographic market; (2) that the objects and conduct pursuant to the conspiracy were illegal; and (3) that the plaintiff was injured as a proximate result of the conspiracy.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Regulated Practices, Price Fixing & Restraints of Trade

A determination of the reasonableness of an agreement under § 1 of the Sherman Act requires a market analysis of the impact the restraining activity has on competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] Monopolies & Monopolization, Actual Monopolization

The Sherman Act distinguishes between concerted and independent action. The conduct of a single firm is governed by § 2 of the Sherman Act alone and is unlawful only when it threatens actual monopolization. In contrast, § 1 of the Sherman Act prohibits unreasonable restraints of trade effected by contract, combination, or conspiracy between separate entities.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Monopolies & Monopolization, Actual Monopolization**

See 15 U.S.C.S. § 2.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

A parent corporation and its wholly owned subsidiary are legally incapable of conspiring with each other under § 1 of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

Two subsidiaries wholly owned by the same parent corporation are legally incapable of conspiring with one another for purposes of § 1 of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN8[] **Sherman Act, Claims**

To prevail on a monopolization claim, a plaintiff must show possession of monopoly power in a relevant market, willful acquisition or maintenance of that power in an exclusionary manner, and causal antitrust injury. To prove attempted monopolization, the plaintiff must prove a specific intent to monopolize a relevant market, predatory or anticompetitive acts, and a dangerous probability of successful monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

A firm, even one with monopoly power, is not guilty of predatory exclusionary conduct when it is simply exploiting the competitive advantages legitimately available to it.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN10[] **Private Actions, Standing**

To allege a causal antitrust injury, a plaintiff must show a reasonably probable causal link between the antitrust violation and a business loss of the sort the antitrust laws were designed to prevent.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN11[] **Sherman Act, Claims**

Assuming that monopoly leveraging constitutes a distinct *§ 2* of the Sherman Act violation, a plaintiff asserting such a claim would have to prove that the defendant possessed monopoly power, that it used that power to gain an unwarranted competitive advantage in a second distinct market, and that there was causal antitrust injury to the leveraged market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN12[] **Conspiracy to Monopolize, Sherman Act**

In order to state a claim for conspiracy to monopolize, a plaintiff must show concerted action, a specific intent to achieve an unlawful monopoly, and commission of an overt act in furtherance of the conspiracy. Unlike an attempted monopolization claim, it is not necessary that the committed acts, themselves, be predatory.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN13[] **Monopolies & Monopolization, Actual Monopolization**

For a defendant to be liable under the essential facilities doctrine, a plaintiff must prove the following four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors. As with monopoly leveraging claims, the central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market.

Antitrust & Trade Law > Clayton Act > General Overview

HN14[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 14*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN15[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

15 U.S.C.S. § 14 is interpreted to mean that exclusive dealing agreements are not per se illegal, but are prohibited only if performance of the arrangement will foreclose competition in a substantial share of the affected line of commerce. As with other antitrust causes of action, a claim advanced under § 3 of the Clayton Act must allege injury to competition, not just to one competitor.

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Judges: Hall, Circuit Judge, Butzner, Senior Circuit Judge, and Williams, United **[**2]** States District Judge for the Eastern District of Virginia, sitting by designation. Judge Williams wrote the majority opinion, in which Senior Judge Butzner joined. Judge Hall wrote a concurring opinion. Hall Circuit Judge, concurring.

Opinion by: WILLIAMS

Opinion

[*142] WILLIAMS, District Judge.

Advanced Health-Care Services (AHCS) appeals from the district court's dismissal of three cases it filed against several defendants. In two of these, Docket Nos. 89-2376 and 89-2377, AHCS appeals the district court's order of dismissal, pursuant to *Fed. R. Civ. P. 12(b)(6)*, and its refusal to grant leave to amend the complaint upon AHCS's motion for reconsideration. In the other, Docket No. 89-2312, AHCS appeals the district court's grant of the defendants' 12(b)(6) motion to dismiss. In all three cases, AHCS argues that it has stated actionable claims under federal ***antitrust law*** upon which relief could be granted if its allegations were proven. For the reasons discussed below, we reverse the district court's dismissal and denial of leave to file an amended complaint in Docket Nos. 89-2376 and 89-2377, and affirm in part and reverse in part its dismissal of Docket No. 89-2312. [1]

[3]** I.

Advanced Health-Care Services (AHCS), the appellant, is a supplier of durable medical equipment (DME). [2] On August 1, 1988, AHCS filed three nearly identical complaints in the United States District Court for the Western District of Virginia. In each complaint, the plaintiff alleges that an acute care hospital located in southwest Virginia is exclusively marketing a competitor's DME products to its patients in return for a financial stake in those DME sales. According to plaintiff, these arrangements have significantly diminished its DME sales in those geographic areas. AHCS asserts that the defendants' conduct supports causes of action for: (1) unreasonable restraint of trade in violation of Sherman Act *§ 1*, *15 U.S.C. § 1*; (2) monopolization, attempted monopolization, conspiracy to monopolize, and monopoly leveraging in violation of Sherman Act *§ 2*, *15 U.S.C. § 2*; (3) exclusive dealing in violation of Clayton Act § 3, *15 U.S.C. § 14*; and *(4)* tortious interference with business relationships under Virginia common law.

[4]** In Docket Nos. 89-2376 and 89-2377, AHCS alleges that Twin County Community Hospital (Twin County), which owns a 149-bed facility in Galax, Virginia, and Giles Memorial Hospital (Giles), the owner of a 65-bed short-term facility in Pearisburg, Virginia, entered into exclusive agreements under which Medserv Corporation became the sole provider of discharge services and durable medical equipment for the hospitals. [3] AHCS alleges that the hospitals have a monopoly position in the acute care market and that they serve as a funnel for all of the area's DME business. Although AHCS previously serviced a number of the discharged patients from the defendant hospitals as a result of merit-based recommendations from the hospitals' discharge personnel, the new contractual alliances with Medserv allegedly prohibit it from continuing to do so.

[5]** **[*143]** In Docket No. 89-2312, the plaintiff alleges that Radford Community Hospital (Radford), which provides acute care hospital services to approximately seventy-five percent of the residents of the greater Radford, Virginia, region, has used its monopoly status in that regional market to direct the purchase of DME exclusively in its favor. In 1985, Southwest Virginia Pharmacy & Medical Supply Co., a wholly owned subsidiary of Southwest Virginia Health Enterprises, Inc., which is a corporate affiliate of Radford, purchased a local drug store which has since become the exclusive supplier of DME and discharge services to Radford. [4] AHCS, which had been renting

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[1] Upon agreement of counsel for all parties, these three cases were consolidated for purposes of oral argument and rendering of the Court's opinion.

[2] DME consists of wheelchairs, hospital beds, walkers, crutches, and other equipment often used by persons convalescing at home after hospitalization.

[3] The appellant also sued Health East, Inc., the manager of Giles Memorial, in Docket No. 89-2377. The contracts referred to were originally entered into with Primedica, Inc., which was the corporate predecessor to Medserv Corporation. For simplicity, this opinion refers to the company as it existed under both names as "Medserv."

[4] Radford is a wholly owned subsidiary of Southwest Virginia Health Services Corporation. Southwest Virginia Health Enterprises, Inc., is also a wholly owned subsidiary of that holding company. Southwest Virginia Pharmacy & Medical Supply Company d/b/a Community Pharmacy & Medical Supply is a wholly owned subsidiary of Southwest Virginia Health Enterprises,

and selling DME to patients discharged from Radford since 1983, contends that its DME business in the Radford area has diminished to virtually nothing since the corporate affiliates of Radford entered the DME market. AHCS complains that discharge personnel from Radford combined and conspired with its corporate affiliates to influence Radford patients not to deal with AHCS, resulting in the illegal domination of the DME market by Radford and Southwest. Specifically, AHCS claims that these discharge personnel unduly influenced **[**6]** patients to discontinue relations with AHCS, that they steered or referred patients to Southwest solely for the financial gain of Radford, and that they refused to inform patients of their right to choose alternative DME vendors.

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, the defendants to all three suits, the appellees here, moved to dismiss the plaintiff's first amended complaints for failure to state any claims upon which relief could be granted. On December 29, 1988, the district **[**7]** court granted these motions. In so doing, the court found that AHCS had failed to allege the predatory or unreasonable conduct required to sustain claims under either *§ 1* or *§ 2* of the Sherman Act. [5] The court also found that the plaintiff had failed to allege the existence of exclusionary agreements which is required to state a claim under Clayton Act § 3. The district court dismissed the plaintiff's pendent tortious interference claims for lack of jurisdiction.

AHCS took no further action in the district court on the Radford case. In the Twin County and Giles cases, AHCS **[**8]** filed a motion to reconsider the dismissals pursuant to *Fed. R. Civ. P. 59(e)* and to allow a filing of amended complaints. The district court denied the motions to amend as "futile" and denied the motions to reconsider. The plaintiff now appeals all three cases.

II.

HN1[] In assessing a dismissal for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, a court must accept the allegations of the plaintiff's complaint as true. [6] Dismissal is not warranted "unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which **[*144]** could be proven in support of its claim." *Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969)*. In antitrust cases in particular, the Supreme Court has stated that "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 747, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*. *See generally* *Faulkner Advertising Assoc. v. Nissan Motor Corp., 905 F.2d 769*, (4th Cir. 1990) (reversing district court's 12(b)(6) dismissal in a Sherman Act tying case). We conclude **[**9]** that this rigorous standard for summary dismissal is met for only some of the instant claims.

A. Sherman Act *§ 1*

1. The Twin County and Giles Cases

The first count of the appellant's complaint **[**10]** in the Twin County and Giles cases is for unreasonable restraint of trade in violation of *§ 1* of the Sherman Act. In support of this claim, AHCS alleges that the hospitals have

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Inc. For simplicity, this opinion uses the term "Southwest" to refer to this entire family of companies, except for Radford Community Hospital, which is referred to as "Radford."

[5] Most of the district court's opinion focused on the plaintiff's *§ 2* claims. The court reasoned that the plaintiff's claims under *§ 1* of the Sherman Act were also deficient because "those things which are condemned by *§ 2* are in large measure merely the end products of conduct which violates *§ 1*." Joint Appendix at 21 (*citing* *United States v. Griffith, 334 U.S. 100, 106, 92 L. Ed. 1236, 68 S. Ct. 941 (1948))*.

[6] In the cases involving Twin County and Giles, the Court accepts as true the allegations of the plaintiff's proposed second amended complaints for purposes of this opinion. If those allegations state claims upon which relief could be granted, the amendment of the complaints would not have been "futile" and should have been allowed by the district court. *See* *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)*; *Island Creek Coal Co. v. Lake Shore, Inc., 832 F.2d 274, 279 (4th Cir. 1987)*. As to the appellant's § 3 Clayton Act claims against Twin County and Giles, which were not included in its second amended complaints, the Court accepts the allegations of the plaintiff's first amended complaints as true. *See infra* note 20 and accompanying text.

directed their discharge staff to refer all DME business to Medserv and to deny AHCS any access to their patients. Further, AHCS claims that the marketing presentations made by the hospital discharge planners are biased in favor of Medserv in that they do not inform discharged patients about other potential suppliers of DME. AHCS also alleges that, on occasion, the discharge planners have ordered DME from Medserv without first consulting the patients.

The hospitals allegedly receive 65% of all revenues generated by Medserv's DME rentals to their discharged patients. Their discharge personnel are paid $ 40.00 for each patient who orders equipment from Medserv and for each outpatient they convince to switch from AHCS to Medserv. Discharge personnel who fail to switch patients to Medserv are threatened with termination, according to plaintiff.

In sum, the plaintiff alleges that the patients being discharged, who are the consumers of DME, are ignorant of the existence of other DME suppliers and are particularly **[**11]** vulnerable to manipulation by hospital personnel. AHCS asserts that these factors completely foreclose the DME business to Medserv's competitors and deny consumers the benefits of competition in the DME market. As a result, AHCS complains that it no longer receives any orders from patients being discharged from the hospitals, that Medserv now has 85% of all patient orders emanating from the hospitals, and that the appellees have succeeded in monopolizing the DME markets in their respective geographic areas.

Section 1 of the Sherman Act ***HN2***[] provides in pertinent part that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. [7] As the parties agree, in order to prevail on its *§ 1* claim in these cases, plaintiff must prove that the defendants' concerted action established an unreasonable restraint of trade. *See* *Continental T.V. v. GTE Sylvania, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)* (concerted action on non-price restrictions is subject to rule of reason analysis, requiring **[**12]** a showing of an adverse effect on competition in the relevant market). In so doing, the plaintiff must show:

> (1) that the conspiracy produced adverse, anticompetitive effects within the relevant product and geographic market; (2) that the objects and conduct pursuant to the conspiracy were illegal; and (3) that the plaintiff was injured as a proximate result of the conspiracy.

Terry's Floor Fashions v. Burlington Indus., 763 F.2d 604, 610 n. 10 (4th Cir. 1985). To establish these elements in these cases, the plaintiff has alleged that the defendants have successfully conspired to exclude all competition in the DME markets **[*145]** in the areas surrounding Twin County and Giles Memorial and that this exclusion is the result not of business acumen, historical accident, or merits competition, but of anti-competitive monopolistic intentions.

[13]** The district court nonetheless dismissed the plaintiff's *§ 1* Sherman Act claims because it found the acts alleged by the plaintiff to constitute normal, reasonable competitive activity. At this point, there is no record upon which to base such a finding. ***HN3***[] A determination of the reasonableness of an agreement under *§ 1* of the Sherman Act requires a market analysis of the impact the restraining activity has on competition. *See* *NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 103-04, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; *Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1294* (4th Cir.) (pro-competitive efficiencies can justify anti-competitive effects of vertical restraints on competition), *cert. denied*, *484 U.S. 827, 98 L. Ed. 2d 55, 108 S. Ct. 94*

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[7] In *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, the Supreme Court held that a parent corporation and its wholly owned subsidiary are legally incapable of conspiring in violation of *§ 1* of the Sherman Act. *See infra* discussion pp. slip op. at 12-16. Because joint ventures consist of multiple entities, they are legally capable of violating *§ 1*. *See* *NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*.

(1987). At this point, the plaintiff's allegations of adverse effects on competition must be accepted as true, and the defendants' pro-competitive justifications considered unproven. Until some discovery is completed, there is no record upon which to assess the reasonableness of the restraints alleged by the plaintiff, so summary dismissal of the plaintiff's **[**14]** *§ 1* Sherman Act claims against Twin County and Giles was inappropriate. [8]

2. The Radford Case

As in the two companion cases, the first count in plaintiff's complaint against Radford alleges an unreasonable restraint of trade in violation of *§ 1* of the Sherman Act. [9] The gravamen of that count is that Radford and its corporate affiliates directed their discharge staff to divert all DME business to Southwest. In support of this claim, the appellant alleges that Radford's discharge **[**15]** personnel limited AHCS's access to Radford patients, exclusively recommended Southwest's products, and failed to inform patients of other available alternative suppliers of DME. As a consequence of defendants' allegedly illegal concerted activity, appellant claims that its business in that area was significantly diminished.

HN4[] The Sherman Act distinguishes between concerted and independent action. The conduct of a single firm is governed by *§ 2* alone and is unlawful only when it threatens actual monopolization. [10] In contrast, *§ 1* of the Sherman Act prohibits "unreasonable restraints of trade effected by 'contract, combination . . . or conspiracy' between *separate* entities." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. **[**16]**

The question before this Court is whether concerted action between two subsidiaries of the same parent corporation, or more precisely, between a subsidiary of one subsidiary and another subsidiary of the same parent corporation, can lead to Sherman *§ 1* liability. [11] In *Copperweld*, the Supreme Court established that ***HN6***[] a parent corporation and its wholly owned subsidiary **[*146]** are legally incapable of conspiring with each other under *§ 1* of the Sherman Act. *Id. at 771, 104 S. Ct. at 2741*. Thus, any concerted activity between Southwest Virginia Health Services Corporation and Radford or between Southwest Virginia Health Services Corporation and **[**17]** Southwest Virginia Health Enterprises, Inc., would clearly fall outside the reach of *§ 1* of the Sherman Act.

The Supreme Court in *Copperweld*, however, purposely limited its holding to the specific relationship of parent and wholly owned subsidiary. *Id. at 767*. Although the Court was unwilling to expand its holding to encompass other variations in corporate affiliations, it did discourage the resort to a rote application of the intra-enterprise conspiracy doctrine frequently identified with *United States v. Yellow Cab Co., 332 U.S. 218, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947)*, **[**18]** and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*.

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[8] In reaching our decision on this and the other claims that we remand for further consideration, the Court expresses no opinion as to the ultimate merits of the plaintiff's case. As this Court has stated, a complaint should not be dismissed "merely because the court doubts that the plaintiff will ultimately prevail; so long as a plaintiff colorably states facts which, if proven, would entitle him to relief, the motion to dismiss should not be granted." *Adams v. Bain, 697 F.2d 1213, 1216 (4th Cir. 1982)*.

[9] It is unclear from the complaint among whom AHCS alleges the conspiracy. For purposes of this appeal, we assume that it alleges all of the possible permutations of alliances among the defendant entities named in the complaint.

[10] *Section 2* of the Sherman Act provides in part: ***HN5***[] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." *15 U.S.C. § 2*.

[11] AHCS makes clear that it is the subsequent conduct of the affiliated corporations, not the act of affiliation itself, that it deems illegal. It has elected not to allege a claim under § 7 of the Clayton Act. Thus, the Court need not address whether Southwest's acquisition of the local drug store was an illegal combination under *§ 1*. AHCS has not alleged that an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct.

The *Copperweld* Court recommended that courts consider whether the affiliated corporate entities have a complete unity of interest rather than focus on mere corporate form. 467 U.S. at 771-72. Despite its narrow holding, the Court noted that an agreement between two subdivisions of a single corporation was not likely to be anticompetitive and that antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. Id. at 772. The Court found support for this conclusion in its precedent, reasoning that:

> Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 8 L. Ed. 2d 305, 82 S. Ct. 1130 provides strong support for the notion that separate incorporation does not necessarily imply a capacity to conspire. The defendants in that case were an agricultural cooperative, its wholly owned subsidiary, and a second cooperative comprising only members of the first. The Court refused to find a § 1 or § 2 conspiracy among **[**19]** them because they were "one 'organization' or 'association' even though they formally organized themselves into three separate legal entities."

Id. at 773 n. 21 (quoting Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29, 8 L. Ed. 2d 305, 82 S. Ct. 1130 (1962)).

Applying the Supreme Court's reasoning, we conclude that ***HN7***[] two subsidiaries wholly owned by the same parent corporation are legally incapable of conspiring with one another for purposes of § 1 of the Sherman Act. Although this is an issue of first impression for this Court, both the Fifth and Sixth Circuits have reached similar conclusions. *See* Directory Sales Management Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 611 (6th Cir. 1987) ("*Copperweld* precludes a finding that two wholly-owned sibling corporations can combine" in violation of § 1); Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012, 1015 (5th Cir. 1984) (if two siblings cannot conspire with their parent in violation of § 1, they cannot conspire with each other); Century Oil Tool v. Production Specialties, 737 F.2d 1316, 1317 (5th Cir. 1984) (finding **[**20]** no relevant difference between a corporation wholly owned by another corporation and two corporations wholly owned by a third corporation); *see also* Newport Components v. NEC Home Elec., 671 F. Supp. 1525, 1544 (C.D. Cal. 1987) (manufacturer and two wholly owned subsidiaries must be viewed as a "single entity" with "complete unity of interest" for purposes of § 1); Gucci v. Gucci Shops, Inc., 651 F. Supp. 194, 197 (S.D.N.Y. 1986) (two corporations with identical owners are by definition legally incapable of conspiring with each other). [12] *But see* ***[*147]*** In re Ray Dobbins Lincoln-Mercury v. Ford Motor Co., 604 F. Supp. 203, 205 (W.D. Va. 1984) (*Copperweld* does not apply to an allegation of conspiracy between two subsidiaries of the same parent corporation), *aff'd on other issues in an unpublished opinion*, *813 F.2d 402 (4th Cir. 1985)*.

[21]** Thus, we affirm the district court's dismissal of AHCS's § 1 Sherman Act claim in the Radford case, but on different grounds than those set forth by the district court. [13] We further find that the district court's inquiry into the reasonableness of the allegedly anticompetitive activity was inappropriate.

B. Sherman Act § 2

1. The Monopolization and Attempted Monopolization Claims

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[12] This conclusion has also received scholarly support. Professor Areeda posits that the total unity of the corporate enterprise is equally reflected in both the parent-subsidiary relationship and the relationship between sister corporations. In refusing to make corporate form determinative of liability, and in refusing to treat wholly owned corporations differently from unincorporated divisions, the *Copperweld* holding, he argues, also denies conspiratorial capacity to sister corporations' dealings with each other. VII P. Areeda, ***Antitrust Law*** § 1464f (1986).

[13] For similar reasons, we affirm the dismissal of AHCS's claim that Southwest conspired to monopolize the DME market in Radford, Virginia, in violation of § 2 of the Sherman Act. *See infra* discussion p. 150.

The appellant's complaints in all three cases include counts alleging monopolization and attempted monopolization of the relevant regional DME markets in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*. The elements of these claims are very similar. ***HN8***[] To prevail on a monopolization claim, a plaintiff must show possession of monopoly power in a relevant market, willful acquisition or **[**22]** maintenance of that power in an exclusionary manner, and causal antitrust injury. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *Catlin v. Washington Energy Co., 791 F.2d 1343, 1347 (9th Cir. 1986)*. To prove attempted monopolization, the plaintiff must prove a specific intent to monopolize a relevant market, predatory or anticompetitive acts, and a dangerous probability of successful monopolization. *See, e.g., Catlin, 791 F.2d at 1348*.

a. Monopolization of a Relevant Market

The factual allegations of the plaintiff with respect to the relevant markets and the defendants' market shares must be accepted as true at this point. *See Adams v. Bain, 697 F.2d 1213, 1216 (4th Cir. 1982)*. In its complaints, the plaintiff contends that Medserv and Southwest have a dominant share of the DME markets in their respective relevant geographic areas and that this constitutes monopoly power or a dangerous probability of actual monopolization. These allegations could, if proven, support a finding of monopolization or a dangerous probability of monopolization of the relevant **[**23]** DME markets at stake.

b. Predatory Conduct

In its complaints, the plaintiff alleges that the marketing strategies and kickback schemes described above are exclusionary and predatory acts designed to acquire and maintain a permanent monopoly in the relevant DME markets. The district court rejected this argument and dismissed all three monopolization counts in part because the plaintiff failed to allege any "predatory conduct" on the part of the defendants.

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*, the Supreme Court reiterated the established proposition that a plaintiff must show that the defendant's conduct was "exclusionary," "anticompetitive," or "predatory" to prevail on a *§ 2* monopolization claim. *Id. at 602*; *see also United States v. Griffith, 334 U.S. 100, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*; *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056* (3d Cir.), *cert. denied*, *439 U.S. 838, 58 L. Ed. 2d 134, 99 S. Ct. 123 (1978)*. The key to distinguishing legal exclusion from improper, or predatory, exclusion is whether **[**24]** the exclusion was based on superior efficiency. *Aspen Skiing, 472 U.S. at 602-03*. [14]

[*148] In analyzing this issue, it is appropriate to examine the economic effects of the challenged conduct on consumers, competitors, and the alleged violator itself. *See id. at 605*; *Drinkwine v. Federated Publications, Inc., 780 F.2d 735, 739-40 (9th Cir. 1985)*, *cert. denied*, *475 U.S. 1087, 89 L. Ed. 2d 727, 106 S. Ct. 1471 (1986)*. For example, if a plaintiff shows that a defendant has harmed consumers and competition by making a short-term sacrifice in order to further its exclusive, anti-competitive objectives, **[**25]** it has shown predation by that defendant. *See, e.g., SmithKline, 575 F.2d at 1065* (Eli Lilly violated antitrust laws in tying the sale of an unpatented drug to the sale of two other patented drugs, thereby losing sales of the patented drugs in order to harm a competitor selling the unpatented drug).

In finding that the plaintiff had not alleged predation in the cases before us, the district court found that the defendants "have not sacrificed the attractiveness of their hospital services but rather have made a business deal . . . that appears to have produced immediate benefits." Joint Appendix at 33. This finding is premature and shows a misunderstanding of the plaintiff's complaints. In essence, the plaintiff is alleging that the hospitals have linked the purchase of DME to the provision of their hospital services. Thus, for example, if the plaintiff can prove that the DME now provided to patients in the relevant areas is inferior in quality and/or more expensive than AHCS's, it will have shown harm to competitors, short-term sacrifices by the hospitals, and adverse effects on merits competition

[14] ***HN9***[] A firm, even one with monopoly power, is not guilty of predatory exclusionary conduct when it is simply exploiting the competitive advantages legitimately available to it. *See Berkey Photo v. Eastman Kodak, 603 F.2d 263, 276 (2d Cir. 1979)*, *cert. denied*, ***444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)***.

that injure DME consumers, all as a result of the hospitals' entry **[**26]** into the DME markets. From this, a finder of fact may be able to infer that their motives were anti-competitive (*i.e.*, that these were predatory acts stemming from an illegal specific intent to monopolize). Just as Eli Lilly sacrificed some of the monopoly profits it received in one drug market to raise its market share in another, the hospitals have allegedly used their monopoly in the inpatient acute care market to increase their share of the DME market. [15]

[27]** The appellees argue that the district court was correct in its statement that ***antitrust law*** does not impose a duty on them to refer patients to or advertise on behalf of the plaintiff. Again, this reading miscasts the plaintiff's argument. In *Aspen Skiing*, the Supreme Court upheld a jury finding of § 2 Sherman Act liability when a ski facility operator refused to continue a joint marketing arrangement with a competitor. The Court noted that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor" or "to cooperate with its business rivals." *Id. 472 U.S. at 600*. However, the Court found that the monopolist defendant in that case had made an important change in the distribution pattern that had begun in a competitive market and had continued pursuant to consumer demand for several years. The Court then stated:

> The absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it might not give rise to liability in certain circumstances.

472 U.S. at 601. **[**28]**

If a refusal to deal with an individual competitor can give rise to antitrust liability in an appropriate case, it stands to reason that an agreement to exclude such a competitor could create liability as well. [16] **[*149]** Therefore, the question in this case is not whether the defendants have a duty to advertise on behalf of or refer patients to the plaintiff; rather, it is whether the purposeful exclusion of this competitor from gaining access to the hospital's patients constitutes the type of circumstances that can give rise to antitrust liability. *See Oahu Gas Serv. v. Pacific Resources, Inc., 838 F.2d 360, 368* (9th Cir.) (a monopolist in some instances has "affirmative duties" under antitrust laws to aid its competitors), *cert. denied*, *488 U.S. 870, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988)*. Like the plaintiffs in *Aspen Skiing*, AHCS deserves an opportunity to develop a factual record that "supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival." *472 U.S. at 610*.

[29]**

c. Antitrust Injury

The district court also dismissed the plaintiff's monopolization and monopoly leveraging claims for failure ***HN10***[] to allege a causal antitrust injury. To make this showing, a plaintiff must show a reasonably probable causal link between the antitrust violation and a business loss of the sort the antitrust laws were designed to prevent. *See*

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[15] It cannot be assumed on a 12(b)(6) motion that the hospitals have not lost profits in their inpatient services as a result of their exclusive DME agreements. It may be that the plaintiff will be able to show that they are currently losing money with the expectation of recouping those losses after driving the other DME suppliers out of the market. Further, the fact that the monopoly profits gained through the exclusive dealing arrangements may have already offset the lost profits in the hospital services market would not conclusively indicate a lack of antitrust violations. These are all factual issues that cannot be resolved at this point. *Cf. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983)* (outlining conditions necessary for successful predatory pricing).

[16] The appellees may be correct in their assertion that *Aspen Skiing* only establishes duties to engage in cooperative behavior in very limited circumstances. *See Alpert's Newspaper Delivery Inc. v. The New York Times Co., 876 F.2d 266, 272 (2d Cir. 1989)*. Even if *Aspen Skiing* is so limited, it cannot be determined from the allegations of the plaintiff's complaints that such circumstances were not present in these cases.

Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986); Catlin, 791 F.2d at 1347-49. The plaintiff in these cases has made colorable allegations that it has lost income as a direct result of the defendants' anti-competitive actions and monopolization of the relevant DME markets. This states a causal antitrust injury with sufficient specificity to survive a motion to dismiss on that ground.

Thus, AHCS has stated allegations that, although skeletal, could fulfill all of the elements of claims for monopolization and attempted monopolization of the relevant DME markets in all three cases. Therefore, we reverse the district court's dismissals of the monopolization and attempted monopolization claims under § 2 of the Sherman Act.

2. Monopoly **[**30]** Leveraging

The third count of AHCS's proposed amended complaints in the Twin County and Giles cases and the fourth count of its complaint in the Radford case allege claims for monopoly leveraging in violation of § 2 of the Sherman Act. ***HN11***[] Assuming that monopoly leveraging constitutes a distinct § 2 violation, [17] a plaintiff asserting such a claim would have to prove that the defendant possessed monopoly power, that it used that power to gain an unwarranted competitive advantage in a second distinct market, and that there was causal antitrust injury to the leveraged market. *See* Berkey Photo, Inc. v. Eastman Kodak, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*; Kerasotes Mich. Theatres v. National Amusements, Inc., 854 F.2d 135, 137 (6th Cir. 1988), *cert. dismissed*, *490 U.S. 1087, 109 S. Ct. 2461, 104 L. Ed. 2d 982 (1989)*; Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1518-19 (E.D. Cal. 1983).

[31]** The plaintiff here alleges that the hospitals have monopoly power in the market for short-term, acute care hospital services and that they have used that power, with the specific intent of foreclosing competition, to gain an unfair competitive advantage in the relevant DME markets. AHCS further alleges that the acts outlined above constitute exclusionary and predatory conduct that has artificially foreclosed it from a dominant share of those markets. These **[*150]** allegations could, if proven, support a finding of liability for monopoly leveraging under § 2 of the Sherman Act in each of these cases. The district court's dismissals of the plaintiff's monopoly leveraging claims are, therefore, reversed.

3. Conspiracy to Monopolize

AHCS also alleges in all three cases that the defendants conspired to monopolize the relevant DME markets in violation of § 2 of the Sherman Act. ***HN12***[] In order to state a claim for conspiracy to monopolize, a plaintiff must show concerted action, a specific intent to achieve an unlawful monopoly, and commission of an overt act in furtherance of the conspiracy. *See* Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988). **[**32]** Unlike an attempted monopolization claim, it is not necessary that the committed acts, themselves, be predatory. *See* Von Kalinowski, 3 *Anti-Trust Laws and Trade Regulation*, § 9.02[2] (1985).

In the Twin County and Giles cases, AHCS has alleged concerted action (the DME agreements between the hospitals and Medserv), a specific intent to monopolize relevant markets (the DME markets for the geographic areas surrounding the hospitals), and the commission of overt acts in furtherance of that intent (the implementation of the exclusive agreements). Thus, plaintiff has stated colorable claims of illegal conspiracies to monopolize upon which relief might be granted if its allegations were proven.

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[17] Because we address this case at an undeveloped stage, and because we find that the appellant has stated other related § 2 claims that require a remand of this case for further proceedings, we assume that monopoly leveraging is an independent § 2 violation separate from monopolization and attempted monopolization. We reserve definitive resolution of that issue for a case in which the issue is squarely presented. *See* Catlin, 791 F.2d at 1346; Association for Intercollegiate Athletics for Women v. NCAA, 236 U.S. App. D.C. 311, 735 F.2d 577, 586 n. 14 (D.C. Cir. 1984).

In the Radford case, for the reasons stated in the discussion of *§ 1* liability, we affirm the district court's dismissal of AHCS's claim that Radford and Southwest conspired to monopolize the DME market in violation of *§ 2* of the Sherman Act. [18]

4. **[**33]** The Essential Facilities Doctrine

The sixth count of AHCS's proposed amended complaint in the Twin County and Giles cases is for denial of access to an essential facility. [19] ***HN13***[] For a defendant to be liable under the essential facilities doctrine, a plaintiff must prove the following four elements:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors.

MCI Communications v. AT & T, 708 F.2d 1081, 1132-33 (7th Cir.) (*citing Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*), *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*. As with monopoly leveraging claims, the central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market. *Cf. Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 378 (7th Cir. 1986)* (lack of business **[**34]** justification for refusing to give a competitor access to essential facility, when combined with other evidence, may indicate probable anticompetitive effect), *cert. denied*, *480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574 (1987)*.

Here, the plaintiff alleges that the defendants' market power over the provision of acute care hospital services is being used to further a monopoly in the retail of DME to discharged patients. AHCS contends that all DME dealers were equally able to market their services to patients, physicians, and discharge personnel before the hospitals entered into exclusive contracts with Medserv. The plaintiff alleges that now the hospitals will not give it access to their patients. This has resulted in AHCS's inability to compete in the DME market and has ultimately given Medserv complete control **[**35]** over the price and quality of DME services in the areas surrounding Twin County and Giles. AHCS argues that access to patients is an essential facility that cannot be duplicated and that the hospitals could feasibly return to their prior practice **[*151]** of providing this facility to AHCS and other DME providers.

These allegations on their face address all of the elements of a claim under the essential facilities doctrine established by *MCI* and the relevant Supreme Court precedent. Nevertheless, the district court found that the essential facilities doctrine does not apply to this case because it found no allegation that the hospitals controlling the alleged essential facility (access to patients) compete with the plaintiff in supplying DME. Joint Appendix at 35 (*citing Interface Group v. Massachusetts Port Auth., 816 F.2d 9, 12 (1st Cir. 1987)* (upholding airport authority refusal to allow plaintiff to ground facilities because not a competitor)).

As noted above, AHCS has alleged that Twin County and Giles, who control access to the alleged essential facility, now have a financial stake in the sale of DME by Medserv to their discharged patients. Whether **[**36]** this connection alone is enough to make the hospitals competitors of AHCS and whether access to hospital patients is actually an essential facility to entry into the relevant market are factual issues that cannot be resolved on a motion to dismiss. *Compare Fishman v. Estate of Wirtz, 807 F.2d 520, 539-40 (7th Cir. 1986)* (upholding liability under the essential facilities doctrine where the owner of a stadium in competition with the plaintiff to purchase basketball team refused to lease the stadium to the other bidder), *with Ferguson v. Greater Pocatello Chamber of Commerce,*

[18] *See supra* discussion pp. slip op. at 12-16.

[19] Because AHCS did not include an essential facilities claim in its complaint filed in the Radford case, this section of this opinion refers to the Twin County and Giles cases only.

848 F.2d 976, 983 (9th Cir. 1988) (no liability under essential facilities doctrine because minidome owner was not a competitor of prospective trade show producer).

Therefore, we reverse the district court's refusal to allow amendment of the plaintiff's complaints in the Twin County and Giles cases to add claims for denial of access to an essential facility.

C. Clayton Act § 3

In its first amended complaints filed in all three cases, AHCS includes a count for violation of § 3 of the Clayton Act, 15 U.S.C. § 14. [20] Section 3 of the Clayton Act provides **[**37]** in pertinent part:

> ***HN14***[] It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. The Supreme Court has interpreted ***HN15***[] this statute to mean that exclusive dealing agreements are not per se illegal, but are prohibited only if performance of the arrangement will foreclose competition in a substantial share of the affected line of commerce. *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*; *see also* *Satellite Television & Assoc. Resources v. Continental Cablevision of Va., 714 F.2d 351, 354 (4th Cir. 1983)* ("Exclusive dealing contracts which might function to increase interbrand competition have never been held to be a per se violation of the antitrust laws by the Supreme Court."), *cert. denied*, *465 U.S. 1027, 79 L. Ed. 2d 688, 104 S. Ct. 1285 (1984)*. **[**38]** As with other antitrust causes of action, a claim advanced under § 3 of the Clayton Act must allege injury to competition, not just to one competitor. *See* *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. *Cf.* *Eastern Publishing & Advertising v. Chesapeake Publishing & Advertising, 831 F.2d 488, 493 (4th Cir. 1987)* (12(b)(6) dismissal upheld because plaintiff had not alleged injury to more than one competitor).

[*152] The plaintiff's complaints in all three cases allege exclusive dealing agreements in violation of § 3 as follows: [21]

> The contracts, combinations and/or **[**39]** conspiracies by and among [the defendants] whereby said parties jointly agreed or otherwise to act in concert to deal with the Hospital company to the exclusion of all other competitors in the durable medical equipment market constitute an exclusive dealing arrangement in violation of Section 3 of the Clayton Act, 15 U.S.C. § 14.

The pleadings allege that "the Hospital company," which is Medserv in the Twin County and Giles cases and Southwest in the Radford case, is the "seller" for purposes of this claim. The pleadings, however, are somewhat ambiguous as to who the relevant buyer is in each case, although they seem to indicate that the hospitals are the actual DME purchasers who are restrained from dealing with other DME suppliers. [22] **[**40]** The plaintiff now

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[20] AHCS did not include a § 3 Clayton Act claim in the amended complaints it proposed to file against Twin County and Giles. Nevertheless, the Court considers these claims in its review of the district court's dismissal of and refusal to reconsider dismissal of the first amended complaints in the Twin County and Giles cases. *See supra* note 6.

[21] Although separate cases, the language setting forth the Clayton Act § 3 claims is identical in all three complaints.

[22] On the face of the complaints, there are no allegations that the discharged patients are the actual buyers of DME and that they entered into exclusive dealing agreements with Medserv and Southwest. Although plaintiff suggests that the alleged monopoly power of the hospitals influences patients' choice of DME, plaintiff specifically refrains from alleging that the defendants have tied access to medical services with DME selection. Accordingly, we do not address that possibility.

alleges that the relevant buyer may also be the discharged patients, but that their decisions are actually made by the hospital discharge personnel. [23]

[41]** The first possibility, that the agreements run between the hospitals and their exclusive DME suppliers, is deficient because of the respective relationships between the DME vendors and the hospitals. In the Radford case, there can be no exclusive sales arrangement as a matter of law. Although *Copperweld* has not specifically been applied to § 3 Clayton Act claims, extension of the Supreme Court's analysis is appropriate. If there can be no conspiracy or illegal agreement between Radford and Southwest, it follows, likewise, that there cannot be an illegal exclusive dealing arrangement within the corporate enterprise. *Cf.* *New Amsterdam Cheese Corp. v. Kraftco Corp., 363 F. Supp. 135, 140-41 (S.D.N.Y. 1973)* (defendant corporation and its division are not separate competitors, within meaning of Clayton Act section prohibiting sale of goods on condition that purchaser not use or deal in goods of a competitor).

With respect to Twin County and Giles, the existence of exclusive dealing agreements with Medserv appears, at first glance, improbable. While Twin County and Giles do not fall within the *Copperweld* exception, they apparently have a significant relationship **[**42]** with Medserv. The commonality of interests advanced by these relationships, on the one hand, militates against a finding of illegal exclusive agreements as contemplated by § 3 of the Clayton Act. On the other hand, these relationships may obscure a more sophisticated exclusive dealing arrangement.

Under the more prototypical § 3 claim, a seller persuades a buyer by whatever means to buy only from the seller, to the exclusion of all of the seller's competitors. In the instant cases, the buyers allegedly seek to buy only from Medserv. AHCS **[*153]** complains that this arrangement is anticompetitive because of the allegedly monopolistic power that the buyers enjoy and because of the financial benefit they directly reap from Medserv's profits.

This Court made clear in *McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959)*, that the Clayton Act was intended to reach specific conduct which had been held by the courts to be outside the ambit of the Sherman Act and that the "gravamen of a § 3 violation is the forbidden condition, agreement or understanding of exclusivity." *Id. at 337-38*. "It makes no difference whether this is **[**43]** voluntary or is imposed by coercion, but without such agreement, condition or understanding, there can be no statutory infraction." *Id. at 338*. In Twin County and Giles, AHCS alleges that the existence of exclusive dealing arrangements between the hospitals and Medserv has substantially lessened competition and enabled Medserv to garner monopoly power in the DME market. Although not fully developed, plaintiff's allegations are sufficient to withstand a motion to dismiss. The district court thus erred in dismissing this claim.

The plaintiff's alternate theory, that the hospital discharge personnel are the actual buyers of DME, ultimately fails and, therefore, deserves only brief attention. [24] To the extent the discharge personnel are the employees or agents of the hospitals, the hospitals are then the constructive buyers, and the analysis and conclusion of the preceding paragraph apply. To the extent the discharge personnel are employees of Medserv or the joint venture, the alleged personnel/buyers are involved in an agreement with their employers. By definition, there cannot be an exclusive dealing arrangement between an employer and its employees. *Cf.* *Schwimmer v. Sony Corp., 677 F.2d 946,*

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[23] In support of this contention, the plaintiff has cited several cases for the proposition that the appropriate hospital personnel can be the de facto economic decision-makers in the purchasing of medical services. *See, e.g., Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1354 (7th Cir. 1982)*; *United States v. American Soc'y of Anesthesiologists, 473 F. Supp. 147, 159-60 (S.D.N.Y. 1979)*. *But see* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27-28* & *30 n. 50, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (finding it likely that "it is the patient's doctor and not the patient who selects an anesthesiologist," but that this sort of market imperfection was irrelevant); *Key Enterprises of Del. v. Venice Hosp., 703 F. Supp. 1513 (M.D. Fla. 1989)* (rejecting the substitution of hospital discharge personnel for the patient as the consumers of DME). In any event, all of these findings were in the context of defining the relevant market for health-care specialists in Sherman Act cases, and the appellant has not cited any cases that apply this logic to purchaser-identity in exclusive dealing cases.

[24] This theory cannot be maintained in the Radford case because of the extensive corporate relationship in place. *See* discussion *supra* p. slip op. at 29.

953 **[**44]** (2d Cir.) ("collaborative action between a corporation and its employees, or among employees within a corporation, is not regarded as joint action within the meaning of *§ 1*"), *cert. denied*, *459 U.S. 1007, 74 L. Ed. 2d 398, 103 S. Ct. 362 (1982)*; *University Life Ins. Co. v. Unimarc Ltd., 699 F.2d 846, 852 (7th Cir. 1983)* (conspiracy between a corporation and its officers not actionable under *§ 1*).

In summary, the plaintiff in the case of Radford has not alleged facts that, if proven, could fulfill all of the elements of a valid cause of action under § 3, and the district court's dismissal of those counts is affirmed. In the cases of Giles and Twin County, plaintiff's allegations are sufficient to withstand a motion to dismiss.

III.

Because the district court found that plaintiff's allegations did not establish **[**45]** federal antitrust violations, it dismissed plaintiff's state tort claims for lack of jurisdiction. We find that the appellant alleged facts sufficient to state valid causes of action in all three cases currently before this Court, and therefore reverse the district court's dismissal of its state tort claims and remand them for further proceedings as well.

IV.

Based on the foregoing, in the Radford case, we affirm the district court's dismissal of the appellant's claims under *§ 1* of the Sherman Act and § 3 of the Clayton Act and its conspiracy to monopolize claim under *§ 2* of the Sherman Act, but on different grounds than those stated by the district court. We reverse the lower court's dismissal of appellant's other *§ 2* Sherman Act claims in Radford. We also reverse its dismissal of appellant's claims under *§§ 1* and *2* of the Sherman Act and § 3 of the Clayton Act in the Twin County and Giles cases. Dismissal of the state law tort claims in all three cases is also reversed. These cases are hereby remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Concur by: HALL

Concur

[*154] HALL, Circuit Judge, concurring:

[46]** While I join in the majority opinion, I believe its lengthy and scholarly discussion of the elements of these various antitrust claims, and AHCS's corresponding factual allegations, may have the unintended effect of obscuring the underlying bases for our decision. Consequently, I write separately to emphasize the two points that are the essence of our holding. First, as the majority opinion persuasively demonstrates, two subsidiary corporations of the same parent corporation, as a general rule, cannot conspire to unreasonably restrain trade in violation of *§ 1* of the Sherman Act, or enter into an exclusive dealing arrangement violative of § 3 of the Clayton Act. The antitrust laws must recognize business reality and treat these corporations as a single economic entity.

Second, as to the rest of AHCS's claims, although they are tenuous at best, and most likely meritless, they are sufficient to survive a motion to dismiss. As the majority opinion states, dismissal is not proper "merely because the court doubts that the plaintiff will ultimately prevail; so long as a plaintiff colorably states facts which, if proven, would entitle him to relief, the motion to dismiss should not be **[**47]** granted." Op. p. 145, n. 8, *quoting* *Adams v. Bain, 697 F.2d 1213, 1216 (4th Cir. 1982)*. Simply put, a plaintiff must be given a chance to prove his colorable factual allegations, even if it appears unlikely that he can do so. Here, the district court slighted AHCS of this chance and jumped the gun in dismissing these claims under *Rule 12(b)(6)*. Thus, even in the face of the tenuity of these claims, reversal is appropriate.

[Jennings v. Emry](#)

United States Court of Appeals for the Seventh Circuit

May 31, 1990, Argued ; August 16, 1990, Decided

No. 89-3599

Reporter

910 F.2d 1434 *; 1990 U.S. App. LEXIS 14216 **

STEPHEN JENNINGS, D.C., MARY JENNINGS, CHRISTINE JENNINGS, DAVID JENNINGS, DEBBIE JENNINGS, LON A. KAMINSKY, D.C., and TERRY L. KAMINSKY, Plaintiffs-Appellants, v. JOHN EMRY, LINLEY PEARSON, PATRICIA ALDER, KENNETH BUEHRLE, DAVE SYLVESTER, DON DOMBROWSKI, MICHAEL A. MINGLIN, THOMAS G. FISHER, AARON WHITE, MARCI BEYER, ROCKY McCLAIN, RICHARD McCORD, DONNA BAYS-BEINHART, JAMES MARTIN, STEVEN KELMAN, D.C., JOHN HENRY MEYERS, IV, REBECCA ROUCH, ROBERT SIMONSON, D.C., RONALD KOLANKO, D.C., DANIEL A. LANE, RICHARD HENDRICKSON, DAVID MILLER, SCOTT NEWMAN, SHELDON BRESKOW, MARK LUNDY, and MARK DEVINE, Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 88 C 56; Allen Sharp, Chief Judge.

Disposition: Affirmed.

Core Terms

enterprise, allegations, investigate, violations, pattern of racketeering activity, racketeering, racketeering activity, factual allegations, predicate act, enforcement personnel, conspiracy

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8 requires a complaint to contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Rule 8(a)(2)*.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN2[] **Complaints, Requirements for Complaint**

A Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-68*, complaint must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is. And it must be presented with clarity sufficient to avoid requiring a district court or opposing party to forever sift through its pages in search of that understanding.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] **Complaints, Requirements for Complaint**

A pleader is permitted to enjoy all favorable inferences from facts that have been pleaded, but he is not permitted to substitute conclusory statements for minimally-sufficient factual allegations.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4[] **Pleadings, Rule Application & Interpretation**

In pleading predicate acts under the Racketeer Influenced and Corrupt Organizations Act, conclusory allegations that various statutory provisions have been breached are of no consequence if unsupported by proper factual allegations.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

A pattern is something that evinces a continuous and related course of conduct; a complaint asserting a pattern of racketeering activity must allege facts from which such a continuous and related course of conduct one indicating the threat of continuing criminal activity reasonably may be inferred.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN6[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Simply alleging racketeering acts is not enough to allege a Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-68*, pattern.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Under the Racketeer Influenced and Corrupt Organizations Act, enterprises may be of two types: legal entities and extra-legal associations in fact.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN8[] Private Actions, Racketeer Influenced & Corrupt Organizations

Under the Racketeer Influenced and Corrupt Organizations Act, whether legal or extra-legal, each enterprise is an ongoing "structure" of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN9[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

An enterprise is distinct, separate, and apart from a pattern of racketeering activity: although a pattern of racketeering activity may be the means through which the enterprise interacts with society, it is not itself the enterprise, for an enterprise is defined by what it is, not what it does.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN10[] Private Actions, Racketeer Influenced & Corrupt Organizations

Government offices can serve as enterprises under the Racketeer Influenced and Corrupt Organizations Act.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN11[] Private Actions, Racketeer Influenced & Corrupt Organizations

Under the Racketeer Influenced and Corrupt Organizations Act, an enterprise is something more than a conspiracy. It is something more than a group of people who get together and agree to commit a "pattern of racketeering activity," for while the hallmark of conspiracy is agreement, the central element of an enterprise is structure.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN12[] Motions to Dismiss, Failure to State Claim

Though a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, that opinion is not a mandate to countenance balderdash.

Counsel: Kenneth C. Kern, Kern & Associates, Indianapolis, Indiana, Mark Lane, Washington, District of Columbia for Plaintiff-Appellant.

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Judges: Wood, Jr., and Easterbrook, Circuit Judges, and Eschbach, Senior Circuit Judge.

Opinion by: ESCHBACH

Opinion

[*1435] ESCHBACH, Senior Circuit Judge.

Rule 8 of the Federal Rules of Civil Procedure ***HN1***[] requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *FED. R. CIV. P. 8(a)(2)*. In this case, the statement in the Appellants' **[**2]** complaint is not short; rather, it is a lengthy 55 pages and 433 rhetorical paragraphs. The statement also is not plain; rather, it is prolix, disjointed, confusing, and at times unintelligible. And despite this length and complexity (or perhaps, in part, because of it), the complaint does not show that its pleaders are entitled to the relief they seek, relief for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961-68*. Acting on the Appellees' Rule 12(b)(6) motion, the court below dismissed the Appellants' claims for various reasons dealing with immunity, statute of limitations, collateral estoppel, standing, and pendent jurisdiction. We affirm, but on other grounds. *See* *Box v. A & P Tea Co., 772 F.2d 1372 (7th Cir. 1985)*, *cert. denied*, *478 U.S. 1010, 92 L. Ed. 2d 724, 106 S. Ct. 3311 (1986)*; *Brown v. Brienen, 722 F.2d 360 (7th Cir. 1983)*. We have no particular objection to the district court's method of analysis. We simply find it unnecessary to examine that method in light of the evident failure of the Appellants' complaint to adequately state a claim for relief **[**3]** under RICO.

RICO is a complex statute, it is true. Thus, by necessity, most RICO complaints **[*1436]** will be somewhat complex. The necessity for complexity, however, does not give litigants license to plead by means of obfuscation. *See* *FED. R. CIV. P. 8(e)(1)*. ***HN2***[] A RICO complaint must be presented with intelligibility sufficient "for a court or opposing party to understand whether a valid claim is alleged and if so what it is." *Old Time Enter., Inc. v. International Coffee Corp., 862 F.2d 1213, 1218 (5th Cir. 1989)*. And it must be presented with clarity sufficient to avoid requiring a district court or opposing party to forever sift through its pages in search of that understanding. *See* *id. at 1219*. Regarding the Appellants' complaint, the absence of this intelligibility and clarity is notable. The complaint, indeed, is the apogee of pleading by means of obfuscation. For its complete failure to adduce an intelligent story, one that a court can follow without untoward effort, we are tempted to dismiss it. Due to the liberality with which we construe pleadings at this stage, however, we have resisted the temptation. To understand the complaint, **[**4]** we will make the untoward effort.

The gist of the Appellants' claim [1] is that Indiana chiropractors in general, and chiropractors Kaminsky and Jennings, in particular, are being "persecuted" by Indiana state law enforcement personnel who are "supported" by

[1] As always, we regard as true the complaint's *factual* allegations and we view them and the *reasonable* inferences implied by them in the light most favorable to the plaintiffs, here, the Appellants. *See* *SK Hand Tool Corp. v. Dresser Indus., Inc., 852 F.2d*

conspiratorial medical organizations. This "persecution" is evidenced by three investigations carried on by Indiana authorities, one each related to each of two Appellants -- Kaminsky, and Jennings -- and one related to a nonappealing plaintiff, P. Joseph Lisa.

[5]** Kaminsky's "persecution," apparently, began in May of 1981. Kaminsky, it seems, had purchased for $ 1,000 a "Doctor of Homeopathic Medicine" degree from an outfit in Florida and, apparently on the strength of that "degree," had advertised himself as an "M.D." and performed certain medical procedures. These actions caused some small displeasure in the medical community. Several physicians took action, notifying the Indiana Medical Licensing Board (IMLB) and the Tippecanoe County Prosecutor's Office (TCPO) of Kaminsky's deeds and various statutes that may have been infringed. This led to investigations of Kaminsky by the IMLB and the TCPO. The IMLB investigation was short and sweet: hearings were held in June; in July a decision was reached that Kaminsky had violated Indiana law; Kaminsky's license was suspended for six months (with a five year probationary period to follow) in August. [2] The TCPO's investigation was somewhat more involved. Tippecanoe County prosecutor Meyers and deputy prosecutors Beyer, Lane, and Rouch all participated. Eventually, they prosecuted. On June 23, 1982, the TCPO filed criminal charges against Kaminsky. Yet this was just the beginning. Soon, the Indiana **[**6]** Attorney General's Office (IAGO) was contacted and brought into the fray. Attorney General Pearson and deputy attorney generals Minglin, Emry, and Hendrickson all became involved in varying degrees. So too did investigators Alder and Bays-Beinhart of the Consumer Product Division of the IAGO (CPD), CPD chief **[*1437]** counsel Miller, Indiana State Police (ISP) members White, McClain and McCord, and an apparent confidential informant named Martin.

At certain times some or all of these people wrote memoranda to each other discussing the Kaminsky case, made motions and appearances in court, obtained subpoenas and affidavits, gathered evidence from insurance companies, obtained information from Indiana State Chiropractic Association peer review committee member Kelman, observed Kaminsky and his patients, ran various sting operations on Kaminsky and his health clinic, and otherwise "harassed" or "threatened" Kaminsky, his patients, his **[**7]** acquaintances, and his lawyer. This activity bore fruit: Kaminsky's license was suspended on March 22, 1984 and then revoked on June 29, 1984 by the Indiana Board of Chiropractic Examiners (IBCE). [3] In county court, a civil injunction was obtained against Kaminsky and later, on June 28, 1986, Kaminsky pled guilty to a criminal misdemeanor charge. [4]

Compared to Kaminsky's ordeal, Jennings's is refreshingly simple. Jennings and his health clinic apparently were being investigated by ISP member Buehrle. Buehrle, posing as a patient, ran a sting on Jennings's clinic. Evidence was gathered. In October, 1984, Buehrle and ISP member Sylvester entered Jennings's clinic and seized equipment and patient files. Thereafter the two **[**8]** examined the files. In November, Jennings went to court seeking a return of his equipment and files. In December "some of the confiscated items" were returned, but the investigation of Jennings continued. [5] In August, 1985, Jennings found out that the CPD was investigating him. In

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936, 938 (7th Cir. 1988), *cert. denied*, ***492 U.S. 918, 109 S. Ct. 3241, 106 L. Ed. 2d 589 (1989)***. *See also* *Seglin v. Esau, 769 F.2d 1274, 1283 (7th Cir. 1985)* (***HN3***[] a pleader is permitted "to enjoy all favorable inferences from facts that have been pleaded," but he is not permitted to substitute "conclusory statements . . . for minimally-sufficient factual allegations"). The complaint's factual allegations, however, are at times meaningless; they float from nowhere, seemingly unconnected with any worldly experience. Because of this, we have embellished this statement of facts with background material from sources outside of the complaint, in particular two cases: *In re Kenneth C. Kern, 555 N.E.2d 479 (Ind. 1990)*, and *Kaminsky v. Medical Licensing Bd., 511 N.E.2d 492 (Ind. Ct. App. 1987)*. We have used nothing from these sources to contradict the factual allegations in the Appellants' complaint or the reasonable inferences implied by those allegations. We have used the sources merely to give insight into what the Appellants are talking about. *Cf.* *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)*, *cert. denied*, ***470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)***.

[2] The Medical Board's decision later was upheld by the Indiana courts.

[3] Instrumental in effecting this decision, which later was upheld by the Indiana courts, was IBCE member Kolanko.

[4] Despite these setbacks, Kaminsky persevered. He obtained reinstatement of his license in 1987; this, despite the contrary efforts of IBCE member Simonson and others.

October, Jasper County prosecutor Fisher told Jennings that he was being investigated by the Grand Jury of Jasper County. Eventually, however, the Grand Jury returned a "no bill." About Jennings's further trials and tribulations, nothing more is known.

Unlike Kaminsky and Jennings, P. Joseph Lisa is not a chiropractor. He is a medical researcher and author. Nonetheless, like Kaminsky and Jennings, Lisa was "persecuted" by Indiana law enforcement personnel. Kaminsky and Jennings had hired Lisa to investigate a possible medical monopoly in Indiana. Lisa went to the IAGO and the TCPO to obtain information about **[**9]** Kaminsky's case. Amazingly, in both offices he was mistaken for an investigating member of a congressman's staff and was given access to attorney work product regarding the Kaminsky investigation. Minglin of the IAGO and Beyer of the TCPO eventually became suspicious about Lisa's credentials, however, and they got in touch with ISP member White. White was asked to investigate, and did investigate, Lisa. That investigation led to Lisa's arrest for misrepresentation and theft, his prosecution by Marion County deputy prosecutors Lundy, Devine, and Newman, and his eventual plea of guilty to charges of impersonating a public servant. [6]

[10]** The Appellees assert that this story does not state a claim under any section of RICO. Their assertion is comprised of several arguments. First, the Appellees argue that allegations of a "pattern of racketeering activity" are required for all sections of RICO, and that the Appellants **[*1438]** have failed completely to allege a pattern of racketeering activity. The Appellants argue to the contrary; they point out that besides its factual allegation section, the complaint contains a 16 page section entitled "Racketeering Activity" that is devoted to showing the numerous racketeering acts of the Appellees. But a review of this section shows it to be 16 pages of waste. Most all of the purported racketeering acts listed are outside the scope of *18 U.S.C. § 1961*, which defines the crimes (called "predicate acts") constituting racketeering acts. For example, the Appellants allege that the Appellees have committed numerous violations of state and federal ***antitrust law***, yet violation of ***antitrust law*** is not a predicate act under RICO. The Appellants allege that the Appellees have committed numerous violations of civil rights and constitutional law, yet, again, **[**11]** violations of these laws are not predicate acts under RICO. Such irrelevant allegations, and others like them, [7] go on page after page. While alleging statutory violations -- indeed, while just about incorporating all of the federal and Indiana codes -- the allegations do not allege racketeering acts.

[12]** In their brief, the Appellants seem to concede the irrelevancy of most of their allegations. They do, however, point out that somewhere in the 16 pages there are a few allegations of predicate acts. In their brief, for example, the Appellants state that they alleged that in July, 1984, Buehrle violated I.C. 16-6-8-3(f)(1), which makes it unlawful for any person to obtain a legend drug [8] by fraud. [9] A look at the complaint's "racketeering activity" section shows,

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[5] ISP member White and deputy attorney general Minglin also worked on the Jennings case, although to what extent is unknown.

[6] As part of the proceedings against Lisa, members of the Marion County Prosecutor's Office and the IAGO waged a disqualification campaign against Lisa's (and Kaminsky and Jennings's) counsel, Kenneth Kern. This campaign failed, but another was more successful. Two counts of alleged improper conduct were filed against Kern by Indiana Supreme Court Disciplinary Commission executive secretary Breskow. Minglin, Lane, Emry, Beyer, Meyers, White, Newman, and Pearson all gave deposition testimony for the disciplinary hearings, deposition testimony unfavorable to Kern. Kern was found guilty of Count II, alleging conflict of interest. He eventually was suspended from the practice of law for 60 days.

[7] Other examples of irrelevant alleged federal law violations: *18 U.S.C. § 242* (deprivation of rights under color of law); *18 U.S.C. § 2* (aiding and abetting the commission of some unknown crime); *18 U.S.C. § 1* (classification of crimes); *18 U.S.C. § 1001* (lying to the FBI). Examples of alleged state law violations: I.C. 34-1-5-1 (rules for pleading for libel and slander); I.C. 34-1-14-5 (incompetent witnesses); *I.C. 35-43-4-4(h)(3)* & *(4)* (authorizing return of property from law enforcement agency); *I.C. 35-44-2-2* (false informing); *I.C. 35-44-3-4* (obstruction of justice); *I.C. 35-44-1-2* (official misconduct); *I.C. 35-41-5-1* (attempt to restrain trade): *I.C. 35-41-5-2* (conspiracy to restrain trade); I.C. 34-41-2-4 (aiding and abetting); *I.C. 35-43-1-2* (criminal mischief); *I.C. 35-45-2-2* (harassment); *I.C. 24-1-2-5* (duties of attorney general and prosecuting attorney); I.C. 34-4-30.5-2 (action by prosecuting attorney to enjoin violation of law); I.C. 34-1-60-9 (deceit of attorney); *I.C. 35-33-5-5* (disposition of seized items); *I.C. 35-41-1-2* (repealed); etc.

[8] For a definition of "legend drug," *see* I.C. 16-6-8-2(k).

however, that the Appellants charged Buehrle with violating I.C. 16-6-8-3.5(a), which makes prescriptions for legend drugs invalid under certain circumstances, not with violating I.C. 16-6-8-3(f)(1). This discrepancy is minor, however, since ***HN4***[] in pleading predicate acts conclusory allegations that various statutory provisions have been breached are of no consequence if unsupported by proper factual allegations; *Reynolds v. East Dyer Dev. Co., 882 F.2d 1249, 1251-52 (7th Cir. 1989)*; *see also* *Jones v. Lampe, 845 F.2d 755, 758 (7th Cir. 1988)*; *Ray v. Karris, 780 F.2d 636, 645 (7th Cir. 1985)*; *Seglin v. Esau, 769 F.2d 1274, 1283 (7th Cir. 1985)*; and in this **[**13]** case neither of the conclusory allegations are supported by proper factual allegations. [10] The same holds for the Appellants' other allegations of state and federal law violations, both those "pinpointed" in their brief and otherwise: all are bare legal conclusions unsupported by sufficient factual detail. [11]

[14]** **[*1439]** Even assuming, *arguendo*, that somewhere in their complaint the Appellants hid sufficient allegations of racketeering activity, their complaint would still fail for lack of alleging a "pattern," which is "[a] crucial element of a section 1962 claim." *Triad Assoc., Inc. v. Chicago Hous. Auth., 892 F.2d 583, 594 (7th Cir. 1989)*. ***HN5***[] A pattern is something that evinces a continuous and related course of conduct; *H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S. Ct. 2893, 2900, 106 L. Ed. 2d 195 (1989)*; a complaint asserting a pattern of racketeering activity must allege facts from which such a continuous and related course of conduct -- one indicating the threat of continuing criminal activity -- reasonably may be inferred. *See* *Jones, 845 F.2d at 757, 758*. *See generally* *Management Computer Serv., Inc. v. Hawkins, Ash, Baptie & Co., 883 F.2d 48, 51 (7th Cir. 1989)*; *Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986)*. The Appellants' complaint fails in this regard. In several places it boldly asserts that "each Defendant agreed to and did commit at least two racketeering **[**15]** activities" or that "at least two predicate offenses of racketeering activity were committed by each Defendant." These statements are mere conclusions, however, and will not suffice; *Jones, 845 F.2d at 758*; moreover, "merely alleging two predicate acts . . . does not satisfy the pattern requirement," *Olive Can Co. v. Martin, 906 F.2d 1147, 1150 (7th Cir. 1990)*, and that is the most that can be squeezed from these statements. In other places the complaint asserts that "each Defendant has been involved in a pattern of racketeering activity" or that "each of the Defendants has been associated with their predicate offenses"; but, again, these conclusory and indirect (involved in?; associated with?) statements will not suffice. *See* *Jones, 845 F.2d at 758*. And the statements that will suffice -- the facts alleged in the complaint -- fail adequately to allege on the part of any of the Appellees a continuous and related course of racketeering activity, a "pattern" as defined by our prior opinions. *See* *Olive Can Co., supra*; *Triad Assoc., Inc., supra*; *Management Computer Serv., Inc., supra*; *Sutherland v. O'Malley, 882 F.2d 1196 (7th Cir. 1989)*; **[**16]** *Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989)*; *Deppe v. Tripp, 863 F.2d 1356 (7th Cir. 1988)*; *Brandt v. Schal Assoc., Inc., 854 F.2d 948 (7th Cir. 1988)*; *SK Hand Tool Corp. v. Dresser Indus., Inc., 852 F.2d 936 (7th Cir. 1988)*, *cert. denied*, *492 U.S. 918, 109 S. Ct. 3241, 106 L. Ed. 2d 589 (1989)*; *Jones, supra*; *Medical Emergency Serv. Assoc., S.C. v. Foulke, 844 F.2d 391 (7th Cir. 1988)*; *Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987)*, *cert. denied*, *492 U.S. 917, 109 S. Ct. 3241, 106 L. Ed. 2d 588 (1989)*; *United States v. Horak, 833 F.2d 1235 (7th Cir. 1987)*; *Appley v. West, 832 F.2d 1021 (7th Cir. 1987)*; *Tellis v. United States Fidelity & Guar. Co., 826 F.2d 477 (7th Cir. 1986)*; *Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806 (7th Cir. 1987)*; *Skycom Corp. v. Telstar Corp., 813 F.2d 810 (7th Cir. 1987)*; *Marks v. Pannell Kerr Forster, 811 F.2d 1108 (7th Cir. 1987)*;

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[9] We offer no opinion on whether a violation of I.C. 16-6-8-3(f)(1) constitutes a racketeering act.

[10] The factual allegation portion of the complaint alleges the following: "In July 1984, Defendant BUEHRLE after obtaining an illegal prescription of diabenzanine from a licensed pharmacist, went to the office of JENNINGS using an undercover name, Mike Peterson, and a fictitious employment." We cannot find from this allegation "facts from which the court may make . . . a determination" that the Indiana statutes were violated. *See* *Reynolds, supra, 882 F.2d 1251-52*. This is especially so in light of the complaint's presentation of Buehrle as an investigating member of the ISP.

[11] The "pinpointed" allegations include Martin's purported violation of *I.C. 35-43-1-1* (arson), Alder's purported violation of *I.C. 35-43-4-2* (theft; receiving stolen property), and Simonson's purported violation of *I.C. 35-44-1-1* (bribery). They also include a plethora of purported violations, by numerous Appellees, of *18 U.S.C. § 1951*. The factual detail supporting these purported violations is absent, however; the complaint fails adequately to allege -- in facts -- that the above mentioned crimes were committed. The same goes for all of the Appellants' other allegations, including their numerous allegations of mail and wire fraud, *18 U.S.C. §§ 1341* & *1343*.

Elliott v. Chicago Motor Club Ins., 809 F.2d 347 (7th Cir. 1986); **[**17]** *Morgan, supra*; *Lipin Enter., Inc. v. Lee, 803 F.2d 322 (7th Cir. 1986)*. True it is that the Appellants have included in their complaint a whole list of statutes they allege were breached. But "***HN6***[] simply alleging racketeering acts is not enough to allege a RICO pattern," *Lipin Enter., Inc., 803 F.2d at 324*, and simply alleging racketeering acts is all we can possibly credit the Appellants with here. [12]

The "pattern" requirement aside, the Appellees also argue that the Appellants have failed adequately to allege a RICO enterprise. Indeed they have. Regarding pleading, the first rule is that "[a] plaintiff **[*1440]** must identify the enterprise." *Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1136 (7th Cir. 1986)*, *cert. denied* **[**18]** , *486 U.S. 1026, 100 L. Ed. 2d 235, 108 S. Ct. 2004 (1988)*. ***HN7***[] Enterprises may be of two types: legal entities and extra-legal "associations in fact." *United States v. Turkette, 452 U.S. 576, 101 S. Ct. 2524, 2528-29, 69 L. Ed. 2d 246 (1981)*. The Appellants have lots of entities, legal or otherwise, floating about in their complaint, but nowhere do the Appellants adequately identify the enterprise upon which our attention should be directed. [13]

Their closest attempt at identification is an allegation that each of the Appellees is "connected" **[**19]** "with various enterprises including the collective criminal enterprise," which is "an on-going criminal syndicate, the operation of which is carried out with support of the American Medical Association and its affiliated groups including the Indiana State Medical Association and the Tippecanoe County Medical Association as well as the Indiana State Police, the Office of the Attorney General of the State of Indiana and the Prosecutors' Offices for Tippecanoe, Marion and Jasper Counties." According to the Appellants, this "enterprise" is purportedly described in the complaint's factual allegation section; but we find nothing there alleging the existence of an enterprise. ***HN8***[] Whether legal or extra-legal, each enterprise is an ongoing "structure" of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchial or consensual decision-making. *See Old Time Enter., Inc., 862 F.2d at 1217*; *Atlas Pile Driving Co. v. Di Con Financial Co., 886 F.2d 986, 995 (8th Cir. 1989)*. *See also Turkette, 101 S. Ct. at 2528-29*. ***HN9***[] An enterprise is distinct, separate, and apart from a pattern of racketeering activity: although **[**20]** a pattern of racketeering activity may be the means through which the enterprise interacts with society, it is not itself the enterprise, for an enterprise is defined by what it is, not what it does. *See Turkette, 101 S. Ct. at 2528-29*. The factual allegation section of the complaint alleges in great detail that various law enforcement personnel *did* certain things, *e.g.*, wrote memos, talked on the telephone, investigated people, prosecuted people, but it alleges little more than this and it completely fails to indicate that a structure existed through which the law enforcement personnel worked their purpose. Of course, an obvious inference from the factual allegation portion of the complaint is that the "structure" through which the law enforcement personnel worked was their respective government offices. And precedent teaches us that ***HN10***[] government offices can serve as RICO enterprises. *See United States v. Ambrose, 740 F.2d 505, 512 (7th Cir. 1984)*, *cert. denied*, *472 U.S. 1017, 87 L. Ed. 2d 614, 105 S. Ct. 3479 (1985)*; *United States v. Lee Stoller Enter., Inc., 652 F.2d 1313* (7th Cir.), *cert. denied*, **[**21]** *454 U.S. 1082, 102 S. Ct. 636, 70 L. Ed. 2d 615 (1981)*. But the complaint indicates that the enterprise asserted is something else, something existing with the "support" of the government offices, but not including them, [14] something that we simply cannot find.

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[12] Assuming, *arguendo*, that some of the alleged statutory violations constitute racketeering acts, and waiving, for the moment, our plaint with the conclusory manner in which the allegations are made.

[13] The Appellants mention, among other entities, (1) the conspiracy of the "members of the Indiana State Medical Association," (2) the conspiracy of the American Medical Association, the Indiana State Medical Association, Minglin, White, and "numerous other named and unnamed people," (3) "various enterprises including [the] collective criminal enterprise," (4) "an on-going criminal syndicate," and (5) "the legitimate practice of chiropractic."

[14] Appellants' counsel's concession at oral argument that the complaint's purported enterprise is an association-in-fact of the Appellees bears this interpretation out: the government offices are not the purported enterprise, the Appellees are. As for this association-in-fact, again, there is nothing in the complaint to show that the Appellees constitute a separate and distinct enterprise: there is nothing indicating a command structure separate and distinct from the government offices; there is nothing indicating an enterprise existing apart from the Appellees' deeds.

Why not look for an enterprise in the Appellants' assertions of conspiracy? Throughout the complaint there are many pseudo-allegations of "conspiracy," including those **[**22]** of a conspiracy of the Appellees to "contain or eliminate chiropractic." Putting **[*1441]** our objections to the conclusory nature of these allegations aside, *see Otto, 814 F.2d at 1137*, do they not suffice to allege an enterprise? Alas, they do not. ***HN11***[] An enterprise is something more than a conspiracy. *United States v. Neapolitan, 791 F.2d 489, 499-500* (7th Cir.), *cert. denied*, *479 U.S. 940, 93 L. Ed. 2d 372, 107 S. Ct. 422* and *Messino v. United States, 479 U.S. 939, 93 L. Ed. 2d 371, 107 S. Ct. 421 (1986)*. It is something "more than a group of people who get together [and agree] to commit a 'pattern of racketeering activity,'" for "while the hallmark of conspiracy is agreement, the central element of an enterprise is structure." *Id.* The complaint may allege agreement; structure, however, it does not.

The Appellees raise other arguments to sink the Appellants' complaint. We feel no need to address them, just as we felt no need to address the many sound reasons relied on by the district court. The Appellants have raised claims under RICO subsections 1962(a), (b), (c), and (d). But in their attempt to allege **[**23]** everything, the Appellants have alleged nothing. "The needle in the haystack," if any, "might as well not be there." *Old Time Enter., Inc., 862 F.2d at 1220*. The claims under subsections (a) and (b) are ludicrous; those under subsections (c) and (d) deficient. Thus, when the district court dismissed the Appellants' complaint [15] it did not err. ***HN12***[] Though the Supreme Court has opined that a complaint should not be dismissed for failure to state a claim unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)*, that opinion is not a mandate to countenance balderdash. As an epithet for the Appellants' complaint, "balderdash" is as good as it gets.

[24]** Below, the district court gave the Appellants leave to amend their complaint. The Appellants chose instead to stand on it and take this appeal. For that decision, they now must pay the price.

AFFIRMED.

End of Document

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[15] In addition to claiming under the federal RICO statute, the Appellants' complaint claims under various provisions of Indiana state law. Absent the jurisdiction provided by the federal RICO count, however, the Appellants' state law claims need not be addressed. *United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*.

Lasercomb Am., Inc. v. Reynolds

United States Court of Appeals for the Fourth Circuit

January 8, 1990, Argued ; August 16, 1990, Decided

No. 89-3245

Reporter

911 F.2d 970 *; 1990 U.S. App. LEXIS 14278 **; 15 U.S.P.Q.2D (BNA) 1846 ***; Copy. L. Rep. (CCH) P26,619; 1990-2 Trade Cas. (CCH) P96,145; 18 Fed. R. Serv. 3d (Callaghan) 130

LASERCOMB AMERICA, INC., Plaintiff-Appellee, v. JOB REYNOLDS; LARRY HOLLIDAY, Defendants-Appellants, and HOLIDAY STEEL RULE DIE CORPORATION, Defendant

Subsequent History: [1]** Rehearing and Rehearing In Banc Denied September 27, 1990, Reported at *1990 U.S. App. LEXIS 22984*.

Prior History: Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, Senior District Judge. No. CA-86-197-G-C.

Disposition: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Core Terms

patent, misuse, Steel, software, district court, damages, infringement, copies, public policy, license agreement, monopoly, licensee, Salt, patent misuse, authors, exclusive right, inventions, license, copyright infringement, anti trust law, patent law, anticompetitive, intellectual property, limited time, inventors, manufacture, die-making, clauses, calculated, antitrust

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Copyright Law > ... > Protected Subject Matter > Literary Works > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > ... > Civil Infringement Actions > Online Infringement > General Overview

Copyright Law > ... > Civil Infringement Actions > Online Infringement > Defenses

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

HN1[] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

A successful defense of misuse of copyright bars a culpable plaintiff from prevailing on an action for infringement of the misused copyright.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

HN2[] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

A misuse of copyright defense is inherent in the law of copyright just as a misuse of patent defense is inherent in patent law.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN3[] **Intellectual Property, Misuse of Rights**

The grant to the inventor of the special privilege of a patent monopoly carries out a public policy adopted by the Constitution and laws of the United States, to promote the Progress of Science and useful Arts, by securing for limited times to inventors the exclusive right to their new and useful inventions. *U.S. Const. art. I, § 8, cl. 8*, 35 U.S.C.S. § 31. But the public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

Contracts Law > Defenses > Public Policy Violations

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

HN4[] **Regulated Practices, Intellectual Property**

So while it is true that the attempted use of a copyright to violate ***antitrust law*** probably would give rise to a misuse of copyright defense, the converse is not necessarily true -- a misuse need not be a violation of ***antitrust law*** in order to comprise an equitable defense to an infringement action. The question is not whether the copyright is being used in a manner violative of ***antitrust law*** (such as whether the licensing agreement is reasonable), but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Patent Law > Infringement Actions > Defenses > General Overview

HN5[] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

The defense of copyright misuse is available even if the defendants themselves have not been injured by the misuse.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN6[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) requires that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Thus, a complaint which fails to specifically allege the time, place and nature of the fraud is subject to dismissal on a *Fed. R. Civ. P. 12(b)(6)* motion. However, once the case has actually gone to trial, the issue of fraud is within the ambit of *Rule 15(b)*: When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Fed. R. Civ. P. 15(b)*.

Computer & Internet Law > ... > Civil Infringement > Remedies > General Overview

Copyright Law > ... > Remedies > Damages > General Overview

HN7[] **Civil Infringement, Remedies**

In North Carolina, the goal sought in awarding damages is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money. Alternatively stated, the goal of the law of damages is to place an injured party in as nearly the same position as he would have been had he not been injured.

Counsel: Argued: Boris Haskell, Paris and Haskell, Arlington, Virginia, for Appellants.

Lee Carl Bromberg, Bromberg & Sunstein, Boston, Massachusetts, for Appellee.

On Brief: Judith R. S. Stern, Bromberg & Sunstein, Boston, Massachusetts, for Appellee.

Judges: Widener and Sprouse, Circuit Judges, and Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation. Judge Sprouse wrote the opinion, in which Judge Widener and Senior Judge Hoffman joined.

Opinion by: SPROUSE

Opinion

[*1847]** **[*971]** SPROUSE, Circuit Judge.

Appellants Larry Holliday and Job Reynolds appeal from a district court judgment holding them liable to appellee Lasercomb America, Inc., for copyright infringement and for fraud, based on appellants' unauthorized copying and marketing of appellee's software. We affirm in part, reverse in part, **[**2]** and remand for recomputation of damages.

I

Facts and Proceedings Below

Appellants and defendants below are Larry Holliday, president and sole shareholder of Holiday Steel Rule Die Corporation (Holiday Steel), and Job Reynolds, a computer programmer for that company. [1] Appellee is Lasercomb America, Inc. (Lasercomb), the plaintiff below. Holiday Steel and Lasercomb were competitors in the manufacture of steel rule dies that are used to cut and score paper and cardboard for folding into boxes and cartons. Lasercomb developed a software program, Interact, which is the object of the dispute between the parties. Using this program, a designer creates a template of a cardboard cutout on a computer screen and the software directs the mechanized creation of the conforming steel rule die. [2]

[3]** In 1983, before Lasercomb was ready to market its Interact program generally, it licensed four prerelease copies to Holiday Steel which paid $ 35,000 for the first copy, $ 17,500 each for the next two copies, and **[***1848]** $ 2,000 for the fourth copy. Lasercomb informed Holiday Steel that it would charge $ 2,000 for each additional copy Holiday Steel cared to purchase. Apparently ambitious to create for itself an even better deal, Holiday Steel circumvented the protective devices Lasercomb had provided with the software and made three unauthorized copies of Interact which it used on its computer systems. Perhaps buoyed by its success in copying, Holiday Steel then created a software program called "PDS-1000," which was almost entirely a direct copy of Interact, and marketed it as its own CAD/CAM die-making software. These infringing activities were accomplished by Job Reynolds at the direction of Larry Holliday.

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[1] Holiday Steel was a defendant below but it is now bankrupt and is not a party to this appeal.

[2] This genre of software is called CAD/CAM, which stands for "computer assisted design and computer assisted manufacture."

There is no question that defendants engaged in unauthorized copying, and the purposefulness of their unlawful action is manifest from their deceptive practices. For example, Lasercomb had asked Holiday Steel to use devices called "chronoguards" to prevent unauthorized access to **[**4]** Interact. Although defendants had deduced how to circumvent the chronoguards and had removed them from their computers, they represented to Lasercomb that the chronoguards **[*972]** were in use. Another example of subterfuge is Reynolds' attempt to modify the PDS-1000 program output so it would present a different appearance than the output from Interact.

When Lasercomb discovered Holiday Steel's activities, it registered its copyright in Interact and filed this action against Holiday Steel, Holliday, and Reynolds on March 7, 1986. Lasercomb claimed copyright infringement, breach of contract, misappropriation of trade secret, false designation of origin, unfair competition, and fraud. Defendants filed a number of counterclaims. On March 24, 1986, the district court entered a preliminary injunction, enjoining defendants from marketing the PDS-1000 software.

The procedural history of this case is complex, with various claims and defenses experiencing both death and resurrection on various pretrial motions and at the bench trial itself. For purposes of this appeal it suffices to say that, ultimately, all of the counterclaims were dismissed; Lasercomb's claims of misappropriation **[**5]** of trade secret, false designation of origin, and unfair competition were dismissed as preempted by the Copyright Act; the court found the defendants liable to Lasercomb for copyright infringement, rejecting their affirmative defenses of misuse of copyright and lack of statutory copyright notice; and the court held for Lasercomb on its claims of breach of contract and fraud.

The district court awarded Lasercomb $ 105,000 in actual damages for copyright infringement and for fraud [3] -- with Holiday Steel, Holliday, and Reynolds jointly and severally liable -- plus $ 10,000 against Holliday and $ 5,000 against Reynolds as punitive damages on the fraud claim. [4] All defendants were permanently enjoined from publishing and marketing the PDS-1000 software.

[6]** Holliday and Reynolds raise several issues on appeal. They do not dispute that they copied Interact, but they contend that Lasercomb is barred from recovery for infringement by its concomitant culpability. They assert that, assuming Lasercomb had a perfected copyright, it impermissibly abused it. This assertion of the "misuse of copyright" defense is based on language in Lasercomb's standard licensing agreement, restricting licensees from creating any of their own CAD/CAM die-making software. [5] Appellants also argue that the district court's finding of fraud was erroneously based on facts not alleged in the complaint. Finally, they contend that, even if they are liable, the district court erred in the calculation of damages. We consider these issues *seriatim*.

[7]** II

Misuse of Copyright Defense

HN1[] A successful defense of misuse of copyright bars a culpable plaintiff from prevailing on an action for infringement of the misused copyright. Here, appellants claim Lasercomb has misused its copyright by including in

[3] The court found Lasercomb was damaged in the amount of $ 105,000 on the copyright infringement claim, and was damaged in the amount of $ 105,000 on the fraud claim. Because those two damages amounts arose from lost sales of the same three Interact copies, the court ruled Lasercomb could recover only once.

[4] Additional actual and punitive damages were awarded against the corporation severally. Because damages for the breach of contract were awarded against the corporation only, issues relating to that cause of action are not raised in this appeal.

[5] Appellants raise two other defenses to copyright infringement. They claim Lasercomb's recovery is barred by their failure to comply with statutory notice requirements in perfecting the copyright. Somewhat incongruously, appellants alternatively advance the defense of innocent infringement. Because of our disposition of the copyright misuse defense, we do not reach these other two defenses to infringement.

its standard licensing agreement clauses which prevent the licensee from participating in any manner in the creation of **[***1849]** computer-assisted die-making software. [6] The offending paragraphs read:

> **[*973]** D. Licensee agrees during the term of this Agreement that it will not permit or suffer its directors, officers and employees, directly or indirectly, to write, develop, produce or sell computer assisted die making software.
>
> E. Licensee agrees during the term of this Agreement and for one (1) year after the termination of this Agreement, that it will not write, develop, produce or sell or assist others in the writing, developing, producing or selling computer assisted die making software, directly or indirectly without Lasercomb's prior written consent. Any such activity undertaken without Lasercomb's written consent shall nullify **[**8]** any warranties or agreements of Lasercomb set forth herein.

The "term of this Agreement" referred to in these clauses is ninety-nine years.

Defendants were not themselves bound by the standard licensing agreement. Lasercomb had sent the agreement to Holiday Steel with a request that it be signed and returned. Larry Holliday, however, decided **[**9]** not to sign the document, and Lasercomb apparently overlooked the fact that the document had not been returned. [7] Although defendants were not party to the restrictions of which they complain, they proved at trial that at least one Interact licensee had entered into the standard agreement, including the anticompetitive language. [8]

The district court rejected the copyright misuse defense for three reasons. First, it **[**10]** noted that defendants had not explicitly agreed to the contract clauses alleged to constitute copyright misuse. Second, it found "such a clause is reasonable in light of the delicate and sensitive area of computer software." And, third, it questioned whether such a defense exists. We consider the district court's reasoning in reverse order.

A. *Does a "Misuse of Copyright" Defense Exist*?

We agree with the district court that much uncertainty engulfs the "misuse of copyright" defense. [9] We are persuaded, however, that ***HN2***[] a misuse of copyright defense is inherent in the law of copyright just as a misuse of patent defense is inherent in patent law.

[11]** The misuse of a patent is a potential defense to suit for its infringement, and both the existence and parameters of that body of law are well established. *E.g.,* United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 465, 1 L. Ed. 2d 465, 77 S. Ct. 490 (1957); *see generally* 8 E. Lipscomb, *Lipscomb's Walker on Patents* §§ 28:32-28:36 (3d ed. 1989) [hereinafter *Walker on Patents*]; Calkins, *Patent Law: The Impact of the 1988 Patent Misuse Reform Act and Noerr-Pennington Doctrine on Misuse Defenses and Antitrust Counterclaims*, 38 Drake L.

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[6] Appellants also claim Lasercomb has created an illegal tie-in by discounting the price of Interact to licensees who purchase steel rule dies and other goods from Lasercomb. This simply is not a tie-in. No customer is required to buy steel rule dies in order to be able to purchase the Interact software, nor must any customer buy the Interact software in order to purchase steel rule dies, nor does Lasercomb require customers to agree to not purchase any other vendor's wares in order to be able to purchase Lasercomb's software and dies. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 & n. 4 (1958).

[7] The district court's finding of breach of contract (not before us on appeal) was based on a letter in which Holliday admitted an oral agreement between Holiday Steel and Lasercomb was binding.

[8] At the time of trial, Lasercomb had sold approximately 40 licenses in Interact. Lasercomb's president testified that the terms of the licensing agreement, including the noncompete language, were negotiable. He stated the noncompete language had been negotiated out or modified in "several" instances, but could not specifically state the degree to which the language had been removed or altered.

[9] *See generally* 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright § 13.09[A]* (1989) [hereinafter *Nimmer on Copyright*]; Gibbs, *Copyright Misuse: Thirty Years Waiting for the Other Shoe*, 23 Copyright L. Symp. (ASCAP) 31 (1977); Fine, *Misuse and Antitrust Defenses to Copyright Infringement Actions*, 17 Hastings L.J. 315 (1965).

Rev. 175 (1989) [hereinafter Calkins, *Patent Law*]. Although there is little case law on the subject, courts from time to time have intimated that the similarity of rationales underlying the law of patents and the law of copyrights argues for a defense to an infringement of copyright based on misuse **[*974]** of the copyright. *E.g., United States v. Loew's, Inc., 371 U.S. 38, 44-51, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*; *United States v. Paramount Pictures, Inc., 334 U.S. 131, 157-59, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*; *Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 865 & n.27 (5th Cir. 1979)*, **[**12]** *cert. denied*, *445 U.S. 917, 63 L. Ed. 2d 601, 100 S. Ct. 1277 (1980)*. The origins of patent and copyright law in England, the treatment of these two aspects of intellectual property by the framers of our Constitution, and the later statutory and judicial development of patent and **[***1850]** copyright law in this country persuade us that parallel public policies underlie the protection of both types of intellectual property rights. We think these parallel policies call for application of the misuse defense to copyright as well as patent law.

1. Overview

Because of the paucity of precedent in the copyright misuse area, some historical perspective of the elements underlying intellectual property law is helpful to our inquiry. Fortunately, respected treatise authors have captured well the essence of the relevant historical perspective.

During the sixteenth century, it became common for the English Crown to grant "letters patent" [10] which gave individuals exclusive rights to produce, import and/or sell given items within the kingdom. 1 *Walker on Patents* §§ 1:1-1:2. These monopolies were granted for such commonplace items as salt, vinegar, and calfskins, to name but a **[**13]** few. *Id.* at § 1:2. The practice of granting monopolies led to widespread abuses, such as shortages and inflated prices for items that would otherwise be easily and cheaply available. *Id.* Consequently, Parliament passed the Statute of Monopolies (1623-24), [11] prohibiting the creation of such monopolies by the Crown. *Id.* at § 1.5. An exception was made, however, to permit a patent to be granted for a period of fourteen years to the creator of a new invention. 21 Jac., ch. 3, § 6.

The rationale for allowing patents for new inventions was and is to encourage their creation for the benefit of society. 1 *Walker on Patents* § 1:6. The monopolies granted by the Crown had been odious because they restrained trade **[**14]** in articles that had previously been a part of the public domain. An invention, however, does not withdraw anything from public traffic; rather, it introduces something new. To encourage and reward inventors for increasing the inventory of useful objects, the government grants them, for a limited time, the right to exclude others from making and selling their inventions. *Id.; United States v. Dubilier Condenser Corp., 289 U.S. 178, 186, 77 L. Ed. 1114, 53 S. Ct. 554 (1933)*.

The development of copyright law in England likewise grew out of a differentiation by Parliament between a monopoly that restricts publication of works and a limited copyright that encourages the efforts of authors. In sixteenth-century England, the Crown granted to the Stationers' Company the exclusive right to publish and print all published works (apparently to enable censorship of Protestant materials). In the early 1700s, the Stationer's Company petitioned Parliament to recognize that these rights inured to it in perpetuity. Instead, Parliament passed the Statute of Anne (1709-10), [12] the first known copyright legislation. A. Latman, *The Copyright Law: Howell's Copyright Law Revised and* **[**15]** *the 1976 Act* 2-3 (5th ed. 1979) [hereinafter *Howell's Copyright Law*]; R. Bowker, *Copyright: Its History and Its Law* 21-23 (1912). That statute gave authors the sole right of publication for up to **[*975]** twenty-eight years. Thus, the English statutory treatment of copyright was similar to that of patent in that it granted the creator a monopoly for a limited time only.

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[10] From the Latin *patentes* meaning open or accessible. Thus, letters patent were documents left open for examination by the public. 1 *Walker on Patents* § 1:1.

[11] An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof, 21 Jac., ch. 3.

[12] An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned, 8 Anne, ch. 19.

It is significant, we think, that the framers of our Constitution continued the English development of intellectual property law and considered in tandem those property rights protectable by copyrights and those protectable by patents. In giving Congress the power to create copyright and patent laws, the framers combined the two concepts in one clause, stating a unitary purpose -- to promote progress. *Article I, section 8, clause 8 of the United* ***[**16]*** *States Constitution* provides:

> [The Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

This clause was adopted without debate, and material explaining the intention of the framers is limited. However, a comment in *The Federalist* papers indicates the public policy behind the grant of copyright and patent powers is essentially the same:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.

The Federalist, No. 43 at 279 (J. Madison) (Mod. Lib. ed. 1941). [13]

[17]** Supreme Court comment has likewise equated the public policies of copyright and patent. For example, in *Mazer v. Stein, 347 U.S. 201, 219, 98 L. Ed. 630, 74 S. Ct. 460 (1953)*, the Supreme Court stated:

> The economic philosophy behind the clause empowering Congress to grant *patents and copyrights* is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

(Emphasis added.) *See also* *Loew's, 371 U.S. at 44-51*; *Paramount Pictures, 334 U.S. at 154-59*. The philosophy behind copyright, parallel to that discussed above for patent, is that the public benefits from the efforts of authors to introduce new ideas and knowledge into the public domain. To encourage such efforts, society grants authors exclusive rights in their works for a limited time.

2. The Misuse of Patent Defense

Although a patent misuse defense was recognized by the courts as early as 1917, [14] most commentators **[**18]** point to *Morton Salt Co. v. G. S. Suppiger, 314 U.S. 488, 86 L. Ed. 363, 62 S. Ct. 402 (1942)*, as the foundational patent misuse case. In that case, the plaintiff Morton Salt brought suit on the basis that the defendant had infringed Morton's patent in a salt-depositing machine. The salt tablets were not themselves a patented item, but Morton's patent license required that licensees use only salt tablets produced by Morton. Morton was thereby using its patent

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[13] **[***1851]** The Court of Customs and Patent Appeals observed that the patent/copyright clause was unusual in stating the reason the power had been granted, and commented:

> Its inclusion doubtlessly was due to the fact that those who formulated the Constitution were familiar with the long struggle over monopolies so prominent in English history, where exclusive rights to engage even in ordinary business activities were granted so frequently by the Crown for the financial benefits accruing to the Crown only. It was desired that in this country any Government grant of a monopoly for even a limited time should be limited to those things which serve in the promotion of science and the useful arts.

In Re Shao Wen Yuan, 38 C.C.P.A. 967, 188 F.2d 377, 380 (C.C.P.A. 1951). *See also Howell's Copyright Law*, at 15.

[14] *Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 61 L. Ed. 871, 37 S. Ct. 416 (1917)*. For a history of the patent misuse defense, see Calkins, *Patent Law*, at 178-92.

to restrain competition in the sale of an item which was not within the scope of the patent's privilege. The Supreme Court held that, as a court of **[*976]** equity, it would not aid Morton in protecting its patent when Morton was using that patent in a manner contrary to public policy. *Id. at 490-92*. The Court stated:

> ***HN3***[] The grant to the inventor of the special privilege of a patent monopoly carries out a public policy adopted by the Constitution and laws of the United States, "to promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right **[**19]** . . ." to their "new and useful" inventions. *United States Constitution, Art. I, § 8, cl. 8*, 35 U.S.C. § 31. But the public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant.

Id. at 492. Thus, the Supreme Court endorsed "misuse of patent" as an equitable defense to a suit for infringement of that patent.

Since *Morton Salt*, the courts have recognized patent misuse as a valid defense and have applied it in a number of cases in which patent owners have attempted to use their patents for price fixing, tie-ins, **[**20]** territorial restrictions, and so forth. *See* Calkins, *Patent Law*, at 187-89 n.38, 8 *Walker on Patents* §§ 28:32-28:36; W. Holmes, *Intellectual Property and* ***Antitrust Law*** § 1.07 (1989) [hereinafter Holmes, *Intellectual Property*]. The patent misuse defense also has been acknowledged by Congress in the 1988 Patent Misuse Reform Act, Pub. L. No. 100-703, 102 Stat. 4676 (1988) (codified at *35 U.S.C. § 271(d)(4)* & *(5)*), which limited but did not eliminate the defense. [15]

3. The "Misuse of Copyright" Defense

Although the patent misuse defense has been generally recognized since *Morton Salt*, it has been much less certain whether an analogous copyright misuse defense exists. *See supra* note 9. This uncertainty persists because no United States Supreme Court decision **[**21]** has firmly established a copyright misuse defense in a manner analogous **[***1852]** to the establishment of the patent misuse defense by *Morton Salt*. The few courts considering the issue have split on whether the defense should be recognized, *see* Holmes, *Intellectual Property* § 4.09 (collecting cases), and we have discovered only one case which has actually applied copyright misuse to bar an action for infringement. *M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948)*, *appeal dismissed*, *177 F.2d 515 (8th Cir. 1949)*.

We are of the view, however, that since copyright and patent law serve parallel public interests, a "misuse" defense should apply to infringement actions brought to vindicate either right. As discussed above, the similarity of the policies underlying patent and copyright is great and historically has been consistently recognized. Both patent law and copyright law seek to increase the store of human knowledge and arts by rewarding inventors and authors with the exclusive rights to their works for a limited time. At the same time, the granted monopoly power does not extend to property not covered by the patent or copyright. **[**22]** *Morton Salt, 314 U.S. at 492*; *Paramount Pictures, 334 U.S. at 156-58*; [16] *cf.* *Baker v. Selden, 101 U.S. 99, 101-04, 25 L. Ed. 841 (1880)*.

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[15] The primary effect of the Patent Misuse Reform Act is to eliminate the presumption that use of a patent license to create a tie-in is *per se* misuse. *See* Calkins, *Patent Law*, at 196-97.

[16] In *Paramount Pictures*, the Court in an antitrust context stated:

> Block-booking [of feature films] prevents competitors from bidding for single features on their individual merits. The District Court held it illegal for that reason and for the reason that it "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first." That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials. The court enjoined defendants from

[23] [*977]** Thus, we are persuaded that the rationale of *Morton Salt* in establishing the misuse defense applies to copyrights. In the passage from *Morton Salt* quoted above, the phraseology adapts easily to a copyright context:

> The grant to the [author] of the special privilege of a [copyright] carries out a public policy adopted by the Constitution and laws of the United States, "to promote the Progress of Science and useful Arts, by securing for limited Times to [Authors] . . . the exclusive Right . . ." to their ["original" works]. *United States Constitution, Art. I, § 8, cl. 8*, [*17 U.S.C.A. § 102*]. But the public policy which includes [original works] within the granted monopoly excludes from it all that is not embraced in the [original expression]. It equally forbids the use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which it is contrary to public policy to grant.

Cf. Morton Salt, 314 U.S. at 492.

Having determined that "misuse of copyright" is a valid defense, analogous to the misuse of patent defense, our next task is to **[**24]** determine whether the defense should have been applied by the district court to bar Lasercomb's infringement action against the defendants in this case.

B. *The District Court's Finding that the Anticompetitive Clauses Are Reasonable*

In declining to recognize a misuse of copyright defense, the district court found "reasonable" Lasercomb's attempt to protect its software copyright by using anticompetitive clauses in their licensing agreement. In briefly expressing its reasoning, the court referred to the "delicate and sensitive" nature of software. It also observed that Lasercomb's president had testified that the noncompete language was negotiable.

If, as it appears, the district court analogized from the "rule of reason" concept of ***antitrust law***, we think its reliance on that principle was misplaced. Such reliance is, however, understandable. Both the presentation by appellants and the literature tend to intermingle antitrust and misuse defenses. **[***1853]** [17] **[**26]** *E.g.*, Holmes, *Intellectual Property*, at § 4.09. A patent or copyright is often regarded as a limited monopoly -- an exception to the general public policy against restraints of trade. [18] Since ***antitrust law*** is the **[**25]** statutory embodiment of that public

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> performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.
>
> We approve that restriction.

334 U.S. at 156-58 (citations and footnote omitted). Citing *Paramount*, the Fifth Circuit has opined in dicta that "it is . . . likely that the public monopoly extension rationale of *Morton Salt* . . . is applicable to copyright." *Mitchell, 604 F.2d at 865 n. 27*.

[17] In the context of copyright, this confusion probably arises at least in part from *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. In that case, CBS brought an antitrust suit and also asked for a declaratory judgment that defendant's action constituted misuse of copyright. The Second Circuit first addressed whether there was an antitrust violation, and finding there was, "the Court of Appeals held that the challenged conduct constituted misuse of copyrights solely on the basis of its finding of unlawful price fixing." *Id. at 6 n. 9*. The Supreme Court reversed the finding of a Sherman Act violation -- on the basis that the court of appeals had used the wrong standard to evaluate the price fixing -- stating: "We reverse that judgment, and the copyright misuse judgment dependent upon it. . . ." *Id. at 24*. Standing alone, this latter sentence seems to imply that copyright misuse depends on a finding of an antitrust violation. In context, however, it is apparent that misuse was linked to antitrust in that case simply as a matter of litigation strategy. Copyright misuse was not asserted as a defense to an infringement suit, and the primary claim was an antitrust claim.

[18] For example, Calkins states, "The essence of every patent is the power to exclude, that is, monopoly power." Calkins, *Patent Law*, at 176 n. 1. But see 1 *Walker on Patents* ch. 1, which repeatedly distinguishes a monopoly, which withdraws a previously

policy, there is an understandable association of ***antitrust law*** with the misuse defense. Certainly, an entity which uses its patent as the means of violating **[*978]** ***antitrust law*** is subject to a misuse of patent defense. However, *Morton Salt* held that it is not necessary to prove an antitrust violation in order to successfully assert patent misuse:

> It is unnecessary to decide whether respondent has violated the Clayton Act, for we conclude that in any event the maintenance of the present suit to restrain petitioner's manufacture or sale of the alleged infringing machines is contrary to public policy and that the district court rightly dismissed the complaint for want of equity.

314 U.S. at 494. *See also* *Hensley Equip. Co. v. Esco Corp., 383 F.2d 252, 261* & n. 19, *amended on reh'g*, *386 F.2d 442 (5th Cir. 1967)*; 8 *Walker on Patents*, at § 28:33.

So while it is true that the attempted use of a copyright to violate ***antitrust law*** probably would give rise to a misuse of copyright defense, the converse is not necessarily true -- a misuse need not be a violation of ***antitrust law*** in order to comprise an equitable defense to an infringement action. The question is not whether the copyright is being used in a manner violative of ***antitrust law*** (such as whether the licensing agreement is "reasonable"), but whether the copyright is being used in a manner **[**27]** violative of the public policy embodied in the grant of a copyright.

Lasercomb undoubtedly has the right to protect against copying of the Interact code. Its standard licensing agreement, however, goes much further and essentially attempts to suppress any attempt by the licensee to independently implement the idea which Interact expresses. [19] The agreement forbids the licensee to develop or assist in developing *any* kind of computer-assisted die-making software. If the licensee is a business, it is to prevent all its directors, officers and employees from assisting in any manner to develop computer-assisted die-making software. Although one or another licensee might succeed in negotiating out the noncompete provisions, this does not negate the fact that Lasercomb is attempting to use its copyright in a manner adverse to the public policy embodied in copyright law, and that it has succeeded in doing so with at least one licensee. *See supra* note 8 and accompanying text. *Cf.* *Berlenbach v. Anderson & Thompson Ski Co., 329 F.2d 782, 784-85* (9th Cir.), *cert. denied*, *379 U.S. 830, 13 L. Ed. 2d 39, 85 S. Ct. 60 (1964)*.

[28]** The language employed in the Lasercomb agreement is extremely broad. Each time Lasercomb sells its Interact program to a company and obtains that company's agreement to the noncompete language, the company is required to forego utilization of the creative abilities of all its officers, directors and employees in the area of CAD/CAM die-making software. Of yet greater concern, these creative abilities are withdrawn from the public. [20] **[**29]** The period for which this anticompetitive restraint exists is ninety-nine years, which could be longer than the life of the copyright itself. [21]

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public item from the public domain, from a patent, which protects for a limited time a new item which is then added to the public domain. *See also* *Dubilier Condenser, 289 U.S. at 186*; Holmes, *Intellectual Property*, at § 1.02.

HN4[] -

[19] A copyright, of course, protects only the expression of an idea (the Interact code), and not the idea itself (using CAD/CAM software to make steel rule dies). *17 U.S.C. § 102(b)*; *Mazer v. Stein, 347 U.S. at 217*; *M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 434-37 (4th Cir. 1986)*.

[20] **[***1854]** *Cf.* *Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 45 L. Ed. 2d 84, 95 S. Ct. 2040 (1975)*:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

(Footnotes omitted.) *See also* 1 *Nimmer on Copyright, at § 1.03[A]*.

We previously have considered the effect of anticompetitive language in a licensing agreement in the context of patent misuse. Compton v. Metal Products, Inc., 453 F.2d 38 (4th Cir. 1971), *cert. denied*, *406 U.S. 968, 32 L. Ed. 2d 667, 92 S. Ct. 2414 (1972)*. **[*979]** Compton had invented and patented coal auguring equipment. He granted an exclusive license in the patents to Joy Manufacturing, and the license agreement included a provision that Compton would not "engage in any business or activity relating to the manufacture or sale of equipment of the type licensed hereunder" for as long as he was due royalties under the patents. Suit for infringement of the Compton patents was brought against Metal Products, and the district court granted injunctive relief and damages. On appeal we held that relief for the infringement was barred by the misuse defense, stating:

> The need of Joy to protect its investment does not outweigh the public's **[**30]** right under our system to expect competition and the benefits which flow therefrom, and the total withdrawal of Compton from the mining machine business . . . everywhere in the world for a period of 20 years unreasonably lessens the competition which the public has a right to expect, and constitutes misuse of the patents.

Id. at 45. *Cf.* Berlenbach, supra (applying misuse doctrine where license to sell patented ski bindings prohibited licensee from manufacturing or selling any competing ski binding).

We think the anticompetitive language in Lasercomb's licensing agreement is at least as egregious as that which led us to bar the infringement action in *Compton*, and therefore amounts to misuse of its copyright. Again, the analysis necessary to a finding of misuse is similar to but separate from the analysis necessary to a finding of antitrust violation. The misuse arises from Lasercomb's attempt to use its copyright in a particular expression, the Interact software, to control competition in an area outside the copyright, *i.e.*, the idea of computer-assisted die manufacture, regardless of whether such conduct amounts to an antitrust **[**31]** violation.

C. *The Effect of Appellants Not Being Party to the Anticompetitive Contract*

In its rejection of the copyright misuse defense, the district court emphasized that Holiday Steel was not explicitly party to a licensing agreement containing the offending language. However, again analogizing to patent misuse, ***HN5***[] the defense of copyright misuse is available even if the defendants themselves have not been injured by the misuse. In *Morton Salt*, the defendant was not a party to the license requirement that only Morton-produced salt tablets be used with Morton's salt-depositing machine. Nevertheless, suit against defendant for infringement of Morton's patent was barred on public policy grounds. Similarly, in *Compton*, even though the defendant Metal Products was not a party to the license agreement that restrained competition by Compton, suit against Metal Products was barred because of the public interest in free competition. *See also* Hensley Equip. Co., 383 F.2d at 261; *cf.* Berlenbach, 329 F.2d at 784-85.

Therefore, the fact that appellants **[**32]** here were not parties to one of Lasercomb's standard license agreements is inapposite to their copyright misuse defense. The question is whether Lasercomb is using its copyright in a manner contrary to public policy, which question we have answered in the affirmative.

In sum, we find that misuse of copyright is a valid defense, that Lasercomb's anticompetitive clauses in its standard licensing agreement constitute misuse of copyright, and that the defense is available to appellants even though they were not parties to the standard licensing agreement. Holding that Lasercomb should have been barred by the defense of copyright misuse from suing for infringement of its copyright in the Interact program, we reverse the injunction and the award of damages for copyright infringement. [22]

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[21] In general, copyrights last for the life of the author plus 50 years. 17 U.S.C. § 302(a).

[22] This holding, of course, is not an invalidation of Lasercomb's copyright. Lasercomb is free to bring a suit for infringement once it has purged itself of the misuse. *Cf.* United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 465, 1 L. Ed. 2d 465, 77 S. Ct. 490 (1957); *Hensley Equipment Co.*, 383 F.2d at 261, 386 F.2d at 443.

[33]** **[*980]** III

Finding of Fraud

The complaint alleged that defendants committed fraud "at the time they sought to purchase a license to use the software at the Holiday plant" by representing to Lasercomb that they would preserve Lasercomb's **[***1855]** copyright and proprietary rights in Interact. The district court found Lasercomb had established fraud by showing that defendants made various false representations on which Lasercomb reasonably relied in continuing its relationship with Holiday Steel, thereby giving defendants the opportunity to make the unlawful copies. On appeal, Holliday and Reynolds contend that the district court erred in finding fraud on the basis of incidents which were not alleged in the complaint; that is, the false representations found by the court occurred after the time of the events alleged in the complaint.

Appellants point to *Rule 9(b) of the Federal Rules of Civil Procedure*, which requires that, ***HN6***[] "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, a complaint which fails to specifically **[**34]** allege the time, place and nature of the fraud is subject to dismissal on a *Rule 12(b)(6)* motion. However, once the case has actually gone to trial, the issue of fraud is within the ambit of *Rule 15(b)*: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Appellants made no objection below to the introduction of the evidence which proved fraud at times after Interact was purchased, nor have they averred that their failure to object resulted from a reasonable belief that the evidence was introduced in support of some other issue being litigated. Therefore, the issues of fraud after the purchase of Interact were properly treated as if raised in the pleadings, and we affirm the district court's finding of fraud. *Fed. R. Civ. P. 15(b)*; *see* *Federal Mut. Ins. Co. v. Deal, 239 F. Supp. 618, 621 (S.D.W. Va. 1965)*; *Strand v. Librascope, Inc., 197 F. Supp. 743, 744 (E.D. Mich. 1961)*; 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1300 (1969); *cf.* *Consolidated Data Terminals v. Applied Digital Data Sys., 708 F.2d 385, 396 (9th Cir. 1983)* **[**35]** (even if pleadings never amended, judgment stands if issue tried by express or implied consent).

IV

Calculation of Damages

The district court calculated Lasercomb's damages on the basis of the three copies of Interact that defendants made and used without authorization and without payment to Lasercomb. [23] The district court calculated the damages based on the cost of a copy of Interact to a first-time user, *i.e.*, $ 35,000. Multiplying this amount by three, the district court arrived at actual damages of $ 105,000 assessed once for the count of copyright infringement and again for the count of fraud. The court, however, properly ruled that Lasercomb could recover the $ 105,000 only once. *See* *Clifford v. River Bend Plantation, Inc., 55 N.C. App. 514, 522, 286 S.E.2d 352, 356 (1982)*. The district court also awarded punitive damages on the fraud count against Holliday and Reynolds in the amounts of $ 10,000 and $ 5,000 respectively.

[36]** Having avoided the Charybdis of damages for copyright infringement by the misuse defense, appellants are now confronted with the Scylla of yet the same amount of damages for their fraudulent actions. This they face by challenging the **[*981]** court's calculation, claiming that, as to *them*, the cost of a copy of Interact was $ 2,000

Because of this holding, we do not reach the other defenses to copyright infringement advanced by appellants.

Although we find misuse of copyright, we reject the contention of appellants -- that they should recover attorney fees from Lasercomb under *17 U.S.C. § 505* because Lasercomb brought this action in bad faith. Given the conduct of defendants and the obscurity of their defenses, we find such a position completely untenable.

[23] Separate damages were awarded against Holiday Steel severally to account for profits realized by sale of the infringing PDS-1000 software. These damages are not at issue in this appeal.

rather than $ 35,000. We agree that the district court's approach was erroneous under the principles of North Carolina law. [24]

In North Carolina, "the goal sought in awarding damages is 'to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.'" *Quate v. Caudle, 95 N.C. App. 80, 87, 381 S.E.2d 842, 846 (1989)* (quoting *Phillips v. Chesson, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950))*, **[**37]** *rev. denied*, *325 N.C. 709, 388 S.E.2d 462 (1989)*. Alternatively stated, "The goal of the law of damages is to place an injured party in as nearly the same position as he would have been had he not been injured." *Cates v. Wilson, 321 N.C. 1, 7, 361 S.E.2d 734, 738 (1987)*.

The district court stated, "Plaintiff's actual damages may be measured by its lost sales." This is a generally correct statement of North Carolina law. However, by using a figure of $ 35,000, the court evidently was considering loss of sales to persons other than Holiday Steel. Due to the nature of software, however, Lasercomb could have sold copies to any other interested buyer notwithstanding defendants' copying, so it is difficult to discern how Lasercomb could have lost sales to prospective buyers -- other than Holiday Steel -- on account of the copying. Thus, **[***1856]** damages can be properly measured only by consideration of lost sales *to Holiday Steel*.

On August 2, 1983, Lasercomb sent a letter to Holiday Steel which stated that the charge for all future software licenses would be $ 2,000. [25] Appellants therefore assert that, had Holiday Steel properly purchased the three Interact **[**38]** copies rather than copying them, Lasercomb would have received $ 6,000. Lasercomb contends that "it would be a perversion of justice to allow" appellants the benefit of the "discount," given their intentional infringement and fraudulent actions. Appellants' wrongful actions, however, have bearing on the *actual* damages only if those actions induced Lasercomb to lower its price to $ 2,000; otherwise, the wrongful actions are relevant only to assessment of punitive damages.

The district court did not specifically find whether the $ 2,000 price was a product of business decisions that were unaffected by any fraudulent activity taking place, or whether (and, if so, to what extent) appellants obtained that favorable price only through its wrongful actions. Even if the price were $ 2,000 only because of fraud, however, it appears $ 35,000 per copy still would not be the proper amount of damages. Defendants submitted evidence **[**39]** that, under Lasercomb's standard discounting policy, the fifth, sixth, and seventh licenses each would have cost 25 percent of $ 35,000. We therefore vacate the judgment for $ 105,000 and remand for the district court to determine what amount Holiday Steel would have paid for the three copies of Interact, apart from fraud. [26]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

End of Document

[24] It is undisputed that North Carolina law governs the common law claims in this case.

HN7[] -

[25] The charge also covered "programming of the chronoguard, and administrative functions."

[26] Appellants have not challenged the awards of punitive damages against them, and we do not disturb those awards.

Scales v. Vill. of Camden

United States District Court for the Northern District of New York

August 17, 1990, Decided ; August 17, 1990, Filed

No. 89-CV-151

Reporter

1990 U.S. Dist. LEXIS 11194 *; 1990-2 Trade Cas. (CCH) P69,210

RONALD D. SCALES and KAREN M. SCALES, Individually and d/b/a THE COUNTRY STORE and SCHMITT SALES, INC., Plaintiffs, v. VILLAGE OF CAMDEN, NEW YORK, HENRY C. SPELLICY, Individually and as Mayor of The Village of Camden, CHARLENE PHINNEY, Individually and as the Village Clerk of Camden, WALTON SIMMONS, THOMAS WALKER, KEVIN HANNON and TIM BERQUIST, Individually and constituting the Zoning Board of Appeals for the Village of Camden, DAVID BARKER, as Zoning Code Enforcement Officer for the Village of Camden, GEORGE HENRY, Individually and as Zoning Enforcement Officer for the Village of Camden, Defendants

Core Terms

plaintiffs', gasoline, variance, Zoning, cause of action, defendants', conspiracy, self-service, deprivation, certificate, pumps, summary judgment, exemption, property right, install, rights, state action, summary judgment motion, restraint of trade, due process claim, property interest, equal protection, building permit, due process, municipalities, nonmoving, Sales, zoning ordinance, neighborhood, residential

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Summary Judgment, Opposing Materials**

In a motion for summary judgment, the movant bears the burden of establishing that there is no genuine issue of material fact to be submitted to the trier of fact, and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. As a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party. Under the current formulation of the standards governing summary judgment motions, the moving party does not, however, bear the burden of proving that his opponent's case is wholly frivolous. In cases where the nonmovant will bear the ultimate burden of proof at trial on an issue, the moving party's burden under *Rule 56* will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim. Thus, the evidentiary burdens that the respective parties will bear at trial guide this court in its determination of summary judgment motions.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Evidence > Weight & Sufficiency

HN2[] **Summary Judgment, Evidentiary Considerations**

In cases where a party that has filed a motion for summary judgment has attempted to demonstrate that the nonmoving party's evidence is insufficient as a matter of law to establish his claim, the burden shifts to the nonmoving party to come forward with persuasive evidence that his claim is not "implausible." The question then becomes, is there sufficient evidence to reasonably expect that a jury could return a verdict in favor of the nonmoving party. In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. No issue for trial exists unless there is sufficient evidence favoring the nonmoving party produced in opposition to the motion for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative summary judgment may be granted. A plaintiff opposing a fully supported motion must offer concrete evidence from which a reasonable juror could return a verdict in his favor. Then, if no such evidence is offered alluding to a genuine issue of material fact, the trial judge shall grant summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] Summary Judgment, Entitlement as Matter of Law

The substantive law will identify those facts which are to be considered as material, and only disputes over those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. The United States Supreme Court explains the level of inquiry required in a summary judgment as whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN4[] Procedural Due Process, Scope of Protection

In order to establish a procedural due process violation, a plaintiff must prove that he or she was deprived of an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Constitutional Law > Substantive Due Process > Scope

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN5[] Zoning, Constitutional Limits

In the context of a zoning dispute, to state a claim under the *Fourteenth Amendment* for deprivation of "property" without due process of law a person must establish that he had a valid "property interest" in some benefit that was protectible under the *Fourteenth Amendment* at the time he was deprived of the benefit. Property interests are not created by the United States Constitution. Instead, in order to determine whether a property interest in some benefit rises to the level of a right protectible under the *Fourteenth Amendment*, courts must look to existing rules or understandings that stem from an independent source such as state law. Those are rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Constitutional Law > Substantive Due Process > Scope

HN6[] Constitutional Law, Substantive Due Process

The question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted. Otherwise the application would amount to a mere unilateral expectancy not rising to the level of a property right guaranteed against deprivation by the *Fourteenth Amendment*. By that standard the United States Court of Appeals for the Second Circuit does not intend to remove from constitutional protection every application for a license or certificate that could, under any conceivable version of facts, be the subject of discretionary action, and a theoretical possibility of discretionary action does not automatically classify an application for a license or certificate as a mere unilateral hope or expectation. On the contrary, the standard is intended to be a tool capable of measuring particular applications to determine if the applicant had a legitimate claim of entitlement based on the likelihood that without the due process violation that application would have been granted.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Constitutional Law > Substantive Due Process > Scope

HN7[] Zoning, Constitutional Limits

A zoning authority's discretion, embodied in the governing law, prevents plaintiff's expectation of success from rising to the level of certainty required to give rise to a cognizable property right.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

HN8[] Zoning, Variances

Where a use variance is sought, the applicant must show practical difficulties and unnecessary hardship. Before a zoning board may exercise its discretion and grant a variance, the record must show (1) that the land in question cannot yield a reasonable return if only used for a purpose allowed in that zone; (2) that the plight of the applicants was due to unique circumstances and not to the general conditions in the neighborhood; and (3) that the essential character of the neighborhood will not be altered by the use sought.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > General Overview

HN9[] Equal Protection, Nature & Scope of Protection

The *Equal Protection Clause* is essentially a direction that all persons similarly situated should be treated alike. To state an equal protection claim, a plaintiff must charge a governmental officer not only with deliberately interpreting a statute against the plaintiff, but also with singling him out alone for that misinterpretation.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Evidence > Inferences & Presumptions > General Overview

HN10[] Equal Protection, Nature & Scope of Protection

An equal protection claim may be raised even though a plaintiff is not a member of a suspect class. It is, however, necessary for the plaintiff to set forth substantial facts supporting his allegation of discriminatory treatment, as well as facts that the alleged discrimination was purposeful or intentional.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN11[] Summary Judgment, Entitlement as Matter of Law

On a summary judgment motion all ambiguities and inferences to be drawn from the underlying facts should be resolved in the light most favorable to the nonmoving party.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Inferences & Presumptions > General Overview

Civil Rights Law > Protection of Rights > Conspiracy Against Rights > Elements

Constitutional Law > Equal Protection > General Overview

Constitutional Law > Privileges & Immunities

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN12[] Equal Protection, Nature & Scope of Protection

A *42 U.S.C.S. § 1985(3)* claim is merely a codification of a claim of conspiracy to violate the *Equal Protection Clause of the Fourteenth Amendment*. In order to make out a violation of *§ 1985(3)*, plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN13[] Elements, Color of State Law

Rights under the *Equal Protection Clause* itself arise only where there has been involvement of the state or of one acting under the color of its authority. The *Equal Protection Clause* does not add any thing to the rights which one citizen has under the United States Constitution against another. The *Fourteenth Amendment* protects the individual against state action, not against wrongs done by individuals.

Constitutional Law > Equal Protection > National Origin & Race

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Constitutional Law > Equal Protection > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN14[] Equal Protection, National Origin & Race

Under *42 U.S.C.S. § 1983(5)*, a conspiracy not only must have as its purpose the deprivation of equal protection of the laws, or of equal privileges and immunities under the laws, but also must be motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

Civil Rights Law > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN15[] **Civil Rights Law**

The United States Supreme Court explicitly foreclosed the possibility of a viable *42 U.S.C.S. § 1985(3)* claim where plaintiff alleges a conspiracy motivated by economic or commercial animus. The Court finds no support for the proposition that *§ 1985(3)* was intended to reach conspiracies motivated by bias towards others on account of their economic views, status, or economic activities. Economic and commercial conflicts are best dealt with by statutes, federal or state, specifically addressed to such problems.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Exemptions & Immunities, Parker State Action Doctrine**

Nothing in the language of the Sherman Act or in its history suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. This deference to the states has come to be known as the "state action" exemption to the federal antitrust laws. Under this exemption doctrine, when a state directs, or acts in, some noncompetitive activity, the state and its officers are nonetheless exempt from the operation of the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Bill of Rights > General Overview

HN17[] **Antitrust & Trade Law, Sherman Act**

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise-system as the *Bill of Rights* is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete-to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Duties & Powers

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Public Improvements > General Overview

HN18[] Exemptions & Immunities, Parker State Action Doctrine

Unlike the several states, cities are not automatically within the Parker doctrine, that is, exempt from the operation of the antitrust laws. To invoke the protection afforded by the Parker doctrine, a municipality must show that its anticompetitive conduct was taken pursuant to state policy to displace competition with regulation or monopoly public service. This state policy must be one that is clearly articulated and affirmatively expressed. An additional requirement that the state policy be actively supervised also has been imposed by the United States Supreme Court.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

Governments > Local Governments > Duties & Powers

Real Property Law > Zoning > Judicial Review

Administrative Law > Agency Adjudication > Review of Initial Decisions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN19[] Zoning, Variances

The authority of a city to make an initial determination as to the issuance of a use variance upon an application for such variance and to subsequently review such decision after an appeal is taken as to the denial of such variance has been expressly granted by the New York Legislature, that is, affirmatively addressed. This grant of authority, giving great deference to a city in determining whether to grant a use variance to an applicant based upon certain well-established standards, satisfies the requirement of a clearly articulated and affirmatively expressed state policy for purposes of the Parker exemption from the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN20[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy in restraint of trade. A Sherman Act, *§ 1* plaintiff must establish both elements: first, that defendant entered into a contract, combination or conspiracy; and second, that such was in restraint of trade. Although the Sherman Act speaks of restraint of trade in absolute terms, it has long been established that Sherman Act, *§ 1*, proscribes only unreasonable restraints. Therefore, the "rule of reason" has evolved as the basic test for determining the legality of a business practice which purportedly operates to restrain trade. Under this rule, the court is required to analyze the challenged restraint's impact on competitive conditions. In fact, certain business relationships are deemed unreasonable per se, due to their pernicious effect on competition and lack of any redeeming virtue.

Counsel: **[*1]** TRONOLONE & SURGALLA, Debra C. Rougeux, Esq., Kevin P. Shelby, Esq., Daniel G. Tronolone, Esq., Attorney for Plaintiffs, Buffalo, New York.

CHRIS T. BRUNEA, ESQ., Admitted Pro hac vice, Lancaster, New York.

KERNAN & KERNAN, Steven Smith, Esq., Merritt E. Vaughan, Esq., Utica, New York.

MUDGE, ROSE, GUTHRIE, ALEXANDER & FERDON, Andrew Enthwhistle, Esq., Trial Counsel for Defendants, New York, New York.

Judges: Thomas J. McAvoy, United States District Judge.

Opinion by: MCAVOY

Opinion

MEMORANDUM/DECISION/ORDER

1. Procedure

Plaintiffs have commenced an action under *42 U.S.C. §§ 1983* and *1985(3)*, and *15 U.S.C. §§ 1*, *2*, and *15* seeking damages for alleged violations of their rights to procedural and substantive due process and to equal protection and for violations of the Federal Antitrust Laws. The plaintiffs, Ronald D. Scales, Karen Scales and Schmitt Sales, Inc., alleged that they were wrongfully denied the ability to install gasoline tanks and pumps at property known as 15 Oswego Street, Camden, New York due to the alleged illegal activities of various officials of the Village of Camden, New York in denying certain building and zoning permits and applications for variance filed by plaintiffs. The plaintiffs **[*2]** are seeking damages for the period of time from September 13, 1983, the date on which the Scales were first denied a building permit to July 26, 1986, the date on which the defendants were approved for a building permit by the Village Of Camden.

The wrongful conduct which the Plaintiffs complain of is as follows:

1. A conspiracy by Defendants' to favor the interest of C & J Variety Store, the operators of 38-44 Oswego Street, and Defendants' self-interest to the detriment of Plaintiffs.

2. Preferential treatment of a similiarly situated business.

3. Alteration of an official document to correct a procedural irregularity.

4. A decision to deny Plaintiffs' request for a variance formed prior to any hearing in violation of plaintiffs' right to due process.

The defendants move to dismiss plaintiffs' complaint, or alternatively for summary judgment on the following grounds:

1. That Schmitt Sales, Inc. lacks standing to bring this action;

2. That plaintiff's Fourth and Fifth Causes of Action alleging Anti-Trust violations are without legal or factual basis and further defendants are exempt from such statutes;

3. That the majority of plaintiffs' claims are barred by the three **[*3]** year Statute of Limitations;

4. That the defendants are immune from liability;

5. The alleged acts of defendants, even if true, are not of a constitutional dimension; and

6. Plaintiffs have obtained full legal redress in State Court.

2. Facts

On June 16, 1982 the plaintiffs Ronald D. Scales and Karen M. Scales purchased real property known as The Country Store located within the Village of Camden, New York. The defendants argue, and the court agrees, that it is material that such location was within a residential neighborhood. The plaintiffs did not challenge that fact at oral argument.

On August 26, 1983 the plaintiffs entered into a Commission Marketing Agreement and Special Purpose Lease with Schmitt Sales, Inc.. Pursuant to this Agreement and Lease, Schmitt Sales agreed to supply gasoline, pumps and tanks to the Scales in exchange for one-half of all net profits from gasoline sales. At the time the Scales purchased The Country Store, it is uncontradicted that gasoline had never been sold at that location.

On or about September 14, 1983 the Scales applied for a building and zoning permit for the construction of gasoline pumps, inground tanks, and a gasoline pump island **[*4]** at their store. The building permit was denied on the basis that the sale of gasoline was not allowed in the zone in which the store was located. The Country Store had existed only as a grocery store for several years and had been granted nonconforming use status. The installation and sale of self-service gasoline was deemed an expansion of the non-conforming use and would require a variance, in accordance with Sections 30.71 and 30.86 of the Village of Camden Ordinance.

Subsequently, on October 10, 1983 the Scales filed an appeal with the Village of Camden Zoning Board of Appeals requesting a variance. On December 6, 1983 a public hearing on the Scales' variance request was conducted by the Village of Camden Zoning Board of Appeals. After a request by Scales' counsel for time to "submit additional information, the hearing was continued to April 3, 1984. The defendants allege that there had been public opposition to the sale of gasoline at The Country Store, due to public concerns about traffic hazards and the proximity of the Camden Elementary School and the detrimental effects of gasoline sales on the character of the neighborhood.

After being reconvened on April 3, 1984, the Village **[*5]** of Camden Zoning Board of Appeals determined to deny the variance on the grounds that the variance would alter the residential character of the neighborhood, create a traffic hazard for the neighboring elementary school, would adversely impact neighborly residential uses, would be contrary to spirit and intent of the zoning ordinance and further that the Scales did not sustain their burden of proof on the issue of economic hardship.

On April 30, 1984 the Scales commenced an Article 78 proceeding in New York State Supreme Court, Oneida County, seeking to reverse the decision of the Zoning Board of Appeals. The Article 78 petition was denied and the matter was remanded by the Supreme Court to the Zoning Board of Appeals for further consideration because the Zoning Board of Appeals was determined by the Court to have been improperly constituted at the time of the decision.

A further public hearing was held on November 13, 1985 and the Zoning Board of Appeals denied the Scales a variance based on various grounds including the grounds previously determined by the Board, all as more fully reflected in the Board's decision on February 12, 1986.

On March 14, 1986 the Scales commenced a second **[*6]** Article 78 proceeding seeking to reverse the determination of the Village of Camden Zoning Board of Appeals. On June 18, 1986 Justice Tenney of the Oneida County Supreme Court issued an order granting the Scales' Article 78 proceeding and directing the Village of Camden to issue a variance and building permit for the installation of gas pumps at The Country Store.

On July 26, 1986 Ronald D. and Karen M. Scales submitted a building permit for the gasoline pumps which was approved by the Village of Camden Zoning Enforcement Officer, and shortly thereafter the gasoline pumps were installed.

3. Discussion

The arguments presented by the Defendants' in their motion to dismiss, or in the alternative for summary judgment will be considered pursuant to the outline set forth in the Defendants' Memorandum. First, we will discuss the Plaintiffs' due process claims, specifically, the procedural and substantive due process arguments, including most importantly, the issue of whether the plaintiffs' mere expectation of a variance warrants protection under the Constitution as a property right. Next, we will consider the equal protection argument and antitrust claims respectively. The rationale **[*7]** for this structure is that if we find that the plaintiffs' mere expectation of a variance does not warrant protection as a Constitutionally protected property right, find no denial of equal protection under the laws of New York State and find no anti-trust violation, we need not reach the remaining motions, but instead, may simply grant the defendants' summary judgment motion.

HN1[] In a motion for summary judgment, the movant bears the burden of establishing that there is no genuine issue of material fact to be submitted to the trier of fact, and that the movant is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 330, 106 S.Ct. 2548, 2556, 91 L.Ed.2d 265 (1986)*(Brennan, J., dissenting); *Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)*. As a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party. *Celotex, 477 U.S. at 330 n.2, 106 S.Ct. at 2556-57 n.2*; *Adickes, 398 U.S. at 158-59, 90 S.Ct. at 1609*. **[*8]**

Under the current formulation of the standards governing summary judgment motions, the moving party does not, however, bear the burden of proving that his opponent's case is wholly frivolous. See *Celotex, 477 U.S. at 323-26, 106 S.Ct. at 2553-55*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89L*.Ed.2d 538 (1986). In Celotex, the Supreme Court made it clear that in cases where the nonmovant will bear the ultimate burden of proof at trial on an issue, the moving party's burden under *Rule 56* will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim. Thus, the evidentiary burdens that the respective parties will bear at trial guide this court in its determination of summary judgment motions.

HN2[] In cases such as this one, where the moving party has attempted to demonstrate that the nonmoving party's evidence is insufficient as a matter of law to establish his claim, the burden shifts to the nonmoving party to come foward with persuasive evidence that his claim is not "implausible." See *Matsushita Elec. Indus. Co., 475 U.S. at 587, 106 S.Ct. at 1356*. The question then becomes, **[*9]** is there sufficient evidence to reasonably expect that a jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251, 106 S.Ct. 1505, 2510, 2512, 91 L.Ed.2d 202 (1986)*. The Supreme Court in Liberty Lobby reasoned that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Id. at 254*. Under *Liberty Lobby, supra*, no issue for trial exists unless:

. . . there is sufficient evidence favoring the nonmoving party [produced in opposition to the motion] for a jury to return a verdict for that party . . . . If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted.

106 S.Ct. 2505, at 2511, 2515. The Liberty Lobby Court stressed that a plaintiff opposing a fully supported motion must offer "concrete evidence from which a reasonable juror could return a verdict in his favor." Then, if no such evidence is offered alluding to a genuine issue of material fact, the trial judge shall grant summary judgment. *Id. at 2511*.

HN3[] The substantive law will identify those facts which are to **[*10]** be considered as material, and only disputes over those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrevelant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983).

In conclusion, the Supreme Court has explained the level of inquiry required in a summary judgment as: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

A. DUE PROCESS CLAIMS

1. Procedural Due Process Claim

Before addressing plaintiffs' substantive due process claim, we first briefly will consider plaintiffs' procedural due process claim. ***HN4***[] In order to establish a procedural due process violation, a plaintiff must prove that he or she was deprived of "'an opportunity . . . granted at a meaningful time and in a meaningful manner' for [a] hearing appropriate to the nature of the case." *Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed. 2d 113 (1971)* (citations omitted). The plaintiffs' **[*11]** in this case do not claim that they were deprived of such due process rights, but instead, argue that the decision to deny plaintiffs' request for a variance was formed prior to any hearing, and therefore, was in violation of plaintiffs' right to due process. On the facts of this case, I must wholeheartedly disagree.

In their complaint, plaintiffs' state that the defendants' have violated their due process rights by failing to conduct fair and unbiased hearings, failing to render fair and impartial decisions, failing to empanel a proper Board of Review, altering official documents in order to defraud the plaintiffs' and acting with total disregard for plaintiffs' property and civil rights. These allegations, however, are not supported by the evidence and, therefore, the plaintiffs' first cause of action is hereby dismissed.

2. Substantive Due Process Claim

a. Does Plaintiffs' Mere Expectancy of a Variance Merit Protection as a Constitutionally Protected Property Right?

Prior to addressing the merits of appellants' substantive due process claim, we must first determine whether the property rights which the Scales assert they were deprived of could have constituted protected **[*12]** "property interests" within the meaning of the *fourteenth amendment*.

HN5[] In the context of a zoning dispute, to state a claim under the *fourteenth amendment* for deprivation of "property" without due process of law a person must establish that he had a valid "property interest" in some benefit that was protectible under the *fourteenth amendment* at the time he was deprived of the benefit. See *Board of Regents v. Roth, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972)*; *G.T. Scott v. Greenville County, 716 F.2d 1409, 1418 (4th Cir.1983)*. In Roth, the Supreme Court pointed out that property interests are not created by the Constitution. Instead, in order to determine whether a property interest in some benefit rises to the level of a right protectible under the *fourteenth amendment*, courts must look to existing rules or understandings that stem from an independent source such as state law. Those are rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *408 U.S. at 577, 92 S.Ct. at 2709*.

In answering these questions, we can look towards the three leading decisions in this area, *Yale Auto Parts v. Johnson, **[*13]** 758 F.2d 54 (2d Cir.1985)*, *Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir.1986)*, and *Dean Tarry Corp. v. Friedlander, 826 F.2d 210 (2d Cir.1987)*, in which the Second Circuit articulated the following principles:

HN6[] [T]he question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted. Otherwise the application would amount to a mere unilateral expectancy not rising to the level of a property right guaranteed against deprivation by the *Fourteenth Amendment*. (citation omitted).

By that standard the Second Circuit did not intend to remove from constitutional protection every application for a license or certificate that could, under any conceivable version of facts, be the subject of discretionary action, and a theoretical possibility of discretionary action does not automatically classify an application for a license or certificate as a mere "unilateral hope or expectation". On the contrary, our standard [is] intended to be a tool capable of measuring particular **[*14]** applications to determine if the applicant had a legitimate claim of entitlement based on the likelihood that without the due process violation that application would have been granted. Sullivan, 805 F.2d at 85 (quoting Yale Auto Parts, 758 F.2d at 59).

In Yale Auto Parts, the Second Circuit reviewed a grant of judgment on the pleadings against a plaintiff-motor vehicle junkyard proprietor who applied to the Zoning Board of Appeals of West Haven, Connecticut, for a certificate of location approval. The Zoning Board of Appeals denied the application. The Second Circuit held that the plaintiff did not possess a cognizable property right in gaining approval of its application despite the defendants' "egregious misconduct" because the defendants possessed "wide discretion" under state law in reviewing such applications. 758 F.2d at 59. Applying the standard set forth earlier, the Second Circuit wrote:

Since plaintiffs were not entitled as a matter of right to the ZBA certificate of location approval sought by them and there is no allegation that but for the ZBA members' alleged misconduct the ZBA would have been required to award them the requested certificate, they lack any **[*15]** property interest protectible under the Due Process Clause.

Id. at 60.

In Sullivan, the Second Circuit reviewed a finding of summary judgment against a plaintiff-builder who applied for certificates of occupancy for certain newly constructed houses. 805 F.2d at 83. The building inspector of the defendant Town of Salem refused to issue the certificates despite the builder's apparent compliance with all lawfully imposed requirements. Id. at 85. The court found that if the houses complied with the applicable lawfully imposed state and municipal requirements, there was no element of discretion or judgment for the building official to exercise in determining whether or not to issue the certificates. See id. In those circumstances a denial of the certificates "would constitute a deprivation of property without due process." Id.

In Dean Tarry Corp., the Planning Board denied Dean Tarry's application in an exercise of the discretion granted to the Planning Board by the zoning ordinance. The ordinance, while later struck down as too generous in this regard, specifically permitted the Planning Board to reject applications after taking "into consideration the public health, **[*16]** safety and general welfare." 826 F.2d at 212.

The distinction should now become clear. In Sullivan, the unlawful requirement preventing approval of the builder's application came out of thin air and was not derived from an existing legislative or administrative standard. Having met all existing requirements, the Sullivan plaintiff would have had a "certainty or a very strong likelihood" of success at the time he submitted his application. Id.

In contrast, in both Yale Auto Parts, and Dean Tarry Corp., the plaintiff's application was rejected pursuant to a zoning ordinance, in existance at the time the plaintiff submitted its plan for approval, that conferred broad discretion on the Planning Board. **HN7**[] This discretion, embodied in the governing law, prevented the plaintiffs' expectation of success from rising to the level of certainty required to give rise to a cognizable property right. See Yale Auto Parts, 758 F.2d at 59-60; Dean Tarry Corp., 826 F.2d at 213.

It is relevant to note that the Second Circuit held that the state courts' decisions invalidating the zoning ordinance and the Planning Board's rejection of Dean Tarry's application did not require a **[*17]** contrary result. The Planning Board possessed wide discretion under then existing law to reject Dean Tarry's site plan on the basis of the Planning Board's assessment of the plan's effect on "the public health, safety and general welfare." Dean Tarry Corp., 826 F.2d at 213. This wide discretion prevented Dean Tarry's expectation of success from rising to the level of a property right meriting protection under the Fifth and Fourteenth Amendments. Id.; See Board of Regents v. Roth, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) ("unilateral expectation" of gaining entitlement insufficient to constitute property right; claimant must have "legitimate claim of entitlement" to the benefit); Yale Auto Parts, 758 F.2d at 58-59 (no property right where "there is no assurance that if the defendants had properly exercised their discretion they would have issued the [license]"). The Second Circuit held that the district court properly found in favor of defendants in this regard.

Based on the facts in the case at bar, a result consistant with the one in both Yale Auto Parts, and Dean Tarry Corp., is warranted here. For plaintiffs' to maintain this cause of **[*18]** action there must be proof that they were entitled to the variance as a matter of right, and but for the defendants' alleged misconduct, the defendants would have been required to award them the requested variance. See *Dean Tarry Corp., 826 F.2d at 212*. Otherwise, the plaintiffs' application is merely a unilateral expectancy not rising to the level of a property right entitled to protection against deprivation under the Constitutions' *Fourteenth Amendment*. See *Sullivan, 805 F.2d at 85*. Since the zoning ordinance in the Village of Camden conferred broad discretion on the Zoning Board, as embodied in governing law, this discretion prevents plaintiffs' expectation of success from rising to the level of certainty required to give rise to a cognizable property right.

As mentioned above, and consistant with Dean Tarry Corp., the state courts' reversal of defendants' rejection of plaintiffs' application does not require a different result. See *Dean Tarry Corp., 826 F.2d at 213*. The Zoning Board of Appeals possessed wide discretion to reject plaintiffs' application based on the variances' anticipated effect on the public health, safety and general welfare. More specifically, **[*19]** the Village of Camden Zoning Board of Appeals decided to deny the variance on the grounds that the variance would alter the residential character of the neighborhood, create a traffic hazard for the neighboring elementary school, would adversely impact neighborly residential uses and would be contrary to the intent of the zoning ordinance. In addition, the plaintiffs' were found not to have met their burden of establishing those facts required in order to receive a use variance. ***HN8***[] Where a use variance is sought, the applicant must show practical difficulties and unnecessary hardship. Huntington Town Bd. v. Zoning Bd. of Appeals, 555 N.Y.S. 425, 426 (A.D.2 Dept. 1990). Before a Zoning Board may exercise its discretion and grant a variance, the record must show (1) that the land in question cannot yield a reasonable return if only used for a purpose allowed in that zone; (2) that the plight of the applicants was due to unique circumstances and not to the general conditions in the neighborhood; and (3) that the essential character of the neighborhood will not be altered by the use sought. Id. citing *Otto v. Steinhilber, 282 N.Y. 71, 76, 24 N.E.2d 851*, rearg. denied *282* ***[*20]*** *N.Y. 681, 26 N.E.2d 811 (1939)*.

Based on the above analysis, this court holds that the plaintiffs' second cause of action: a violation of *42 U.S.C. § 1983* and the *14th amendment* based on a denial of substantive due process should be dismissed. But see *Brady v. Town of Colchester, 863 F.2d 205 (2d Cir.1988)* (the Second Circuit held that an issue of material fact existed as to whether two-story building had been zoned and used commercially prior to owners acquisition of property, precluding summary judgment as to whether owners had vested property interest in commercial use of property, for purpose of claim that conduct of town planning and zoning commission, town and town officials in denying certificate of occupancy and revoking building permit deprived owners of protected property interest in violation if substantive due process).

The plaintiffs' also allege the existence of a conspiracy by defendants' to favor the interest of C & J Variety Store, the operators of 38-44 Oswego Street, and Defendants' self-interest to the detriment of Plaintiffs. As noted in *Villanueva v. McInnis, 723 F.2d 414 (5th Cir.1984)*, a conspiracy allegation does not obviate the necessity of proving **[*21]** "an actual deprivation of a constitutional right." *Id. at 418*. As described above, the Scales did not possess a property right in being granted a variance. This does, however, lead us to the next cause of action alleged by the plaintiffs'. In their third cause of action, the plaintiffs' allege a violation of *§ 1983* and the *14th Amendment* based on a denial of equal protection. In their fourth cause of action, the plaintiffs' allege a conspiracy to violate their civil rights under the *Equal Protection Clause of the Fourteenth Amendment*.

B. EQUAL PROTECTION CLAIMS

1. Under *42 U.S.C. § 1983* and the *Fourteenth Amendment*.

HN9[] The *equal protection clause* "is essentially a direction that all persons similiarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3252, 87 L.Ed.2d 313 (1985)*. To state an equal protection claim, a plaintiff must charge a governmental officer "not only with deliberately interpreting a statute against the plaintiff, but also with singling him out alone for that misinterpretation." *Burt v. City of New York, 156 F.2d 791, 792 (2d Cir.1946)*, as cited in *Brady v. Town of Colchester, 863* ***[*22]*** *F.2d 205 (2d Cir.1988)*.

The plaintiffs' argue in their third cause of action that the defendants' violated *42 U.S.C. § 1983* and the *14th Amendment* by denying them equal protection. More specifically, the plaintiffs' claim that the defendants' have denied the plaintiffs' Equal Protection through conduct including but not limited to the granting to Chuck's R.V. Service and Convenient Mart building permits or variances to install gasoline pumps under conditions that they have alleged to be the same or at least similiar to the Plaintiffs'. In the Plaintiffs' Answers to Defendants' First Set of Interrogatories the plaintiffs' describe how, in their opinion, "Chuck's RV Service" was similiarly situated to the "Country Store." They allege that because both establishments were non-conforming uses in Residential Zones and both provided retail sales services prior to the installation of gasoline pumps, these two establishments were similiarly situated for the purposes of maintaining a cause of action for an alleged equal protection violation. In addition, in describing the nature of the allegedly illegal conduct of the defendants', the plaintiffs' state that all defendants acted in concert **[*23]** to deny Plaintiffs' a variance to install gasoline pumps. Specifically, defendant Henry Spellicy preferred the rights of Chuck's RV Services to that if the Plaintiffs', denied Plaintiffs' equal treatment and conspired to monopolize gasoline prices and restrain trade in gasoline. In addition, the Plaintiffs' argue that Defendant Davis Baker denied equal treatment to Plaintiffs', and Defendants Walton Simmons, Kevin Hannon, Timothy Berquist, and Thomas Walker denied Plaintiffs a fair hearing, equal protection, acted arbitrarily and capriciously and conspired to monopolize gasoline prices and restrain the trade of gasoline. The Plaintiffs' also argue that Defendant Thomas Walker acted without proper authority, Defendant Charlene Phinney falsified documents including the Municipal Code and Certification, and Defendant George Henry arbitrarily stopped work at Plaintiffs site and arbitrarily inspected work in progress in order to harass Plaintiffs. While it is the courts opinion that the plaintiffs' may have adequately alleged an equal protection claim, they have failed to present any evidence to support the claim.

Plaintiffs' allege that they were denied a variance that all others who applied **[*24]** for had received. In addition, the plaintiffs' claim that those who did receive such variance were basically in the same position that they were in. Under the doctrine of *Burt v. City of New York, 156 F.2d 791 (2d Cir.1946)* consistently applied by the Second Circuit, ***HN10***[] an equal protection claim may be raised even though the plaintiff is not a member of a suspect class. See *Rodrigues v. Village of Larchmont, New York, 608 F.Supp. 467, 475 (D.C.N.Y. 1985)*. It is, however, necessary for the plaintiff to set forth substantial facts supporting his allegation of discriminatory treatment, Marty's Adult World of New Britian, *Inc. v. Guida, 453 F.Supp. 810, 818 (D.Conn.1978)*, as well as facts that the alleged discrimination was purposeful or intentional. Telepromnter of Erie, *Inc. v. City of Erie, 567 F.Supp. 1277, 1293 (W.D.Pa.1983)*; see also *Burt, 156 F.2d at 792*.

Based on testimony illicited at oral argument, the court believes that the other establishments were not similiarly situated with the plaintiffs. [1] More specifically, it was pointed out that, in fact, the other establishments were either located a greater distance away from the school, [2] had gasoline **[*25]** pumps located on the premises that had been previously installed, were previously zoned to allow the sale of self-service gasoline, or a combination of the above factors.

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[1] While this court realizes that in today's economy a store such as "The Country Store" would ordinarily need to sell gasoline at their establishment along with other traditional goods, and we acknowledge that most stores such as the one in question do, in fact, sell gasoline, these facts do not warrant consideration in an equal protection analysis.

[2] At oral argument the plaintiffs argued that the fact that the Zoning Board of Appeals considered the location of "The Country Store" to the school in question should be ignored altogether or at least discounted because the school itself dispensed gasoline to its buses. This argument is not compelling. The fact that the school dispenses gasoline for the use of its buses is distinguishable from the use that "The Country Store" had hoped to employ. The schools use was a very controlled and limited one, whereas "The Country Store" was quite the opposite, both uncontrolled and unlimited. Therefore, the Zoning Board of Appeals consideration of that fact in rendering its decision on the issue of whether to grant such establishment a use variance was warranted.

[*26] ***HN11***[] On a summary judgment motion all ambiguities and inferences to be drawn from the underlying facts should be resolved in the light most favorable to the nonmoving party. In applying this standard to the facts presented, however, this cause of action is hereby dismissed because the plaintiffs have failed to offer sufficient proof supporting their allegations.

2. Conspiracy Under 42 U.S.C. § 1985(3) and the Equal Protection Clause of the Fourteenth Amendment.

In the fourth cause of action, the plaintiffs allege a violation of *42 U.S.C. § 1985(3)* and the *Equal Protection Clause of the Fourteenth Amendment*. Although the plaintiffs' agreed at oral argument to withdraw their claim under *§ 1985(3)*, they continued to argue their claim under the *Equal Protection Clause*. This is problematic since ***HN12***[] a *§ 1985(3)* claim is merely a codification of a claim of conspiracy to violate the *equal protection clause of the Fourteenth Amendment*. Therefore, we will discuss the merits of such claim at this time. In order to make out a violation of *§ 1985(3)*, as construed in the seminal case of *Griffin v. Breckenridge,* ***[*27]*** *403 U.S. 88, 102-103, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971)*, the plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

"It is a commonplace that ***HN13***[] rights under the *Equal Protection Clause* itself arise only where there has been involvement of the State or of one acting under the color of its authority. The *Equal Protection Clause* 'does not . . . add any thing to the rights which one citizen has under the Constitution against another.' *United States v. Cruikshank, 92 U.S. 542, 554-555 [23 L.Ed. 588]*. As . . . Justice Douglas . . . put it, "The *Fourteenth Amendment* protects the individual against state action, not against wrongs done by individuals.

United States v. Williams, 341 U.S. 70, 92 [71 S. Ct. 581, 593, 95 L.Ed. 758] (dissenting opinion). This has been the view of the Court from **[*28]** the beginning. (citations omitted).

United Broth. of Carpenters & Joiners v. Scott, 463 U.S. 822, 831, 103 S.Ct. 3352, 3357, 77 L.Ed.2d 1049 (1983). The opinion for the Court characterized the *Fourteenth Amendment* rights in the same way. *United States v. Price, 383 U.S. 787, 799, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1966)*.

The plaintiffs' have failed to establish or even sufficiently allege all the elements required under *§ 1983* (5) to maintain a cause of action. As to the first and fourth elements, the plaintiffs' have alleged a conspiracy to deny them of the equal protection of the laws of the Village of Camden, State of New York; and United States of America. As to the second and third elements, however, the complaint is facially insufficient to maintain a cause of action. In construing the second element, the Supreme Court in Griffin held that ***HN14***[] the conspiracy not only must have as its purpose the deprivation of "equal protection of the laws, or of equal privileges and immunities under the laws," but also must be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id., at 102, 91 S.Ct., at* ***[*29]*** *1798*. The plaintiffs have failed to meet this requirement. In addition, it is unclear exactly what act was done in furtherance of the conspiracy. If the conspiratorial goal was to deny the plaintiffs equal protection, or equal privileges and immunities under the law, then the denial of the variance permitting the sale of gasoline at the location in question was the specific act that created the equal protection violation. It is still, however, unclear exactly what act was done in furtherance of the conspiratorial goal. The plaintiffs' allege, first, that certain official documents were altered. They do not, however, explain what relation this act had on the achievement of the objectives of the conspiracy. In addition, the plaintiffs allege that the defendants discriminated against them by preferring the interests of other proprietorships over theirs. They fail to specifically allege the facts necessary to bolster such an allegation or relate it to a violation of *§ 1985(3)*. Lastly, the plaintiffs allege that the defendants acted arbitrarily and capriciously. Once again, the plaintiffs have failed to tie the alleged acts of the defendants to any violation of *§ 1985(3)*.

Even if we were **[*30]** to hold that the plaintiffs' had successfully alleged a conspiracy under *§ 1985(3)*, the allegations of plaintiffs' complaint refer to a class distinguished only by economic characteristics, i.e., proprietors wishing to sell self-service gasoline. As to this, the plaintiffs' allege only that the defendants "discriminated against plaintiffs and preferr[ed] the interests of other proprietorships without any good reason" (paragraph 47(E)). This is clearly defective. In *United Broth. of Carpenters & Joiners v. Scott, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983)*, ***HN15***[] the Supreme Court explicitly foreclosed the possibility of a viable *section 1985(3)* claim where plaintiff alleges a conspiracy "motivated by economic or commercial animus." *Id., 463 U.S. at 839, 103 S.Ct. at 3361*. The Court found no support for the proposition that the provision (*section 1985(3)*) was intended to reach conspiracies motivated by bias towards others on account of their economic views, status, or economic activities." *Id., at 839, 103 S.Ct. at 3361*. Therefore, the Court concluded that "[e] conomic and commercial conflicts . . . are best dealt with by statutes, federal or state, specifically addressed **[*31]** to such problems, ..." Id.

Based on the above analysis, the plaintiffs' fourth cause of action, an alleged violation of *42 U.S.C. § 1985(3)* and the *Equal Protection Clause of the Fourteenth Amendment*, is hereby dismissed.

C. ANTI-TRUST VIOLATIONS

1. Violation of 15 U.S.C. §§ 1, 2 and the Sherman Trust Act §§ 1, 2.

In their fifth and sixth causes of action the plaintiffs allege violations of *15 U.S.C. § 1* and the Sherman Trust Act *§ 1*, and *15 U.S.C. § 2* and the Sherman Trust Act *§ 2* respectively. Specifically, the plaintiffs allege that they have a common interest in maintaining a free and unhampered market for the sale of self-service gasoline to the public, and the conduct of the trade and business of the plaintiffs in self-service gasoline wholly depends on plaintiffs' ability to install self-service gasoline pumps at plaintiffs' Scales establishment. Furthermore, the plaintiffs' allege that the acts of the defendants as members of the Village of Camden Zoning Board and of the government of the Village of Camden were undertaken as part of a conspiracy to fix and control the sale of self-service gasoline in interstate commerce, to restrain trade in interstate **[*32]** commerce for self-service gasoline and to preclude plaintiffs and other dealers marketing and distributing self-service gasoline from dealing in interstate commerce except on the terms control led by the defendants. In addition, the plaintiffs' allege that the defendants, in futherance of said conspiracy, attempted to forbid plaintiffs, by the illegal use of Village Zoning Regulations, from selling self-service gasoline and to control the market and sale of self-service gasoline to the benefit of other dealers in self-service gasoline and to the detriment of the public and plaintiffs. In addition, in their sixth cause of action, the plaintiffs' allege facts identical to those already mentioned, except they also allege that such acts were undertaken to monopolize, or attempt to monopolize the marketing and distribution of self-service gasoline among the various states and in interstate commerce.

In their answer and subsequently in their summary judgment motion, the defendants assert that plaintiff has failed to state a claim upon which relief can be granted, and regardless, defendants are immune from any liability under the "state action" exemption thereto first enunciated by the Supreme **[*33]** Court in *Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943)*. We will first consider the "state action" exemption and then the Sherman Act claim itself.

While there is no doubt, in our society, of the important role played by the anti-trust laws, [3] the Supreme Court has found ***HN16***[] "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to

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[3] As the Supreme Court has said:

HN17[] Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise-system as the *Bill of Rights* is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete-to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster.

restrain a state or its officers or agents from activities directed by its legislature." Parker v. Brown, supra, 317 U.S. at 350-351, 63 S.Ct. at 313-314. This deference to the states has come to be known as the "state action" exemption to the federal antitrust laws. Under this exemption doctrine, when a state directs, or acts in, some noncompetitive activity, the state and its officers are nonetheless exempt from the operation of the antitrust laws. See Capital Telephone Co. v. City of Schenectady, N.Y., 560 F.Supp. 207 (N.D.N.Y. 1983).

[*34] ***HN18***[] Unlike the several states, cities are not automatically within the Parker doctrine, i.e., exempt from the operation of the antitrust laws. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). To invoke the protection afforded by the Parker doctrine, a municipality must show that its anticompetitive conduct was taken "pursuant to state policy to displace competition with regulation or monopoly public service." Id. at 413, 98 S.Ct. at 1137. This state policy must be one that is "clearly articulated and affirmatively expressed." Id. at 410, 98 S.Ct. at 1135. An additional requirement that the state policy be "actively supervised" also has been imposed by the Supreme Court. The plaintiffs, however, question the application of this doctrine to municipalities and its officials in furtherance of a conspiracy with private individuals, which they argue is the case here.

Here, the action taken by the Village of Camden, through its council including the Zoning Board of Appeals, clearly was contemplated by New York's state legislature. ***HN19***[] The authority of a city to make an initial determination as to the issuance of a use variance upon an-application **[*35]** for such variance and to subsequently review such decision after an appeal is taken as to the denial of such variance has been expressly granted, (citations omitted) i.e., "affirmatively addressed". It is this courts' opinion, therefore, that this grant of authority, giving great deference to a city in determining whether to grant a use variance to an applicant based upon certain well-established standards, satisfies the requirement of a "clearly articulated and affirmatively expressed" state policy.

With respect to the additional requirement of "active supervision," whether this additional showing must be made by a municipality purporting to implement a state policy is still open to some doubt, since the Court has indicated that private parties and municipalities are not necessarily to be insulated from anti-trust laws under the same circumstances. Lafayette v. Louisiana Power & Light Co., 435 U.S. at 410, n.40, 98 S.Ct. at 1135, n.40. Assuming that such is required, it is unlikely that it exists in this case. It is the opinion of this court, however, that upon these facts and considering the broad grant of power given to a Village by the State in these matters under Article **[*36]** 7 of the CPLR, that such "active supervision" is not a necessary element to maintain a "state action" exemption. It is clear from a review of Article 7 that the State intended to give a Village very broad powers in such zoning matters in order to regulate land use (Village Law Article 7), and establish a Zoning Board of Appeals (Village Law § 7-712). And while the State takes no active supervisory role, they have created a means of review for such decisions under Article 78. It is, therefore, the decision of this court that the the "state action" exemption to the federal antitrust laws as extended to municipalities applies in this case and compels this court to grant summary judgment in favor of the defendants regarding causes of action five and six. Even if the Village of Camden was not entitled to the "state action" exemption, nor to summary judgment on those grounds, they would still be entitled to summary judgment based on a review of the Sherman Act claim on the merits.

HN20[] Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy in restraint of trade. A section 1 plaintiff must establish both elements: first, that defendant entered into a contract, combination **[*37]** or conspiracy; and second, that such was in restraint of trade. Oreck Corp. v. Whirlpool Corp., 639 F.2d 78 (2d Cir.1980).

Although the Sherman Act speaks of restraint of trade in absolute terms, it has long been established that section 1 proscribes only unreasonable restraints. Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); see also Medical Arts Pharmacy v. Blue Cross & Blue Shield, 518 F.Supp. 1100, 1105 (D.Conn.1981). Therefore, the "rule of reason" has evolved as the basic test for determining the legality of a business practice which purportedly operates to restrain trade. Under this rule, the court is required to analyze "the challenged

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United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972).

restraint's impact on competitive conditions." *National Society of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978)*. In fact, certain business relationships are deemed unreasonable per se, due to their pernicious effect on competition and lack of any redeeming virtue." *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958)*. That, however, is not the case here.

Based upon a review of the **[*38]** available case law in conjunction with the facts of this case, it should become blatantly obvious that the plaintiffs' fifth and sixth causes of action are plainly frivilous. In fact, they have not even come close to alleging sufficient facts to maintain a cause of action under either Sherman Trust Act *§ 1* or *§ 2*. Therefore, regardless of whether the "state action" exemption applies, plaintiffs' fifth and sixth causes of action are hereby dismissed as a matter of law.

IT IS SO ORDERED.

Dated at Binghamton, New York

August 17, 1990

End of Document

Health First, Inc. v. Bronson Methodist Hosp.

United States District Court for the Western District of Michigan, Southern Division

August 20, 1990, Decided ; August 20, 1990, Filed

File No. 1:89-CV-1191

Reporter

1990 U.S. Dist. LEXIS 11007 *; 1990-2 Trade Cas. (CCH) P69,200

HEALTH FIRST, INC. and BCN, GREAT LAKES, Plaintiffs, v. BRONSON METHODIST HOSPITAL and JAMES R. WARD, Defendants

Core Terms

hospital service, amended complaint, plaintiffs', defendants', anticompetitive, geographic, allegations, antitrust, market power, consumers, rule of reason, relevant market, adverse effect, motion to dismiss, assertions, costs

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN1[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign states, is declared to be illegal. *15 U.S.C.S. § 1*. Courts have two methods of analysis to determine whether an agreement unreasonably restrains trade, the per se rule and the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN2[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Antitrust claims premised on some sort of business diversion are analyzed under a rule of reason approach.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN3[] **Sherman Act, Claims**

To establish a *§ 1* of the Sherman Act claim under the rule of reason approach, a plaintiff must establish: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) that the objects of and conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy. These essential elements must be alleged in more than vague and conclusory terms to prevent the dismissal of the complaint on a defendant's *Fed. R. Civ. P. 12(b)(6)* motion.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN4[] **Regulated Practices, Market Definition**

In support of the allegation of adverse, anticompetitive effects, the antitrust plaintiff must allege and prove that the defendant enjoyed market power. Without market power, a firm cannot have an adverse effect on competition. Market power is inferred from the possession of a substantial portion of sales in a market carefully defined in terms of both product and geography. Unless an antitrust plaintiff alleges the existence of market power, the complaint may be dismissed for failure to state a claim upon which relief can be granted.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN5[] **Regulated Practices, Trade Practices & Unfair Competition**

The mere adverse effect on a firm's business is insufficient to establish an anticompetitive effect, absent proof that such adverse effect also impairs competition in the marketplace as a whole. Antitrust laws exist to protect competition, not individual competitors.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] **Public Enforcement, State Civil Actions**

The Michigan Antitrust Reform Act, *Mich. Comp. Laws Ann. §§ 445.771-445.788* (1989), is construed in the same manner as the federal ***antitrust law***. Sections 445.772, 445.784(2).

Judges: [*1] Robert Holmes Bell, United States District Judge.

Opinion by: BELL

Opinion

OPINION OF THE COURT

Plaintiffs Health First Inc., a hospital services broker, and BCN, Great Lakes, a health maintenance organization, bring suit against defendants Bronson Methodist Hospital (hereinafter "Bronson") and James R. Ward alleging violations of *Section 1* of the Sherman Anti-Trust Act, *15 U.S.C. § 1*, (*Section 1*), the Michigan Antitrust Reform Act, *Mich. Comp. Laws Ann. §§ 445.771-445.788* (West 1989), and the Racketeer Influenced and Corrupt Organizations Act, *19 U.S.C. §§ 1961-68*.

Pending before the Court is defendants' motion to dismiss both the federal and state antitrust claims for failure to state a claim upon which relief can be granted. Subsequent to the filing of the motion, the plaintiffs filed an amended complaint as of right. Since the defendants assert that the amended complaint contains the same defects as the original complaint, the Court will address the merits of the motion to dismiss despite the filing of an amended complaint by the plaintiffs.

FACTS

In their amended complaint, the plaintiffs allege that the defendants agreed to make payments to physicians through Southwest Michigan Physician's **[*2]** Organization, P.C. (Southwest) if the physicians referred BCN subscribers to Bronson, a high-cost provider of hospital service, rather than Borgess Medical Center, (Borgess), a low-cost provider of hospital services, when patients needed hospitalization. In essence, the plaintiffs assert that the defendants, Southwest, and individual physicians conspired to "steer" patients from Borgess to Bronson.

In addition to this allegation, the amended complaint also asserts that the conduct of the defendants had an anticompetitive effect on the hospital services industry in Kalamazoo County, eastern Van Buren County and adjacent areas. It also alleges that defendant Bronson possesses sufficient market power in the relevant market to cause an anticompetitive effect. According to the plaintiffs, the alleged "steering" of patients from Borgess to Bronson had an adverse affect on competition because it tended to:

(1) increase health care costs;

(2) cause consumers to over-utilize hospital services;

(3) distort consumer demand for low-cost hospital services at Borgess in favor of high-cost-hospital services at Bronson;

(4) encourage doctors to refer consumers to Bronson for hospital services **[*3]** irrespective of the price of those services;

(5) affect the price of hospital services; and

(6) affect the financing of hospital services.

Complaint, para. 18. Finally, the plaintiffs allege that they were injured as a result of the "steering" since they either incurred excessive hospital costs or lost subscribers to their services. Id., para. 19.

ANALYSIS

1. SHERMAN ACT

HN1[] *Section 1* provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign states, is declared to be illegal." *15 U.S.C. § 1*. Courts have developed two methods of analysis to determine whether an agreement unreasonably restrains trade: the per se rule and the rule of reason.

After reviewing the allegations in plaintiffs' amended complaint, the court finds that they do not establish the existence of a per se violation of *Section 1*. Therefore, the Court will review the merits of the amended complaint under a rule of reason approach. The Court notes that ***HN2***[] antitrust claims, such as the one alleged by the plaintiffs, premised on some sort of business diversion, traditionally have been analyzed **[*4]** under a rule of reason approach. Dunn v. *Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241, 245 (6th Cir. 1982)*. Even where the complaint alleges some form of illegal or criminal behavior on the part of the defendant, the rule of reason approach is still applied. E.g., *Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367 (3d Cir. 1985)*.

HN3[] To establish a *Section 1* claim under the rule of reason approach, plaintiffs must establish:

1. That the defendants contracted, combined or conspired among each other;

2. That the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets;

3. That the objects of and conduct pursuant to that contract or conspiracy were illegal; and

4. That the plaintiffs were injured as a proximate result of that conspiracy.

Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1195-96 (6th Cir. 1982), cert. denied, *466 U.S. 931 (1984)*. These essential elements must be alleged in more than vague and conclusory terms to prevent the dismissal of the complaint on a defendants' *Rule 12(b)(6)* motion. *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. **[*5]** 1988)*.

The plaintiffs must plead and prove the existence of relevant product and geographic markets in order to establish a *Section 1* claim. *Service Merchandise, 686 F.2d at 1195*. Plaintiffs' amended complaint alleges that "the relevant geographic market is Kalamazoo and Eastern Van Buren counties and adjacent areas." Para. 10 Plaintiffs' Amended Complaint. This statement by the plaintiffs contains no factual allegations, such as the geographical area where most of the patients served by defendant Bronson or its competitors live, that would support the conclusion that the above-mentioned area is the relevant geographic market. This allegation is a mere conclusion and does not establish the clearly defined geographic market required by the rule of reason approach. *Manufacturers Supply Co. v. Minnesota Mining & Mfg. Co., 688 F.Supp. 303, 307 (W.D. Mich. 1988)*.

In order to establish a *Section 1* violation, plaintiff must allege that the activity of the defendant caused adverse, anticompetitive effects. ***HN4***[] In support of this allegation, the plaintiff must allege and prove that the defendant enjoyed market power. *Service Merchandise, 686 F.2d at 1202*. "Without market power, a firm **[*6]** cannot have an adverse effect on competition." Id. See also *Valley Liquors v. Renfield Importers, Ltd., 678 F.2d 742, 745* (7th cir. 1982). In most cases, market power is usually inferred from the possession of a substantial portion of sales in a market carefully defined in terms of both product and geography. *Valley Liquors, Inc. v. Renfield Importers, Inc., 822 F.2d 656, 666 (7th Cir. 1987)*; *Manufacturers Supply Co., 688 F.Supp. at 307*. Unless an antitrust plaintiff alleges the existence of market power, the complaint may be dismissed for failure to state a claim upon which relief can be granted. *Hand v. Central Transp., Inc., 779 F.2d 8, 11 (6th Cir. 1985)*.

The Court finds that plaintiffs' amended complaint does not establish the existence of market power on the part of the defendants. The plaintiffs merely allege that "defendant Bronson enjoys sufficient market power in the relevant market to injure competition in the relevant market through the conduct alleged below." Para. 11, Plaintiffs' Amended Complaint. However, the amended complaint contains no allegations that would establish the market share of Bronson or its competitors in the relevant geographical market. **[*7]** Furthermore, the plaintiffs have not alleged facts from which one could infer that Bronson has a substantial percentage of the hospital services market in a carefully defined market. Thus, this allegation on the part of the plaintiffs is a mere conclusion and is insufficient to withstand a motion to dismiss.

In addition to the above deficiencies, the defendants also maintain that plaintiffs' assertions regarding anticompetitive effect are insufficient to withstand a motion to dismiss. As stated previously by the Court, plaintiffs allege that the defendants' conduct harmed competition in the relevant product and geographic market because it tended to:

(1) increase health costs;

(2) cause consumers to over-utilize hospital services;

(3) distort consumer demand for low-cost hospital services at Borgess in favor of high-cost hospital services at Bronson;

(4) encourage doctors to refer consumers to Bronson for hospital services irrespective of the price of those services;

(5) affect the price of hospital services; and

(6) affect the financing of hospital services.

Para. 18, Plaintiffs' Amended Complaint. A defendant's conduct is adverse to competition if it has an adverse **[*8]** impact on the price, quality or quantity of the product available to consumers in the relevant geographic market. E.g., *Alex Hosiery Co. v. Leader, 310 U.S. 469 (1940)*; *Sitkin Smelting & Ref. Co. v. FMC Corp., 575 F.2d 440* (3d Cir.), cert. denied, *439 U.S. 866 (1978)*. The Court agrees with defendants that these allegations do not establish the existence of an anticompetitive effect for several reasons.

First, a number of the plaintiffs' assertions are so vague that they do not establish the existence of any effect or establish the existence of a pro-competitive effect. The fifth and sixth assertions of the plaintiffs which speak merely to an effect are insufficient to establish the existence of an adverse effect on the marketplace. Furthermore, the plaintiffs' second assertion regarding the increased utilization of hospital services seems to indicate that the alleged conduct of the defendants increased the demand for hospital services, a pro-competitive effect.

Second, the plaintiffs' third and fourth assertions regarding a shift in consumer preference from a low-cost provider to a high-cost provider of hospital services merely establish that the defendants' conduct **[*9]** adversely affected the plaintiffs' business. ***HN5***[] The mere adverse effect on a firm's business in insufficient to establish an anticompetitive effect, absent proof that such adverse effect also impairs competition in the marketplace as a whole.

Ace Beer Distrib. Inc. v. Kohn Inc., 318 F.2d 283, 287 (6th Cir.), cert. denied, *375 U.S. 922 (1963)*. Antitrust laws exist to protect competition, not individual competitors. *Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)*. These allegations focus solely on the injury to the plaintiffs, not the market. Thus, they cannot establish that the defendants' conduct had an anticompetitive impact on the relevant market.

Finally, the only allegation made by the plaintiffs which addresses the issue of anticompetitive effect on the relevant market is the first one, which states that the defendants' conduct tended to increase health care costs. This allegation could establish that the defendants' conduct had an adverse effect. However, according to the plaintiffs, the relevant product market is hospital services, not health care costs. Para. 9, Plaintiffs' Amended Complaint. Since this allegation concerns a different product market, it **[*10]** cannot establish that the defendants' conduct had an adverse effect on competition.

Due to the failure of the plaintiffs to properly plead the existence of a relevant geographic market, market power on the part of the defendants, and that the defendants' conduct had an anticompetitive effect on the relevant market, the Court concludes that Count I of the amended complaint fails to state a claim upon which relief can be granted under the rule of reason approach. [1] Since the plaintiffs may be able to state a viable *Section 1* claim, the dismissal is without prejudice.

[*11] 2. MICHIGAN ANTITRUST CLAIM

The plaintiffs also allege that the defendants' conduct violated ***HN6***[] the Michigan Antitrust Reform Act. See *Mich. Comp. Laws Ann. §§ 445.771-445.788* (West 1989). Michigan's ***antitrust law*** is to be construed in the same manner as the federal ***antitrust law***. Id. §§ 445.772, 445.784(2). Thus, the Court dismisses Count II of the amended complaint, the state ***antitrust law*** claim, without prejudice.

An order consistent with this opinion shall issue forthwith.

ORDER OF THE COURT - August 20, 1990, Filed

In accordance with the Court's written opinion dated August 20, 1990,

IT IS HEREBY ORDERED that defendants' motion to dismiss is granted;

IT IS FURTHER ORDERED that Counts I and II of plaintiffs' First Amended Complaint are dismissed without prejudice.

IT IS SO ORDERED.

End of Document

[1] Plaintiffs' reliance upon *Michaels Building Co. v. Ameritrust Co., N.A., 848 F.2d 674 (6th Cir. 1988)* to support their argument that the amended complaint states a valid *Section 1* claim is misplaced. Michaels Building, unlike the present case, involved allegations that various lending institutions had entered into an agreement to fix the interest rates charged by them. *Id. at 681*. Such an agreement is clearly a form of horizontal price fixing, a per se violation of *Section 1*. Since a per se restraint is conclusively presumed to have an anticompetitive effect, the plaintiff does not have to make detailed allegations concerning relevant markets, market power and anticompetitive effect. See e.g., *Haveco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 555 (7th Cir. 1980)*.

Beard v. Parkview Hosp.

United States Court of Appeals for the Sixth Circuit

November 7, 1989, Argued ; August 23, 1990, Decided ; August 23, 1990, Filed

No. 89-3176

Reporter
912 F.2d 138 *; 1990 U.S. App. LEXIS 14593 **; 1990-2 Trade Cas. (CCH) P69,154

James B. Beard, Plaintiff-Appellant, v. Parkview Hospital; Gilbert S. Bucholz; and B. A. Zeiher, Defendants-Appellees

Prior History: [1]** On Appeal from the United States District Court for the Northern District of Ohio; D.C. No. 85-07838, Walinski, Senior District Judge.

Disposition: AFFIRMED.

Core Terms

tying arrangement, economic benefit, radiological, Sherman Act, tied product, tying product, seller, district court, monopoly, patients, monopolize, exclusive contract, cases, sales, antitrust, provider, summary judgment motion, summary judgment, market power, anesthesiological, anticompetitive, transportation, competitors, osteopathic, buyer, rebut

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Summary Judgment, Motions for Summary Judgment**

A motion for summary judgment in an antitrust case requires the plaintiff to show that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused the plaintiff to suffer a cognizable injury.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN2[] **Standards of Review, De Novo Review**

An appellate court reviews a district court's legal determination de novo.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A so-called tying arrangement exists when a seller conditions the sale of one product or service, the tying product or service, on the buyer's purchase of another product or service, the tied product or service. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN4[] **Tying Arrangements, Clayton Act**

A tying arrangement is per se unlawful under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, that is, it is proscribed without examining the actual market conditions, when the seller has such power in the tying product or service market that the existence of forcing is probable, and there is a substantial potential for impact on competition. A tying arrangement which is not per se unlawful may be invalidated under the rule of reason if the party challenging the tie demonstrates that it is an unreasonable restraint on competition in the relevant market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Tying Arrangements, Clayton Act**

In order for a tying arrangement to violate *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, the seller must exploit its market power over the tying product to force the buyer into purchasing a tied product that the buyer either did not want at all, or might have preferred to purchase from someone else. An implicit requirement to a finding that a tying arrangement violates *§ 1* is that the seller of the tying product must also profit from the sale of the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] **Tying Arrangements, Defenses**

The law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures. This impairment can either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, and can increase the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie.

Antitrust & Trade Law > Sherman Act > General Overview

Trademark Law > Conveyances > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

A seller who derives no direct economic benefit from sales of an alleged tied product or service is not attempting to invade the alleged tied product or service market in a manner proscribed by *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

An unlawful monopoly consists of: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

A plaintiff asserting the offense of monopolization must show that a defendant either unfairly attained or maintained monopoly power, which consists of the power to control prices or exclude competition. Attempted monopolization occurs when a competitor, with a dangerous probability of success, engages in anticompetitive practices the specific design of which are to build a monopoly or exclude or destroy competition.

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Counsel for Defendants-Appellees Parkview Hospital and B. A. Zeiher: David W. Wicklund, Robert G. Clayton, Jr., Argued, Shumaker, Loop & Kendrick, Toledo, Ohio.

Counsel for Defendant-Appellee Gilbert S. Bucholz: Jamille G. Jamra, Argued, Eastman & Smith, Toledo, Ohio.

Judges: Cornelia G. Kennedy and James L. Ryan, Circuit Judges; and George Clifton Edwards, Jr., Senior Circuit Judge.

Opinion by: RYAN

Opinion

[*139] RYAN, Circuit Judge.

This appeal from a district court's grant of summary judgment presents two issues:

> * Whether a tying arrangement, in violation of *section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*, occurs where the supplier of the alleged tying service receives no direct economic benefit from sales of the tied service; and
>
> * Whether *section 2* of the Sherman Antitrust Act, *15 U.S.C. § 2*, is violated where a hospital grants an exclusive contract for the provision **[**2]** of radiological services but does not compete in the market alleged to be monopolized, and supplies a legitimate explanation in support of its exclusive service contract.

We answer both questions in the negative and affirm the district court's summary judgment dismissing the plaintiff's claim.

I.

James B. Beard, D.O., is an osteopathic physician specializing in radiology who began working for G.S. Bucholz, Inc. on October 1, 1984. Bucholz is the exclusive provider of radiological services to Parkview Hospital, the only osteopathic hospital in Lucas County, Ohio, and serves patients from northwestern Ohio and lower southeastern Michigan. Eight allopathic hospitals also operate in Lucas County.

On June 25, 1985, Dr. Beard resigned from Bucholz, with the intention of providing radiological services himself to patients at Parkview. However, Parkview's chief operating officer, Dr. B. A. Zeiher, told Dr. Beard that Parkview had an exclusive contract with Bucholz for the provision of radiological services and that Dr. Beard would no longer be permitted to work in Parkview's radiology department. He remained a member of the hospital's staff, however.

Dr. Beard filed a complaint **[**3]** in the United States District Court for the Northern District of Ohio, Western Division, naming Parkview, Dr. Zeiher, and Bucholz, defendants. He claimed the contract between Parkview and

Bucholz was a tying arrangement violating *section 1* of the Sherman Act, *15 U.S.C. § 1*, and that the contract furthered "a monopoly or attempt to monopolize a part of the trade and commerce **[*140]** among the several states," in violation of *section 2* of the Sherman Act, *15 U.S.C. § 2*.

Parkview and Bucholz answered that their contract is consistent with a common practice among hospitals trying to remain competitive in the health care field. By contracting with a specific radiologist, hospitals ensure responsibility and accountability for their radiology departments and guarantee the availability of services when needed.

By the terms of the agreement between Bucholz and Parkview, Bucholz bills patients directly for all services it provides, and Parkview does not share in the fees Bucholz charges.

The district court granted Parkview and Bucholz's motions for summary judgment, pursuant to *Fed. R. Civ. P. 56*. It dismissed Dr. Beard's *section 1* claim **[**4]** because Parkview, the alleged tying service seller, received no direct economic benefit from the sale of the allegedly tied radiological services. It dismissed Dr. Beard's *section 2* claim against Parkview because Parkview was not a competitor in the radiological services market, and dismissed the *section 2* claim against Bucholz because Dr. Beard failed to rebut the legitimate reasons advanced by defendants for maintaining the exclusive agreement.

II.

HN1[] A motion for summary judgment in an antitrust case requires the plaintiff to show that there is "a genuine issue of material fact as to whether [the defendants] entered into an illegal conspiracy that caused [the plaintiff] to suffer a cognizable injury." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citations omitted). Dr. Beard's obligation to avoid summary judgment was to present "specific facts showing that there is a genuine issue for trial," *Fed. R. Civ. P. 56(e)*, as to whether Parkview and Bucholz engaged in an illegal tying arrangement or **[**5]** attempted to monopolize a segment of the radiological services market. The district court then had to determine whether Parkview, Dr. Zeiher, and Bucholz were "entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. ***HN2***[] We must now review the district court's legal determination on that question *de novo*.

A. The Tying Arrangement

HN3[] A so-called tying arrangement exists when a seller conditions the sale of one product or service, the tying product or service, on the buyer's purchase of another product or service, the tied product or service. *See Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*.

> The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). **[**6]**

HN4[] A tying arrangement is *per se* unlawful under *section 1* of the Sherman Act; that is, it is proscribed without examining the actual market conditions, when the seller has such power in the tying product or service market that "the existence of forcing is probable," *id. at 15*, and there is "a substantial potential for impact on competition." *Id. at 16*. A tying arrangement which is not *per se* unlawful may be invalidated under the "rule of reason" if the party challenging the tie demonstrates that it is "an unreasonable restraint on competition in the relevant market." *Id. at 18*.

As previously noted, the alleged tying arrangement challenged in this case arises from the exclusive contract Parkview entered into with Bucholz for the provision of radiological services. Consequently, under the *Jefferson Parish* analysis, we must decide whether Parkview's contract with Bucholz is illegal as forcing surgical patients at

Parkview to obtain radiological **[*141]** services from Bucholz which they might wish to obtain from another provider **[**7]** or as unreasonably restraining competition among radiologists in the Parkview area. We first examine, however, the precise reason for the district court's dismissal of Dr. Beard's *section 1* claim.

In its decision granting Parkview's motion for summary judgment, the district court said:

> ***HN5***[] In order for a tying arrangement to violate *§ 1* of the Sherman Act, the seller must exploit its market power over the tying product to force the buyer into purchasing a tied product that the buyer either did not want at all, or might have preferred to purchase from someone else. An implicit requirement to a finding that a tying arrangement violates *§ 1* is that the seller of the tying product must also profit from the sale of the tied product.

The district court went on to say that, "in all of the cases addressing this question which the Court is aware of, the courts require that the seller of the tying product must have benefited *directly* from the sale of the tied product." And, "in this case, it is clear from the evidence before the Court that none of the monies paid to Bucholz, Inc. **[**8]** reached Parkview's hands. Therefore, the Court finds defendants' motions for summary judgment as to plaintiff's *§ 1* claim well taken."

The district court's reliance on the "direct economic benefit" rule was well-grounded in ***antitrust law***.

Prior to *Jefferson Parish*, courts ordinarily tested a challenged tying arrangement for *section 1* validity by determining whether the provider of the tying product or service derived any direct economic benefit from the arrangement. An absence of direct economic benefit was taken as a determinative indicator that the provider of the tying product or service had no anti-competitive impact upon the market for the tied product or service. *See, e.g., Venzie Corp. v. United States Mineral Products Co., Inc., 521 F.2d 1309, 1317 (3d Cir. 1975)*; *Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441, 446-47 (4th Cir. 1958)*; *Keener v. Sizzler Family Steak Houses, 597 F.2d 453, 456 (5th Cir. 1979)*; *Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934, 939 (6th Cir. 1964)*, *cert. denied*, *380 U.S. 954, 85 S. Ct. 1088, 13 L. Ed. 2d 971 (1965)*; *Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476, 1478-81 (9th Cir. 1983)*. **[**9]** These courts dismissed *section 1* Sherman Act claims where the seller, accused of providing an alleged tying product or service, did not derive any direct economic benefit from the sale of the product said to be tied.

Notable among these decisions is *Crawford Transp. Co.* in which this court held that Chrysler Corporation "was guilty of no tying arrangement in violation of *Section 1* of the Sherman Act" when it required its dealers to purchase new car delivery services from the company with which Chrysler had an exclusive contract along with new cars the dealers bought. *338 F.2d at 939*. This court said:

> Chrysler owned no transportation companies and had no financial interest in any of the transportation carriers to which it tendered traffic for its 1958 and subsequent models. It did not seek to invade and dominate the automobile transportation carriers' business. True, Chrysler benefited financially to the extent that it saved millions of dollars in the cost of transportation but it received no direct profits from the transportation carriers.

Id. The district court cited *Crawford Transp. Co.*, for its reliance upon the "direct economic benefit" **[**10]** rule.

On appeal, Dr. Beard concedes that the district court correctly found that Parkview derives no direct economic benefit from the radiological services provided by Bucholz. He also concedes that if *Crawford* is a correct statement of the law, his *section 1* claim fails. He contends, however, that in *Jefferson Parish* the Supreme Court overruled *sub silentio* those cases, including *Crawford Transp. Co.*, holding that the supplier of a tying product or service who receives no direct economic benefit from the sale of the tied product or service is not guilty of an illegal tying arrangement under *section 1* of the Sherman Act.

[*142] After a careful examination of *Jefferson Parish*, and a number of cases applying it, as well as the recent decision of *Gonzalez v. St. Margaret's Housing Div. Fund, 880 F.2d 1514 (2d Cir. 1989)*, which Dr. Beard cites in support of his argument, we are unpersuaded that the "direct economic benefit" requirement of *Crawford Transp. Co.* has been displaced or is otherwise inapplicable to this case.

In *Jefferson Parish*, the Supreme Court held that a contract between a hospital and a firm of anesthesiologists **[**11]** was not a *per se* violation of *section 1* of the Sherman Act merely because the agreement required patients to buy all the anethesiological services they needed from the firm. *466 U.S. at 28-29, 104 S. Ct. 1551, 80 L. Ed. 2d 2*. The Court also held that the claimant in that case failed to make a showing of adverse competitive effect resulting from the agreement sufficient to demonstrate rule of reason invalidity. *Id. at 30-31*.

To be sure, the Court in *Jefferson Parish* did not state that the seller of a tying product or service must secure a direct economic benefit from sales of a tied product or service in order to violate *section 1* of the Sherman Act. The Court's analysis turned on whether the seller of the alleged tying and tied services, namely Jefferson Parish Hospital District No. 2, used its market power "to force patients to buy [anesthesiological] services they would not otherwise purchase," *id. at 26*, and whether the effect of the exclusive contract for anesthesiological services was to unreasonably restrain competition among anesthesiologists in the hospital's market. *Id. at 29*. But, the Court's **[**12]** silence in *Jefferson Parish* on the "direct economic benefit" issue ought not be interpreted as overruling the considerable body of pre-Jefferson Parish precedent relying on the "direct economic benefit" requirement as a means of determining whether a challenged contract or agreement is an illegal tying arrangement.

The Court in *Jefferson Parish* was not required to address the "direct economic benefit" issue because there was no dispute that the hospital in that case received a direct economic benefit from each sale of anesthesiological services. The Court noted that while "the fees for anesthesiological services are billed separately . . . they are divided equally between [the anesthesiology firm] and the hospital." *Id. at 6 n. 4*.

Moreover, the "direct economic benefit" requirement is consistent with the Court's explanation of what an illegal tying arrangement is in *Jefferson Parish*:

> ***HN6***[] The law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose **[**13]** restraints on competition in the market for a tied product, on the other. When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures. This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, and can increase the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie.

Id. at 14-15 (citations and footnotes omitted). ***HN7***[] A seller who derives no direct economic benefit from sales of an alleged tied product or service is not attempting to invade the alleged tied product or service market in a manner proscribed by *section 1* of the Sherman Act.

Furthermore, our conclusion **[**14]** that the pre-Jefferson *Parish* cases recognizing the "direct economic benefit" requirement in illegal tying cases were not overruled by *Jefferson Parish* is supported by numerous post-Jefferson *Parish* decisions holding that the absence of a direct economic benefit to the seller from sales of an alleged tied product or service precludes a determination **[*143]** that the alleged illegal tying arrangement violates the Sherman Act under either the *per se* or rule of reason analysis. *See, e.g., White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104 (4th Cir. 1987)*; *Directory Sales Management v. Ohio Bell Tel. Co., 833 F.2d 606, 610 (6th Cir. 1987)*; *Sandburg Village Condominium Ass'n v. First Condominium Development Co., 758 F.2d 203, 209* and 210 (7th Cir. 1985); *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 712 (11th Cir. 1984)*. Notable among those cases is this court's decision in *Directory Sales*, in which we affirmed a district court's entry of summary judgment in a case alleging a illegal tying arrangement, stating, "if Ohio Bell does not receive a financial benefit from the **[**15]** tied product, case law indicates that a tying arrangement does not exist." *833 F.2d at 610* (citations omitted).

In support of his argument to the contrary, Dr. Beard cites the Second Circuit *Gonzalez* case. *880 F.2d 1514*.

In *Gonzalez*, the court of appeals remanded the appeal of a number of tenants of a non-profit housing facility who sued the facility under *section 1* of the Sherman Act. *Id. at 1520*. The tenants alleged that the facility was engaged in an illegal tying arrangement by its requiring that they purchase at least one meal, supplied by a third party, every day they stayed at the facility. *Id. at 1515-16*. The Second Circuit remanded the case so that the district court could determine whether the alleged tying arrangement impacted interstate commerce and, thus, whether the Sherman Act applied. *Id. at 1519*. But, because the district court had formerly dismissed the *Gonzalez* tenants' claim on the ground that the housing facility had no economic interest in the sale of the meals, *id. at 1515*, the court of appeals addressed the "direct economic benefit" issue. **[**16]** *Id. at 1517*. The court said, "We do not feel justified, in this situation, to choose to add a sixth requirement of 'economic interest' to our [five-part] test for proving an illegal tying claim." *Id.* [1] The court reasoned:

> The majority in *Jefferson Parish* focused primarily on the anticompetitive effect of tying arrangements and the resultant harm to consumer choice in the tied-product market. In protecting those interests, the majority in *Jefferson Parish* appeared to require a plaintiff to prove only that the tie impairs competition in the tied market and forecloses a substantial volume of commerce in that market. The majority in *Jefferson Parish* does not require any "economic interest" by the tying seller in the tied-product market.

Id. (citations omitted). The court then went on to suggest that, even if it were to adopt the "economic interest" test, it believed the housing facility received some economic benefit, albeit no profit, from the meal sales. *Id.*

[17]** While it is arguable that *Gonzalez* can be distinguished from this case as declining only in dicta to adopt the "direct economic benefit" requirement, we shall assume instead that *Gonzalez* is directly contrary to our holding in *Crawford Transp. Co.* and the line of cases previously cited that require a provider of the alleged tying product or service to derive a direct economic benefit from sales of the alleged tied product or service in order for an illegal tying arrangement to be found. We believe the rule of *Crawford Transp. Co.* to be the better reasoned rule; one consistent with the fundamental antitrust policy opposing the use of market power in one part of the economy to acquire power in another part and one to which we are bound as the rule of this circuit. [2]

[18]** **[*144]** For the foregoing reasons, we hold, as a matter of law, that because Parkview received no direct economic benefit from the radiological services provided to its patients by Bucholz, it engaged in no unlawful tying arrangement, under either the *per se* or the rule of reason approaches, by entering into an exclusive contract for radiological services with Bucholz. The district court did not err in dismissing Dr. Beard's *section 1* claim on this basis.

B. Monopoly

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[1] The Second Circuit's five elements for finding an illegal tying arrangement are:

> First, a tying and a tied product; second, evidence of actual coercion by the seller that forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, the involvement of a "not insubstantial" amount of interstate commerce in the "tied" market.

Gonzalez, 880 F.2d at 1516-17 (citing *Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980))*.

[2] We can only note as a curiosity the *Gonzalez* court's unwillingness to "add" a sixth, "economic interest" requirement to its list of five elements for an illegal tying arrangement on the ground that the Supreme Court in *Jefferson* focused only on "the anticompetitive effect of tying arrangements and the resultant harm to consumer choice in the tied product market." It would appear that the five elements for evaluating an alleged illegal tying arrangement were not intended by the court in *Yentsch*, upon which the *Gonzalez* court relied, to comprise an exhaustive list. The *Yentsch* court recognized "considerable logic for using [the 'direct economic benefit'] criterion" even though it did not have occasion to adopt the requirement in that case. *630 F.2d at 57 n. 15*.

Dr. Beard also claims that the Parkview/Bucholz exclusive services contract violated section 2 of the Sherman Act. He claims that by their agreement, Parkview, and its chief operating officer Dr. Zeiher, and Bucholz were monopolizing or attempting to monopolize the osteopathic radiological services market for northwestern Ohio and southeastern Michigan.

HN8[] An unlawful monopoly consists of:

> (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, **[**19]** or historic accident.

United States v. Grinnell, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). HN9[] A plaintiff asserting the offense of monopolization must show, "that a defendant either unfairly attained or maintained monopoly power . . . [which] consists of 'the power to control prices or exclude competition.'" Smith v. Northern Michigan Hospitals, Inc., 703 F.2d 942, 954 (6th Cir. 1983) (citations omitted). Attempted monopolization "occurs when a competitor, with a 'dangerous probability of success,' engages in anticompetitive practices the specific design of which are, to build a monopoly or exclude or destroy competition." *Id.* (citations omitted).

1. Parkview and Dr. Zeiher

In *Smith v. Northern Michigan Hospitals*, a group of independent doctors on staff at Northern Michigan Hospitals, Inc. ("NMH"), which resulted from the merger of two Petoskey, Michigan hospitals, alleged that NMH's exclusive contract with Burns Clinic Medical Center, P.C. for the provision of emergency room care was part of "a conspiracy designed **[**20]** to monopolize acute care medicine in the Petoskey market in violation of section 2 [of the Sherman Act]." Id. at 946. This court affirmed the summary dismissal of a section 2 action against NMH because, "it is beyond question that NMH does not compete in any fashion with the appellants." Id. at 955. That is, NMH neither enjoyed nor attempted to enjoy monopoly power in the acute care medicine market in Petoskey.

In the same way, Parkview does not compete with Dr. Beard or Bucholz as a provider of osteopathic radiological services in northwestern Ohio and southeastern Michigan. We do not decide whether "osteopathic radiology" is a unique service for antitrust purposes. But, even assuming, *arguendo*, that it is, Parkview and Dr. Zeiher are entitled to judgment as a matter of law because they neither enjoyed nor were attempting to enjoy monopoly power in the Ohio and Michigan radiological services market.

2. Bucholz

In *Smith v. Northern Michigan Hospitals*, this court refused to dismiss the independent physicians' monopoly claim against Burns Clinic because "there is . . . no evidence provided by the present record to contradict the appellants' **[**21]** allegations that competition exists between appellants and the Burns Clinic for referral patients from the NMH emergency room." 703 F.2d at 955. **[*145]** After the case was remanded for further proceedings as to Burns Clinic, the district court dismissed the remaining portion of the complaint against Burns Clinic by granting its motion for summary judgment. This court affirmed the dismissal because, among other reasons, "the plaintiffs submitted no evidence from which the court could infer the defendant's general intent to monopolize. Nor did the plaintiffs submit evidence to rebut the defendant's explanations for the small number of post-merger referrals received by the plaintiffs." Smith v. Burns Clinic Medical Center, 779 F.2d 1173, 1176 (6th Cir. 1985). Thus, the case was dismissed because the doctors did not, as they were required, "rebut the defendant's legitimate explanations for the alleged anticompetitive conduct with 'significant probative evidence tending to support the complaint.'" Id. at 1176 (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 290, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)). **[**22]**

Likewise, in this case, Dr. Beard has failed to rebut Bucholz's legitimate explanation for its "anticompetitive" exclusive agreement with Parkview. Parkview and Bucholz explained that their contract is necessary to enhance the quality of care its patients receive as well as improve the efficiency of the hospital. Through use of the exclusive contract, Parkview is able to monitor the radiologists to whom it grants staff privileges, negotiating on behalf of its patients the best available radiological care upon the expiration of each contract's term.

Dr. Beard has provided no "significant probative evidence" to rebut Bucholz's legitimate explanation for its agreement with Parkview. Dr. Beard questions only whether the contract was formally executed as of 1984, when he joined Bucholz, or whether it was signed in response to his filing this lawsuit in 1985. Assuming it was the latter, as Dr. Beard claims, the legitimate explanation Parkview and Bucholz provide for the contract remains unrebutted. The district court properly granted summary judgment in favor of Bucholz on the *section 2* claim because Dr. Beard "failed to submit probative evidence which would 'require a judge or jury **[**23]** to resolve the parties' differing versions of the truth at trial.'" *Id.* (citations omitted).

III.

For the foregoing reasons, the judgment of the district court dismissing the plaintiff's *sections 1* and *2* Sherman Act claims is AFFIRMED.

End of Document

Alcon Labs., Inc. v. Allergan, Inc.

United States District Court for the Northern District of Texas, Fort Worth Division

August 27, 1990, Decided ; August 28, 1990, Filed

Civil Action No. 4-88-333-E

Reporter

1990 U.S. Dist. LEXIS 13348 *; 17 U.S.P.Q.2D (BNA) 1365 **

ALCON LABORATORIES, INC. v. ALLERGAN, INC.

Core Terms

patent, disinfection, cleaning, enzyme, contact lens, invention, prior art, peroxide, reissue, declaration, experiment, protein, hydrogen peroxide, anticipated, one-step, proteolytic enzyme, invalid, determines, detergent, inventors, skilled, describes, lenses, enzymatic, infringement, cleaners, laundry, soaked, tablet, clear and convincing evidence

LexisNexis® Headnotes

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > ... > Defenses > Patent Invalidity > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN1[] **Burdens of Proof, Clear & Convincing Proof**

A patent is presumed valid as to each claim under *35 U.S.C.S. § 282*. The presumption of validity is not absolute but can be rebutted. The burden of proof is on the party challenging validity to prove the facts establishing invalidity by clear and convincing evidence. The presumption is affected by several factors. For instance, if the most pertinent prior art was before the Patent and Trademark Office Examiner, the presumption is bolstered. However, if there is evidence of more pertinent prior art which was not presented to the examiner, such evidence would weigh heavily in overcoming the presumption.

Patent Law > Anticipation & Novelty > Fact & Law Issues

Patent Law > Anticipation & Novelty > General Overview

HN2[] **Anticipation & Novelty, Fact & Law Issues**

Under *35 U.S.C.S. § 102*, anticipation requires that each and every element of the claimed invention be disclosed in a prior art reference. In addition, the prior art reference must be enabling, thus placing the allegedly disclosed matter in the possession of the public. A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. Anticipation is a factual determination.

Patent Law > Nonobviousness > Elements & Tests > Claimed Invention as a Whole

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > ... > Specifications > Enablement Requirement > General Overview

Patent Law > Nonobviousness > Elements & Tests > Ordinary Skill Standard

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN3[] **Elements & Tests, Claimed Invention as a Whole**

A patent may not be obtained if the differences in the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

Patent Law > Nonobviousness > Evidence > Fact & Law Issues

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > ... > Specifications > Enablement Requirement > General Overview

Patent Law > Nonobviousness > Elements & Tests > Claimed Invention as a Whole

Patent Law > Nonobviousness > Elements & Tests > Ordinary Skill Standard

Patent Law > Nonobviousness > Elements & Tests > Prior Art

Patent Law > ... > Elements & Tests > Graham Test > Secondary Considerations

Patent Law > Nonobviousness > Evidence > General Overview

Patent Law > Nonobviousness > Evidence > Inferences & Presumptions

HN4[] **Evidence, Fact & Law Issues**

To be obvious, the claimed invention as a whole must have been obvious to one of ordinary skill in the art at the time of the invention. Obviousness is a question of law based on factual inquiries into: (1) the scope and content of the prior art, (2) the level of ordinary skill in the art, (3) differences between the claimed invention and the prior art, and (4) objective evidence of nonobviousness such as long-felt need, unexpected results, failure of others, commercial success, and copying. The court must look at the invention at the time it was made from the perspective of the hypothetical person and in light of the prior art to determine if the patent would have been obvious to such person.

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > ... > Specifications > Enablement Requirement > General Overview

HN5[] **Nonobviousness, Elements & Tests**

The factors a court considers in determining the level of ordinary skill in the art are (1) the educational level of the inventor, (2) the type of problems encountered in the art, (3) prior art solutions to these problems, (4) the rapidity with which inventions were made, (5) the sophistication of the technology, and (6) the educational level of active workers in the field.

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN6[] **Nonobviousness, Elements & Tests**

A court may look to several secondary considerations in its determination of obviousness such as long felt but unsolved need, failed attempts by others, initial skepticism, subsequent praise, commercial success, and copying by others.

Patent Law > ... > Specifications > Definiteness > General Overview

HN7[] **Specifications, Definiteness**

Inventions are required to be sufficiently described in a patent such that one skilled in the art could practice the invention.

Patent Law > ... > Specifications > Description Requirement > General Overview

Patent Law > ... > Specifications > Definiteness > General Overview

HN8[] **Specifications, Description Requirement**

See *35 U.S.C.S. § 112*.

Patent Law > US Patent & Trademark Office Proceedings > Examinations > Amendments & New Matter

Patent Law > US Patent & Trademark Office Proceedings > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Reissue Proceedings > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Reissue Proceedings > Requirements

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > Drawings

HN9[] **Examinations, Amendments & New Matter**

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the Commissioner shall, on the surrender of such patent and the payment of the fee required by law, reissue the patent for the invention disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent. No new matter shall be introduced into the application for reissue.

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > Drawings

Patent Law > US Patent & Trademark Office Proceedings > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Reissue Proceedings > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Reissue Proceedings > Requirements

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > Oaths

HN10[] **Filing Requirements, Drawings**

There are two distinct statutory requirements that a reissue oath or declaration must satisfy. First, it must state that the patent is defective or partly inoperative or invalid because of defects in the specification or drawing, or because the patentee has claimed more or less than he is entitled to. Second, the applicant must allege that the defective, inoperative, or invalid patent arose through error without deceptive intent.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN11[] **Inequitable Conduct, Effect of Inequitable Conduct**

To establish inequitable conduct before the United States Patent and Trademark Office, and thus render a patent unenforceable, the defendant must establish by clear and convincing evidence (1) a material misrepresentation or omission of information, and (2) a threshold level of intent on the part of the applicant. A determination as to each element must be made separately. The standard for materiality is whether a reasonable patent examiner would consider the omitted material pertinent in making a decision on whether to issue a patent.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN12[] **Inequitable Conduct, Burdens of Proof**

The following three-step test for analyzing patent misuse in a tying context is appropriate. First, determine whether there are two things tied, i.e., whether there are separable or inseparable items; if so, determine whether the thing which is assertedly tied to the patented item is a staple or non-staple item in commerce; if it is a staple, determine whether in fact they are tied.

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN13[] **Infringement Actions, Infringing Acts**

A product is a nonstaple if it constitutes a material part of the invention, not a staple article or commodity of commerce suitable for substantial noninfringing use. *35 U.S.C.S. § 271(c)*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN14[] **Antitrust & Trade Law, Sherman Act**

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is violated.

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Judges: [*1] Eldon B. Mahon, United States District Judge.

Opinion by: MAHON

Opinion

[1366]** MEMORANDUM OPINION AND ORDER

INTRODUCTION

This action came on for trial before the Court, the Honorable Eldon B. Mahon, United States District Judge, presiding. This opinion shall constitute the Court's findings of fact and conclusions of law.

A. Jurisdiction

The Court has jurisdiction over this action under *28 U.S.C. § 1338(a)*, and venue is proper under *28 U.S.C. § 1400(b)*.

B. The Parties

The plaintiff, Alcon Laboratories, Inc., is incorporated under the laws of Delaware and has its principal place of business in Fort Worth, Texas. Defendant, Allergan, Inc., is also incorporated under the laws of Delaware and has its principal place of business in Irvine, California.

C. The Claims

This action involves the validity and enforceability of United States Patent No. Re. 32,672 (hereinafter "the '672 patent") entitled "Method for Simultaneously Cleaning and Disinfecting Contact Lenses Using a Mixture of Peroxide and Proteolytic Enzyme." The '672 patent was issued on May 24, 1988 to the defendant, Allergan, Inc., as assignee of the inventors of the patent. [1] Accordingly, Allergan is the owner of the '672 patent. The '672 patent **[*2]** is a reissue patent based on U.S. Patent No. 4,670,178 issued on June 2, 1987 (hereinafter "the '178 patent").

This action was originally filed on June 3, 1988 by Alcon for declaratory judgment, urging the Court to declare that the patent was invalid, unenforceable and not infringed. Alcon also sought damages for violations of the Antitrust laws, *15 U.S.C. §§ 1*, *2*, and *15*; violation of *Texas Business & Commerce Code, § 15.05*; and requested treble damages, exemplary damages, attorneys' fees, and an accounting to determine damages. Allergan had filed a suit the preceding day in the United States District Court for the District of Delaware. [2] The Delaware suit was subsequently transferred to this Court and consolidated with the instant action. Allergan's action was for patent infringement, alleging that Alcon had directly infringed and induced others to infringe upon claims 1, 2, 3, 6, 10, 13, and 14 of the '672 patent in violation of *35 U.S.C. §§ **[*3]** 271(a)* and *(b)*. [3]

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[1] The inventors are Stanley W. Huth, Sam W. Lam, and Richard M. Kiral.

[2] Allergan, Inc. v. Alcon Laboratories, Inc., CA 4-88-279.

[3] The claims of the patent are as follows:

Claim 1. A method for the simultaneous cleaning and disinfecting of contact lenses which method comprises contacting the lenses with a solution comprised of a disinfecting amount of peroxide and an effective amount of peroxide-active proteolytic enzyme for a time sufficient to remove substantially all protein accretions and to disinfect the lenses.

Claim 2. The method of claim 1 wherein the solution is prepared by combining the enzyme and peroxide at the time the lenses are contacted with the solution.

Claim 3. The method of claim 2 wherein the enzyme is in a powder or tablet form and is dissolved in the peroxide solution.

Claim 4. The method of claim 1 wherein the solution is prepared by dissolving a dry peroxide and dry enzyme in an aqueous solution.

Claim 5. The method of claim 4 wherein both components are combined in powder or tablet form.

Claim 6. The method of claim 2 wherein the enzyme is present in an amount between 0.001 and 5 Anson units, and the peroxide is hydrogen peroxide and is present in an amount between 0.02 and 10% by weight/volume.

Claim 7. A method, according to claim 6, where the proteolytic enzyme is subtilisin.

Claim 8. The method of claim 7 wherein the peroxide is hydrogen peroxide, sodium perborate, potassiumpersulfate, sodium percarbonate, diperisophthalic acid, peroxydiphosphate salts or sodium aluminum aminohydroperoxide.

Claim 9. The method of claim 8 where the [aqueous composition] solution comprises 3% hydrogen peroxide and 0.30% subtilisin A by weight/volume.

Claim 10. The method of claim 1 wherein said contact lenses have a hydrophilic surface.

[1367]** **[*4]** Prior to trial, the parties entered into a stipulation concerning the infringement and damage claims which are no longer issues in this suit. [4]

BACKGROUND

The patent in suit is a method patent involving the simultaneous cleansing and disinfecting of daily wear soft, or hydrophilic, contact lenses by combining a mixture of peroxide and a proteolytic enzyme. The peroxide is **[*5]** the disinfecting ingredient and the enzyme is the protein cleansing ingredient. Allergan has received FDA approval [5] for labeling of its enzymatic cleaning product, Ultrazyme. [6] Ultrazyme itself is not a patented product. However, the labeling on the Ultrazyme packaging allows the purchaser to practice the patent in suit. Ultrazyme is a tablet. The tablet is dissolved in hydrogen peroxide, and the lens is then soaked in the solution for a period of time for simultaneous cleaning and disinfecting.

[*6] A background of the purpose and function of the patented process is helpful for a clear understanding of the patent. Wearers of soft contact lenses perform a maintenance regimen in caring for their lenses. Soft contact lenses require both daily disinfection and weekly cleaning of protein accretions which form deposits on the lenses. Failure to comply with the care regimen is considered a significant problem in the industry. Noncompliance could result in severe consequences from irritation and discomfort to disease, infection, and even eye loss. Patient compliance is therefore a goal of practitioners and of manufacturers of lens care products. The consensus in the industry is that the simpler the lens care regimen, the greater the patient compliance.

Daily care requires (1) cleansing with a surfactant-based cleaner to remove foreign materials and (2) disinfection. In addition, contact wearers must clean protein deposits from the lenses weekly. Allergan discovered a method for removing protein deposits on the lenses with a proteolytic enzyme. This discovery was claimed in United States Patent No. 3,910,296 **[*7]** (hereinafter "the Karageozian patent") issued on October 7, 1975, and entitled "Method of Removing Proteinaceous Deposits from Contact Lenses." Alcon has entered into a licensing agreement with Allergan under its Karageozian patent. Alcon sells a proteolytic enzyme containing contact lens cleaning product, Opti-Zyme. Alcon has received FDA approval of the use of Opti-Zyme in hydrogen peroxide. Alcon concedes that, if

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Claim 11. The method of claim 10 wherein said peroxide-active proteolytic enzyme is a sutilisin enzyme.

Claim 12. The method of claim 11 wherein said subtilisin enzyme is subtilisin A.

Claim 13. The method of claim 10 wherein said peroxide is hydrogen peroxide in an amount between 0.02 and 10% by weight/volume.

Claim 14. The method of claim 13 wherein said hydrogen peroxide is present in an amount of about 3% by weight/volume.

Claim 15. The method of claim 10 wherein said peroxide-active proteolytic enzyme is subtilisin A and said peroxide is hydrogen peroxide.

[4] Alcon has a product -- Opti-Zyme -- which is similar to Allergan's Ultrazyme product. The Opti-Zyme tablet contains a proteolytic enzyme which is the active protein removing ingredient. The combination of Opti-Zyme with hydrogen peroxide would also facilitate a one-step solution for simultaneous cleaning and disinfecting contact lenses. Alcon has conceded that if FDA approval is received for promoting the use of Opti-Zyme with hydrogen peroxide, that such acts will constitute inducement of infringement of claims 1, 2, 3, 6, 10, 13, and 14 of the '672 patent.

[5] Approval from the Food and Drug Administration is required before a product can be commercialized. The FDA tests for safety to insure that no adverse consequences result from the use of the product and for efficacy to insure that the product performs as it claims on its labeling.

[6] Ultrazyme was introduced commercially in the United States in 1987. The Ultrazyme tablet contains the enzyme subtilisin A, which is a proteolytic enzyme and the active protein removing ingredient. Other ingredients include sorbitol, N-acetylcysteine, sodium carbonate, polyethylene glycol 3350, and tartaric acid.

Alcon promotes Opti-Zyme for use in hydrogen peroxide, such acts will constitute inducement of infringement of the '672 patent.

The typical regimen for weekly enzymatic cleaning of lenses is a two-step method. In the first step, the lens is soaked in a solution of an enzyme tablet dissolved in saline for cleaning. Disinfection does not occur in the first step. In the second step, the lens is soaked in a disinfectant. Practitioners and lens care manufacturers recognized a need in the market for a one-step cleaning and disinfecting product in order to enhance patient compliance. Patients were frequently skipping one of the steps, more frequently the disinfecting step. Alcon has been working on a one-step system since at least early 1979. **[**1368]**

Although enzymatic cleaners have **[*8]** been used since 1975 to clean protein deposits from contact lenses, and hydrogen peroxide has been used to disinfect soft contact lenses since 1970, the two were used in the two-step method and had not been combined in a one-step method. The key difference in the two methods is that in the two-step method, the enzyme tablet is dissolved in saline, whereas, in the one-step method, the enzyme tablet is dissolved directly into the hydrogen peroxide. The patent in suit (the '672 patent) is a one-step method patent involving the combination of a mixture of peroxide and a proteolytic enzyme.

DISCUSSION

I. PATENT VALIDITY

HN1[] A patent is presumed valid as to each claim. *35 U.S.C. § 282*. The presumption of validity is not absolute but can be rebutted. The burden of proof is on the party challenging validity to prove the facts establishing invalidity by clear and convincing evidence. *American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1360 (Fed. Cir.)*, cert. denied, *469 U.S. 821 (1984)*. The presumption is affected by several factors. For instance, if the most pertinent prior art was before the Patent and Trademark Office ("PTO") Examiner, the presumption is bolstered. **[*9]** However, if there is evidence of more pertinent prior art which was not presented to the examiner, such evidence would weigh heavily in overcomimg the presumption. *W.L. Gore & Assoc. v. Garlock, Inc., 721 F.2d 1540 (Fed. Cir. 1983)*, cert. denied, *469 U.S. 851 (1984)*.

Alcon has cited several pieces of prior art which it deems to have been more pertinent than the art before the examiner, including the Randeri patent (PX 286), the Boghosian patent (PX 287), another Boghosian patent (PX 288), the Ogunbiyi patent (PX 68), the Blomeyer patent (PX 23), the Fu patent (PX 406), Allergans' Japanese enzyme/disinfection patent publication (PX 359A), and the Hira Japanese article (PX 346A).

A. Anticipation

Defendant argues that claims 1, 2, 3, 4, 5, 6, 7, and 8 of the '672 patent were anticipated by the prior art and therefore not patentable under *35 U.S.C. § 102*. Particularly, Alcon argues that the '672 patent is not novel because the Lo article suggested the claims of the '672 patent to those skilled in the art.

HN2[] "Under *35 U.S.C. § 102*, anticipation requires that each and every element of the claimed invention be disclosed in a prior art reference. In addition, the prior art reference **[*10]** must be enabling, thus placing the allegedly disclosed matter in the possession of the public." *Akzo N.V. v. U.S. Int'l Trade Comm., 808 F.2d 1471, 1479 (Fed. Cir. 1986)*, cert. denied, *482 U.S. 909 (1987)* (citations omitted). "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros., Inc. v. Union Oil Co., 814 F.2d 628 (Fed. Cir.)* cert. denied, *484 U.S. 827 (1987)*. Anticipation is a factual determination. *Lindemann Machinenfabrik GMBH v. American Hoist & Derrick Co., 730 F.2d 1452, 1458 (Fed. Cir. 1984)*. To anticipate, Lo's experiment must have disclosed the process of the patent, although he need not have appreciated the effect of his experiment. *General Electric Co. v. Jewel Incandescent Lamp Co., 326 U.S. 242 (1945)*. The '672 patent is anticipated if the Lo article disclosed each and every element as set forth in the claims of the '672 patent.

The Lo article, entitled "Studies on Cleaning Solutions for Contact Lenses," was published in the Journal of the American optometric Association in November of 1969. The Lo article contained **[*11]** a cleaning study of contact lenses using twelve commercial contact lens cleaning solutions, four experimental cleaning solutions, and four enzyme-containing laundry detergents. The focus with respect to this litigation is on the experiments with enzyme-containing laundry detergents, particularly with the detergent BIZ, a patented laundry detergent product under U.S. patent 3,353,139 issued January 5, 1971 to Procter and Gamble as assignee of Charles Bruce McCarty.

The Lo article described cleaning proteins from contact lenses with an enzyme containing solution, BIZ. BIZ contained the enzyme subtilisin and also sodium perborate, a peroxide. Alcon argues that the process anticipated the patent in suit because it cleaned the lenses with the enzyme and inherently, simultaneously disinfected the lenses due to the presence of sodium perborate (a peroxide). The act of soaking contact lenses in BIZ, Alcon contends, necessarily disinfected the lenses. Hence, the Lo reference anticipates and thereby invalidates claims 1, 2, 3, 4, 5, 6, 7, and 8 of the '672 patent. **[**1369]**

However, Allergan argues that the use of the detergent BIZ in the experiment reported in the Lo article did not satisfy each **[*12]** and every element of the claims because the BIZ experiment did not remove substantially all protein accretions, employ a "disinfecting amount of peroxide," or disinfect the contact lenses.

The Lo article describes cleaning contact lenses in the laundry detergent BIZ. BIZ contains sodium perborate and an enzyme stain remover. The experiment included smearing blood serum (a protein) and "Magic Marker" onto a hard contact lens. The lens was then soaked in a 2% BIZ solution with a pH level of 9.8 for 33 minutes. The result was a 50% cleaning rate of the contact lens.

Although Alcon presents many arguments in support of its claim of anticipation, it primarily relies on the experiments of Mrs. Ruth Ann Rosenthal. [7] Before trial, Rosenthal, an Alcon employee, attempted to duplicate the Lo experiment. However, Rosenthal's experiment differed in several respects. While Lo's experiment involved a 2% solution, Rosenthal's experiment involved a 1% solution because she could not obtain the 2% solution. [8] Rosenthal's experiment involved a soak time of 3 hours compared to 33 minutes by Lo. Other factors also differed. Rosenthal performed her test at room temperature, in sterile distilled water. **[*13]** However, these conditions are unknown for Lo's experiment. Although the pH level in Lo's experiment is known to be 9.8%, Rosenthal does not know the pH level of her experiment.

Although Rosenthal testified that the organisms were reduced by 1 log in 3 hours (the same rate as defined in the patent), she also testified that the tests she performed do not prove **[*14]** disinfection. Rosenthal ran D-value tests which measure antimicrobial activity. D-value tests do not necessarily measure disinfection. ("A D-value test will not prove that it will disinfect." TR. 6:38). Rosenthal never ran a separate disinfection test on BIZ and therefore never tested its disinfecting abilities. Alcon asserts that Lo's experiment inherently disinfected, thereby disclosing the same process as in the '672 patent. However, based on all the evidence, the Court finds that Alcon has fallen short of its burden to prove that disinfection actually occurred in the Lo experiment.

Based on the evidence presented at trial, the Court finds that the Lo article did not expressly or inherently disinfect the lenses. Claim 1 defines a solution of a disinfecting amount of peroxide and proteolytic enzyme for a time sufficient to disinfect. The Court cannot conclude that the BIZ experiment by Lo disinfected the contact lenses. Because the Lo article does not suggest every element of Claim 1, it cannot anticipate such claim.

Furthermore, the Court finds that the Lo experiment did not remove "substantially all" of the protein accretions. Lo's results show that he removed only 50% of the **[*15]** protein (in the form of blood serum) smeared on the lenses.

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[7] Alcon also presented the affidavit of Bruce McCarty, the inventor of the BIZ '139 patent. Dr. McCarty concludes that Lo's experiment would meet all claims of the patent. However, his opinions are based on recollection, and he has performed no tests to verify such conclusions. The Court has considered Dr. McCarty's opinions and has concluded that they are not persuasive, and they have not been given significant weight.

[8] Rosenthal was unable to obtain the same solution as Lo. This indicates that, although the BIZ used by Rosenthal had the same McCarty patent number on the box, the formulation was not necessarily the same as the formulation of BIZ in 1969.

One of the elements of Claim 1 of the '672 patent is that the method "removes substantially all protein accretions." Lo shows that he removed 50% of the protein accretions in his experiment. To anticipate the '672 patent, Lo must have removed "substantially all" of the protein.

In order to resolve the issue, the Court must interpret "substantially all" used in Claim 1. First, the words must be given their "ordinary and accustomed meaning" unless it appears that the inventor used them differently. *Universal Oil Products Co. v. Globe Oil & Refining Co., 137 F.2d 3 (7th Cir. 1943)*, aff'd, *322 U.S. 471 (1944)*. Webster's New World Dictionary (1972) defines substantial as "of or having substance; considerable, ample, large." Substance, in turn, is defined as "the real or essential part of anything." Webster's dictionary defines "all" as "the whole extent; the entire number of; every one of; every." Given its ordinary and accustomed meaning, substantially all means a large or considerable amount of the whole; not everything, but almost everything. It does not mean "some" or "half" or even " a majority." Indeed, Dr. Quintana **[*16]** and Mr. Burton, both of Alcon, agreed that, in the ordinary usage of the term, 50% is not "substantially all." This ordinary meaning is not inconsistent with its use in the inventor's use in the patent. [9]

[1370]** Because the remaining claims are dependent on Claim 1, the Court further concludes that claims 2, 3, 4, 5, 6, 7, and 8 were not anticipated by the Lo article. Moreover, Lo did not anticipate other elements of claim 3. Lo used BIZ with the perborate and the enzyme both in a dry form and mixed it with **[*17]** water. Claim 3 describes dissolving the enzyme in powder or tablet form into a peroxide solution.

Based on all the evidence presented, the Court determines that Alcon has failed to sustain its burden of proving that the Lo article "anticipated" the '672 patent.

B. Obviousness

Alcon claims that the '672 patent is invalid because it was obvious at the time of the invention. *Section 103* provides in part:

HN3[] A patent may not be obtained . . . if the differences in the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

35 U.S.C. § 103.

Alcon has the burden of proving obviousness by clear and convincing evidence. [10] ***HN4***[] To be obvious, the claimed invention as a whole must have been obvious to one of ordinary skill in the art at the time of the invention. Obviousness is a question of law [11] based on factual inquiries into: (1) the scope and content of the prior art, (2) the level of ordinary skill in the art, (3) differences between the claimed invention and the prior art, and (4) objective evidence **[*18]** of nonobviousness such as long-felt need, unexpected results, failure of others, commercial success, and copying. *Graham v. John Deere Co., 383 U.S. 1, 17 (1966)*; *Atlas Powder Co. v. E.I. Du Font de Nemours, 750 F.2d 1569 (Fed. Cir. 1984)*. The Court must look at the invention at the time it was made from the perspective of the hypothetical person and in light of the prior art to determine if the patent would have been obvious to such person.

[9] Alcon points out that Lo's 50% level of cleaning is comparable to the cleaning in Example 1 and better than the results of the second Example 7 of the patent in suit. The Court must define the scope of the patent from the claims; the examples are merely illustrative. Alcon would have the Court isolate the examples showing 30% and 50% cleaning and ignore the more numerous examples showing 60%-90% cleaning. Example 1 showed 50% to 70% cleaning; second Example 7 showed 30% cleaning and Example 2 showed 80%-90% cleaning.

[10] *Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888 (Fed. Cir.)*, cert. denied, ***469 U.S. 857 (1984)***; *American Hoist, 725 F.2d at 1358-59*.

[11] *Akzo, 808 F.2d at 1480*.

Additionally, Alcon suggests that the presumption of validity is weakened because the most pertinent art was not before the PTO Examiner during the prosecution of the patent. *W.L. Gore, 721 F.2d 1540*.

1. Scope and Content of the Prior Art

The Court will consider the relevant prior art in existence before December 10, 1984, the record date of the invention. Based on the **[*19]** evidence presented at trial, the Court determines that the related art includes art in the fields of protein chemistry, enzymology, contact lens cleaning and disinfecting, dental, and laundry detergent art.

Alcon has asserted that the prior art made the patent in suit obvious to one of ordinary skill in the art. Alcon supports its contention with the argument that the concept of enzymatic cleaning, hydrogen peroxide disinfection and one-step methods of cleaning and disinfecting were all well known at the time of the patent, thereby making the invention obvious. In the following section, the Court will discuss the related art which Alcon suggests makes the patent obvious.

2. Differences Between the Claimed Invention and the Prior Art

The Court will now discuss the prior art in the related fields. The art relied upon by Alcon includes the art presented to the PTO and art which was not presented to the PTO.

The Lo Article. The Lo article has been thoroughly discussed above. Lo attempted to clean hard contact lenses with a 1% solution of BIZ laundry detergent which contains enzymes and sodium perborate. The article showed only 50% cleaning and does not mention disinfection.

[*20] The Randeri '696 Patent. The Randeri patent describes a method of cleaning and sterilizing soft contact lenses with an oxidative system. The method involved an aqueous, isotonic solution containing oxygen releasing salt, such as potassium peroxymonosulfate. Alcon describes the Randeri patent as a one-step cleaning and disinfecting system. However, Randeri differs from the '672 patent in that it does not involve enzymatic cleaning. Furthermore, the Randeri patent cannot actually be used to clean and disinfect contact lenses in a useful manner because oxone cannot be used for that purpose. The Randeri '696 patent was not disclosed to PTO during issue or reissue of the patent in suit. **[**1371]**

The Boghosian '965 Patent. The Boghosian '965 patent also describes a one-step method of cleaning and disinfecting contact lenses. However, the '965 does not involve the use of enzymes or peroxides. The Boghosian '965 patent was not before the PTO during the issue or the reissue of the patent in suit.

The Boghosian '782 Patent. The Boghosian '782 also describes a method for one-step cleaning and disinfecting of soft contact lenses. The patent involves the use of a solution of chlorhexidine, **[*21]** polyvinylpyrrolidone, and polyhydroxyethylmethacrylate. The Boghosian '782 does not mention the use of an enzyme or a peroxide in the process. The Boghosian '782 patent was not before the PTO during the issue or the reissue of the patent in suit.

The Ogunbiyi '549 Patent. Ogunbiyi teaches one-step cleaning and disinfection using an enzyme with thermal disinfection. This patent differs in that it involves thermal disinfection, not a peroxide or other chemical type of disinfection. One of the enzymes suggested by Ogunbiyi for use in the invention is papain. Papain will not work in the patent in suit because it is inactivated too quickly. The Oginbiyi patent process tends to have a discoloring effect on lenses and it cannot be used on certain types of high water content lenses.

The Fu '127 Patent. The Fu '127 patent involves cleaning contact lenses with a peroxide, transition metal salts, and a surfactant. The Fu patent does not mention disinfection or the use of enzymes. The Fu patent was not before the PTO.

The Blomeyer '379 Patent. The Blomeyer '379 patent comes from the laundry detergent art. It describes a method for soaking and laundering in a solution of a proteolytic **[*22]** enzyme and a peroxy compound along with an organic detergent and an alkaline builder to achieve superior stain removal. The patent describes superior cleaning from combining a proteolytic enzyme with an oxygen bleach compound than cleaning with only one of these. Although the patent refers to cleaning and bleaching, it makes no reference to disinfection. The Blomeyer '379 patent was not before the PTO during the issue or the reissue of the patent in suit.

The Rosenbaum Patent. This patent comes from the dental art and describes combining a peroxide compound with a peroxidase to kill bacteria to alleviate gingival disease and periodontal disease. However, Rosenbaum uses a peroxidase enzyme which cannot clean protein accretions.

The Japanese Boghosian Publication. The Japanese Boghosian publication, entitled "Method of Cleaning and Sterilizing Contact Lenses," dated April 20, 1974, teaches a method of simultaneous cleaning and disinfecting soft contact lenses with a proteolytic enzyme -- papa in -- and a non-peroxide chemical disinfectant -- Hydrocare. [12] "The resulting solution possesses excellent antimicrobial activity as well as cleaning ability." The preferred proteolytic **[*23]** enzyme is papain in the amount of about 0.5 to 1 percent. The preferred non-toxic sterilizing compound is alkyl (tallow) triethanol ammonium chloride in an amount from about 0.03 to 0.1 percent (w/v).

Alcon argues that the only difference between Allergan's Japanese enzyme/disinfectant patent publication and the patent-in-suit is the use of a non-peroxide chemical disinfectant rather than a peroxide chemical disinfectant. The Court agrees with Alcon with two distinguishing qualifications. First, although papain is a proteolytic enzyme, it does not work in the patent in suit because it does not produce the cleaning activity in the presence of a peroxide. Second, as Alcon has pointed out, this publication further differs from the patent in suit because it uses a different kind of disinfection -- a non-peroxide. This patent publication was not before the PTO.

The McCarty '139 Patent. The McCarty patent comes from the **[*24]** laundry detergent art and is the patent listed on the BIZ laundry detergent box. The patent describes the combination of a detergent, an enzyme, a peroxide compound, and builder salts. The patent discusses cleaning but does not mention disinfection.

The Hira Japanese Article. The Hira article is entitled "Study of the Removal of Protein Stains with Enzymes (I) -- Comparison of the Effects of Different Enzymes and Treatment Conditions." Hira reported cleaning results from soaking stained cloth samples in different enzyme-containing solutions and reported a synergistic effect on cleaning when hydrogen peroxide was added to the enzyme solution. However, the article also showed reduced activity of the enzyme as the amount of hydrogen peroxide in the solution was increased. The Hira article does not mention disinfection. This article was not before the PTO.

The Stauffer and Etson Article. This article, entitled "The Effect of Subtilisin Activity of Oxidizing a Methionine Residue," was **[**1372]** published in the Journal of Biological Chemistry in October, 1969. The authors tested "the effects of hydrogen peroxide on a bacterial serene protease, subtilisin Carlsberg (EC 3.4.4.16)." The result **[*25]** was that the enzyme had been "crippled" but not rendered totally inactive. The enzymatic activity of subtilisin was reduced by approximately 90% in the presence of hydrogen peroxide. This article mentions nothing of disinfection.

The Kaplan '868 Patent. This patent comes from the dental art and was cited in the application as "related art." It describes a water soluble effervescent denture cleanser tablet containing an enzyme and an active oxygen compound. The patent suggests sequential cleaning; first by the enzyme, "before the dissolution of the active oxygen compound reaches a level which would totally inactivate the enzyme," [13] and then from the active oxygen compound such as sodium perborate. There is no mention of disinfection. This patent was before the PTO.

Information Bulletin from NOVO. This bulletin appeared in a brochure of NOVO Industries of Copenhagen, Denmark, one of the biggest suppliers of enzymes, in March of 1987. The brochure describes **[*26]** the properties of subtilisin A. This brochure was also before the PTO examiner.

3. Level of Ordinary Skill in the Art

[12] Hydrocare is the commercial name of the chemical disinfectant used in the Japanese publication.

[13] Column 2, lines 63-68 of the Kaplan '868 patent.

The Court must now determine the level of ordinary skill in the art. This is accomplished by constructing a hypothetical person -- sometimes described as a "ghost" [14] -- from whose perspective the Court will determine obviousness. The Court must consider several factors when constructing this "ghost." ***HN5***[] The factors include (1) the educational level of the inventor, (2) the type of problems encountered in the art, (3) prior art solutions to these problems, (4) the rapidity with which inventions were made, (5) the sophistication of the technology, and (6) the educational level of active workers in the field. *Environmental Designs v. Union Oil Co. of Cal., 713 F.2d 693, 696 (Fed. Cir. 1983)*, cert. denied, *464 U.S. 1043 (1984)*.

Based on the evidence presented at trial, the Court determines **[*27]** that a person of ordinary skill in the art at the time of the invention would have one of a variety of educational backgrounds with hands-on experience in the contact lens care industry. The person would have at least a bachelor's degree in a field of natural science such as chemistry, organic chemistry (the most typical training in the field), biology, microbiology, pharmacy, optometry and ophthalmology. Many skilled in the field also have postgraduate degrees.

4. Secondary Considerations

HN6[] The Court may look to several secondary considerations in its determination of obviousness such as long felt but unsolved need, failed attempts by others, initial skepticism, subsequent praise, commercial success, and copying by others. *Graham v. John Deere Co., 383 U.S. 1 (1966)*.

The evidence showed that since the early 1970's, competitors in the contact lens cleaning field felt a need to develop a method of one-step cleaning and disinfecting of soft contact lenses. As discussed above, patient compliance with the two-step method was more susceptible to failure, creating the risks associated with noncompliance. Those in the contact lens care field made efforts to develop one-step methods. **[*28]** Many attempts were made to develop such a system without success. Bausch & Lomb's Renu product -- involving a thermal disinfection -- from the Ogunbiyi '549 patent was introduced commercially in December 1986. The invention of the patent in suit was in December of 1984. In addition, when the invention was introduced, it was met with great skepticism from those skilled in the art. This skepticism stems from the prior art which taught that enzymes and peroxides were incompatible. Since the invention, Allergan's competitors (Bausch & Lomb, Barnes Hind, and Alcon) have filed applications for FDA approval for enzyme products which can be used in the patented process. Moreover, Ultrazyme has been commercially successful in both domestic and international markets.

5. Conclusion as to Obviousness

Alcon supports its contention of obviousness with several known facts at the time of the invention:

(1) the use of enzymes to clean contact lenses,

(2) the use of hydrogen peroxide as a disinfectant for contact lenses, and

(3) the use of one-step cleaning and disinfecting of contact lenses with enzyme cleaners **[**1373]** and chemical disinfectants. [15]

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[14] *Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561 (Fed. Cir.)*, cert. denied, ***481 U.S. 1052 (1987)***.

[15] Alcon has also urged that Allergan must show a synergistic result from combining the two known ingredients, each to be used for their intended purpose. Allergan presented evidence -- much of it from Alcon's own experiments -- which showed findings of synergism. However, after review of all the evidence, the Court determines that such enhancement was not attributable to the combination of enzymes and hydrogen peroxide alone. Rather, enhanced disinfection is related to pH level. The Court has reviewed the briefs, evidence, and applicable law and determines that a showing of synergism is not required in this case. Allergan is not distinguishing the patent in suit from the prior art on the basis of unexpected synergism alone. Hence, a lack of synergy does not render the patent obvious. See, *Merck & Co. v. Biocraft Laboratories, Inc., 874 F. 2d 804 (Fed. Cir.)*, cert. denied, ***U.S. , 110 S.Ct. 498 (1989)***; *Gardner v. TEC Systems, Inc., 725 F.2d 1338 (Fed. Cir.)* (in banc), cert. denied, ***469 U.S. 830 (1984)***.

[*29] Alcon ties these rather broadly stated facts together to conclude that, because each element performs its known function, and because it was known that ingredients could be combined to achieve one step cleaning and disinfection, the process was obvious as "a logical path in the art to combine enzyme cleaners (known) with peroxide disinfectants (known) to achieve one-step cleaning and disinfecting (known)." However, Alcon grossly oversimplifies its argument and ignores the evidence which permeated the trial. That is, that each and every piece of prior art differs from the patent in suit in at least one material way. For instance, one piece of prior art might include the use of a proteolytic enzyme for cleaning, yet mention nothing of disinfection, whatsoever. A piece of art might describe the use of a proteolytic enzyme for cleaning, but the enzyme may be of the type which is susceptible to oxidation or which does not clean protein accretions. Yet another piece of art may address nonperoxide chemical disinfection or thermal disinfection, or no disinfection at all. Still others do not even mention the use of an enzyme or peroxide. Although some of the art taught methods of simultaneous **[*30]** cleaning and disinfecting, the methods did not combine proteolytic enzymes and hydrogen peroxide.

The prior art taught away from combining enzymes and disinfectants because the two had a detrimental effect on each other -- each inactivated the other. This incompatibility formed a consensus with those skilled in the art. The art taught that some proteins inactivate some disinfectants. An enzyme is a protein which can reduce the antimicrobial activity of peroxide. The art also taught that peroxides could inactivate enzymes. For example the Berg reference teaches that hydrogen peroxide has a negative impact on proteolytic enzymes (such as subtilisin A) by reducing the enzyme activity. The Hira and the Stauffer and Etson articles also showed decreased activity of the enzyme in the presence of hydrogen peroxide. Such prior art would have created skepticism toward the patent in suit to those skilled in the art. Although some enzymes, such as subtilisin A, are less susceptible to oxidation than others, this fact was not well known to those skilled in the art.

Hence, after consideration of the prior art as a whole, viewed by those with ordinary skill in the art at the time of the invention **[*31]** -- and taking into account the secondary considerations -- the Court determines that the evidence fails to show the invention was obvious. The Court further finds that there has been no showing of more pertinent prior art than that which was before the PTO.

C. Specificity

HN7[] Inventions are required to be sufficiently described in a patent such that one skilled in the art could practice the invention. *Allen Archery, Inc. v. Browning Mfg. Co., 819 F.2d 1087, 1092 (Fed. Cir. 1987)*. *Section 112* provides, in pertinent part:

HN8[] The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

* * *

An element in a claim for a combination may be expressed as a means or step for performing a **[*32]** specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

35 U.S.C. § 112.

Alcon contends that the patent does not specifically describe the method such that **[**1374]** one skilled in the art could practice the patent. Lack of factors such as osmolality, protein denaturing agents such as N-acetylcysteine, diffusion, surface accessibility, tablet formulation ingredients, and pH level, Alcon contends, would require undue experimentation, thereby rendering the claims invalid under *§ 112*. *In re Lundak, 773 F.2d 1216, 1220 (Fed. Cir.*

1985). However, Allergan asserts that what is claimed is sufficiently understandable to those skilled in the art in light of the specifications. See, *Orthokinetics, Inc. v. Safety Travel Chairs, Inc., 806 F.2d 1565 (Fed. Cir. 1986)*.

The evidence presented at trial showed that the claims are not indefinite or ambiguous and that those skilled in the art could understand what was claimed without undue experimentation. For instance, it was well known that pH affects enzyme activity. The **[*33]** patent calls for an "effective amount of proteolytic enzyme." The patent explains that enzyme activity is pH dependent, "So for any given enzyme, there will be a particular pH range in which that enzyme will function best." Those with ordinary skill in the art could ascertain the effectiveness of an enzyme without the patent including all possible levels of pH for each and every enzyme. The other factors are likewise unnecessary for one skilled in the art to understand the claims.

After thorough review of the claims in light of the specifications, the Court determines that Alcon has failed to prove by clear and convincing evidence that the patent violates *§ 112*.

D. Reissue Oath

Allergan submitted a reissue application to the PTO pursuant to *35 U.S.C. § 251*, which provides in pertinent part:

HN9[] Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the Commissioner shall, on the surrender of such patent and the payment of the fee required by law, reissue the patent for the invention **[*34]** disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent. No new matter shall be introduced into the application for reissue.

In In re Wilder, [16] the Federal Circuit succinctly described the requirements of *§ 251*.

HN10[] There are two distinct statutory requirements that a reissue oath or declaration must satisfy. First, it must state that the patent is defective or partly inoperative or invalid because of defects in the specification or drawing, or because the patentee has claimed more or less than he is entitled to. Second, the applicant must allege that the defective, inoperative, or invalid patent arose through error without deceptive intent.

Id. at 1518. In other words, the applicant must show (1) error in the patent and (2) error in conduct. *Hewlett-Packard Co. v. Bausch & Lomb Inc., 882 F.2d 1556 (Fed. Cir. 1989)*. When Allergan submitted its application for reissuance, it included a reissue declaration signed by Stanley Huth, Sam Wah Lam and Richard Kiral, the inventors of the original patent, pursuant to *37 C.F.R. § 1.175*. [17] The reissue declaration was prepared by Mr. Fuchs, **[*35]**

[16] *736 F.2d 1516 (Fed. Cir. 1984)*, cert. denied, ***469 U.S. 1209 (1985)***.

[17] The regulation provides, as it did in 1987:

(a) Applicants for reissue, in addition to complying with the requirements of § 1.63, must also file with their applications a statement under oath or declaration as follows:

(1) When the applicant verily believes the original patent to be wholly or partly inoperative or invalid, stating such belief and the reasons why.

(2) When it is claimed that such patent is so inoperative or invalid "by reason of a defective specification or drawing," particularly specifying such defects.

(3) When it is claimed that such patent is inoperative or invalid "by reason of the patentee claiming more or less than he had the right to claim in the patent," distinctly specifying the excess or insufficiency in the claims.

(4) [Reserved]

(5) Particularly specifying the errors relied upon, and how they arose or occurred.

(6) Stating that said errors arose "without any deceptive intention" on the part of the applicant.

outside counsel to Allergan. Mr. Kanagy, the patent attorney for Allergan who prosecuted the original patent, presented **[**1375]** each of the inventors with the reissue declaration, informed them that the errors were his and asked them to sign the declaration if they felt comfortable with the information contained in it. Each of the inventors, without further investigation, signed the declaration. Alcon contends that the declaration is insufficient under *§ 251* as expanded by the regulation, thereby invalidating Clams 9-15 as a matter of law. The burden is on Alcon to show by clear and convincing evidence that the reissue declaration is inadequate.

[*36] 1. Error in the Patent

In the reissue declaration, the inventors claimed that the original patent was partly inoperative because of two errors. First, Claim 9 was defective because it used the language "aqueous composition" and there was no antecedent basis for such language in the claims from which Claim 9 depends. The claim could be corrected by using the term "solution" which could be referred back to the term "solution" in claim 1. second, the inventors maintained that the patent was partly inoperative because the original patent claims were less than the inventors had a right to claim in the patent. They sought to add claims 10-15 -- all of which are dependent on Claim 1 -- which describe the use of the patent with hydrophilic contact lenses. Claims 10-15 do not broaden the scope of the claims contained in the original patent. Claims 10-15 are simply additional dependent claims. The Federal Circuit has recognized its tacit approval of allowing reissue for the purpose of including such claims. *Hewlett Packard, 882 F.2d at 1565*. Accordingly, the Court finds that the first prong of the *§ 251* **[*37]** requirements -- error in the patent -- has been satisfied.

2. Error in Conduct

In the reissue declaration, the inventors claimed that both of the errors "occurred as a result of oversight in the preparation and review of the patent application. These errors arose inadvertently without any deceptive intention on my part."

The evidence at trial showed that the errors were made through oversight in drafting by Mr. Kanagy, the patent attorney for Allergan who prosecuted the original patent. As mentioned above, Mr. Kanagy informed the inventors of his errors and asked them to sign the reissue declaration if they felt comfortable with the information contained in the declaration.

The issue before the Court is whether the declaration was sufficient under *§ 251* as expanded by regulation *§ 1.175*. As stated above, Alcon has the burden to prove by clear and convincing evidence that the declaration is inadequate under the regulation. Alcon has satisfied that burden by showing that the declaration, on its face, is inadequate for the examiner to determine reissuable error. The regulation requires an explanation particularly specifying the errors and how they arose. As the Federal circuit **[*38]** explained in Hewlett-Packard,

the statutory provision has been implemented and expanded by the PTO regulations . . . which require an oath or declaration with respect to both aspects of error under *section 251* and further require an explanation as to how and when the error in conduct arose and how and when it was discovered.

Id. at 1565.

The declaration in this case fails to make such a showing. The mere conclusion that the error was made through oversight in drafting by the patent attorney, without more, falls short of what the regulation requires. Because the affidavit is insufficient evidence of reissuable error, the examiner was wrong in reissuing the patent. If Allergan

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(7) Acknowledging a duty to disclose information applicant is aware of which is material to the examination of the application.

(b) Corroborating affidavits or declarations of others may be filed and the examiner may, in any case, require additional information or affidavits or declarations concerning the application for reissue and its object.

37 C.F.R. § 1.175.

could show reissuable error by some other evidence before the examiner, the newly added claims could be saved. However, Allergan has not made such a showing.

Accordingly, the Court declares claims 9-15 of the '672 patent to be invalid for failure to comply with *35 U.S.C. § 251* and *37 C.F.R. § 1.175*.

II. ENFORCEABILITY

A. Inequitable Conduct

HN11[] To establish inequitable conduct before the PTO, and thus render a patent unenforceable, the defendant must establish by clear and convincing evidence **[*39]** (1) a material misrepresentation or omission of information, and (2) a threshold level of intent on the part of the applicant. *J.P. Stevens & Co. v. Lex Tex Ltd., 747 F.2d 1553 (Fed. Cir. 1984)*, cert. denied, *474 U.S. 822 (1985)*. A determination as to each element must be made separately. The standard for materiality is whether a reasonable patent examiner would consider the omitted material pertinent in making a decision on whether to issue a patent. [18]

[1376]** Alcon bases its inequitable conduct argument on several grounds; withholding material inconsistent test data, withholding **[*40]** material prior art, misleading the PTO and inequitable conduct based on the reissue application. Inequitable conduct requires an intent to mislead or deceive. Intent must usually be proven by circumstantial evidence.

Alcon has alleged that Allergan intentionally withheld data from the PTO which was inconsistent with the data supplied. In particular, Alcon argues that Allergan had conducted studies which showed substantially greater cleaning with subtilisin and saline than tests disclosed to the PTO. However, based on the evidence presented at trial, the Court determines that Alcon has failed to prove by clear and convincing evidence that data not before the examiner was material. That is, Alcon did not prove a substantial likelihood that a reasonable examiner would consider it important in deciding whether to allow the application to issue as a patent. Moreover, the evidence showed that there are many variables which effect the results of the tests -- pH and tonicity level, presence or absence of N-acetylcysteine and time of soaking. Looking to results alone, without looking at the parameters of the tests, for comparison purposes is a faulty technique. Furthermore, inconsistent test **[*41]** results is not per se material. Alcon would have the Court conclude from the results alone that the data is inconsistent with the data in the patent in spite of the evidence presented at trial which showed differently. The Court further determines that Alcon has failed to prove that Allergan acted with the requisite culpability in not submitting the data.

The evidence relating to Alcon's other arguments is insufficient as well. The Court has thoroughly reviewed the prior art and has determined that Allergan did not withhold more pertinent prior art. Furthermore, Alcon has failed to prove that the submission of such art would have been pertinent to a reasonable patent examiner in making a decision on whether to issue a patent. Alcon also asserts that Allergan mislead the PTO with respect to Lo, McCarty, and Stauffer and Etson. However, all of these were before the examiner, who could interpret the information on its face. The Court finds no material misrepresentation or requisite intent. The allegation that the reissue application was submitted for an improper purpose, which stems from the withholding of material information, is likewise unsupported by the evidence. Alcon asserts that **[*42]** Allergan had an ulterior motive for submitting the reissue application [19] which was contrary to its stated reason of claiming less than they had a right to

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[18] The regulations of the Patent and Trademark Office describe the duty of good faith and candor toward the PTO. The duty includes the duty to disclose all known information which is material to the examination of the application. "Such information is material where there is a substantial likelihood that a reasonable examiner would consider it important in deciding whether to allow the application to issue as a patent."

37 C.F.R. § 1.56(a).

[19] That is, to "whitewash the prior art and the withheld, contradictory cleaning study, and to insert fallback position claims to help distinguish Lo."

claim. [20] This argument is unsupported by the evidence. Furthermore, of all the evidence cited by Allergan in support of its claim, none has been proven to be material.

Accordingly, the Court determines that Alcon has failed to prove by clear and convincing evidence that Allergan is guilty of inequitable conduct before the PTO.

B. Misuse

Alcon has asserted a misuse defense to Allergan's claims of infringement. *Carbice Corp. v. American Patents and Development Corp., 283 U.S. 27 (1931)*. Alcon alleges **[*43]** that Allergan has illegally extended the scope of its monopoly in the method patent by "tying" it to an unpatented, nonstaple product. [21] That is, by selling Ultrazyme and licensing the patent to its users in a single transaction.

In *Senza-Gel Corp. v. Seiffhart, 803 F.2d 661 (Fed. Cir. 1986)*, the Federal Circuit has approved ***HN12***[] the following three-step test for analyzing patent misuse in a tying context.

First: Determine whether there are two things tied, i.e., whether there are separable or inseparable items; if so

Second: Determine whether the "thing" which is assertedly tied to the patented item is a staple or non-staple item in commerce; if staple

Third: Determine **[*44]** whether in fact they are tied. **[**1377]**

Id. at 664.

The Court determines that the product Ultrazyme is clearly separable from the method patent. Allergan argues that they are indistinguishable because Ultrazyme is offered for use only in the patented method. However, the focus is not on the relation of the products, but "on the character of the demand for the two items." *Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 19 (1984)*. In other words, there must be two distinct product markets. Ultrazyme competes with many other products in the weekly enzymatic cleaner market. There is a sufficient demand for weekly enzymatic cleaners to distinguish the market. The Court determines that there are two distinguishable product markets from the perspective of the buyer.

Alcon seems to misunderstand the test for determining whether a product is a nonstaple. The focus is not on the market; rather, the focus is on the conduct of the patentee. [22] **[*46]** ***HN13***[] A product is a nonstaple if it constitutes a "material part of the invention . . . not a staple article or commodity of commerce suitable for substantial noninfringing use." *§ 271(c)*. In other words, Ultrazyme must have an actual and substantial noninfringing **[*45]** use; a theoretical capability does not suffice. *Fromberg, Inc. v. Thornhill, 315 F.2d 407 (5th Cir. 1963)*. The Court determines that Ultrazyme is a nonstaple product. Its use is a material and substantial part of the invention. At the time of trial, Ultrazyme was the only FDA approved product for use in combination with hydrogen peroxide. The labeling and instructions in Ultrazyme direct that it be used in the patented process, granting an implied license to the purchaser. In sum, Ultrazyme can only be used in the patented process. Although Allergan has received FDA approval to use a tablet with the Ultrazyme formulation in combination with saline, [23] Allergan has never promoted its use and does not intend to promote such use in the future. The Court agrees with Allergan

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[20] Although Alcon argues that the addition of dependent claims was improper, the case law supports the submission of reissue applications for such a purpose. See, *Hewlett-Packard, 882 F.2d at 1565*.

[21] Alcon further supports its allegations of misuse with the argument that, as a matter of Allergan policy, it will not grant licenses under the patented method. The Court finds this argument irrelevant to the issue of patent misuse, as did the Supreme Court in *Dawson Chemical v. Rohm & Haas Co., 448 U.S. 176, at 202* and 214-215 (1980).

[22] *Dawson Chemical 448 U.S. at 192*.

[23] The trade name of the tablet is Hydrozyme Enzymatic Cleaner.

that, unless Ultrazyme is allowed to be used for such purpose, the defendant's defense of misuse is premature. Furthermore, the Court finds *§ 271(d)* applicable in this case. As the supreme Court held in Dawson Chemical, under *§ 271(d)*, "a patentee may make and sell nonstaple goods used in connection with his invention." *Id. at 201*. Accordingly, defendant's defense of patent misuse is hereby DENIED.

III. ANTITRUST VIOLATIONS

Alcon has also alleged that Allergan has violated *§§ 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2*, and under the parallel Texas statutes. *Tex. Bus. & Comm. Code § 15.04*. The relevant product market is weekly enzymatic contact lens cleaners. The relevant geographic market is the United States.

A. *Section 1*

Alcon asserts that Allergan imposed a tie-in restriction on its customers in restraint of trade, creating a per se violation. To prove a violation of *§ 1*, Alcon must show (1) two separable products, (2) market power, and (3) an effect on a not insubstantial amount of interstate commerce in the tied market. The Court has previously determined that two separable products exist. However, where Alcon has failed in its proof is on the second requirement of market power. As the Supreme Court explained in Jefferson Parish,

Our cases have concluded that ***HN14***[] the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product **[*47]** to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to 'purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

466 U.S. at 12.

Assuming, arguendo, that there is a tying arrangement, Alcon has made no showing of anticompetitive effect of such an arrangement. Alcon relies only on its argument that there is a per se violation because one of the items is a patented item. This is insufficient proof and cannot support Alcon's contentions. In order to prove a per se violation, Alcon must show that the tying arrangement involves the use of market power to force buyers to make purchases which they would not otherwise have made. Accordingly, Alcon's allegations of a *§ 1* violation are denied.

B. *Section 2*

Alcon also alleges that Allergan has a monopoly in the enzymatic cleaner market because of its predatory conduct and under **[**1378]** Walker Process. [24] The predatory conduct listed by Alcon includes (1) Allergan has over 50% of the market, (2) there are only two other competitors in the market **[*48]** (Alcon and Bausch & Lomb), and (3) Allergan has absolute control over market entry through its Karageozian patent. However, these actions, taken at face value, do not establish an antitrust violation. There must be a showing of an anticompetitive effect in the tied market. [25] There has been no evidence of any conduct which would coerce or force buyers into purchasing the allegedly tied product, Ultrazyme. Rather, the evidence clearly showed that the other weekly enzymatic cleaners in the market, including Alcon's Opti-Zyme, are competitive with Ultrazyme. Hence, an essential element of an antitrust violation -- anticompetitive effect -- is blatantly missing from Alcon's evidence at trial. Because the Court finds no antitrust injury, it need not consider the other elements.

Under Walker Process, the enforcement of a patent obtained by fraud **[*49]** on the PTO may be the basis of an action under *§ 2*. However, the other elements of a *§ 2* violation must also be shown. As the Court has already determined, Alcon has failed to prove anticompetitive effect. Furthermore, under Walker Process, Alcon must show

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[24] *Walker Process Equip., Inc. v. Food Machinery and Chem. Corp., 382 U.S. 172 (1965)*.

[25] *Driskill v. Dallas Cowboys Football Club, 498 F.2d 321 (5th Cir. 1974)*.

willful and deliberate fraud on the PTO. There has been no showing of intentional fraud. Accordingly, Alcon's *§ 2* claim is hereby denied.

C. *Texas Business and Commerce Code § 15.04*

For the foregoing reasons, Alcon's state law claim under *§ 15.04* is hereby denied.

IV. ATTORNEY'S FEES

The Court determines that this is not an exceptional case under *35 U.S.C. § 285*, and that Alcon's request for attorneys' fees should therefore be denied.

V. INJUNCTION

On June 20, 1989, the parties filed a joint stipulation with the Court. [26] Accordingly, the issues of infringement and damages have been eliminated by agreement of the parties. However, the Court determines that an injunction is proper. Accordingly, the Court hereby enjoins Alcon, from using or promoting the use of Opti-Zyme or Improved Opti-Zyme in combination with hydrogen peroxide for one-step cleaning and disinfecting as embodied in claims 1 through 9 the '672 patent. **[*50]** *35 U.S.C. § 283*. This injunction is in effect until the expiration of the '672 patent.

[*51] CONCLUSION

The '672 patent was not anticipated or obvious under *35 U.S.C. §§ 102* and *103*, respectively. The patent is sufficiently described per *§ 112*. However, claims 9-15 of the patent are invalid for failure to comply with *35 U.S.C. § 251* and C.F.R. *§ 1.175*. Alcon failed to prove that Allergan engaged in inequitable conduct or misuse of the patent. Finally, Alcon failed to prove an Antitrust violation under any of its asserted theories. Accordingly, the Court hereby declares claims 9-15 of the patent invalid and claims 1-8 of the patent valid and enforceable. Alcon is enjoined from infringing acts until the expiration of the patent.

A judgment consistent with this order will be rendered herewith.

Signed this 27th day of August, 1990

JUDGMENT - August 28, 1990, Filed

This case came on for trial before the Court without a jury, Honorable Eldon B. Mahon, U. S. District Judge, presiding, and the issues having been duly considered, and **[**1379]** an opinion having been rendered, it is ORDERED, ADJUDGED, and DECREED that:

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[26] The stipulation provides as follows:

The parties hereby stipulate to the following terms regarding the issues of infringement, attorneys' fees and costs:

(1) Allergan shall forego any claim for damages, willful and deliberate infringement, and attorneys' fees. This would not, however, preclude Allergan from arguing that Alcon copied the invention or the like.

(2) Alcon shall not rely upon *35 U.S.C. § 271(e)* to exempt alleged infringements proved by Allergan and shall agree to refrain from filing any motions for dismissal, summary judgment, judgment, or directed verdict with respect to noninfringement based on the *Eli Lilly and Co. v. Medtronic, Inc., 10 U.S.P.Q. 2d 1304 (Fed. Cir. 1989)* decision. However, this would not preclude Alcon from urging that it has not copied the invention or that its application to the FDA for approval of Opti-Zyme in combination with peroxide and its conduct in support of that application is not evidence of an intent to copy the invention or the like.

(3) Alcon and Allergan shall both forego any claim for costs.

(4) Neither party shall file a motion to dismiss based on lack of subject matter jurisdiction or a lack of a case or controversy.

1. Defendant Allergan, Inc. is the lawful owner of the right, title, and interest in U. S. Patent No. Re. 32,672 which issued on May 24, 1988.

2. Claims 1-8 of U. **[*52]** S. Patent No. Re. 32,672 are valid and enforceable.

3. Claims 9-15 of U. S. Patent No. Re. 32,672 are invalid.

4. Plaintiff Alcon Laboratories, Inc. is enjoined from using or promoting the use of Opti-Zyme or Improved Opti-Zyme in an infringing manner with respect to claims 1-8 of the patent until the expiration of the patent.

5. Each party shall bear its own costs of action.

Signed this 27th day of August, 1990.

ORDER - September 5, 1990, Filed

Having considered Allergan's Motion to Correct Clerical Errors, it is hereby ordered that the Motion is granted, that the two errors will be corrected, and that substitute pages will be filed with the Court.

September 4, 1990

Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.

United States District Court for the Middle District of North Carolina, Durham Division

August 27, 1990 ; August 27, 1990, Filed

Civil No. C-84-617-D

Reporter

748 F. Supp. 344 *; 1990 U.S. Dist. LEXIS 11680 **; 1990-2 Trade Cas. (CCH) P69,182

LIGGETT GROUP, INC., Plaintiff, v. BROWN & WILLIAMSON TOBACCO CORPORATION, Defendant

Core Terms

cigarettes, generic, prices, branded, predatory, consumers, antitrust, price discrimination, rebates, volume, Robinson-Patman Act, customers, competitive injury, Sherman Act, wholesalers, market power, segment, manufacturers, competitor, trademark, profits, injure, reasonable possibility, black and white, recoupment, monopoly, compete, cigarette manufacturer, market share, primary-line

LexisNexis® Headnotes

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN1[] **Antitrust & Trade Law, Robinson-Patman Act**

See 15 U.S.C.S. § 13(a).

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

HN2[] **Consumer Protection, False Advertising**

See 15 U.S.C.S. § 1125(a).

Civil Procedure > Trials > Judgment as Matter of Law > Alternative Motions for New Trials

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN3[] Judgment as Matter of Law, Alternative Motions for New Trials

A court may in its discretion grant a motion for judgment notwithstanding the verdict and deny an alternative motion for a new trial. See *Fed. R. Civ. P. 50(c)(1)*.

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN4[] Judgment as Matter of Law, Judgment Notwithstanding Verdict

A motion for judgment notwithstanding the verdict (JNOV) may be granted only if, taking all the evidence in the light most favorable to the prevailing party, there is no substantial evidence to support the jury's verdict. Evidence is substantial if it is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party. However, a mere scintilla of evidence is insufficient to sustain a verdict. Therefore, in order to warrant JNOV, the movant must show that the prevailing party failed to prove an essential element of its claim.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

HN5[] Robinson-Patman Act, Claims

Despite the connotations of the term "discrimination" in the Robinson-Patman Act, *15 U.S.C.S. §13(a)*, there is nothing illegal per se about a company discriminating in price. Price discrimination means price difference and nothing more.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Civil Procedure > Remedies > Damages > Monetary Damages

HN6[] Robinson-Patman Act, Claims

Antitrust injury is a requirement in all antitrust actions for monetary damages brought by private parties. *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN7[] Robinson-Patman Act, Claims

The Robinson-Patman Act prohibits only price discrimination the effect of which may be substantially to lessen competition. *15 U.S.C.S. § 13(a)*. This statutory language has been interpreted to proscribe only that price discrimination which has a reasonable possibility of injuring competition in the relevant market.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN8[] Robinson-Patman Act, Claims

The competitive injury requirement of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, in the context of a primary-line, non-geographic claim is not fundamentally different from an attempted monopolization claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*. Of course, the standards to evaluate competitive injury are different. The Robinson-Patman Act requires a showing of reasonable possibility of injury to competition while the Sherman Act requires a dangerous probability that the attempt to monopolize will be successful. However, this difference affects only the quantum of proof needed to satisfy the respective statute's competitive injury requirements and not the type of evidence which furnishes that proof.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN9[] **Robinson-Patman Act, Claims**

In a primary-line, non-geographic case under the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, the competitive injury evidence must consist of predatory pricing practices indicating a reasonable possibility of injury to competition and consumer welfare rather than evidence merely of injury to a competitor combined with bad intent. Absent some objective economic ability to injure competition conduct cannot be illegal no matter what the intent.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN10[] **Price Discrimination, Competitive Injuries**

The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN11[] **Price Discrimination, Competitive Injuries**

Market power is the ability to raise prices above levels that would exist in a perfectly competitive market.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN12[] **Robinson-Patman Act, Claims**

Documentary evidence alone is not substantial evidence sufficient to satisfy the competitive injury requirement of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, absent some showing of market power and the possibility of recoupment.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN13[] Robinson-Patman Act, Claims

The Robinson-Patman Act, 15 U.S.C.S. § 13(a), is aimed only at price discrimination. A plaintiff must prove that the reasonable possibility of injury to competition was the effect of price discrimination, in order to establish the necessary causal relationship between the difference in prices and the alleged competitive injury.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN14[] Price Discrimination, Competitive Injuries

A plaintiff in a non-geographic antitrust suit cannot meet its burden of causation where low prices, not price discrimination, provide the only possible linkage to competitive injury.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN15[] Robinson-Patman Act, Claims

In a private treble damage action brought under § 4 of the Clayton Act, 15 U.S.C.S. § 15(a), there is an additional causation requirement -- antitrust injury. Not only must a plaintiff prove that a defendant's price discrimination had a reasonable possibility of injuring competition, it also must prove that the price discrimination caused its complained-of damages. A private plaintiff may not recover damages simply by showing injury causally linked to an illegal presence in the market. Instead, it must prove it was injured by conduct violating the Robinson-Patman Act, 15 U.S.C.S. § 13(a). That is, the plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful.

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN16[] **Antitrust & Trade Law, Clayton Act**

Antitrust injury does not arise for purposes of § 4 of the Clayton Act, *15 U.S.C.S. § 15(a)*, until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN17[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, should be conformed if at all possible to the standards governing the other antitrust laws.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN18[] **Price Discrimination, Competitive Injuries**

Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN19[] **Price Discrimination, Competitive Injuries**

Cross-elasticity of demand is the extent to which products are reasonably interchangeable by consumers for the same purposes. Cross-elasticity of supply is the capability of other production facilities to be converted to produce a substitutable product.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN20[] **Price Discrimination, Competitive Injuries**

Where there is nothing economically distinct about a particular product line, the average variable cost test should not be applied to it.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN21[] Price Discrimination, Competitive Injuries

An examination of price-cost relationships should be made only in reference to the dangers posed by predatory pricing.

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

Evidence > Weight & Sufficiency

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN22[] Jurors, Misconduct

A motion for a new trial is governed by a different standard than a motion for judgment notwithstanding the verdict. Under *Fed. R. Civ. P. 59*, a trial judge may weigh the evidence and consider the credibility of the witnesses and, if he finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial. A new trial may also be granted if the court believes it has erred in the admission or rejection of evidence, or improperly instructed the jury.

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > Burdens of Proof

Patent Law > Infringement Actions > Infringing Acts > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

Trademark Law > Likelihood of Confusion > General Overview

Trademark Law > ... > Factors for Determining Confusion > Intent of Defendant to Confuse > General Overview

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

Trademark Law > ... > Eligibility for Trademark Protection > Distinctiveness > General Overview

HN23[] Infringement Actions, Burdens of Proof

To establish trademark infringement a plaintiff must prove that there is a likelihood of confusion between its mark and the defendant's mark. The seven factors are: (1) the strength or distinctiveness of the mark; (2) the similarity of the two marks; (3) the similarity of the goods/services identified by the marks; (4) the similarity of the facilities the two parties use in their businesses; (5) the similarity of the advertising used by the two parties; (6) the defendant's intent; (7) actual confusion.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

HN24[] **Reviewability of Lower Court Decisions, Preservation for Review**

During closing argument counsel cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial.

Counsel: [1]** Joel M. Craig, E.C. Bryson, Jr., Durham, North Carolina, Philip T. Shannon, Joseph Diamante, New York, New York, Garret G. Rasmussen, Washington, District of Columbia, Adam Barker, William H. Hogeland, Bruce Topman, Webster & Sheffield, New York, New York, (In house counsel) Jean E. Sharpe, Josiah S. Murray, III., Durham, North Carolina, Thomas J. Pooley, Jim Schenck, C. Allen Foster, Greensboro, North Carolina

Sharon L. Parker, Michael L. Robinson, Norwood Robinson, George L. Little, Jr., Robert J. Lawing, Winston-Salem, North Carolina, Cowan, Liebowitz & Latman, New York, New York, Andrew J. Peck, Martin Klotz, Martin London, Martin Flumenbaum, New York, New York, Ernest Pepples, Michael J. McGraw, in house counsel, Louisville, Kentucky.

Lennox P. McLendon, Jr., Greensboro, North Carolina, Raymond M. Carlson, McLean, Virginia.

Judges: Frank W. Bullock, Jr., United States District Judge.

Opinion by: BULLOCK

Opinion

[*347] MEMORANDUM OPINION

FRANK W. BULLOCK, JR., UNITED STATES DISTRICT JUDGE

Liggett Group, Inc., ("Liggett") brought this private antitrust suit to recover treble damages against Brown & Williamson Tobacco Corporation ("B & W") alleging predatory price discrimination in violation of *Section 2(a)* of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13(a)*. [1] Liggett also charged that B & W

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[1] *HN1*[] The Robinson-Patman Act states in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

[*348] violated the unfair **[**2]** competition section of the Lanham Act, *15 U.S.C. § 1125(a)*, [2] **[**3]** as well as various state common law and statutory unfair trade practices. [3]

After a lengthy trial, [4] the jury returned a verdict in favor of Liggett on the Robinson-Patman Act claim in the amount of $ 49,600,000.00. When trebled pursuant to *15 U.S.C. § 15(a)*, Liggett's award totals $ 148,800,000.00, excluding post-judgment interest and attorneys' fees. The jury found that Brown & Williamson was not liable to Liggett on the trademark and unfair competition claims.

[4]** B & W has moved for judgment notwithstanding the verdict (JNOV) under *Federal Rule of Civil Procedure 50(b)* and, alternatively, for a new trial under *Federal Rule of Civil Procedure 59* on the antitrust portion of the case. [5] Liggett has moved for a new trial under *Federal Rule of Civil Procedure 59* on its trademark and unfair competition claims. After careful consideration, the court will set aside the antitrust verdict and grant B & W's motion for judgment notwithstanding the verdict. The court will deny B & W's alternative motion for a new trial. [6] Liggett's motion for a **[*349]** new trial on the trademark and unfair competition claims will be denied.

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[2] ***HN2***[] *Section 1125(a)* states in relevant part:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

[3] Liggett's complaint alleges a statutory claim under the North Carolina unfair trade practices statute, *N.C.Gen.Stat. § 75-1 et seq*., and state common law claims under the North Carolina common law of trademarks and the North Carolina common law of unfair competition. All these claims stem from B & W's alleged infringement of Liggett's quality seal ("Q-seal") closure by B & W's oval closure seal.

[4] The jury heard evidence and arguments for 115 days, and considered 2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses. The verdict was returned after nine days of deliberations. The court's instructions to the jury on the antitrust claim were generally consistent with the legal position and theory espoused by Liggett. Some of the same issues and contentions had been considered by the court at summary judgment and/or the directed verdict stage of the trial, and resolved in Liggett's favor. In a complex case such as this, however, development of a complete record is sometimes necessary in order for the court to have a thorough understanding of the issues and facts in controversy. An ever expanding court docket does not always provide an atmosphere conducive to pre-trial analysis of complex economic and legal issues.

[5] A different standard applies to a JNOV motion pursuant to *Fed. R. Civ. P. 50(b)*, *see infra* [slip op.] at p. 8, than to a motion for a new trial pursuant to *Fed. R. Civ. P. 59*, *see infra* [slip op.] at p. 44.

[6] ***HN3***[] A court may in its discretion grant a JNOV motion and deny an alternative motion for a new trial. *See* *Fed. R. Civ. P. 50(c)(1)*; *Stone v. First Wyoming Bank, 625 F.2d 332, 349-50 (10th Cir. 1980)*; *Reagin v. Terry, 675 F. Supp. 297, 304-05 (M.D.N.C. 1986)*, *aff'd*, ***829 F.2d 36 (4th Cir. 1987)***. The court's JNOV rulings on competitive injury, causation, and antitrust injury are based upon interpretations of the applicable law. If these interpretations are found to be erroneous and an appellate court applies legal standards more favorable to Liggett, this court does not believe that an examination of the weight of the evidence, the credibility of witnesses, and any alleged errors in the admission or rejection of evidence or instructions to the jury would justify granting B & W a new trial. The only remaining significant issue concerns the sufficiency of Liggett's damage evidence. If antitrust injury is proven, courts are lenient in assessing the proof required to support a damage award. *See* *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265-66, 90 L. Ed. 652, 66 S. Ct. 574 (1946)*; *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563-64, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*. Liggett presented two damage theories and extensive evidence from the testimony of two experts and other witnesses. The court believes there was sufficient evidence to support the jury's damage award.

[5]** I. FACTS

The cigarette industry in the United States during the mid-1980's provides the setting for this dispute. Six major manufacturers form this industry. [7] Philip Morris and R. J. Reynolds Tobacco Corp. ("RJR") are the industry giants. The other cigarette manufacturers hold substantially smaller market shares. Liggett and B & W compete for wholesale and retail customers across the United States. Both companies sell branded [8] **[**6]** and generic [9] cigarettes. At year-end 1985, B & W's total cigarette sales in the United States were about double Liggett's, although Liggett still sold more generic cigarettes than B & W.

The market shares of both companies have declined in recent years. Since 1975 when its market share was nearly seventeen per cent (17%), B & W's sales have steadily declined. Liggett has had even less success. Years ago, Liggett was a major force in the cigarette industry, enjoying market shares exceeding twenty per **[**7]** cent (20%). However, Liggett's sales declined precipitously for many years. By 1980, Liggett's market share stood at 2.33%, and the company was close to going out of business. Out of desperation, Liggett became the first major cigarette manufacturer to sell generic cigarettes. [10] Liggett encouraged its customers to buy large quantities of generic cigarettes by offering volume rebates so that the more a customer bought the less that customer paid on a per carton basis.

Generic cigarettes were an unqualified success for Liggett. The segment grew steadily, and by mid-1984 generic sales accounted for 4.1% of the total United States cigarette business **[**8]** with Liggett holding ninety-seven per cent (97%) of the segment. The popularity of generic cigarettes attracted other major cigarette manufacturers. In 1983, both RJR and B & W introduced "25's" in response to the success of generic cigarettes. [11] **[**9]** In May 1984, RJR also introduced "branded generics." [12] Later that month, B & W announced it would start selling black and white cigarettes positioned to compete directly with Liggett. B & W offered prospective customers volume rebates similar to Liggett's, only higher. Liggett responded by increasing its volume rebates. The rebate war between **[*350]** the companies continued for several more rounds. When the dust settled, B & W's published volume rebates were greater than Liggett's published volume rebates. [13] This rebate activity took place before B &

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[7] The six major cigarette manufacturers are Philip Morris, Inc., R. J. Reynolds Tobacco Corp., B & W, Lorillard, Inc., American Tobacco Co., and Liggett. A few other domestic and foreign firms have sold cigarettes in the United States during the 1980's, but none has attained any significance in the marketplace.

[8] The term "branded cigarettes" describes full-price cigarettes targeted to the image-conscious cigarette consumer. Branded cigarettes are advertised heavily and packaged in containers with distinctive designs. Well-known branded cigarettes include Newport, Pall Mall, Kool, Winston, and, of course, Marlboro -- America's most popular branded cigarette by a wide margin.

[9] The term "generic cigarettes" refers to a catch-all category of cigarettes priced significantly lower than branded cigarettes. Within this category, sometimes called the price-value category, there are different types of generic cigarettes. This dispute centers around one such type -- black and white cigarettes. Black and white cigarettes are sold in plain-looking white packages with black lettering indicating the nature of the product contained within (*e.g.*, "Filter Cigarettes"). These packages look like other generic products on the grocery shelf so that consumers can quickly identify them as lower-priced cigarettes. Another category of generic cigarettes is "branded generics." Branded generics are cigarettes in branded packaging but priced in the black and white cigarette range.

[10] Liggett was not the first cigarette company to sell generic cigarettes. Both U.S. Tobacco Co. and G. A. George Georgopulo & Co., smaller cigarette manufacturers with no significant market share, sold generic cigarettes prior to Liggett. However, once Liggett entered the generic category it became the dominant player and was responsible for the segment's initial growth.

[11] "Twenty-five's" ("25's") are cigarettes priced and packaged like branded cigarettes but with twenty-five cigarettes contained in each package instead of the standard twenty. RJR introduced Century and B & W introduced Richland as entries in the "25's" category.

[12] RJR repositioned Doral, a brand which had previously been unsuccessful competing with other branded cigarettes, by lowering the price to generic levels. Since May 1984, Doral's market share has grown considerably.

W sold its first generic cigarette. B & W began selling generic cigarettes in July 1984, giving rise to this lawsuit in which Liggett alleges that, until the end of 1985, B & W engaged in a predatory pricing campaign designed to "kill" the generic cigarette category.

Today generic cigarettes are a fixture in the cigarette market. Five of the six major cigarette companies have significant entries in the category [14] and growth has been steady. The growth of generic cigarettes has encouraged additional competition, primarily in the form of couponing and stickering, **[**10]** [15] on branded cigarettes.

II. THE ANTITRUST ISSUES

HN4[] B & W's JNOV motion may be granted only if, taking all the evidence in the light most favorable to Liggett, there is no substantial evidence to support the jury's verdict. *Evington v. Forbes, 742 F.2d 834, 835 (4th Cir. 1984)*. Evidence is substantial if it is "of such quality and weight that reasonable and fair-minded men in the exercise of impartial **[**11]** judgment could reasonably return a verdict for the nonmoving party." *Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980)*. However, a mere scintilla of evidence is insufficient to sustain a verdict. *Austin v. Torrington Co., 810 F.2d 416, 420* (4th Cir.), *cert. denied*, *484 U.S. 977, 98 L. Ed. 2d 487, 108 S. Ct. 489 (1987)*. Therefore, in order to warrant JNOV, B & W must show that Liggett has failed to prove an essential element of its claim.

Liggett's antitrust claim is a private, primary-line, [16] non-geographic [17] Robinson-Patman Act suit. Except for the issue of price discrimination, the jurisdictional elements are undisputed. [18] ***HN5***[] Despite the connotations of the term "discrimination," there is nothing illegal *per se* about a company discriminating in price. Price discrimination means price difference and nothing more. *See* *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 110 S. Ct. 2535, 2544, 110 L. Ed. 2d 492 (1990)*. B & W discriminated in price by charging different net prices [19] **[**13]** to different purchasers via volume **[*351]** rebates in actual black and white cigarette transactions. The other elements [20] -- competitive injury, causation, and antitrust injury -- have been vigorously contested throughout the entire **[**12]** litigation. The court believes that Liggett's evidence falls short in each of these categories.

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[13] B & W's published volume rebates from mid-1984 to the end of 1985 ranged from sixty to eighty cents per carton depending on the number of cartons a customer bought from the company. B & W's rebate schedule on a per carton basis was as follows: 60 cent rebate for customers who bought 0-499 cases per quarter; 65 cent rebate for customers who bought 500-999 cases per quarter; 70 cent rebate for customers who bought 1,000-1,499 cases per quarter; 75 cent rebate for customers who bought 1,500-7,999 cases per quarter; and 80 cent rebate for customers who bought 8,000 or more cases per quarter.

[14] Lorillard is the only major cigarette manufacturer without a significant presence in the generic cigarette segment.

[15] Coupons are a form of price competition in which money-off vouchers on cigarette cartons and packs are distributed to consumers through newspapers and other mediums. Stickering is a form of price competition in which money-off stickers are attached to cigarette cartons, and sometimes even individual packs. Although the list price of couponed and stickered cigarettes does not change, the amount of money the consumer has to pay at the cash register is lessened by the value of the coupon or sticker.

[16] In Robinson-Patman Act cases, courts distinguish the probable impact of the price discrimination upon competitors of the seller (primary-line injury), the favored and disfavored buyers (secondary-line injury), or the customers of either of them (tertiary-line injury). *See* 3 E. Kintner & J. Bauer, *Federal* ***Antitrust Law*** § 20.9, at 127 (1983).

[17] Non-geographic means that the United States is the relevant market as opposed to any particular city, state, or region.

[18] The parties do not dispute that at least one of the sales of B & W black and white cigarettes was made across a state line; that each pertinent sale of B & W black and white cigarettes was for use and resale in the United States; that the black and white cigarettes sold by B & W were physical items; that the black and white cigarette sales being compared were made by B & W at about the same time; and that the B & W black and white cigarettes involved in the sales being compared were of like grade and quality.

[19] Net price equals list price minus all discounts to the customer.

[20] ***HN6***[] Antitrust injury is a requirement in all antitrust actions for monetary damages brought by private parties. *15 U.S.C. § 15(a)*. The other elements of Liggett's claim are part of the Robinson-Patman Act. *15 U.S.C. § 13(a)*.

A. *Competitive Injury*

HN7[] The Robinson-Patman Act prohibits only price discrimination the effect of which "may be substantially to lessen competition." *15 U.S.C. § 13(a)*. This statutory language has been interpreted to proscribe only that price discrimination which has a reasonable possibility [21] of injuring competition in the relevant market. *Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434-35, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*. Prior to trial, the parties stipulated that the relevant market in which to examine competitive injury was the entire United States cigarette market. Therefore, Liggett must prove that B & W's price discrimination in the sale of its black and white cigarettes had a reasonable possibility of injuring competition in the United States cigarette market as a whole.

HN8[]

[14]** The competitive injury requirement of the Robinson-Patman Act in the context of this primary-line, non-geographic claim is not fundamentally different from an attempted monopolization claim under *Section 2* of the Sherman Act. *15 U.S.C. § 2*. Of course, the standards to evaluate competitive injury are different. The Robinson-Patman Act requires a showing of reasonable possibility of injury to competition while the Sherman Act requires a dangerous probability that the attempt to monopolize will be successful. *See Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413 (7th Cir. 1989)*. However, this difference affects only the quantum of proof needed to satisfy the respective statute's competitive injury requirements and not the type of evidence which furnishes that proof. [22] ***HN9***[] In the present case, the court believes that such evidence must consist of predatory pricing practices indicating a reasonable possibility of injury to competition and consumer welfare rather than evidence merely of injury to a competitor combined with bad intent. Absent some objective economic ability to injure competition conduct cannot be illegal no matter what the intent. *See Matsushita Elec.* ***[**15]*** *Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-93, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Henry v. Chloride, Inc., 809 F.2d 1334, 1344-45 (8th Cir. 1987)*.

Liggett fundamentally disagreed with this position at trial and argued numerous times, citing *Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 87 S. Ct. 1326, 18 L. Ed. 2d 406 (1967)*, that some showing of injury to a competitor combined with bad intent satisfied the Robinson-Patman Act's competitive injury requirement. This court rejects **[**16]** that position in the context of Liggett's atypical primary-line, non-geographic Robinson-Patman Act claim.

[*352] The typical primary-line Robinson-Patman Act case is much different from this one, pitting a small business with a limited product-line which competes only in a single geographic region against a large national manufacturer using predatory pricing tactics to displace the local competitor. *Utah Pie* is just such a case. In *Utah Pie*, several national manufacturers of frozen dessert pies challenged a small, family-operated dessert manufacturer which sold pies in the Salt Lake City area. The national manufacturers' strategy was to lower prices below cost on dessert pies in Salt Lake City, 386 U.S. at 696-97 & n. 12, 698, 701, and run the local competitor out of business. The national manufacturers could afford to do this due to profits obtained on the sale of dessert pies in other areas of the

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[21] A few courts have used a reasonable probability of injuring competition standard instead of reasonable possibility. *See, e.g., Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 35 (7th Cir. 1976)*. This is a distinction of form over substance. *See International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714, 729 (5th Cir. 1975)* ("any difference between the two formulations is trivial"), *cert. denied*, ***424 U.S. 943, 47 L. Ed. 2d 349, 96 S. Ct. 1411 (1976)***. The Supreme Court in at least one case has used these standards interchangeably. *See Corn Prods. Refining Co. v. FTC, 324 U.S. 726, 739, 742, 89 L. Ed. 1320, 65 S. Ct. 961 (1945)*.

[22] A noted authority explained the parallel competitive injury requirements of the two statutes this way:

> Once a price is shown to be below the relevant costs its effect may be substantially to lessen competition, and it is condemned precisely because it has the potential to destroy competition and, if continued, the dangerous probability of doing so. If the price does not violate the relevant predatory pricing standard, it cannot tend to lessen competition or to have the dangerous probability of doing so.

P. Areeda & H. Hovenkamp, ***Antitrust Law*** 720, at 618 (Supp. 1989).

country. The local competitor could sell dessert pies only in Salt Lake City and was faced with the bleak prospect of either lowering prices to unprofitable levels or eventually losing its sales to the low-priced pies. It was in this factual setting that the Supreme Court last addressed **[**17]** the requirements of a primary-line Robinson-Patman Act claim.

Liggett's situation is much different. Liggett, as a national manufacturer of branded and generic cigarettes, is free to compete with B & W in any area of the country over any line of cigarette products and in fact does so. It faces none of the competitive constraints of the local business in *Utah Pie*. [23] **[**18]** In primary-line, non-geographic, predatory pricing cases the Robinson-Patman Act's competitive injury analysis more closely mirrors *Section 2* of the Sherman Act than *Utah Pie*. Whether brought under the Sherman Act or the Robinson-Patman Act, predatory pricing is predatory pricing. [24] After all, price cutting is the essence of any predatory pricing campaign and, as the Supreme Court has warned, "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita, 475 U.S. at 594*. Although the Fourth Circuit has not addressed this issue, many other circuits have held that the competitive injury analysis in a predatory pricing case is the same under either the Robinson-Patman Act or *Section 2* of the Sherman Act. [25]

[19]** That this interpretation of the competitive injury requirement has been widely followed is not surprising since it best comports with basic antitrust principles. The antitrust laws' goal is to promote consumer welfare, not to discourage aggressive price competition. Liggett cannot satisfy the competitive injury requirement by showing simply that it was injured by B & W's price discrimination. Injury to competition occurs only if a competitor is able to raise and maintain prices in the relevant market above competitive levels because this is the only situation where consumer welfare is threatened. So, in order to injure competition via price discrimination in the United **[*353]** States cigarette market, B & W must be able to create a real possibility of both driving out rivals by loss-creating price cutting and then holding on to that advantage to recoup losses by raising and maintaining prices at higher than competitive levels. *See* *Matsushita, 475 U.S. at 589*.

With these principles in mind, there are fatal defects in both Liggett's theory and evidence of competitive injury. Liggett's theory of competitive injury was developed by its expert **[**20]** economist, William Burnett. Burnett concluded that B & W's predatory pricing of black and white cigarettes had a reasonable possibility of injuring competition in the entire United States cigarette market. He based his analysis on numerous B & W internal documents and his study of the structure and history of the cigarette industry. Burnett's theory is quite complicated and requires detailed explanation.

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[23] Because the factual differences between geographic and non-geographic primary-line Robinson-Patman Act claims are so striking, the Third Circuit limited *Utah Pie's* competitive injury analysis to primary-line, geographic price discrimination cases. *O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 351-52 (3d Cir. 1981)*, *cert. denied*, ***455 U.S. 1017, 72 L. Ed. 2d 134, 102 S. Ct. 1711 (1982)***.

[24] *See* P. Areeda & D. Turner, ***Antitrust Law*** 720, at 190 (1978) ("The basic substantive issues raised by the Robinson-Patman Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical.").

[25] *See* *McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1493 n. 9 (11th Cir. 1988)*, *cert. denied*, ***490 U.S. 1084, 109 S. Ct. 2110, 104 L. Ed. 2d 670 (1989)***; *Henry, 809 F.2d at 1345*; *D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1439 (6th Cir. 1983)*, *cert. denied*, ***467 U.S. 1242, 82 L. Ed. 2d 822, 104 S. Ct. 3513 (1984)***; ***William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1041 (9th Cir. 1981)***, *cert. denied*, ***459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982)***; *O. Hommel, 659 F.2d at 346-47*; *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790, 798* (10th Cir.), *cert. denied*, ***434 U.S. 879, 54 L. Ed. 2d 160, 98 S. Ct. 234 (1977)***; *International Air, 517 F.2d at 720 n. 10*. *But see* *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1404-06 (7th Cir. 1989)*, *cert. denied*, ***494 U.S. 1019, 110 S. Ct. 1326, 108 L. Ed. 2d 501 (1990)***; *Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 528-29 (1st Cir. 1989)*.

Central to Burnett's analysis is that the cigarette market is a highly concentrated oligopoly [26] and that predatory pricing schemes make sense in such markets. The starting point for this analysis is Burnett's opinion that all of the manufacturers in the cigarette industry, including Liggett, enjoy monopoly profits on the sale of their branded cigarettes. He bases this opinion on six factors: (1) the degree of concentration in the domestic cigarette industry; (2) the long-time industry pattern of list-price uniformity and price leadership -- that is, when one manufacturer raises the price of its branded cigarette line the others follow and raise their prices to the same level; (3) the relative price inelasticity [27] of cigarette demand; (4) the significant barriers to entry, including **[**21]** large capital costs and the television advertising ban, which prevent new companies from competing with the major cigarette manufacturers; (5) an analysis of the relationship between cigarette prices and costs which concluded that prices have risen in the industry during a period of declining costs; and (6) the degree to which tobacco industry accounting rates of return exceed those of companies in the domestic food and kindred products industry. Burnett thought this industry structure made it possible for the major cigarette manufacturers to tacitly coordinate [28] their prices at supracompetitive levels.

[22]** According to Burnett, B & W engaged in a campaign of predatory pricing against Liggett's black and white cigarettes to protect its monopoly profits on branded cigarettes. Burnett alleged that B & W had great economic incentive to wage such a predatory campaign. His analysis was based on the following factors. First, consumer demand for cigarettes in the United States market was no longer growing and, due to health concerns, was unlikely to grow in the future. Thus, a cigarette manufacturer could increase its market share only at the expense of a rival competitor by getting existing cigarette consumers to switch their brand loyalty. Second, Liggett was a maverick -- that is, Liggett was the only major cigarette manufacturer willing to compete for consumers by offering lower prices. Liggett was not worried about its black and white cigarettes cannibalizing its monopoly profits on branded cigarettes because its branded market share was so low. Third, B & W was hurt by Liggett's entry into generic cigarettes more than the other major manufacturers. On a percentage basis, significantly more B & W branded smokers **[**23]** were switching to Liggett generics than were smokers of brands of other manufacturers. As a result, B & W's market share and its alleged **[*354]** monopoly profits were eroding quickly. This erosion gave B & W its incentive to predate.

Burnett testified that B & W came up with an ingenious scheme to kill the generic category and stop losing market share. This alleged scheme is as follows. B & W entered the generic cigarette segment by offering a look-alike black and white package designed to confuse Liggett's existing generic smokers. B & W did not want to fuel consumer demand for generic cigarettes so it focused exclusively on establishing its new business at the wholesale level. B & W captured wholesaler loyalty through significant volume rebates, targeting Liggett's highest volume customers. These rebates made the price of black and white cigarettes to wholesalers well below B & W's average variable cost. [29] B & W encouraged the wholesalers to pocket these rebates instead of passing the savings on to consumers to prevent any new demand for black and white cigarettes.

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[26] Oligopoly is the economic term for a market in which few producers are present. There is nothing illegal *per se* about an oligopoly.

[27] Elasticity means the responsiveness of a dependent variable to changes in a causal factor. Burnett looked at what happened to consumer demand in the cigarette industry when prices rose. He concluded that demand for cigarettes was inelastic because consumer demand did not decrease very much despite steadily rising prices.

[28] Burnett does not contend that the major cigarette manufacturers overtly engaged in price-fixing in a smoke-filled room. Instead, he believes the major manufacturers silently agreed that price uniformity was in their best interests and, therefore, priced in lock-step fashion.

[29] Average variable cost equals the sum of all the variable costs divided by output. For a manufacturing firm such as a cigarette company, costs are divided into two categories -- fixed and variable. Variable costs fluctuate with a firm's output while fixed costs are independent of output. Variable costs typically include items such as materials, fuel, labor, maintenance, licensing fees, and depreciation occasioned by use. Fixed costs generally include management expenses, overhead, interest on debt, and depreciation occasioned by obsolescence. A price below average variable cost causes a manufacturer to lose money on each unit of output of the product.

[24]** According to Burnett, B & W's plan was a "win-win/lose-lose" strategy of predation since no matter what Liggett did in response B & W's plan would be successful. Because Liggett had limited financial resources, if it matched B & W's rebates it would have to cut back on its black and white consumer promotional campaign. This cutback in consumer advertising would slow the growth of the generic category and eventually, without advertising, demand for generic cigarettes would decline. If Liggett refused to offer rebates or offered less lucrative deals, its wholesale customers would abandon it in favor of B & W, preventing Liggett from getting its product to the consumer. In a few years, B & W could control prices in the generic cigarette category. Then it would narrow the price gap between branded and generic cigarettes. Price stimulated consumer demand for black and white cigarettes. By raising generic prices, B & W would decrease the relative savings on black and white cigarettes, thus cutting off consumer demand.

Although predatory pricing schemes are typically very costly due to below-cost pricing, Burnett thought B & W's plan was the exception because of simultaneous recoupment. [30] By entering **[**25]** the generic market in the above fashion, according to Burnett, B & W slowed the growth of the generic cigarette segment and thereby slowed the rate at which B & W branded smokers switched to generics. Thus, B & W recovered predatory losses immediately by slowing the loss of sales of its branded cigarettes sold at monopoly prices.

Burnett's theory is buttressed by numerous B & W documents written by top executives. These documents, indicating B & W's anticompetitive intent, are more voluminous and detailed than any other reported case. This evidence not only indicates B & W wanted to injure Liggett, it also details an extensive plan to slow the growth of the generic cigarette segment. [31]

[26]** However, despite Burnett's complicated theory and the extensive documentary evidence, Liggett still has not satisfied the competitive injury requirement of the Robinson-Patman Act with any substantial evidence. As a matter of law, B & W could not have had a reasonable possibility of injuring competition unless at the very least it had the realistic prospect of obtaining market power over the generic segment **[*355]** of the market [32] **[**27]** and an economically plausible way to recoup its losses. [33]

HN11[] Market power is "the ability to raise prices above levels that would exist in a perfectly competitive market." *Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 495 (4th Cir. 1986)*, *cert. denied*, *481 U.S. 1050, 95 L. Ed. 2d 838, 107 S. Ct. 2182 (1987)*. Without the power to control market prices, a firm that raises the price of a product cannot maintain that increase because other firms will offer consumers lower prices, thereby forcing the price-

30 Burnett's only theory of recoupment was simultaneous recoupment. He did not contend that B & W's recoupment would come by raising the price of generic cigarettes.

31 Issues of corporate ethics and morality, or the lack thereof, are not appropriate subjects for consideration by the court unless they are also violative of the antitrust, trademark, and unfair competition claims alleged.

32 Many circuits have held that the competitive injury requirement of the Robinson-Patman Act cannot be satisfied unless the alleged predator has at least a reasonable prospect of obtaining market power. *See* *Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1255-56* (5th Cir.), *cert. denied*, ***488 U.S. 890, 109 S. Ct. 224, 102 L. Ed. 2d 214 (1988)***; *Henry, 809 F.2d at 1345*; *D. E. Rogers, 718 F.2d at 1436* (quoting *Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 823* [6th Cir. 1982]); *O. Hommel, 659 F.2d at 348*; *Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 856 (9th Cir. 1977)*, *cert. denied*, ***439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978)***; *Pacific Eng'g, 551 F.2d at 798*. A few circuits have been hesitant to apply the market power concept to the Robinson-Patman Act, but this hesitance has always been in the context of geographic price discrimination claims factually distinct from the non-geographic claim alleged here. *See* *A.A. Poultry Farms, 881 F.2d at 1404-05*; *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 588 F.2d 24, 28 (2d Cir. 1978)*, *cert. denied*, ***440 U.S. 960, 99 S. Ct. 1502, 59 L. Ed. 2d 773 (1979)***; *Lloyd A. Fry Roofing Co. v. FTC, 371 F.2d 277, 284-85 (7th Cir. 1966)*. Most importantly, the Supreme Court has indicated that ***HN10***[] "the success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Matsushita, 475 U.S. at 589*.

33 For a predatory pricing scheme to injure competition the predator must be able not only to recover its initial losses but also harvest some additional gain. *Matsushita, 475 U.S. at 588-89*. This additional gain is called recoupment, and it is only at the recoupment stage that consumer welfare is injured.

raising firm either to lower prices or lose sales. *See* [*Matsushita, 475 U.S. at 590-91*] ("petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices"). An avowed predator with no prospect of controlling prices is a paper tiger unable **[**28]** to harm consumer welfare. Burnett's theory illustrates this point. According to Burnett, for B & W's scheme to succeed it had to raise generic cigarette prices above competitive levels; otherwise, it could not narrow the price gap between branded and generic cigarettes. Without a narrowing of this gap there is no incentive for generic consumers to switch back to their old brands, and B & W's alleged scheme necessarily fails.

With at most twelve per cent (12%) of the domestic cigarette market, B & W as a matter of law could not exercise market power unilaterally in either the whole cigarette market or the generic segment. *See* *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 119 n. 15, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*. Even Burnett conceded this point, admitting that acting alone B & W could not injure consumer welfare by narrowing the price gap between branded and generic cigarettes. However, Burnett argued B & W was not acting unilaterally due to tacit collusion -- that is, silent price coordination -- among the major manufacturers regarding branded prices. According to Burnett, this tacit collusion effectively gave B & W upwards of ninety-five per cent (95%) of the cigarette market.

Tacit collusion among the **[**29]** major cigarette manufacturers is a dubious theory of market power. In typical cases, market power analysis is straightforward and hinges on whether a company has a large enough market share to control prices in the relevant market. Under this traditional analysis, a company with twelve per cent (12%) of the market cannot have market power. [34] **[*356]** Burnett theorizes, however, that even a relatively small company like B & W can exercise shared market power through tacit collusion with the other major cigarette manufacturers save Liggett. Liggett cites no Robinson-Patman Act or Sherman Act legal precedent which supports this theory of shared market power via tacit collusion. By contrast, the shared market power theory has been rejected several times in the Sherman Act context. *See* *H. L. Hayden Co. v. Siemens Medical Sys., Inc., 879 F.2d 1005, 1018 (2d Cir. 1989)*; *Consolidated Terminal Sys., Inc. v. ITT World Communications, Inc., 535 F. Supp. 225, 228-29 (S.D.N.Y. 1982)*; *In re Kellogg Co., 99 F.T.C. 8, 260 (1982)*. Furthermore, one circuit court considering a *Section 2* Sherman Act claim frankly acknowledged that there is "no case support" for the shared monopoly theory. *Harkins **[**30]** Amusement Enters., Inc. v. General Cinema Corp., 850 F.2d 477, 490 (9th Cir. 1988)*, *cert. denied*, *488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 806 (1989)*. Finally, a leading antitrust authority has noted that the scenario for predatory pricing by a firm possessing a small share of the market is "highly speculative" and "presses the potential for tacit price coordination very far." P. Areeda & H. Hovenkamp, ***Antitrust Law*** 711.2c, at 538-39 (Supp. 1989).

Although there is little legal precedent supporting Burnett's shared **[**31]** market power theory, in rejecting it the court need not rule that this theory is insufficient as a matter of law. The only record evidence supporting such a theory was Burnett's opinion testimony which was contradicted by witnesses from the Liggett boardroom. Liggett's most senior executives, including the president of the company, K.V. Dye, unequivocally testified at trial that there was no tacit collusion on branded cigarette pricing decisions, that the cigarette industry has never been a collusive oligopoly, and that the industry does not reap excessive profits.

Liggett seeks to explain this obvious problem by arguing that the decision-makers at Liggett are not economists and do not understand economic terms such as oligopoly, tacit collusion, and monopoly profits. This argument was considered at the summary judgment stage since these executives gave basically the same testimony at their depositions. The court allowed the case to go to trial in part because the Liggett executives were not economists and in part because of affidavits from the Liggett executives stating that they were confused by the questions asked by B & W lawyers and did not mean to contradict the testimony of **[**32]** Burnett. However, at trial, despite having

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[34] *See, e.g.,* *United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737, 742 (2d Cir. 1989)* (no market power with 10% of the local market and 31% of the national market); *Rutman Wine Co. v. E & J Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987)* (no market power with about 33% of the national market and 25% of the local market); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248, 261 (3d Cir. 1984)* (no market power with 32-35% of the relevant market), *cert. denied*, ***471 U.S. 1016, 85 L. Ed. 2d 303, 105 S. Ct. 2021 (1985)***.

consulted extensively with Burnett and having had adequate time to familiarize themselves with concepts such as tacit collusion, oligopoly, and monopoly profits, these Liggett executives again contradicted Burnett's theory. The court realizes that at the JNOV stage all reasonable inferences must be given to Liggett, the non-moving party. However, Burnett's expert opinion testimony on these issues cannot be considered substantial evidence sufficient to survive B & W's JNOV motion in light of unequivocal and contradictory trial testimony from the senior executives at Liggett who made the pricing decisions. *See* Newman v. Hy-Way Heat Sys., Inc., 789 F.2d 269, 270 (4th Cir. 1976) (experts may not "speculate in fashions unsupported by, and in this case indeed in contradiction of, the uncontroverted evidence in the case"); Selle v. Gibb, 567 F. Supp. 1173, 1182 (N.D.Ill. 1983) ("The law does not permit the oath of credible witnesses, testifying to matters within their knowledge, to be disregarded, particularly where lay persons give testimony contradicting existence of the ultimate fact to be inferred from the opinion of an expert."), **[**33]** *aff'd*, 741 F.2d 896 (7th Cir. 1984). [35]

[*357] Even if Burnett's opinion testimony on tacit collusion was uncontradicted, competition could not be injured by B & W unless it could raise generic cigarette prices, thereby narrowing the price gap between branded and generic cigarettes. Yet, even Burnett denied there was tacit collusion in the generic cigarette segment. Instead, his theory relied on the supposed motivations of the other major cigarette manufacturers. Burnett contended that there was an alignment of interest among these **[**34]** companies to protect their branded cigarette profits. Thus, they would not disrupt B & W's attempts to slow the growth of the generic segment. If no such alignment of interest existed and any of the other major cigarette manufacturers were interested in promoting the sale of generic cigarettes, even Burnett admitted that successful predation by B & W would be impossible.

No substantial record evidence supports Burnett's alignment of interest theory. Even before B & W began selling black and white cigarettes, RJR had entered the generic segment by repositioning Doral at generic prices. Burnett conceded that RJR had no anticompetitive intent and that Doral's entry expanded the generic segment. The evidence is uncontroverted that RJR's motive for selling generic cigarettes was to regain its number one position in the cigarette industry from Philip Morris. In order to do this, RJR had to sell a lot of generic cigarettes. Furthermore, there is no evidence that any of the other major cigarette companies had an interest in slowing the growth of generic cigarettes. Today, five of the six major manufacturers sell generic cigarettes in one form or another. Most importantly, in late 1985 B & W tried **[**35]** to raise the price of its generic cigarettes. Neither Liggett nor RJR followed with price increases, and B & W was forced to retract its price increase -- exactly what is supposed to happen when a company without market power unilaterally raises its price above competitive levels. Had there been an alignment of interest, RJR would have followed B & W's lead.

Not only is there no substantial evidence of market power, the testimony of Liggett's decision-makers that there were no monopoly profits obtained on branded cigarettes and that branded cigarette prices were fair to consumers totally undermines any plausible theory of economic recoupment for B & W. Without some likelihood of recoupment there is no reasonable possibility of injury to competition. Typically, recoupment happens after the predatory objective has been achieved and the predator has the ability to control prices. As explained earlier, Burnett's theory of simultaneous recoupment departed from this model. However, if there were no monopoly profits from branded cigarettes then B & W could not simultaneously recoup its losses from below-cost pricing.

Even apart from this testimony, there is another problem with Burnett's recoupment **[**36]** analysis. There is no substantial evidence in the record indicating that wholesalers would not promote the sale of generic cigarettes. Burnett's simultaneous recoupment theory depends on wholesalers pocketing B & W's volume rebates instead of promoting generic cigarettes; otherwise, there is no mechanism to slow the growth of the segment. Yet it makes no sense for wholesalers to pocket all of these rebates. Unlike branded cigarettes, there were no guarantees for wholesalers when they bought B & W's generic cigarettes. If the wholesalers did not sell all the generic cigarettes they bought, they were stuck with the product. B & W's volume rebates were lucrative to them only if they could sell

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[35] *Accord* Miller v. FDIC, 906 F.2d 972, 975 (4th Cir. 1990) (plaintiff's contradictory testimony insufficient to create a genuine issue of fact); Townley v. Norfolk & W. Ry. Co., 887 F.2d 498, 501 (4th Cir. 1989) (a party may not create an issue of fact by contradicting own testimony); Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984) (a party examined at length on deposition cannot raise an issue of fact simply by submitting an affidavit contradicting the prior testimony).

their generic cigarette allotment; otherwise, they lost money. Therefore, there was no alignment of interest between B & W and the wholesalers with respect to generic cigarettes. To the extent that wholesalers wanted to sell generics to consumers, and the only record evidence at trial indicates that they did, B & W could not slow the growth of the category and consumer welfare could not be injured.

Similarly, ***HN12***[] documentary evidence alone is not substantial evidence sufficient to satisfy the competitive injury **[**37]** requirement of the Robinson-Patman Act absent some showing of market power and the possibility of recoupment. *See Henry, 809 **[*358]** F.2d at 1345*. A company with anticompetitive intent cannot injure consumers unless it has at least a reasonable possibility of obtaining market power and recouping its losses. B & W could not achieve either of these objectives and, therefore, it does not matter what the documents say concerning its hopes and plans.

Finally, Liggett did not provide any substantial evidence of actual injury to competition via market analysis. Obviously, without even the realistic prospect of obtaining market power it is impossible for a firm to actually injure competition since prices cannot be increased above competitive levels. Furthermore, even Liggett admits that the generic cigarette segment has grown. Five of the six major cigarette companies have significant entries in the generic category, and growth has increased from about four per cent (4%) when Liggett was alone in the segment to fifteen per cent (15%). The success of generic cigarettes has even encouraged some price competition on branded cigarettes. This court is aware of no Robinson-Patman Act verdict upheld solely **[**38]** on market analysis grounds. Liggett's market analysis evidence is not compelling enough for this court to become the first. [36]

[39]** B. *Causation*

HN13[] The Robinson-Patman Act is aimed only at price discrimination. Liggett must prove that the reasonable possibility of injury to competition was "the effect of" price discrimination, *15 U.S.C. § 13(a)*, in order to establish "the necessary causal relationship between the difference in prices and the alleged competitive injury." *Borden Co. v. FTC, 381 F.2d 175, 180 (5th Cir. 1967)*. [37]

In a typical primary-line Robinson-Patman Act case, the injury alleged is the result of geographic price discrimination. As the Supreme Court has explained, the Clayton Act, as amended by the Robinson-Patman Act, "was born of a desire by Congress to curb the use by financially powerful corporations **[**40]** of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)* (footnote omitted). [38] Proof of causation is

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[36] Much of Liggett's market analysis focuses on the steady decline of the market share of black and white cigarettes. This decline has not injured consumers because of the steady growth of branded generic cigarettes sold at the same price as black and white cigarettes. Overall, the generic segment has grown with consumers preferring branded generic cigarettes to black and white cigarettes. The rest of Liggett's market analysis is equally unconvincing. Liggett contends that B & W caused the price differential between branded and generic cigarettes to decrease. Yet, the percentage price differential has remained about thirty per cent (30%), and B & W quickly retracted the only generic cigarette price increase that it initiated because the competition did not follow. Liggett also alleges that B & W's pricing forced it to reduce its advertising, thereby slowing the segment. Still, the generic cigarette category continued to grow, fueled in part by RJR's aggressive promotion of Doral. Finally, Liggett argues that the military market provides empirical evidence of actual injury to consumers. The generic segment now accounts for over thirty per cent (30%) of the military market, as compared to approximately fifteen per cent (15%) of the civilian market. However, the age, income, and image differences in the military and the civilian sectors make such inferences suspect; the market for generic cigarettes has grown in both sectors; and without any realistic prospect of obtaining market power B & W's conduct cannot be the cause of the different market shares in the two sectors.

[37] *Accord Stitt Spark Plug, 840 F.2d at 1257*; *Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 680* (10th Cir.), *cert. denied*, ***469 U.S. 854, 83 L. Ed. 2d 113, 105 S. Ct. 178 (1984)***; ***William Inglis, 668 F.2d at 1040***; *Marty's Floor Covering Co. v. GAF Corp., 604 F.2d 266, 270 (4th Cir. 1979)*, *cert. denied*, ***444 U.S. 1017, 62 L. Ed. 2d 647, 100 S. Ct. 670 (1980)***.

straightforward when the price discrimination is geographic. In these cases, a national firm can supplant local competitors confined to a specific geographic market by charging below-cost prices in that market. The local competitor is necessarily limited to competing for customers who can buy at the below-cost price offered by **[*359]** the national company. The national firm can subsidize its losses in the local market through profits from sales in other geographic areas. Therefore, since the national firm can remain profitable while the local competitor cannot, the difference between the national firm's below-cost prices and its profitable prices has a reasonable possibility of injuring competition. However, Liggett's primary line, non-geographic claim differs from this scenario, and the geographic causation rationale discussed above has no persuasive force. Both B & W and Liggett competed for generic sales throughout the United States, and Liggett competed in all the markets in which **[**41]** B & W offered the discriminatory prices.

Because this claim is non-geographic, Liggett has not proven causation by any substantial evidence. The Robinson-Patman Act does not proscribe low prices. B & W's net prices were generally lower than Liggett's at every volume level. Yet, if there was any reasonable possibility of injury to competition from B & W's conduct it came from the low prices that B & W offered to its customers and not from the fact that these low prices varied depending on volume. *See* *O. Hommel, 659 F.2d at 350-51* (when price discrimination occurs only in the same geographic market in which the predator and the target compete "selective price-cutting cannot possibly be more harmful to small competitors than a general price reduction to the same level") (quoting Areeda & Turner, **[**42]** *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 725-26 [1975]). [39]

Even if B & W's low prices created a reasonable possibility of injuring competition by displacing Liggett and making it possible for B & W to raise generic cigarette prices, the fact that those prices varied gave B & W no advantage over Liggett. Liggett was free to compete for sales to B & W's low-volume generic customers, as well as those customers getting the best deals from B & W. Liggett was not excluded from any markets. As a result, Liggett was not disadvantaged any more by B & W's volume rebates than it would have been by one uniform low price. Liggett's complaint is that B & W was selling generic cigarettes for a lower price than it could at all volume levels. Consequently, ***HN14***[] Liggett has not met its burden of causation because low prices, not price discrimination, **[**43]** provide the only possible linkage to competitive injury.

Liggett disagrees. It contends that the price discrimination was a central component of B & W's predatory plan enabling B & W to make its scheme cost effective and inducing wholesalers to buy generic cigarettes exclusively from B & W. The court will consider these arguments in turn.

Liggett contends that price discrimination made B & W's plan feasible by making it less costly than if B & W offered only one low price. It cites several documents indicating that B & W wanted to "put the money where the volume was." There are no primary-line, non-geographic cases, that this court is aware of, in which cost efficiency satisfied the Robinson-Patman Act's causation requirement. Such an argument if accepted would read any meaningful causation requirement out of the Act. As opposed to one low price set at B & W's high-volume rate, volume rebates certainly saved the company money. However, the same is true of any price discrimination by any firm since price discrimination by definition requires a higher and a lower price. Furthermore, although it may have been more cost efficient for B & W, price discrimination also meant that it would cost less for **[**44]** Liggett to match B & W's prices. Since Liggett and B & W had access to the same customers and markets, B & W could not inflict greater injury on Liggett by charging different prices than by charging a lower uniform price. If Liggett was not injured more by the price discrimination then neither was competition, since Burnett's competitive injury theory hinges on **[*360]** B & W replacing Liggett as the generic price leader.

Liggett also argues that B & W's discriminatory rebates encouraged wholesalers to buy generic cigarettes exclusively from B & W. According to Liggett, the volume rebates acted as a magnet enticing customers to buy

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[38] *Accord* *Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 991 & n. 5 (4th Cir. 1990)*; *O. Hommel, 659 F.2d at 350*; *Marty's Floor Covering, 604 F.2d at 270*; *International Air, 517 F.2d at 720-21*.

[39] *Accord* *Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 667-68 (2d Cir. 1989)*; *Borden, 381 F.2d at 180*.

more B & W generic cigarettes to get to the next rebate level; because higher volume purchases entitled customers to higher discounts, customers opting to allocate a portion of their generic cigarette purchases to Liggett would in effect be penalized; to avoid this penalty customers would buy exclusively from B & W; the more exclusive relationships B & W could cement with former Liggett wholesale customers the faster B & W could displace Liggett and increase generic prices.

Again, Liggett cites no primary-line, non-geographic cases which support its analysis that encouraging exclusivity **[**45]** satisfies the Robinson-Patman Act's causation requirement. Volume discounts do not hurt Liggett, and hence competition, more than any other incentive since both companies compete for the same customers and the same markets. Liggett could respond to B & W's volume rebates by allocating the majority of its own incentives to its high-volume customers, a practice it had followed even before B & W's entry. Furthermore, the only advantage to a wholesaler from getting into B & W's highest volume category is receiving the lowest price available on generic cigarettes. Yet, even at the lowest volume levels, B & W's net prices were below Liggett's, obviously an incentive for a customer to buy only from the manufacturer offering the lowest price on the same product. Therefore, the magnet enticing customers to buy generic cigarettes exclusively from B & W was that B & W's net prices were below Liggett's at every volume level and not that B & W's competitive offer to customers took the form of volume rebates.

C. *Antitrust Injury*

HN15[] In a private treble damage action brought under Section 4 of the Clayton Act, [40] there is an additional causation requirement -- antitrust injury. Not only must Liggett prove that **[**46]** B & W's price discrimination had a reasonable possibility of injuring competition, Liggett also must prove that B & W's price discrimination caused its complained-of damages.

A private plaintiff like Liggett may not recover damages simply by showing "injury causally linked to an illegal presence in the market." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Instead, Liggett must prove it was injured by conduct violating the Robinson-Patman Act. *See 15 U.S.C. § 15(a)*. That is, Liggett must prove the existence of "'*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co., 690 F.2d 411, 414 **[**47]** (4th Cir. 1982)* (quoting *Brunswick, 429 U.S. at 489*). Therefore, Liggett cannot recover damages unless it is "able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins v. Standard Oil Co., 395 U.S. 642, 648, 23 L. Ed. 2d 599, 89 S. Ct. 1871 (1969)*.

Subsequent to the completion of this trial, the Supreme Court decided a case clarifying the requirements of antitrust injury. The Supreme Court held:

> ***HN16***[] Antitrust injury does not arise for purposes of § 4 of the Clayton Act until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do **[*361]** not threaten competition. Hence, they cannot give rise to antitrust injury.

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 1892, 109 L. Ed. 2d 333 (1990) (citations and footnotes omitted). In the context of the present case, *Atlantic Richfield* makes clear that only evidence of predatory pricing is sufficient to prove antitrust **[**48]** injury. Neither incriminating documentary evidence nor an allegedly distorted market proves antitrust injury unless accompanied by proof of predatory pricing. *Id. at 1891 n. 7* ("a firm cannot claim antitrust injury from nonpredatory price competition on the asserted ground that it is ruinous").

[40] Section 4 of the Clayton Act is a remedial provision that makes treble damages available to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15(a)*.

Liggett, of course, disagrees with this interpretation of *Atlantic Richfield*, arguing that the Supreme Court's antitrust injury analysis applies only to vertical maximum resale price-fixing cases and that the decision illustrates only that Sherman Act principles are different from Robinson-Patman Act principles. It cites as proof the fact that the Supreme Court in *Atlantic Richfield* did not dismiss the Robinson-Patman Act claim since it was "misconduct not relevant here." *110 S. Ct. at 1887*. In *Atlantic Richfield*, plaintiff sued defendant under various legal theories including the Sherman Act, the Robinson-Patman Act, and state law unfair competition statutes. Defendant moved for summary judgment on the Section 1 Sherman Act claim and the district court granted the motion. On appeal, both the Ninth Circuit and the Supreme Court considered only the issue of whether dismissing **[**49]** plaintiff's Section 1 Sherman Act claim was proper. The Robinson-Patman Act claim was not relevant to the Supreme Court's decision because that claim was not before it. This language of the Supreme Court cannot be construed to mean that antitrust injury principles under the Robinson-Patman Act are fundamentally different from those under the Sherman Act.

Liggett's interpretation of *Atlantic Richfield* is legally insupportable for several reasons. First, Liggett alleges a primary-line, non-geographic Robinson-Patman Act claim analytically similar to a *Section 2* Sherman Act attempted monopolization claim. The goal of both statutes is to maximize competition. Second, Liggett's interpretation is anticompetitive since it protects Liggett from non-predatory price competition by B & W despite the fact that such activity cannot injure competition. In *Atlantic Richfield*, the Supreme Court reiterated that "'cutting prices in order to increase business often is the very essence of competition,'" *id. at 1891* (quoting *Matsushita, 475 U.S. at 594*), and Liggett has provided no theoretical justification for distinguishing between straight price cuts and volume rebates. Also, the Supreme **[**50]** Court has held on numerous occasions that ***HN17***[] the Robinson-Patman Act should be conformed if at all possible to the standards governing the other antitrust laws. *See* *Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979)*; *United States v. United States Gypsum Co., 438 U.S. 422, 458-59, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*; *Automatic Canteen Co. v. FTC, 346 U.S. 61, 63, 97 L. Ed. 1454, 73 S. Ct. 1017 (1953)*. Third, Section 4 of the Clayton Act, *15 U.S.C. § 15(a)*, provides the antitrust injury standard for both the Sherman Act and the Robinson-Patman Act. It would be odd indeed to interpret the same language of Section 4 one way under the Sherman Act and another way under the Robinson-Patman Act. Fourth, and most importantly, Liggett's interpretation requires this court to ignore the plain language of *Atlantic Richfield* in which the Supreme Court clearly stated that non-predatory pricing behavior cannot give rise to antitrust injury "regardless of the type of antitrust claim involved." *110 S. Ct. at 1892*.

Liggett also argues that *Atlantic Richfield* does not apply to Robinson-Patman Act claims because it is price discrimination rather than predatory prices which must cause the antitrust injury. Liggett's position is correct as **[**51]** far as it goes. In Robinson-Patman Act cases the price discrimination must be linked with the antitrust injury. However, this does not mean that predatory pricing is not relevant. For that position to have merit there would **[*362]** have to be some anticompetitive aspect of price discrimination other than the fact that one or all of the prices charged were predatory. Yet, the only anticompetitive aspect to B & W's volume rebates is that they were allegedly below cost. Burnett's theory is that B & W's below-cost, volume rebates were designed to drive Liggett out of the generic cigarette segment. The below-cost aspect of these rebates was crucial since this forced Liggett to either lose money on the sale of generic cigarettes or lose customers to B & W. For these reasons this court is convinced that in a primary-line, non-geographic price discrimination case predatory pricing is the only type of evidence which satisfies the antitrust injury requirement.

The court must examine whether Liggett has presented any substantial evidence of antitrust injury. The Supreme Court has stated that ***HN18***[] "predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors **[**52]** in the short run and reducing competition in the long run." *Cargill, 479 U.S. at 117*. But the Court has never defined what "cost" is relevant. *Id. at 117 n. 12*. Given this Supreme Court guidance, most circuits presume that pricing below reasonably anticipated marginal cost is predatory. [41] Because marginal costs cannot be determined easily from conventional accounting methods, average variable cost

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[41] *See, e.g.,* *Northeastern Tel. Co. v. AT & T Co., 651 F.2d 76, 88 (2d Cir. 1981)* (citations collected therein), *cert. denied*, ***455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982)***.

is used as a surrogate. Most cases of predatory pricing focus on average variable cost evidence, and this one is no different. [42]

[53]** Liggett's predatory pricing evidence consisted of expert testimony that B & W priced its generic cigarettes below average variable cost. B & W countered with its chief financial officer who admitted that B & W lost money on the sale of generic cigarettes but stated prices were never below average variable cost. He explained that most companies lose money when they introduce a new product and that there was nothing exceptional about that. Furthermore, he stressed that B & W's overall line of cigarettes -- generic plus branded -- was very profitable.

In order to evaluate Liggett's predatory pricing evidence, this debate need not be resolved. The court believes that Liggett's predatory pricing evidence must show that B & W lost money in the relevant market stipulated to by the parties prior to trial -- the market for all cigarettes in the United States. Liggett has not and cannot do this. The evidence is uncontroverted that B & W made money on its overall cigarette sales -- branded and generic -- during the alleged predatory period.

The parties have stipulated that the relevant market is the entire cigarette market in the United States. Upon close examination, this court **[**54]** believes that there is no substantial economic evidence that generic cigarettes are sufficiently distinct from branded cigarettes to justify applying the average variable cost test to generic cigarettes alone. [43] Markets are determined by the substitutability of goods, and market definition turns on these goods' cross-elasticity of demand and supply. ***HN19***[] Cross-elasticity **[*363]** of demand is the extent to which products are "reasonably interchangeable by consumers for the same purposes." *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. Cross-elasticity of supply is "the capability of other production facilities to be converted to produce a substitutable product." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210, 218 (D.C. Cir. 1986)*, *cert. denied*, *479 U.S. 1033, 93 L. Ed. 2d 834, 107 S. Ct. 880 (1987)*. There is obviously high cross-elasticity of demand between branded and generic cigarettes. In fact, Liggett's theory hinges on consumers substituting generic for branded cigarettes because the alleged reason for predating was that B & W branded smokers were switching to Liggett's generic cigarettes. There is also high cross-elasticity of supply between branded and generic cigarettes **[**55]** because the same machines that make branded cigarettes can easily produce generic cigarettes.

Because there is no question that generic and branded cigarettes compete with each other for **[**56]** the favor of consumers, there is no economic justification for analyzing one separately from the other. ***HN20***[] Where there is nothing economically distinct about a particular product line, the average variable cost test should not be applied to it. Dr. Philip Areeda, one of the fathers of that test, explains that where the predator and the target sell the same line of products the average variable cost test should be applied to an alleged predator's entire product line instead of to a particular product because "rivals generally can hardly be ruined so long as prices for the product line as a whole are compensatory." P. Areeda & H. Hovenkamp, ***Antitrust Law*** 1715.1a, at 592 (Supp. 1989). Numerous courts, in cases like this one where the parties are full product line competitors, have refused to apply the average variable

[42] This court used average variable cost because Liggett's evidence of predatory pricing centered on this measure; average variable cost is a conservative measure unlikely to penalize the competitive pricing activities of a more efficient competitor; and many circuits use some variant of the average variable cost test to isolate predatory pricing.

[43] Since Liggett and B & W are full-line competitors who compete for market share across all cigarette product lines, this court instructed the jury that they could consider Liggett's below-cost pricing evidence only if they determined that generic cigarettes formed a well-defined submarket based on the practical indicia test of *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. The court used this concept to aid the jury in determining whether generic cigarettes were sufficiently distinct from branded cigarettes to justify applying the average variable cost test to generic cigarettes, and not as a means of deciding the appropriate market in which to evaluate competitive injury. If there are no significant economic differences between the two products there is no reason to analyze their price-cost relationship separately.

cost test to a single product line because there could be no competitive injury in the relevant market even if that product line was priced below cost. [44]

[57]** During the alleged predatory period, Liggett and B & W were both profitable, full product line competitors with access to the same customers and markets. Due to these facts, applying the average variable cost test solely to B & W's generic cigarettes would be inappropriate. ***HN21***[] An examination of price-cost relationships should be made only in reference to the dangers posed by predatory pricing. *Henry, 809 F.2d at 1344* ("the issue of 'predatory intent' should focus on what the defendant did and whether it could lead to the evil feared"). Under Liggett's theory, the danger posed by B & W's predatory pricing was that B & W would obtain control of the generic segment, raise prices, and thereby kill-off the only low-price alternative to branded cigarettes to the disadvantage of consumers. Even assuming that this danger was real, consumer welfare could not be injured if Liggett responded by switching emphasis to its line of branded cigarettes and decreasing their price, thus charging consumers a fair price instead of a monopolistic one. This would prevent injury to both Liggett and the consumer. Liggett's market share would increase to **[*364]** offset its lost monopoly profits and consumers would still **[**58]** have a low-price cigarette alternative. Furthermore, B & W could not recoup if Liggett decreased branded prices because cost-conscious consumers would switch to the low-price Liggett brands instead of other branded cigarettes priced at monopoly rates. If the average variable cost test is applied solely to generic cigarettes and antitrust injury is inferred from this below-cost pricing, then Liggett is unjustly rewarded for failing to compete on price with its branded cigarettes. Under this scenario, Liggett's antitrust injury would come from its unwillingness to charge a competitive price for its branded cigarettes and not from B & W's price discrimination. Since Liggett has failed to introduce substantial evidence of predatory pricing to meet the antitrust injury requirement, this provides another ground for granting B & W's JNOV motion.

III. THE TRADEMARK ISSUES

Liggett has made a motion for a new trial pursuant to *Rule 59, Fed. R. Civ. P.*, on the trademark and unfair competition claims arising from B & W's alleged infringement of Liggett's quality seal trademark. Liggett contends that the court should order a new trial on these issues because (1) the jury verdict was clearly against the **[**59]** weight of the evidence, (2) B & W repeatedly relied upon prejudicial, inadmissible, and improper evidence which tainted the jury process, and (3) Liggett was precluded from using evidence which could have countered B & W's prejudicial and misleading arguments. The court finds these contentions to be without merit, and Liggett's motion will be denied.

HN22[] A motion for a new trial is governed by a different standard than a JNOV motion. *Gill v. Rollins Protective Servs. Co., 773 F.2d 592, 594 (4th Cir. 1985)*, *modified on other grounds*, *788 F.2d 1042 (4th Cir. 1986)*. Recently, the Fourth Circuit has reiterated the trial court's duty in ruling on a *Rule 59* motion for a new trial. In *Poynter by Poynter v. Ratcliff, 874 F.2d 219, 223 (4th Cir. 1989)*, the court explained that:

> Under *Rule 59 of the Federal Rules of Civil Procedure*, a trial judge may weigh the evidence and consider the credibility of the witnesses and, if he finds the verdict is against the clear weight of the evidence, is based on

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[44] *See* *Morgan v. Ponder, 892 F.2d 1355, 1361-62 (8th Cir. 1989)* (court refuses to apply a price-cost test solely to legal advertising as opposed to all commercial advertising); *Stitt Spark Plug, 840 F.2d at 1256-57* (a relevant predatory pricing analysis must include defendant's entire line of spark plugs and not just its original equipment line); *Directory Sales Management Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 614 (6th Cir. 1987)* (although a telephone company gave away free first listings in its telephone book, they engaged in predatory pricing only if their "overall charges for advertising space in their yellow pages are priced below cost"); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 597-98 (8th Cir. 1987)*, *cert. denied*, ***484 U.S. 1010, 108 S. Ct. 707, 98 L. Ed. 2d 658 (1988)*** (court refused to apply below-cost pricing test to only four of the 180 common items that competing specialty food stores sold); *Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 305* (5th Cir.), *cert. denied*, ***469 U.S. 833, 83 L. Ed. 2d 65, 105 S. Ct. 123 (1984)*** (where both parties are full-line competitors, 32-ounce bottles not a relevant product to apply average variable cost test to); *Janich Bros., 570 F.2d at 856* (half-gallon containers of gin and vodka are not relevant products for predatory pricing analysis); *Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1228 (W.D.N.C. 1988)* (three-liter bottles not a relevant product for predatory pricing analysis).

> false evidence or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial.

See also Wyatt, 623 F.2d 888, 891-92; **[**60]** Williams v. Nichols, 266 F.2d 389, 392 (4th Cir. 1959). A new trial may also be granted if the court believes it has erred in the admission or rejection of evidence, or improperly instructed the jury. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 85 L. Ed. 147, 61 S. Ct. 189 (1940).

HN23[] To establish trademark infringement a plaintiff must prove that there is a "likelihood of confusion" between its mark and the defendant's mark. Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984). Both parties presented evidence from which a reasonable jury could have found in favor of that party on the trademark and unfair competition issues. The jury ruled for B & W. From the evidence introduced on the seven likelihood of confusion factors outlined in *Pizzeria Uno*, [45] the verdict cannot be considered contrary to the clear weight of the evidence.

[61]** The cornerstone of Liggett's position is its contention that B & W's stipulation of the validity of Liggett's quality seal trademark precluded any evidence or argument by B & W that consumers were not aware of the quality seal. Liggett couples this argument with the contention that B & W's repeated references to the results of Liggett's Conway Milliken Report, a telephone survey of consumers conducted by Liggett, as proof of lack of consumer recognition of the quality seal, were improper **[*365]** and contrary to the court's *in limine* ruling.

Liggett's contention that the stipulation of validity of the quality seal trademark precluded evidence and argument by B & W that most consumers were not aware of the mark is contrary to the position taken by Liggett's counsel at trial. Liggett's counsel conceded on the record at the charge conference that the strength of the mark was a question for the jury, that B & W could argue that it was not recognized, and that Liggett could argue that it was recognized. Evidence of the extent of consumer awareness of a mark obviously helps a jury determine the scope of protection to be afforded the mark. However, the court clearly instructed the jury that Liggett had **[**62]** valid federal trademark registrations for the quality seal and that the jury must accept the quality seal as a valid trademark.

Furthermore, Liggett's argument that the stipulation of validity precludes evidence that consumers were not aware of the mark is simply not the law. *See* Miss World (U.K.) Ltd. v. Mrs. America Pageants, 856 F.2d 1445, 1449 (9th Cir. 1988) ("An incontestable status does not alone establish a strong mark."); Oreck Corp. v. U.S. Floor Sys., Inc., 803 F.2d 166, 171 (5th Cir. 1986) (incontestable status does not preclude defendant from arguing mark is weak and not infringed; "Incontestable status does not make a weak mark strong."), *cert. denied*, *481 U.S. 1069, 95 L. Ed. 2d 871, 107 S. Ct. 2462 (1987)*; *see also* Munters Corp. v. Matsui America, Inc., 730 F. Supp. 790, 795-96 (N.D. Ill. 1989), *aff'd*, 909 F.2d 250 (7th Cir. 1990); Cullman Ventures, Inc. v. Columbian Art Works, Inc., 717 F. Supp. 96, 121 (S.D.N.Y. 1989); 2 J. McCarthy, *Trademarks and Unfair Competition* § 32:44D (2d ed. 1984 & Supp. 1989).

Liggett's emphasis on B & W's questions to witnesses and arguments about Liggett's Conway Milliken study is also misplaced. The court **[**63]** explained on numerous occasions during the trial that Liggett's extensive testimony and evidence concerning the promotion of its quality seal opened the door to cross-examination and evidence of the effectiveness of that promotion. The court then allowed Liggett to present additional evidence about what the study was designed to determine, how it was conducted, and the significance of the results. Furthermore, Liggett's counsel had ample opportunity in closing arguments to counter any arguments by B & W's counsel concerning the significance of the Conway Milliken Report. [46]

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[45] The seven factors are: (1) the strength or distinctiveness of the mark; (2) the similarity of the two marks; (3) the similarity of the goods/services identified by the marks; (4) the similarity of the facilities the two parties use in their businesses; (5) the similarity of the advertising used by the two parties; (6) the defendant's intent; (7) actual confusion.

[46] Liggett also contends that B & W improperly took advantage of the court's pre-trial rulings which prevented Liggett from calling consumers who had confused B & W's black and gold lion closure seal, a seal which was not the basis of Liggett's claim in this case, with the Liggett quality seal trademark. Liggett further contends that it was tricked or prevented from calling Saul Lefkowitz, a former chairman of the United States Trademark Trial and Appeal Board, who would have testified that registration of the

[64]** Liggett's other arguments concerning the use of prejudicial, inadmissible, and improper evidence are based almost exclusively on B & W's closing argument. However, Liggett failed to object during closing argument to most of the statements which it now claims were so prejudicial as to warrant a new trial. The Fourth Circuit has emphasized that "it is the universal rule that ***HN24***[] during closing argument counsel '"cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial."'" *Dennis v. General Elec. Corp., 762 F.2d 365, 366-67 (4th Cir. 1985)* (quoting *United States v. Elmore, 423 F.2d 775, 781* [4th Cir.], *cert. denied*, *400 U.S. 825, 91 S. Ct. 49, 27 L. Ed. 2d 54* [1970], and *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239, 84 L. Ed. 1129, 60 S. Ct. 811* [1940]). Liggett had every opportunity in its rebuttal argument to clarify any arguments which it believed were misleading on the part of B & W. The alleged improprieties **[*366]** in B & W's closing argument do not involve any exceptional circumstances which would impair "the public reputation and integrity of the judicial proceeding." *Dennis, 762 F.2d at 367*; **[**65]** *see also* *Socony-Vacuum Oil, 310 U.S. at 239*.

For the foregoing reasons, Liggett's motion for a new trial on the trademark and unfair competition claims will be denied.

An order and judgment in accordance with this memorandum opinion shall be entered contemporaneously herewith.

ORDER and JUDGMENT - August 27, 1990, Filed

For the reasons set forth in a memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that Defendant's motion for judgment notwithstanding the verdict pursuant to *Rule 50(b), Federal Rules of Civil Procedure*, be, and the same hereby is, GRANTED, and that the jury verdict and judgment in favor of the Plaintiff be, and the same hereby is, SET ASIDE, and judgment entered for the Defendant; and

IT IS FURTHER ORDERED that Defendant's alternative motion for a new trial pursuant to *Rule 59, Federal Rules of Civil Procedure*, be, and the same hereby is, DENIED; and

IT IS FURTHER ORDERED that Plaintiff's motion for a new trial pursuant to *Rule 59, Federal Rules of Civil Procedure*, be, and the same hereby is, DENIED.

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quality seal was proper, a fact B & W conceded. Other proposed testimony by Mr. Lefkowitz sought to instruct the jury on the law, a matter within the province of the court. The court is satisfied that its initial position concerning these witnesses was correct.

California State Bd. of Optometry v. FTC

United States Court of Appeals for the District of Columbia Circuit

May 10, 1990, Argued ; August 28, 1990, Decided

No. 89-1190, consolidated case Nos. 89-1191, 89-1202, 89-1293, 89-1301, 89-1307, 89-1308, 89-1314, 89-1316, 89-1317

Reporter

910 F.2d 976 *; 1990 U.S. App. LEXIS 14881 **; 285 U.S. App. D.C. 476; 1990-2 Trade Cas. (CCH) P69,155

California State Board of Optometry, Petitioner v. Federal Trade Commission, Respondent; National Association of Optometrists and Opticians, Intervenor

Subsequent History: **[**1]** Petitions for Rehearing Denied January 8, 1991, Reported at: *1991 U.S. App. LEXIS 651*.

Prior History: Petitions for Review of a Rule of the Federal Trade Commission.

Core Terms

unfair, practices, sovereign, Eyeglasses, commerce, optometry, statutory construction, rule making authority, deceptive act, state law, partnerships, state action doctrine, optometrists, restrictions, optometric, promulgate, antitrust, empower

LexisNexis® Headnotes

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN1[] **Antitrust & Trade Law, Federal Trade Commission Act**

See *15 U.S.C.S. § 45(a) (1988)*.

Administrative Law > Agency Rulemaking > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN2[] **Administrative Law, Agency Rulemaking**

See *15 U.S.C.S. § 57a(a)(1) (1988)*.

Administrative Law > Judicial Review > General Overview

Governments > Legislation > Interpretation

HN3[] **Administrative Law, Judicial Review**

The tools of statutory construction include the language and structure of the act, its legislative history, and any applicable canons of statutory construction.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Governments > Legislation > Interpretation

HN4[] **Separation of Powers, Legislative Controls**

There is nothing in the language of sections 5(a) and 18(a)(1) of the Federal Trade Commission (FTC) Act, *15 U.S.C.S. §§ 45(a)* and *57a(a)(1)(1988)*, to indicate that Congress intended to authorize the FTC to reach the acts or practices of states acting in their sovereign capacities.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN5[] **Separation of Powers, Legislative Controls**

The Federal Trade Commission's power under § 5 of the Federal Trade Commission Act extends to persons, partnerships, and corporations, and with respect to the great industrial activities in interstate commerce. It embraces every kind of person, natural or artificial, who may be engaged in interstate commerce.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Governments > Native Americans > Civil Rights

Governments > Legislation > Interpretation

HN6[] **Separation of Powers, Legislative Controls**

In common usage, the term "person" does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Governments > Legislation > Interpretation

HN7[] Separation of Powers, Legislative Controls

A state is a person for purposes of the antitrust laws.

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Governments > Legislation > Interpretation

HN8[] Administrative Law, Sovereign Immunity

Although a state may be a "person" for purposes of the antitrust laws, it is equally clear, under the "state action" doctrine that when a state acts in a sovereign rather than a proprietary capacity, it is exempt from the antitrust laws even though those actions may restrain trade. State action doctrine provides antitrust immunity for actions taken in a state's capacity as sovereign but does not cover proprietary functions carried out by municipal subdivisions of the state.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN9[] Agency Rulemaking, Formal Rulemaking

When engaged in rulemaking pursuant to section 18(a)(1) of the Federal Trade Commission (FTC) Act, the FTC itself exercises substantive lawmaking authority delegated to it by Congress.

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN10[] Administrative Law, Sovereign Immunity

The state action doctrine is applicable to limit the Federal Trade Commission's rulemaking authority.

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Administrative Law, Sovereign Immunity

The Sherman Act does not apply to the acts of states as sovereigns.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Governments > Legislation > Interpretation

Administrative Law > Sovereign Immunity

HN12[] Separation of Powers, Legislative Controls

If Congress intends to alter the usual constitutional balance between the states and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Intrastate Commerce

Transportation Law > Interstate Commerce > Federal Powers

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > Congressional Duties & Powers > Reserved Powers

Governments > Legislation > Enactment

HN13[] Commerce Clause, Intrastate Commerce

U.S. Const. amend. X does not impose substantive limitations on federal legislative power. Rather, state sovereign interests are properly protected by procedural safeguards inherent in the structure of the federal system. The fundamental limitation that the constitutional scheme imposes on the *Commerce Clause* to protect the states as states is one of process rather than one of result.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

HN14[] Separation of Powers, Legislative Controls

An agency may not exercise authority over states as sovereigns unless that authority has been unambiguously granted to it.

Counsel: Thomas S. Lazar (for California State Board of Optometry), with whom Sara Rittman (for Missouri State Board of Optometry), Steve Clark and Mary B. Stallcup (for Arkansas State Board of Optometry), Allen R. Grossman (for State of Florida and the Florida State Board of Optometry), Kenneth O. Eikenberry and John H. Keith (for Washington State Board of Optometry), Debra W. Jeppson (for State of Nevada and Nevada State Board of Optometry), Fred W. Stork III (for Arizona State Board of Optometry), and Roger L. Chaffe and Howard M.

Casway (for Intervenor Virginia Board of Optometry) were on the joint brief, for Petitioner/Intervenor States and/or State Boards of Optometry.

Edward A. Groobert, with whom Ellis Lyons, Bennett Boskey, D. Biard MacGuineas, and Morris Klein (for American Optometric Ass'n), and William A. Gould, Jr., Alan G. Perkins, and Mark L. Andrews (for California Optometric Ass'n) were on the joint brief, for Petitioners in Nos. 89-1191 and 89-1202.

Lawrence DeMille-Wagman, Attorney, Federal **[**2]** Trade Commission ("FTC"), with whom Jay C. Shaffer, Acting General Counsel, and Ernest J. Isenstadt, Assistant General Counsel, FTC, were on the brief, for Respondent.

Andrew J. Pincus, with whom Kenneth S. Geller was on the brief, for Intervenor National Ass'n of Optometrists and Opticians in Nos. 89-1190, 89-1191, and 89-1202.

Steven S. Honigman, Donald S. Dawson, and M. Joseph Stoutenburgh were on the joint brief for Amici Curiae American Ass'n of Retired Persons and the Opticians Ass'n of America.

Paul Farley, Assistant Attorney General of New Mexico, H. Al Cole, Jr., Senior Deputy Attorney General of North Carolina, and Craig M. Eichstadt, Assistant Attorney General of South Dakota, were on the joint brief for Amici Curiae States of New Mexico, Alabama, Colorado, Mississippi, North Carolina, South Dakota, Texas, Utah, and Wyoming.

Fred Niemann, Jr. was on the brief for Amicus Curiae Texas Optometric Ass'n, Inc.

Peter M. Sfikas and Werner Strupp were on the joint brief for Amici Curiae American Dental Ass'n and American Podiatric Medical Ass'n.

Mary C. Jacobson, Deputy Attorney General, Andrea M. Silkowitz, Assistant Attorney General, and Regina H. Nugent, Deputy Attorney **[**3]** General, were on the brief for Amici Curiae New Jersey State Board of Optometry and the New Jersey State Board of Ophthalmic Dispensers and Ophthalmic Technicians and the State of Oregon.

Thomas J. Gillooly, Senior Deputy Attorney General, was on the brief for Amicus Curiae State of West Virginia.

Kathlyn Rhodes entered an appearance for Petitioners State of Oklahoma and the Oklahoma Board of Examiners in Optometry in No. 89-1316.

Randall W. Childress entered an appearance for Amicus Curiae State of New Mexico.

Judges: Wald, Chief Judge, and Buckley and D. H. Ginsburg, Circuit Judges.

Opinion by: BUCKLEY

Opinion

[*978] BUCKLEY, Circuit Judge.

The American Optometric Association, the California Optometric Association, and several States or state boards of optometry challenge a Federal Trade Commission rule that declares certain state laws restricting the practice of optometry to be unfair acts or practices. We find that the FTC lacked the statutory authority to promulgate the rule because Congress did not authorize the Commission to regulate the sovereign acts of the States.

I. BACKGROUND

A. Statutory Framework

As enacted in 1914, the Federal Trade Commission Act ("Act") **[**4]** empowered the FTC to prevent persons, partnerships, and corporations "from using unfair methods of competition in commerce." *See* Act, ch. 311, § 5, 38 Stat. 719 (1914). In 1938, Congress amended section 5 to authorize the Commission to prevent "unfair or deceptive acts or practices" as well as unfair methods of competition. Wheeler-Lee Amendment to the FTC Act, ch. 49, § 3, 52 Stat. 111 (1938). Finally, in 1975, Congress expanded the scope of section 5 to encompass acts "affecting" commerce. Magnuson-Moss Warranty -- FTC Improvement Act, § 202(a), 88 Stat. 2193 (1975) ("Magnuson-Moss Amendments"). Thus, the relevant language of section 5(a) now reads as follows:

> (1) ***HN1***[] Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
> (2) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

15 U.S.C. § 45 **[**5]** *(a) (1988)*.

The Magnuson-Moss Amendments also added section 18 to the Act, which grants the FTC rulemaking authority to define specific acts or practices as unfair. ***HN2***[] Section 18(a)(1) provides that

> the Commission may prescribe --
> (A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce . . ., and
> (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce. . . . Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

Id. § 57a(a)(1) (1988).

B. Procedural Background

These consolidated petitions seek review of the FTC's Ophthalmic Practice Rules, *54 Fed. Reg. 10,285 (1989)* ("Eyeglasses II" or "rule").

Beginning in the mid-1970's, the FTC began to investigate state-imposed restrictions on the practice of optometry. These tended to discourage the "commercial practice" of optometry -- such as partnerships between optometrists and laymen, **[**6]** use of trade names, and chain operations combining the practice of optometry with the sale of eyeglasses in shopping centers -- in favor of "traditional optometric practice" typified by sole practitioners operating in professional office buildings under their own names. The FTC's studies indicated that these restrictions resulted in higher prices and reduced the quality of eye care available to the public.

In 1980, the FTC published the results of its investigation and issued an Advance Notice of Proposed Rulemaking requesting comments and recommendations. *45 Fed. Reg. 79,823 (1980)*. The Commission formally initiated a rulemaking proceeding in **[*979]** 1985, *50 Fed. Reg. 598 (1985)*, and, on March 13, 1989, issued Eyeglasses II. *54 Fed. Reg. 10,285 (1989)*. Commission Chairman Daniel Oliver voted against adoption of the rule based on principles of federalism and his view that the FTC was without authority to promulgate it. *Id. at 10,305*.

Eyeglasses II revised Title 16, Part 456 of the Code of Federal Regulations to include a new section 456.4, "State bans on commercial practice," which begins as follows:

> (a) It **[**7]** is an unfair act or practice for any *state or local governmental entity* to:
>> (1) Prevent or restrict optometrists from entering into associations with lay persons or corporations. . . .

Id. at 10,305 (emphasis added). There follows an extensive list of the acts or practices the FTC found to be unfair, including state laws or regulations prohibiting laymen from employing optometrists to provide optometric services, limiting the number of offices that may be owned or operated by optometrists individually or as participants in such associations, and prohibiting them from practicing in department stores or shopping centers, or from practicing under any name other than their own. *Id.*

Eyeglasses II provides that the rule may be used as a defense to any state proceeding brought against an optometrist or his affiliated entity for violating those state laws or rules declared by the rule to be unfair practices. *Id.* (to be codified at *16 C.F.R. § 456.5(b)*). The rule disclaims, however, any intention to interfere with the authority of state or local governments to safeguard the health and safety of the recipients of eye care services, including **[**8]** their authority to require that optometric services be provided only by a person qualified to do so by such state or local law and to establish minimum quality standards for ophthalmic goods and services. *Id.* (to be codified at *16 C.F.R. § 456.5(a)*). Finally, it defines a "person" as "any individual, partnership, corporation, association *or other entity*." *Id. at 10,304* (to be codified at *16 C.F.R. § 456.1(g)*) (emphasis added).

Petitioners challenge all of these provisions. Several interested parties appear as *amici curiae* arguing for and against the rule.

II. DISCUSSION

Petitioners challenge Eyeglasses II on both statutory and constitutional grounds. They also attack the factual record upon which the FTC based its decision to adopt the rule. Because we agree with petitioners that the rule exceeds the FTC's statutory authority and vacate it on that basis, we do not address the alternative grounds presented.

Eyeglasses II declares that certain state-imposed restrictions on the practice of optometry are unfair acts or practices. The question of the Commission's authority to promulgate the rule presents two specific issues of statutory interpretation: **[**9]** whether a State acting in its sovereign capacity is a "person" within the FTC's enforcement jurisdiction under section 5(a)(2) of the Act, and whether a state law may be an unfair or deceptive act or practice within the FTC's rulemaking authority under section 18(a)(1).

In reviewing the FTC's interpretation of its organic act, we must first determine whether Congress had an intention on the question at issue using the traditional ***HN3***[] tools of statutory construction. *Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43* & n.9, *104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. These tools include the language and structure of the Act, its legislative history, and any applicable canons of statutory construction. *See Dole v. United Steelworkers of America, 494 U.S. 26, 110 S. Ct. 929, 934-35, 937* & n. 7, *108 L. Ed. 2d 23 (1990)*; *see also Michigan Citizens for an Indep. Press v. Thornburgh, 276 U.S. App. D.C. 130, 868 F.2d 1285, 1292-93* (D.C. Cir.) ("If employment of an accepted canon of construction illustrates that Congress had a specific intent **[**10]** on the issue in question, then the case can be disposed of under the first prong of *Chevron*.") (emphasis deleted), *aff'd without opinion by an equally divided Court, 493 U.S. 38, 110 S. Ct. 398, 107 L. Ed. 2d 277 (1989)* (per curiam).

[*980] ***HN4***[] There is nothing in the language of sections 5(a) and 18(a)(1) to indicate that Congress intended to authorize the FTC to reach the "acts or practices" of States acting in their sovereign capacities. The legislative history of the Act suggests that at the time of its original enactment, Congress was concerned with the anticompetitive conduct of *businesses*, whether organized as corporations, partnerships, associations, or sole proprietorships. The House Report declared that the purpose of the Act was to empower the FTC to stop monopolies "at the threshold [by] prevent[ing] unfair competition," H.R. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914); *see also FTC v. Raladam Co., 283 U.S. 643, 647-50, 75 L. Ed. 1324, 51 S. Ct. 587 (1931)* (discussing purposes of the Act); its sponsor stated that **[**11]** ***HN5***[] the FTC's power under section 5 extended

> to persons, partnerships, and corporations, and with respect to the great *industrial activities* in interstate commerce. It embraces . . . every kind of person, natural or artificial, *who may be engaged in interstate commerce*.

See 51 Cong. Rec. 14,928 (remarks of Rep. Covington) (emphasis added). We can find nothing in the language or history of subsequently adopted amendments to support a finding that Congress has expanded the FTC's jurisdiction to embrace state action. In the absence of any evidence of such a purpose, we turn to well-established rules of statutory construction, which we find dispositive. *See INS v. Cardoza-Fonseca, 480 U.S. 421, 449, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987)* ("ordinary canons of statutory construction compelling").

The Supreme Court has observed that "in *HN6*[] common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 2308, 105 L. Ed. 2d 45 (1989)* **[**12]** (internal quotes omitted) (holding that a State is not a person within the meaning of *42 U.S.C. § 1983*); *see also Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667, 61 L. Ed. 2d 153, 99 S. Ct. 2529 (1979)*; *United States v. Cooper Corp., 312 U.S. 600, 604, 85 L. Ed. 1071, 61 S. Ct. 742 (1941)*. On the other hand, several Supreme Court decisions hold that *HN7*[] a State *is* a person for purposes of the antitrust laws. *See Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 155, 74 L. Ed. 2d 882, 103 S. Ct. 1011 (1983)* (the words "persons" and "purchasers" in the Robinson-Patman Act are "sufficiently broad to cover governmental bodies") (internal quotes omitted); *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 395, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)* ("the definition of 'person' or 'persons' [in the antitrust laws] embraces both cities and States"); *see also Hawaii v. Standard Oil Co., 405 U.S. 251, 260-61, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)* **[**13]** (State may sue as a "person" under section 4 of the Clayton Act); *Georgia v. Evans, 316 U.S. 159, 162, 86 L. Ed. 1346, 62 S. Ct. 972 (1942)* (State may sue under section 7 of the Sherman Act).

HN8[] Although a State may be a "person" for purposes of the antitrust laws, it is equally clear, under the "state action" doctrine enunciated in *Parker v. Brown, 317 U.S. 341, 350-51, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, that when a State acts in a sovereign rather than a proprietary capacity, it is exempt from the antitrust laws even though those actions may restrain trade. *See City of Lafayette, 435 U.S. at 391*; *see also id. at 408-13* (state action doctrine provides antitrust immunity for actions taken in a State's capacity as sovereign but does not cover proprietary functions carried out by municipal subdivisions of the State) (plurality opinion of Brennan, J.). Thus, properly framed, the question before us is not simply whether a State is a person under section 5(a)(2) of the Act, but whether a State acting in its sovereign capacity **[**14]** is subject to the Act.

The *Parker* state action doctrine has been applied to limit the reach of the FTC's enforcement jurisdiction. *See Massachusetts Furniture & Piano Movers Ass'n v. FTC, 773 F.2d 391, 394-97 (1st Cir. 1985)*. *Parker* and later cases applying **[*981]** the doctrine, however, have involved judicial interpretations of the relevant statutes in the context of an adjudication, while in this case we consider whether the doctrine limits the FTC's rulemaking authority. *HN9*[] When engaged in rulemaking pursuant to section 18(a)(1), the Commission itself exercises substantive lawmaking authority delegated to it by Congress. Petitioners argue that we should extend the state action doctrine to limit the FTC's rulemaking authority as well.

Because the rule of statutory construction employed by the Court in *Parker* applies with equal force in this context, we conclude that *HN10*[] the state action doctrine is applicable to limit the FTC's rulemaking authority. In holding that **[**15]** *HN11*[] the Sherman Act was not intended to apply to the acts of States as sovereigns, the Court observed that it could

> find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an *unexpressed purpose* to nullify a state's control over its officers and agents *is not lightly to be attributed* to Congress.

Parker, 317 U.S. at 350-51 (emphasis added). The Supreme Court has since applied this rule of construction in many cases involving issues of federalism. In *Will*, for example, the Court articulated the following "ordinary rule of statutory construction":

> *HN12*[] If Congress intends to alter the "usual constitutional balance between the States and the Federal **[**16]** Government," it must make its intention to do so "unmistakably clear in the language of the statute."

109 S. Ct. at 2308 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)). The Court explained the rationale for this rule as follows:

> "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that *the legislature* has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

Id., 109 S. Ct. at 2308-09 (emphasis added) (quoting United States v. Bass, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971)).

This rule of statutory construction serves to ensure that the States' sovereignty interests are adequately protected by the political process. In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547-55, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985), the Supreme Court held that ***HN13***[] the Tenth **[**17]** Amendment does not impose substantive limitations on federal legislative power. Rather, "State sovereign interests" are "properly protected by procedural safeguards inherent in the structure of the federal system," id. at 552, *e.g.*, the States' equal representation in the Senate. Id. at 551. "The fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result." Id. at 554.

The Commission nevertheless insists that

> in providing the Commission with Section 18 rulemaking authority, Congress has made a limited delegation to the FTC of its legislative authority to protect consumers from acts or practices that unreasonably interfere with the efficient functioning of interstate markets.

Eyeglasses II, 54 Fed. Reg. at 10,296. As it finds the state acts and practices proscribed by the rule to be unfair, the Commission concludes that "Congress authorized the FTC to challenge" them in a section 18 rulemaking. *Id.* Were we to defer to this construction and uphold Eyeglasses II in the face of congressional **[**18]** silence, we would short-circuit the protections offered States by the political process. *See* L. Tribe, *American Constitutional* **[*982]** *Law* § 6-25, at 480 (2d ed. 1988) ("to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests") (emphasis in original); *The Supreme Court, 1987 Term -- Leading Cases*, *102 Harv. L. Rev. 143, 296 (1988)* ("A rule that distills displacement of state law from congressional *silence* divests states of even *Garcia's* slender procedural guarantee.") (emphasis in original).

The clear statement doctrine leaves no room for inferences. ***HN14***[] An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it. When one applies this rule of construction to sections 5 and 18(a)(1) of the Act, it becomes clear that the FTC had no authority to promulgate Eyeglasses II.

First, state regulation of the practice of optometry is a quintessentially sovereign act. Second, **[**19]** there can be little question that accepting an interpretation of the Act that sanctions the rule would alter the usual balance between the Federal Government and the States. The rule subjects States to direct FTC regulation by declaring that certain state laws constitute unfair acts or practices. It thus empowers the FTC directly to "prevent" States from imposing certain restrictions on the practice of optometry. *See* 15 U.S.C. § 45(a)(2). Third, nothing in either the language of the Act or its legislative history evidences a congressional intent to alter the state-federal balance as the rule would. The Magnuson-Moss Amendments, which codified the FTC's rulemaking authority, contain no language that could be construed as an explicit congressional authorization to reach the sovereign acts of the States. This silence is especially compelling in view of Congress's more than thirty years of experience with the state action doctrine at the time it enacted section 18(a)(1). As nothing in the language of the Act clearly expresses a congressional intent to empower the FTC to regulate state action, we must reject the rule.

III. CONCLUSION

Because we find that **[**20]** the FTC has acted beyond its statutory authority in promulgating Eyeglasses II, we grant these petitions and vacate the rule.

So ordered.

LexisNexis

Broad. Music, Inc. v. Hearst/ABC Viacom Entm't Servs.

United States District Court for the Southern District of New York

August 29, 1990, Decided

No. 89 Civ. 2833 (JFK)

Reporter

746 F. Supp. 320 *; 1990 U.S. Dist. LEXIS 11537 **; 16 U.S.P.Q.2D (BNA) 1683 ***; Copy. L. Rep. (CCH) P26,627; 1990-2 Trade Cas. (CCH) P69,171

BROADCAST MUSIC, INC.; COTILLION MUSIC, INC.; IRVING MUSIC, INC.; SCREEN GEMS-EMI MUSIC, INC.; EMBASSY MUSIC CORPORATION; MICHAEL JOE JACKSON d/b/a MIJAC MUSIC; STONE AGATE MUSIC, DIVISION OF JOBETE MUSIC CO., INC.; CEDAR-WOOD PUBLISHING, a DIVISION OF DICK JAMES MUSIC, INC.; PEER INTERNATIONAL CORPORATION; TREE PUBLISHING CO, INC.; MELODY JEAN CRADDOCK d/b/a BOPPING MUSIC COMPANY; LOWERY MUSIC COMPANY, INC.; DORINDA MORGAN, as TRUSTEE of the "HITE MORGAN and DORINDA MORGAN 1974 TRUST" d/b/a GUILD MUSIC COMPANY; DICK JAMES MUSIC, INC.; and MICHAEL JACKSON d/b/a MACLEN MUSIC, Plaintiffs and Counterclaim Defendants, v. HEARST/ABC VIACOM ENTERTAINMENT SERVICES d/b/a LIFETIME TELEVISION, Defendant and Counterclaim Plaintiff. HEARST/ABC VIACOM ENTERTAINMENT SERVICES d/b/a LIFETIME TELEVISION, Defendant and Third-Party Plaintiff, v. FRANCES W. PRESTON, Third-Party Defendant

Core Terms

license, blanket, music, counterclaim, monopolization, allegations, third-party, affirmative defense, antitrust, rights, repertoire, misuse, cable, infringement, affiliates, performing, Broadcast, program services, programming, television, motion to dismiss, copyright owner, monopoly power, cable service, composers, pleadings, copyright infringement, cable television, Sherman Act, compositions

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss for failure to state a claim may be granted only if it appears certain that no relief could be granted under any set of facts that could be proved consistent with the allegations. The factual allegations set forth in the complaint or counterclaim must be accepted as true and a court must view the allegations in the light most favorable to the pleader.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN2[] **Private Actions, Remedies**

Even if it appears on the face of the pleadings that recovery is remote, a claim will withstand the motion to dismiss as long as the pleader retains a possibility of success. To this landscape must be added the caveat that dismissals on the pleadings are especially disfavored in antitrust cases.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN3[] **Antitrust & Trade Law, Sherman Act**

The Sherman Antitrust Act *§ 1*, *15 U.S.C.S. § 1*, forbids every contract, combination or conspiracy in restraint of trade or commerce among the several states. The *§ 1* claimant must demonstrate a (1) concerted action by two or more persons which (2) unreasonably restrains interstate trade or commerce.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Conspiracy to Monopolize, Elements**

Unlike the proof required to establish a conspiracy to monopolize under the Sherman Antitrust Act *§ 2*, *15 U.S.C.S. § 2*, a specific intent to create a monopoly is not required under the Sherman Antitrust Act *§ 1*, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act *§ 2*, *15 U.S.C.S. § 2*, affords a basis for three distinct civil claims, each of which defendant alleges: (1) monopolization; (2) attempted monopolization; and (3) conspiring to monopolize.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN6[] **Regulated Practices, Market Definition**

To establish a monopolization claim, the claimant must demonstrate monopolizing conduct coupled with monopoly power in the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

Monopolizing conduct is the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN8[] **Monopolies & Monopolization, Actual Monopolization**

Monopolizing power is a matter of capacity--the possession of power to control prices or exclude competition. Before monopoly power may be assessed, the relevant geographic and product markets must be defined.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Copyright Law > ... > Protected Subject Matter > Musical Works > Musical Arrangements

Copyright Law > ... > Protected Subject Matter > Musical Works > General Overview

HN9[] **Regulated Practices, Market Definition**

Fed. R. Civ. P. 8 does not require that a claimant define specifically the boundaries of its purported market. Questions of market definition can be narrowed and determined through the discovery process.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Sherman Act, Claims**

An attempted monopolization claim under the Sherman Antitrust Act *§ 2*, *15 U.S.C.S. § 2*, comprises three elements: (1) anticompetitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power. These elements essentially track those required for a successful monopolization claim.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN11[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The conspiracy to monopolize claim entails two components: (1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy. Defendant need not allege that the intended monopoly succeeded in any way; the agreement to restrain trade or monopolize plus the overt act in furtherance of the agreement complete the offense. Only a bare bones statement of conspiracy or injury under the antitrust laws without any supporting facts permits dismissal.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > License

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN12[] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

The patent misuse doctrine allows a court of equity to refuse protection of a patented invention when the patentee uses his lawful monopoly over the patented invention to assert economic control over unpatented products.

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

HN13[] **Civil Infringement Actions, Presumptions**

Public performance of the copyrighted composition is an element of a prima facie copyright infringement claim.

Copyright Law > ... > Ownership Rights > Performances > Definition of Performance

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > ... > Ownership Rights > Performances > General Overview

HN14[] **Performances, Definition of Performance**

Under the Copyright Act, public performance is defined as either (1) performing the work at a place open to the public or (2) transmitting or communicating a performance to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. *17 U.S.C.S. § 101*.

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Copyright

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

HN15[] **Related Legal Issues, Copyright**

Congress intended the definitions of public and performance to encompass each step in the process by which a protected work wends its way to its audience.

Copyright Law > ... > Defenses > Estoppel > Equitable Estoppel

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

HN16[] **Estoppel, Equitable Estoppel**

Equitable estoppel applies both in law and in equity to deny a party the right to plead or prove an otherwise important fact because of something he has done or omitted to do.

Copyright Law > ... > Defenses > Estoppel > Equitable Estoppel

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

HN17[] **Estoppel, Equitable Estoppel**

Crucial to application of the doctrine of equitable estoppel in the copyright infringement context is at least partial responsibility of the party seeking recovery for the alleged infringement.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN18[] **Affirmative Defenses, Unclean Hands**

The unclean hands doctrine is a limited device, invoked by a court only when a plaintiff otherwise entitled to relief has acted so improperly with respect to the controversy at bar that the public interest in punishing the plaintiff outweighs the need to prevent defendant's tortious conduct.

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN19[] **Civil Infringement Actions, Defenses**

The defense of unclean hands in copyright actions is recognized only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action. This doctrine is peculiarly fact-specific, rendering dismissal on the skeletal basis of the pleadings inappropriate.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

HN20[] **Employer Violations, Interference With Protected Activities**

Officers and employees of a corporation may be held individually liable for corporate actions that violate the antitrust laws if they authorize or participate in the unlawful acts.

Civil Procedure > Pleading & Practice > Pleadings > Impleader

HN21[] **Pleadings, Impleader**

See *Fed. R. Civ. P. 14(a)*.

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Judges: John F. Keenan, United States District Judge.

Opinion by: KEENAN

Opinion

[*1684] [*322]** OPINION AND ORDER

JOHN F. KEENAN, UNITED STATES DISTRICT JUDGE

This copyright infringement action is before the Court on plaintiffs' motion to dismiss the three-count antitrust and copyright **[*323]** misuse counterclaim and to strike the affirmative defenses of defendant Hearst/ABC Viacom Entertainment Services d/b/a Lifetime Television ("Lifetime"). *Fed. R. Civ. P. 12(b)(6)*, *(f)*. Frances W. Preston also moves to dismiss the third-party complaint against her. For the reasons discussed below, the Court grants in part and denies in part plaintiffs' application. The third-party complaint is dismissed with leave to re-plead.

BACKGROUND

Plaintiff Broadcast Music, Inc. ("BMI") is engaged in the business of licensing performing rights in **[**2]** the copyrighted musical compositions of its affiliated composers and publishers. BMI currently represents over 53,000 affiliated composers and over 32,000 affiliated publishers who have granted BMI non-exclusive authority to license the performing rights in over 1.5 million musical compositions. Where the authority to license performing rights is non-exclusive, the copyright owner retains the right to license his works individually or on a catalogue-wide basis as if BMI did not exist. After BMI issues a license to a music user, [1] it collects the license fees and distributes all royalties to the composers and publishers after expenses and allowances for cash reserves. BMI also monitors unlicensed or unauthorized performances of music and, when able to join the copyright owner, brings infringement actions.

[3]** The thousands of individual copyright owners who have appointed BMI as their licensing agent have also authorized BMI to determine the types of licenses that it will offer and the prices at which these licenses will be available. BMI licenses its repertoire on an aggregate basis. That is, it issues a blanket license which entitles the licensee to use any or all of the works in the BMI repertoire as often as desired during the **[***1685]** license term. The license is typically conveyed for a fee reflecting a percentage of the user-licensee's revenue. In the television and radio field, BMI also offers a "per program" license which measures license fees based upon the popularity of particular programs or the time-periods in which BMI music is heard.

Lifetime is a cable television program service (in cable television parlance a "cable supplier") that acquires, produces and markets video programming to subscribers, primarily through cable system operators located across the United States. Lifetime is available to tens of millions of Americans each day on their home televisions.

Like most other cable television program services, Lifetime produces little original programming. The bulk of its programming **[**4]** consists of theatrical movies and other pre-recorded programs which are licensed or purchased by Lifetime from third-party syndicators. Most of this programming features copyrighted music, which is selected by the program producer and recorded on the program soundtrack. The music is thus permanently integrated into the program and the cable service wishing to transmit the program must either transmit whatever music is incorporated in the program or not broadcast the program at all.

A pre-recorded television program or theatrical motion picture represents the collaborative efforts of numerous individuals: composers, actors, directors, editors, etc. In the cable television industry, all copyright rights -- save one -- are secured by the program suppliers at the time of production and are transferred to the broadcasting cable service as part of the program package. The one exception to this practice concerns the licensing of music performing rights. These rights are not obtained and conveyed by the producer/syndicator, but are reserved by the copyright owner or other licensor (such as BMI) for licensing in separate transactions with the cable program services.

Defendant alleges that cable **[**5]** television music performing rights are not negotiated and licensed in a transaction between the producer and composer "at the source" because **[*324]** the copyright proprietors who are

[1] BMI licenses the works in its repertoire to the three major television networks, cable program suppliers, and thousands of local television and radio stations. Other licensees include concert halls, nightclubs, bars and skating rinks.

BMI affiliates prefer that the cable services deal with their licensing agent, BMI. The result of this, defendant contends, is that each cable service is required to purchase, through the blanket license, performing rights in all of the music in BMI's repertoire without regard to the service's needs.

Defendant maintains that the alternative of licensing performing rights directly from the copyright owner is a Hobson's choice. The blanket license system, defendant submits, eliminates any incentive for BMI's affiliates to license their works directly. BMI's affiliates are insulated from the negotiations fostered by a competitive marketplace and assured the benefits of what defendant characterizes as "BMI's take-it-or-leave-it licensing tactics." Moreover, defendant claims that it would be prohibitively expensive to locate and obtain licenses from individual composers and publishers.

Plaintiffs allege that Lifetime has for several years willfully infringed numerous copyrights of musical compositions in the BMI **[**6]** repertoire by publicly performing them without a license from either BMI or the individual copyright owners. *See* *17 U.S.C. § 106(4) (1977 & Supp. 1990)*. When plaintiff first became aware of the alleged copyright violations, it proffered an annual blanket license to Lifetime for a fee calculated at one percent of Lifetime's gross revenues. Lifetime claims that the proffered fee would be three to four times greater than the blanket license fee charged to BMI's "pay" cable television, [2] broadcast network and local broadcast station licensees. Lifetime rejected the blanket license offer and this suit followed.

The Consent Decree

In 1964, the United States commenced an anti-trust action against BMI alleging violations **[**7]** of the Sherman Anti-trust Act. In 1966, the United States District Court for the Southern District of New York entered a consent decree in that action, *see United States v. Broadcast Music, Inc*., [1966] Trade Cas. (CCH) P71,941 (S.D.N.Y. 1966), which prohibits BMI from discriminating among similarly situated music users. The second major music licensing society in the United States, the American Society of Composers, Authors and Publishers ("ASCAP") [3] is governed by a separate consent decree which provides for a "rate court." If any music user cannot negotiate an agreeable **[***1686]** license with ASCAP, the user may apply to the district court supervising the decree to fix a reasonable fee. BMI's licenses, on the other hand, are granted through private bargaining alone.

[8]** DISCUSSION

HN1[] A motion to dismiss for failure to state a claim may be granted only if it appears certain that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See* *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*; *Lipsky v. Commonwealth United Corp., 551 F.2d 887, 894 (2d Cir. 1976)*; *Burger v. Health Ins. Plan of Greater New York, 684 F. Supp. 46, 49 (S.D.N.Y. 1988)*. The factual allegations set forth in the complaint or counterclaim must be accepted as true, *see* *Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975, 979, 108 L. Ed. 2d 100 (1990)*, and the Court must view the allegations in the light most favorable to the pleader. *See* *Scheuer v. Rhodes, 416 U.S. 232, 237, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*; *Yoder v. Orthomolecular Nutrition Inst., Inc., 751 F.2d 555, 562 (2d Cir. 1985)*. ***HN2***[] Even if it appears on the face of the pleadings that recovery is remote, the claim will withstand the motion **[*325]** to dismiss as long as the pleader retains a possibility of success. *Scheuer, 416 U.S. at 237*. To this landscape must be added the caveat that "dismissals on the pleadings are especially disfavored in antitrust cases." *Schwartz v. Jamesway Corp., 660 F. Supp. 138, 141 (E.D.N.Y.* ***[**9]*** *1987)* (citing *Hospital Bldg. Co. v. Rex Hosp.* *Trustees, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*.

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[2] "Pay" cable program services typically are offered by cable system operators to subscribers for a monthly premium over the basic monthly cable service fee. Lifetime's cable service is labelled "basic" because it is generally offered by cable operators to subscribers as part of a routine cable package.

[3] Virtually every domestic copyrighted composition is in the repertory of either ASCAP or BMI, but not both. Consequently, defendant asserts, ASCAP and BMI do not compete in the same marketplace. Lifetime must, as a practical matter, seek license relationships with both organizations.

Section 1 of the Sherman Act

Defendant alleges violation of *section 1* of the Sherman Anti-trust Act, *15 U.S.C. § 1 (1982 & Supp. 1990)* in count I of its counterclaim. ***HN3***[] *Section 1* forbids "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States." The *section 1* claimant must demonstrate (1) concerted action by two or more persons which (2) unreasonably restrains interstate trade or commerce. *See Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F. Supp. 832, 837 (S.D.N.Y. 1988)*. *Accord International Distribution Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786, 793* (2d Cir.), *cert. denied*, *482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987)*. ***HN4***[] "Unlike the proof required to establish a conspiracy to monopolize under *section 2*, a specific intent to create a monopoly is not required under *section 1*." *Walsh Trucking, 812 F.2d at 793*.

Defendant maintains that the nonexclusive agreements between BMI and its affiliates, which permit the use of the blanket license, represent a concerted effort to increase the prices of music performing rights and to restrict **[**10]** the market choices available to cable program services. Plaintiffs portray defendant's counterclaim and affirmative defenses as substantively identical to a series of earlier profitless challenges to the blanket license, particularly *Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors and Publishers, 744 F.2d 917 (2d Cir. 1984)*, *cert. denied*, *469 U.S. 1211, 84 L. Ed. 2d 329, 105 S. Ct. 1181 (1985)*. *Buffalo Broadcasting* involved a challenge under *section 1* of the Sherman Act by a class of local television stations to the blanket licenses offered by BMI and ASCAP. After a bench trial, Judge Gagliardi ruled that the blanket license was an unreasonable restraint of trade. The Second Circuit reversed, ruling that the class had not established that the blanket license restrained trade.

Writing for a unanimous panel, Judge Newman concluded that given the availability of realistic licensing alternatives, the blanket license had no anti-competitive effect upon local television stations wishing to purchase music performing rights. *See id. at 926-33*. Plaintiffs argue that this ruling foreclosed all future challenges to the blanket license as an unreasonable restraint of trade. The Court disagrees.

[11]** Plaintiffs' position misapprehends the plain import of the Second Circuit's decision. Several passages from Judge Newman's opinion bear out this point. In the decision's preface, Judge Newman wrote:

> "For reasons that follow, we conclude that the evidence was insufficient as a matter of law to show that the blanket license is an unlawful restraint of trade *in the legal and factual context in which it currently exists*."

Id. at 919 (emphasis added). In discussing the precedential effect of *BMI v. CBS, Inc., 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*, [4] Judge Newman wrote: "the fact that CBS did not prove that blanket licensing of networks restrained competition does not necessarily mean that blanket licensing of local stations may not be shown to be a restraint." *Id. at 925*. If any confusion over the significance of *Buffalo Broadcasting* lingered, **[***1687]** Judge Newman erased it in the penultimate sentence of the opinion:

> "*Without doubting that the context in which the blanket license is challenged can have a significant bearing on the outcome*, we hold that the local television stations have not presented evidence in this case . . . ."

[12]** **[*326]** *Id. at 933*. [5]

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[4] In *BMI*, the Supreme Court held that the blanket license is not a *per se section 1* violation.

[5] The Court does not dispute that Judge Winter, who concurred in *Buffalo Broadcasting*, maintains that absent evidence of agreement among composers or producers to refrain from licensing performing rights independently, "a non-exclusive blanket license cannot restrain competition." *Id. at 934* (Winter, J., concurring). The majority decision of the panel, however, is not that broad. *See BMI, Inc. v. The Christian Broadcasting Network, Inc.*, 89 Civ. 6246 (JES) (Transcript of May 11, 1990 Oral Argument on BMI's motion to dismiss identical antitrust counterclaims of another basic cable television program service, pp. 8-9).

Because the blanket license is not *per se* unlawful, *see* *BMI, Inc., supra, 441 U.S. at 20*, whether it constitutes an unreasonable restraint of trade is determined under the rule of reason. [6] As explained by the Supreme Court, "'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723* **[**13]** *99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)* (citation omitted). Here, an array of factual issues await the crystallizing effect of discovery, including the history of music licensing to cable program services, BMI's reasons for insisting upon the blanket license for cable program services, the presence of disincentives to individual copyright proprietors to market their compositions separately, the concomitant absence of alternatives available to cable program services and the effect of the blanket license on the availability and prices of music performing rights for cable program services.

If plaintiffs' challenge to the sufficiency of defendant's antitrust allegations were governed by the more stringent requirements of *Fed. R. Civ. P. 9(b)*, a different result might obtain. **[**14]** *See Christian Broadcasting* Tr. at 6. Antitrust allegations, however, are governed by the "short and plain statement" requirement of *Rule 8(a)*. Defendant has pleaded sufficient allegations of the material elements of a *section 1* violation to survive a motion to dismiss.

Section 2 of the Sherman Act

HN5[] *Section 2* of the Sherman Act, *15 U.S.C. § 2 (1982 & Supp. 1990)*, affords a basis for three distinct civil claims, each of which defendant alleges: (1) monopolization; (2) attempted monopolization; and (3) conspiring to monopolize. *See* *Medtronic, supra, 687 F. Supp. at 837*.

HN6[] To establish a monopolization claim, the claimant must demonstrate monopolizing conduct coupled with monopoly power in the relevant market. *See* *Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990)*. ***HN7***[] Monopolizing conduct is "'the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Id*. (quoting *United States v. Grinnell, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *see* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)* (describing **[**15]** monopolizing conduct as "exclusionary" or "predatory"). This requirement is in keeping with the cornerstone precept of ***antitrust law*** that competition is to be safeguarded, not competitors. *See* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; *Kelco Disposal, Inc. v. Browning-Ferris Indus., 845 F.2d 404, 411 (2d Cir. 1988)*, *aff'd*, *492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)*; *Medtronic, 687 F. Supp. at 838*.

Defendant alleges that plaintiffs and their affiliates have agreed to accord BMI absolute authority to determine the types of licenses it will offer and the prices at which these licenses will be offered. Defendant further asserts that the affiliates have determined not to license their rights directly, thereby enabling plaintiff to employ the purportedly anti-competitive **[*327]** blanket license. Counterclaim para. 22. Accepting this assertion as true, the Court believes defendant has depicted a "pernicious market structure in which concentration of power saps the salubrious influence of competition." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. *Cf*. L. Sullivan, *Handbook of the Law of Antitrust* 107 **[**16]** (1977) (concerted action which enables wielding of monopoly power constitutes monopolization act in violation of *section 2*). Defendant has pleaded the requisite conduct that is exclusionary of competition.

HN8[] Monopolizing power "is a matter of capacity -- the possession of power to control **[***1688]** prices or exclude competition." *Id*. at 30. Before monopoly power may be assessed, the relevant geographic and product markets must be defined. *See* *Speed Auto Sales, Inc. v. American Motors Corp., 477 F. Supp. 1193, 1197*

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[6] As acknowledged by the *Buffalo Broadcasting* majority, virtually no alleged concerted action has ever been ruled lawful *per se. See* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 23 and n. 62 (1981).

(E.D.N.Y. 1979). "*Rule 8* ***HN9***[] does not require that a [claimant] 'define specifically the boundaries of its purported market' . . . . Questions of market definition can be narrowed and determined through the discovery process." *Minpeco, S.A. v. Conticommodity Servs., Inc., 552 F. Supp. 327, 331 (S.D.N.Y. 1982)*. Here, the relevant product market is apparent: copyrighted musical compositions in BMI's repertoire.

The relevant geographic market is a national one, as BMI offers licenses to cable services across the country. Finally, defendant easily satisfies the requirement of pleading monopoly power within the relevant market. The majority of domestic copyrighted compositions are **[**17]** in either ASCAP or BMI's repertoire, but not in both. Crediting defendant's allegations, a cable service wishing to transmit a program featuring a composition in BMI's repertoire must apply to BMI for the right.

HN10[] An attempted monopolization claim under *section 2* of the Sherman Act comprises three elements: "(1) anticompetitive conduct; (2) intent to monopolize; and (3) a dangerous probability of obtaining monopoly power." *Delaware & Hudson Railway, supra, 902 F.2d at 180*; *see Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 85 (2d Cir. 1981)*, *cert. denied*, *455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982)*. "These elements essentially track those required for a successful monopolization claim." *Delaware & Hudson Railway, 902 F.2d at 180*. Having determined defendant has pleaded a colorable monopolization claim, the same ruling applies *a fortiori* to the attempt claim. *Id*.

HN11[] The conspiracy to monopolize claim entails two components: "'(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy.'" *Walsh Trucking, supra, 812 F.2d at 795* (citation omitted). **[**18]** Defendant need not allege that the intended monopoly succeeded in any way; the agreement to restrain trade or monopolize plus the overt act in furtherance of the agreement complete the offense. *Id. at 796 n. 8*. Only "a bare bones statement of conspiracy or injury under the antitrust laws without any supporting facts permits dismissal." *Heart Disease Research Found. v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)*.

Viewing the allegations in the light most favorable to defendant, the counterclaim alleges an agreement between BMI and its affiliates which facilitated the purportedly anti-competitive blanket license, and that BMI has unreasonably offered only the blanket license to defendant in furtherance of the agreement to deprive music users of less costly licensing arrangements.

Copyright Misuse Counterclaim and Affirmative Defense

The third count of the counterclaim seeks a declaratory judgment that plaintiffs "have misused, extended and enlarged the copyrights they license and such copyrights are . . . unenforceable until such misuse is purged . . . ." Similarly, defendant's third affirmative defense asserts that plaintiffs' alleged copyright misuse **[*328]** bars recovery **[**19]** on their claims. The parties agree that the so-called ***HN12***[] patent misuse doctrine allows a court of equity to refuse protection of a patented invention when the patentee uses his lawful monopoly over the patented invention to assert economic control over unpatented products. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 136-40, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. In *United States v. Loew's, Inc., 371 U.S. 38, 45, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*, the Supreme Court recognized that copyright owners may sometimes gain comparable market dominance over their copyrighted articles, enabling them to assert economic control over uncopyrighted products. The Court did not, however, use the opportunity to create a copyright misuse doctrine.

The copyright misuse doctrine has been ill-received in the lower courts. Some courts have flatly rejected the existence of the doctrine. *See, e.g., Rural Tel. Serv. Co., Inc. v. Feist Publications, Inc., 663 F. Supp. 214, 220 (D. Kan. 1987)*; *Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672, 686 (S.D.N.Y. 1979)*. Others, while recognizing the defense, have rejected its application on the facts. *See United Tel. Co. of Missouri v. Johnson Publishing Co., Inc., 855 F.2d 604, 611-12* ***[**20]*** *(8th Cir. 1988)* (compiling cases); *Broadcast Music, Inc. v. CBS*, [1983-2] Trade Cas. (CCH) para. 65,551 (S.D.N.Y. 1983) (holding that copyright misuse defense unlikely to succeed on the merits). The Court's research discloses no case where the misuse of a copyright prevented recovery on an infringement claim.

Defendant alleges that BMI has used its legal monopoly power to force cable program **[***1689]** services to purchase the blanket license at exorbitant prices. If proven, this would constitute an illegal extension of BMI's monopoly. Although recovery appears remote, the Court is persuaded by the more recent cases that the affirmative defense of copyright misuse is cognizable.

The Court rejects, however, defendant's assertion of the copyright misuse doctrine as a vehicle for affirmative relief. Such a claim is unprecedented and the Court declines to create the claim. Therefore, the Court dismisses count three of the counterclaim.

Public Performance

Defendant claims in its first affirmative defense that the complaint must be dismissed because it does not publicly perform the musical compositions which are the subject of the complaint. Rather, Lifetime asserts that it transmits **[**21]** its programming to cable operators who in turn relay the signal to the television sets of its viewers. Thus, the argument runs, only the cable operators publicly perform the compositions.

HN13[] Public performance of the copyrighted composition is an element of a *prima facie* copyright infringement claim. [7] ***HN14***[] Under the Copyright Act, public performance is defined as either (1) performing the work "at a place open to the public . . . . or (2) "transmitting or communicating a performance . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." *17 U.S.C. § 101 (1977 & Supp. 1990)*. Plaintiffs submit that the second definition encompasses defendant's provision of programming services to cable system operators. The Court agrees.

[22]** Judge Tenney thoroughly addressed this precise question in *David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752 (S.D.N.Y. 1988)*. After parsing the statute and reviewing the pertinent legislative history, Judge Tenney concluded:

> "it seems apparent from the scope of the examples provided in the legislative history that ***HN15***[] Congress intended the definitions **[*329]** of public and performance to encompass each step in the process by which a protected work wends its way to its audience. Moreover, it would strain logic to conclude that Congress would have intended the degree of copyright protection to turn on the mere method by which television signals are transmitted to the public."

Id. at 759.

The Court dismisses the affirmative defense that no public performance has occurred.

Equitable Estoppel and Unclean Hands

As a second affirmative defense, defendant asserts that BMI is equitably estopped from bringing its copyright infringement claim by virtue of anticompetitive and unlawful behavior. The fourth affirmative defense alleges that the same behavior constitutes unclean hands barring recovery. Although the two doctrines raised by these affirmative defenses have considerable **[**23]** overlap, the Court will discuss them separately.

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[7] A copyright plaintiff must make sufficient allegations concerning (1) originality and authorship of compositions; (2) compliance with formalities required to secure a copyright; (3) ownership of the copyrighted compositions; and (4) unauthorized public performance of the copyrighted compositions by defendant. *See Boz Scaggs Music v. KND Corp., 491 F. Supp. 908, 912 (D. Conn. 1980)*. Defendant challenges only the fourth element.

HN16[] "Equitable estoppel applies both in law and in equity to deny a party the right to plead or prove an otherwise important fact -- here, the act of infringement -- because of something he has done or omitted to do." *Tempo Music, Inc. v. Myers, 407 F.2d 503, 507 n. 8 (4th Cir. 1969)*. In *Tempo*, upon which defendant's argument in large measure relies, the Court estopped plaintiff from recovering on its copyright infringement claim because ASCAP, plaintiff's licensing agent, significantly caused the infringement. The defendant supper club in *Tempo* had sought to avoid infringing the copyrights in songs in ASCAP's repertoire by requesting from ASCAP a list of the songs in its repertoire. Although the consent decree governing ASCAP required it to provide such a list on request, ASCAP declined to furnish the list to defendant, who then inadvertently violated certain of plaintiff's copyrights.

HN17[] Crucial to application of the doctrine of equitable estoppel in the copyright infringement context, therefore, is at least partial responsibility of the party seeking recovery for the alleged infringement. *See Broadcast Music, Inc. v.* ***[**24]*** *CBS, Inc*., [1983-2] Trade Cas. P 65,551 at 68,745 (S.D.N.Y. 1983). Defendant maintains that BMI brought about Lifetime's unlicensed **[***1690]** status and the alleged copyright violations by refusing to offer a reasonable license and precluding realistic alternatives. Reading the counterclaim's allegations in the light most favorable to defendant, the Court believes that defendant has alleged the type of direct causation that led the *Tempo* Court to relieve an infringer of liability.

The Fourth Circuit characterized the *Tempo* defendant's position as "impossible" because it could only avoid infringement by playing no music at all or by paying what it regarded "as an exorbitant licensing fee." *Tempo, 407 F.2d at 506*. Plaintiffs argue that defendant's failure to attempt to avoid playing music from the BMI repertoire or to obtain licenses directly from individual owners is fatal to its assertion that BMI in part "caused" the alleged violations. Crediting Lifetime's assertion that it would be unable to obtain licenses directly, it is fatuous to suggest that Lifetime could remain a competitive cable service while unable to transmit programming containing any of the over 1.5 million **[**25]** compositions in BMI's repertoire. The Court cannot dismiss the equitable estoppel affirmative defense at this stage.

HN18[] The unclean hands doctrine "is a limited device, invoked by a court only when a plaintiff otherwise entitled to relief has acted so improperly with respect to the controversy at bar that the public interest in punishing the plaintiff outweighs the need to prevent defendant's tortious conduct." *Playboy Enter., Inc. v. Chuckleberry Publishing, 486 F. Supp. 414, 435 (S.D.N.Y. 1980)*. ***HN19***[] The defense of unclean hands in copyright actions is "recognized only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action." 3 M. Nimmer, *Nimmer on Copyright, § 13.09[B]* at 13-145 (1988). This doctrine is peculiarly fact-specific, rendering dismissal on the skeletal **[*330]** basis of the pleadings inappropriate. Moreover, the Court's observations concerning dismissal of the equitable estoppel affirmative defense on the pleadings apply with equal force to the unclean hands application. *See supra* pp.19-20.

Dismissal of the Third-Party Complaint

Defendant alleges that Frances W. Preston, the President **[**26]** and Chief Executive Officer of BMI, "has authorized the unlawful conduct of BMI" asserted in the counterclaim and affirmative defenses. Paragraph 13 of the Counterclaim and Third-Party Complaint, which contains the sole direct reference to Preston, purports to incorporate Preston into all references to BMI or counterclaim defendants in the pleading. Preston moves pursuant to *Fed. R. Civ. P. 12 (b)(6)* to dismiss the third-party complaint. *See Kenneth Leventhal & Co. v. Joyner Wholesale Co., 736 F.2d 29 (2d Cir. 1984)*.

Preston advances a congeries of arguments in urging dismissal of the third-party-complaint. Her first argument concededly rises and falls with BMI's motion to dismiss the antitrust claims pressed against it. Therefore, this argument is unavailing.

Preston next correctly points out that officers and employees of a corporation cannot conspire with the corporation for purposes of the joint action essential to a violation of *section 1* of the Sherman Act. *See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*; *Gucci v. Gucci Shops, Inc., 651 F. Supp. 194, 197 (S.D.N.Y. 1986)*. Defendant does not claim, however, that the requisite concerted action

[27]** derives from an agreement between Preston and BMI. The plurality of actors alleged to have agreed to violate the antitrust laws consists of BMI and its thousands of affiliates. Further, it is firmly settled that ***HN20***[] officers and employees of a corporation "may be held individually liable for corporate actions that violate the antitrust laws if they authorize or participate in the unlawful acts." *Brown v. Donco Enter., Inc. 783 F.2d 644, 646 (6th Cir. 1986)*; *see* *Tillamook Cheese & Dairy Ass'n Tillamook Co. Cream Ass'n., 358 F.2d 115, 118 (9th Cir. 1966)*. A more fundamental defect impairs the third-party complaint.

Fed. R. Civ. P. 14(a), which governs third-party impleader, provides in relevant part:

> ***HN21***[] "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff* (emphasis added)."

Thus, in order for Lifetime to assert a third-party claim, it must be "attempting to transfer to the third-party defendant liability that may be imposed upon [it] in the main action." *Tri-Ex Enter.,* ***[**28]*** *Inc. v. Morgan Guaranty Trust Co., 586 F. Supp. 930, 932 (S.D.N.Y. 1984)*.

Lifetime may properly assert a third-party complaint against Preston only if she is or may be liable to Lifetime for all or part of Lifetime's copyright infringement liability to BMI. The only ways the Court can conceive Preston could be a proper third-party defendant **[***1691]** would be if she were a co-infringer or a contributory infringer of the copyrights in BMI's repertoire. Plainly she is not. Accordingly the third-party complaint is dismissed.

Conceding its error, Lifetime maintains that Preston may be properly joined as a counterclaim defendant pursuant to *Fed. R. Civ. P. 13* and *20*. *Rule 13(h)* provides that "persons other than those made parties to the original action may be made parties to a counterclaim or crossclaim in accordance with . . . Rules 19 and 20." *Rule 20(a)* permits the joinder as defendants of all persons against whom is asserted any claim arising out of the same transaction "and if any question of law or fact common to all defendants will arise in the action." Since Lifetime seeks to allege the same wrongdoing against BMI and Preston, *Rule 20(a)* is satisfied and Preston may be joined as a counterclaim **[**29]** defendant.

[*331] Lifetime must, of course, amend its answer. Curative assertions in memoranda do not effect the amendment. *See* *Jacobson v. Peat, Marwick, Mitchell & Co., 445 F. Supp. 518, 526 (S.D.N.Y. 1977)*. The Court suggests that in drafting its amended counterclaim, Lifetime apply particular attention to removing the peculiarities in the present answer occasioned by wholesale incorporation-by reference. [8]

CONCLUSION

For the reasons explained above, the Court grants and denies in part BMI's motion to dismiss. Lifetime is directed to file an amended counterclaim within 20 days of this decision. Reciprocal discovery is to proceed. The parties are to **[**30]** appear for a status conference on November 5, 1990 at 11:00 a.m. in courtroom 228.

SO ORDERED.

End of Document

[8] For example, a plain reading of the present pleading reveals such bemusing allegations as: BMI and Preston each have composers and publishers as affiliates, BMI and Preston each control the copyrights which BMI licenses, BMI and Preston were both sued by the United States in 1964, and both BMI and Preston possess unrestrained ability to exert enormous market power.

Vernon v. S. Cal. Edison Co.

United States District Court for the Central District of California

August 30, 1990, Decided ; August 30, 1990, Filed

Case No. CV 83-8137 MRP

Reporter

1990 U.S. Dist. LEXIS 18286 *; 1991-1 Trade Cas. (CCH) P69,336

CITY OF VERNON, CALIFORNIA, Plaintiff, v. SOUTHERN CALIFORNIA EDISON COMPANY, Defendant

Core Terms

transmission, customers, resources, transmission line, Resale, energy, summary judgment, notice, interruptible, generation, foreclosure, relative size, integration, facilities, monopolist, antitrust, electricity, wholesale, network, purchases, imported, damages, legitimate business, anti trust law, load, scenarios, partial, retail customer, monopoly power, calculated

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Antitrust & Trade Law > Regulated Industries > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Antitrust & Trade Law, Regulated Industries**

Summary judgment is a useful tool for narrowing the issues to be tried in antitrust proceedings. Summary judgment is appropriate in an antitrust case involving a regulated electric utility. A moving party is entitled to summary judgment when there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. Summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2[] **Monopolies & Monopolization, Actual Monopolization**

To prove the offense of monopolization under § 2 of the Sherman Act, plaintiff must show that (1) defendant possesses monopoly power in relevant market, (2) defendant willfully acquired or maintained that power, and (3) plaintiff suffered causal antitrust injury.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN3[] **Antitrust & Trade Law, Sherman Act**

To prevail on a claim of attempted monopolization under § 2 of the Sherman Act, plaintiff must demonstrate that (1) defendant had the specific intent to control prices or destroy competition; (2) defendant engaged in predatory or anticompetitive conduct directed towards accomplishing that unlawful purpose; (3) there was a dangerous probability that defendant would succeed in its endeavors; and (4) plaintiff suffered causal antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] **Monopolies & Monopolization, Actual Monopolization**

There is no general unqualified duty for a firm possessing monopoly power to cooperate with its business rivals. A monopolist has no duty to reduce its prices in order to help consumers, or any obligation to extend a helping hand to new market entrants or to help its competitors survive or expand their businesses.

Judges: [*1] Mariana R. Pfaelzer, United States District Judge.

Opinion by: PFAELZER

Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER GRANTING EDISON'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FORECLOSURE CLAIMS

Having read and considered the papers and evidence submitted in connection with defendant Southern California Edison Company's ("Edison's") Motion for Summary Judgment on plaintiff's foreclosure damage claims, associated motions of defendant Edison and plaintiff the City of Vernon ("Vernon") and the pleadings filed herein, and having heard oral argument with respect to the proposed findings and conclusions and objections thereto, the Court finds and concludes as follows:

A.

FINDINGS OF FACT

1. *INTRODUCTION*

1.1 Plaintiff Vernon's First Amended and Supplemental Complaint in this action alleged, *inter alia,* that Edison violated §§ 1 and 2 of the Sherman Act through a pattern of conduct commencing in 1961 and continuing into the present. Vernon's contentions fall into three basic categories: (1) those relating to the terms and conditions of Vernon's access to Edison's transmission lines and access to non-Edison sources of power (the "foreclosure" claims); (2) those concerning **[*2]** Edison's rates; and (3) those asserting a conspiracy between Edison and the Nevada Power Company to boycott Vernon.

1.2 Edison has filed motions for partial summary judgment on Vernon's § 2 rate and § 1 group boycott claims, and for summary judgment on Vernon's foreclosure claims.

1.3 By its Order dated March 1, 1990 and "Memorandum of Decision Granting Motions for Summary Judgment with Respect to Rate Claims and Group Boycott Claims" filed March 7, 1990 (the "Memorandum of Decision"), the Court granted Edison's motions for partial summary judgment on the plaintiff's rate and boycott claims.

1.4 These Findings of Fact and Conclusions of Law are made in connection with the Court's Order dated March 1, 1990 granting Edison's Motion for Summary Judgment on Plaintiff's Foreclosure Damage Claims.

2. *FACTUAL BACKGROUND*

(a) *Southern California Edison Company*

2.1 Defendant Edison is an investor-owned utility that provides electric service in central and southern California, within a service territory established by the California Public Utilities Commission ("CPUC").

2.2 Edison, as a fully integrated electric utility, generates, transmits, and distributes electricity.

2.3 Edison **[*3]** provides electric service to residential, commercial, and industrial customers located throughout its service territory.

2.4 Edison also purchases electricity from and sells electricity to other utilities located outside its service territory.

2.5 Edison operates its own electric "control area." A "control area" can be viewed as an area or system within which the operation of all generation, transmission and distribution facilities must be coordinated so that the system is operated as a synchronized integrated whole, at the same frequency, and in a reliable fashion. Typically every major utility operates a control area.

(b) *Vernon and the Other Resale Cities*

2.6 Plaintiff is a California municipality that owns its own distribution system and provides electric service at retail within its boundaries. While Vernon has some generating capacity, most of the power it sells is acquired through wholesale purchases from Edison or other bulk power suppliers.

2.7 Vernon occupies an area of approximately 5.06 square miles and is located within Edison's service territory. Vernon has common boundaries with the City of Los Angeles, the service territory of the Los Angeles Department of Water **[*4]** and Power ("LADWP") and other cities in Los Angeles County that are also within Edison's service territory. Vernon is primarily an industrial city.

2.8 In addition to Vernon, Edison's "wholesale" or "resale" customers include the cities of Anaheim, Azusa, Banning, Colton, and Riverside ("the "Cities"). Because they purchase from Edison wholesale electricity that they resell to their retail customers, Vernon and the Cities are sometimes referred to as "Resale Cities." Like Vernon, the Cities are located within Edison's service territory and each own their own distribution systems and provide electric service at retail within their boundaries. Because Vernon and the Cities do not operate their own control areas and are within Edison's control area, Edison has the ultimate responsibility for meeting their system load requirements.

2.9 From 1962 to 1977, Vernon purchased all of its electricity that it resold to its resale customers from Edison pursuant to an operating agreement entered into by the parties. Since 1977, Vernon has been a partial requirements customer of Edison.

2.10 Vernon and Edison entered into a limited Integrated Operations Agreement ("IOA") restricted to Vernon's participation **[*5]** in the Palo Verde Nuclear Generating Station located in Arizona. Vernon has an ownership interest in this generation facility and has participated through the Southern California Public Power Authority, in which it is a member. The Edison-Vernon Palo Verde IOA is Exhibit P to the O'Malley Opposition Declaration.

(c) *Edison's Transmission Network*

2.11 Edison's transmission lines are a part of an interconnected series of transmission lines connecting Edison with other utilities located throughout the western United States. Edison's Extra High Voltage ("EHV") transmission lines (generally operated at 500 kV or above) are used for the transmission of large blocks of power from remote generation resources, including those of other utilities, to the main grid of Edison's transmission system which is operated at 220 or 230 kilovolts or "kV" (the "220 kV network").

2.12 One group of EHV transmission lines in which Edison has rights is the Pacific Intertie. The Pacific Intertie consists of two 500 kV alternating current ("AC") lines running from Oregon through California (the "AC lines") and one 800 kV direct current ("DC") line running from Oregon through Nevada into Southern California **[*6]** (the "DC line").

2.13 Edison's EHV transmission lines to the Southwest consist principally of 500 kV AC lines from the Los Angeles basin to Nevada, Palo Verde (in Arizona) and the Four Corners area (in New Mexico). Other EHV transmission lines to the Southwest are owned by LADWP, San Diego Gas & Electric Company and the Southern California Public Power Authority.

2.14 Edison's 220-kV network, which consists of a grid or network of 220 or 230 kV transmission lines, is situated in the greater Los Angeles metropolitan area. Edison's 220 kV network connects with a number of major utilities, including LADWP and the California Department of Water Resources ("CDWR").

(d) *Regulation*

2.15 The terms and conditions of Edison's rates and service to its retail customers are regulated by the CPUC. The CPUC also has jurisdiction over Edison in that Edison cannot dispose of its assets or rights which are used or useful for service to retail customers without CPUC approval.

2.16 Edison's rates and terms of service to its resale customers are regulated by the FERC. Any agreements between Edison and its Resale Cities, including Vernon, regarding resale service or transmission must be filed with **[*7]** the FERC. Edison cannot legally charge a rate or provide a service to a Resale City without an appropriate FERC rate schedule for that rate or service being in effect.

2. *17 In 1972*, in part as a result of certain antitrust claims brought by the Cities, Edison and each of the Resale Cities entered into settlement agreements. Those agreements, in addition to releasing Edison from antitrust liability for conduct prior to that time, contemplated a framework within which the Resale Cities could begin to acquire energy from other sources and integrate it into the Edison system.

2.18 Integration is a contractual concept under which resources and loads of independent parties are planned and operated as if they were a single system.

2.19 The integration of resources into Edison's system, as opposed to the mere transmission of such energy by Edison is important because of Edison's rate structure. If Edison integrates a proposed resource, Edison gives the customer credit not only for the energy brought into the system, but also a "capacity credit" for the reduction in generating capacity Edison must maintain.

2.20 Anaheim and Riverside, after five years of negotiations, entered into IOAs with **[*8]** Edison to establish standards for the integration and transmission of resources. These IOAs became part of Edison's rate schedules in 1979.

2.21 Vernon did not seek to participate in the negotiations for IOAs that took place in the 1970s.

2.22 Azusa, Banning and Colton entered into IOAs similar to those entered into by Anaheim and Riverside. These IOAs became part of Edison's rate schedules in 1981.

2.23 Since 1981, Edison has offered to enter into an IOA with Vernon similar to the IOAs with the five Cities. Vernon, however, has refused to enter into such a "generic" IOA.

2.24 Under the 1972 Settlement Agreements, and the Cities' generic IOAs, Edison must provide the Resale Cities with all of their requirements for electricity to the extent the Resale Cities are unable to obtain power from others or from their own facilities. The IOAs have allowed the Resale Cities to build their own generation projects, to participate in joint projects with others, and to purchase capacity from others.

2.25 Edison's standard for the timing of capacity credit in the generic IOAs, § 8.1.2.3 of the IOAs, past applications of that standard, as well as other terms of the IOAs were challenged in FERC Docket **[*9]** No. ER81-177. Although the decision in that Docket is still subject to rehearing, the FERC concluded that the standard set forth in § 8.1.2.3 of the generic IOAs was not just and reasonable because it allowed Edison to discriminate unduly in determining when a wholesale customer should begin receiving capacity credits for a noticed resource. The FERC concluded that a three-year notice requirement for partial requirements customers who intend to acquire and integrate a capacity resource was reasonable. In that FERC Docket, Vernon proposed and supported the position that a three-year notice requirement should be adopted for the integration of a capacity resource. Docket No. ER 81-177, 27 FERC para. 63.053 at 65,205, incorporated by the FERC in its decision (41 FERC para. 61,188 at 61,496). In addition, the FERC found other terms in the generic IOA to be unreasonable.

2.26 In this action, Vernon does not contend that a three-year notice requirement for the integration of capacity is unreasonable.

(e) *Special Condition 12*

2.27 In addition to the IOAs, Special Condition 12 allows the Resale Cities, in certain circumstances, to import and receive credit for capacity obtained from sources **[*10]** other than Edison without "integration" of the resource pursuant to the IOA.

2.28 Special Condition 12 arose, in part, out of an agreement between Edison and Vernon regarding the operation of diesel generators owned by Vernon. In July 1982, Edison and Vernon entered into an agreement under which Edison committed to file a tariff with the FERC which would provide Vernon with an opportunity to operate generation projects within the City of Vernon, including Vernon's diesel generators.

2.29 Special Condition 12 was included within a proposed resale rate schedule filed by Edison with the FERC in October 1983. Under the terms of the July 1982 settlement, Vernon's diesel generators could be used by Vernon when they were available for capacity and associated energy. Under Special Condition 12, additional capacity and associated energy could be generated or imported by Vernon by giving certain notices to Edison, with the first notice due on or before July 1, 1985, for generation or imports commencing during the two-year period January 1, 1987 through December 31, 1988.

2.30 There is no provision for penalties if a resource noticed by a Resale City under Special Condition 12 is not contracted **[*11]** for or actually received by that City and no limit on the amount of a City's load that must be met by Special Condition 12 resources.

2.31 In June 1985, Vernon noticed approximately 27 MW of Special Condition 12 resources from outside the City boundaries, with credit to commence on January 1, 1987. Prior to January 1, 1987, Vernon requested, and Edison agreed (although not obligated to do so under Special Condition 12) that a purchase from CDWR could substitute for the 27 MW of resources from other utilities which Vernon had noticed. Edison provided Vernon firm transmission service on Edison's 220 kV network for the 27 MW of Special Condition 12 resources from CDWR.

2.32 In June 1987, Vernon gave notice for all of the Special Condition 12 resources that it felt it could handle for the period of January 1, 1989 through December 31, 1990. That included 98 MW of capacity and associated energy during the summer and 62 MW of capacity and associated energy during the winter from CDWR. Prior to the start of delivery of resources on January 1, 1989, Edison again permitted Vernon to substitute for certain Special Condition 12 resources previously noticed.

2.33 Vernon has used Special Condition **[*12]** 12 to reduce its dependence on Edison for its capacity and energy needs.

(f) *Interruptible Transmission Service*

2.34 On or about December 15, 1981, Nevada Power Company ("NPC") and Vernon entered into an Interconnection Agreement providing, in part, for the sale of non-firm energy by NPC to Vernon.

2.35 On or about January 5, 1982, Vernon and Edison entered into an agreement for the integration and interruptible transmission service for non-firm energy purchased by Vernon from NPC. The agreement was filed with the FERC and became part of Edison's rate schedules as of February 1, 1982.

2.36 During 1982 and 1983, Vernon imported significant quantities of non-firm energy from NPC under these arrangements.

2.37 On or about December 23, 1983, Edison and Vernon executed an agreement for the integration of, and interruptible transmission service for, non-firm energy purchased by Vernon from the CDWR.

2.38 The NPC and CDWR interruptible transmission service ("ITS") Agreement provided in part that the availability of transmission service "shall be determined at the sole discretion of Edison," and Edison reserved the right to interrupt or curtail such service "at any time and for any reason." **[*13]** Edison has entered into ITS agreements with the other Resale Cities that provide ITS on all of Edison's transmission lines. These agreements also provide for interruption "at any time and for any reason."

2.39 The form of interruptible transmission service contracts offered by LADWP include a provision that allows LADWP to interrupt or curtail such service "at any time and for any reason." One of Vernon's consultants, Mr. Brodie, admitted that interruptions of ITS for minimum load are not unusual in the industry and that the owner of transmission facilities is expected to have a priority of use of those facilities.

2.40 Although Edison's ITS contracts with Vernon and its other Resale Cities allow Edison to interrupt or curtail such transmission service "at any time and for any reason," Vernon has not presented any evidence that when Edison did interrupt Vernon's transmission, that Edison did so for anticompetitive reasons.

(g) *Vernon's bulk power resources*

2. 41 In 1983, Vernon bought nearly all of its electricity from Edison. By 1987, Vernon was purchasing less than one half of its power from Edison.

2.42 As of 1989, Vernon's non-Edison resources included the following: (1) a **[*14]** diesel plant with peaking capacity of approximately 21.5 MW; (2) entitlements of an average of approximately 11 MW of peaking power and associated energy from Hoover Dam; (3) a 10.6 MW interest in the Palo Verde Nuclear Generating Station; and (4) two gas turbines with a total peaking capacity of 11.2 MW. Vernon also purchases approximately 98 MW during the summer and 62 MW during the winter of capacity and associated energy from the CDWR, and 30 MW of capacity and associated energy from LADWP. In total, Vernon currently has capacity from non-Edison resources of approximately 180 MW during the summer and 145 MW during the winter.

2.43 Vernon's electric requirements at its peak are approximately 195 MW, so during the summer months, Vernon has its own non-Edison resources to obtain over 92% of its capacity.

2.44 In addition, Vernon is able to purchase economy energy during off-peak hours from non-Edison sources at the rate of approximately 70 MW.

2.45 Vernon operates its diesels, its Hoover power, CDWR, and LADWP purchases, and the gas turbines, pursuant to Edison's Special Condition 12; Vernon's Palo Verde ownership interest is integrated pursuant to the Edison-Vernon Palo Verde IOA.

[*15] 2.46 Vernon is increasing its outside resources even beyond what it had as of 1989.

3. *VERNON'S FORECLOSURE DAMAGE CLAIMS*

3.1 In support of its foreclosure claims, Vernon alleges that Edison unlawfully restrained Vernon from purchasing bulk power from suppliers other than Edison by denying Vernon access to its transmission lines. Specifically, Vernon contends that Edison should have given the City additional transmission over the Pacific Intertie and over certain other EHV lines extending to the Southwest, as well as unconstrained transmission over Edison's 220 kV network for Vernon's purchases from CDWR. Vernon further alleges that as a result of this foreclosure, as set out in Claims I and II of Vernon's First Amended Complaint, the City was forced to purchase wholesale power from Edison at prices higher than it would otherwise have had to pay. Vernon claims that it was thus unable to compete with Edison in the provision of retail electric service.

3.2 Vernon calculates its damages resulting from the foreclosure as the difference between the rate Edison charged Vernon and that which Vernon alleges it could have paid if Edison had "foreclosed" Vernon's access to the transmission **[*16]** lines.

3.3 Mr. Whitfield A. Russell, an engineer testifying on behalf of Vernon, quantified these overcharge claims in five alternative damage scenarios. Pursuant to the procedural schedule established by the Court, Exhibit 2867 is the final version of Vernon's damage study and is the only one which could have been presented by Vernon at trial.

3.4 Vernon's damage study prepared by Mr. Russell includes three principal damage scenarios, *i.e.*, the Special Condition 12 capacity claims, the IOA capacity claims, and the energy-only claim. The two capacity claim scenarios each offer an alternative formulation, so that there are a total of five different damage models in the Vernon study.

3.5 These alternative calculations, according to Vernon's witness, produce damages ranging from a low of $ 14,969,341 under the so called "Energy-Only" calculation to a high of $ 59,574,440 under the base case "Capacity Damage" calculation. Damages are calculated for the years 1982 through 1987.

3.6 All five of the damage scenarios presented by Vernon assume that Edison is obligated to provide Vernon with a relative size share access to Edison's EHV transmission lines, and unconstrained access to Edison's **[*17]** 220 kV network. The relative size share access calculated by Mr. Russell is based upon the ratio of Vernon's load divided by Edison's total load, including the load of Vernon.

3.7 Under both of Vernon's IOA capacity damage scenarios, Vernon is assumed to be able to import new and additional capacity and energy into the Edison control area, and receive credit for capacity purchases, pursuant to the provisions of a hypothetical IOA, upon 18-months notice to Edison of the proposed additional capacity transactions.

3.8 Although Edison first made Special Condition 12 available to Vernon in June 1984, such that resources noticed pursuant to this provision could be imported to offset demand charges beginning in January 1987, Vernon's Special Condition 12 capacity damage scenarios assume that this provision would have been available for purposes of offsetting Vernon's demand charge by 1983 rather than 1987.

3.9 In summary, the only conduct of Edison from which Vernon claims quantifiable damages consists of: (1) the failure of Edison to provide Vernon with relative size share access to its EHV transmission lines and unconstrained access to its 220 kV network; (2) the failure of Edison to provide **[*18]** Vernon with an Integrated Operations Agreement containing terms acceptable to Vernon, including a provision requiring Edison to accept into its control area, and provide capacity credit for capacity imported on 18-months advance notice; and (3) the failure of Edison to have Special Condition 12 included in its FERC resale rate schedules four years earlier than this rate provision was included in Edison's FERC rate schedules.

3.10 Vernon's damage study does not segregate damages as to alleged foreclosure from any particular transmission line.

3.11 Vernon has also argued that Edison improperly interrupted transmission service provided to Vernon for purchases of non-firm energy from NPC and CDWR pursuant to the interruptible transmission service agreements between Vernon and Edison. Vernon has not, however, quantified any damages specifically arising from this alleged conduct.

3.12 Vernon's "relative size share" claim is premised on the argument that Vernon is entitled to direct relative size share access to Edison's EHV transmission lines, including Edison's entitlement on the Pacific Intertie and its transmission facilities linking Edison with the desert Southwest. The relative size **[*19]** share entitlement postulated by Vernon would give the City firm transmission service over Edison's EHV lines in an amount determined by first calculating Vernon's load as a proportion of Edison's total load and then multiplying this percentage figure by the megawatt capacity of the particular transmission lines. Vernon claims that Edison was obligated under the antitrust laws to offer this type of access even in the absence of a specific request by the City and even if Edison is unaware that access was desired.

3.13 The Court finds that Vernon has never made a formal request to Edison for relative size share firm transmission access.

3.14 In addition to this direct relative size share access, Vernon contends that it is entitled to unlimited access to Edison's 220 kV network provided there is sufficient capacity to meet the total demand, and if the grid is unable to handle all the demand, that the constraint on the system should be shared.

3.15 Edison admits that it has not given Vernon direct relative size share access to its transmission lines as assumed in Vernon's damage study.

3.16 If Edison granted Vernon relative size share access when Edison was fully utilizing its transmission **[*20]** lines to import low cost power, the result would be to shift the benefit of the low cost power to Vernon and away from Edison's other customers.

3.17 Exhibits A, B and C attached by Vernon to its "Double Dip" Motion demonstrate the shifting of benefits that would occur had Edison acceded to a Vernon demand for greater access to Edison's transmission lines.

3.18 Exhibit C is a specific example of how the type of access assumed by Vernon in its damage claims would discriminate in Vernon's favor and against Edison's retail customers. Page 1 of that exhibit shows that the wholesale customer shares equally and proportionately in the benefits of Edison's low-cost imported energy. Pages 2 and 3 of that exhibit reveal how providing a 10% relative size share access, with the remainder purchased pursuant to an average cost-based wholesale rate, would discriminate in favor of the wholesale customers and against the retail customers. As can be seen on page 3, as a result of the "double dip," [1] the energy costs of the wholesale customer are decreased, with additional costs imposed on the retail customers. This disproportionate access would result in the wholesale customer obtaining a higher percentage **[*21]** of its requirements from the low-cost power, while the retail customers would receive a lower percentage of their requirements from the same source.

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[1] That is, access to low-cost energy both from direct transmission use and indirectly through Edison's resale rates.

3.19 To the extent the foregoing Findings of Fact are also Conclusions of Law, they are to be construed as Conclusions of Law as well.

B.

CONCLUSIONS OF LAW

4. *STANDARDS FOR GRANTING SUMMARY JUDGMENT*

4.1 ***HN1***[] Summary judgment is a useful tool for narrowing the issues to be tried in antitrust proceedings. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986)*; *Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)*; *Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 707 F. Supp. 1170, 1173-74* *("Universal Analytics").*

4.2 Summary judgment is appropriate in an antitrust case involving a regulated electric utility. *See* *City of Mt. Pleasant, Iowa v. Associated Electric Coop, Inc.,* ***[*22]*** *838 F.2d 268, 273 (8th Cir. 1988)* (the court expressly declined to accept the plaintiff's contention that "a different, heightened standard for summary judgment applies in complex antitrust cases.").

4.3 A moving party is entitled to summary judgment when "there is no genuine issue as to any material fact" and the movant "is entitled to a judgment as a matter of law." *See* *Fed. R. Civ. Proc. 56(c)*. Under the *Celotex* Court's interpretation of this rule, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, supra, 477 U.S. at 322*.

4.4 The Court concludes that there is no genuine issue to any material fact, and that Edison's Foreclosure Motion can be decided as a matter of law. The Court further notes that Vernon appears to agree with Edison that in this case, the sufficiency of Edison's proffered business justification is a matter of law and is thus appropriate for resolution pursuant to Edison's Foreclosure Motion. Vernon explicitly states that "Edison's asserted business reasons **[*23]** for denying access to Vernon are insufficient as a matter of law." *Vernon's Statement of Genuine issues,* [2] *Issue No. 4, at 3. See, id.*, *Issue Nos. 5, 12-13, at 3-4.* Moreover, Vernon failed to submit any facts sufficient to controvert or raise a factual dispute underlying the issue of legitimate business justification. *See*, *e.g.*, *Vernon's Opposition Memorandum at 22-27.*

5. *ELEMENTS OF A § 2 CLAIM FOR MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION*

5.1 ***HN2***[] To prove the offense of monopolization under § 2, Vernon must show that (1) Edison possesses monopoly power in relevant market, (2) Edison willfully acquired or maintained that power, and (3) Vernon suffered causal antitrust injury. *Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360, 363 (9th Cir.)*, *cert. denied, 109 S. Ct. 180 (1988) ("Oahu Gas Service")*, *Catlin v. Washington* ***[*24]*** *Energy Co., 791 F.2d 1343, 1347 (9th Cir. 1986)*.

5.2 ***HN3***[] To prevail on a claim of attempted monopolization under § 2, Vernon must demonstrate that (1) Edison had the specific intent to control prices or destroy competition; (2) Edison engaged in predatory or anticompetitive conduct directed towards accomplishing that unlawful purpose; (3) there was a dangerous probability that Edison would succeed in its endeavors; and (4) Vernon suffered causal antitrust injury. *See* *California Computer Products, Inc. v. IBM Corp., 613 F.2d 727, 736 (9th Cir. 1979)*.

5.3 To show that Vernon's claims constitute § 2 violations under either theory, Vernon must show that these claims constitute anticompetitive conduct that caused antitrust injury to Vernon.

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[2] "Vernon's Statement of Genuine Issues" refers to Vernon's Statement of Genuine Issues of Fact Submitted in Opposition to Edison's Foreclosure Motion.

5.4 In its Foreclosure Motion, Edison assumed, solely for the purposes of the Foreclosure Motion, that there was competition between Edison and Vernon, that Edison had monopoly power in a properly defined market, and that Edison's transmission lines are essential facilities. For the purpose of ruling on this Foreclosure Motion, the Court also makes these assumptions, and makes no findings and has reached no conclusions on the issues of competition, **[*25]** monopoly power, or essential facilities.

5.5 In regard to the issue of whether Edison's transmission lines are essential facilities, the Court finds that there are factual questions on this issue, and that such factual questions required the denial of Vernon's Motion for Partial Summary Judgment on the Essential Facilities Claim (Vernon's "Essential Facilities Motion"). The Court notes, however, that credible arguments can be made that Edison's transmission facilities are not essential facilities within the meaning of the antitrust laws.

5.6 With respect to the issue of franchise competition, the Court finds that there are factual questions and that such factual questions required the denial of Vernon's Motion for Partial Summary Judgment on the Franchise Competition Claims (Vernon's "Franchise Competition Motion").

6. *ANTITRUST OBLIGATIONS IMPOSED UPON A COMPANY WITH MONOPOLY POWER*

6.1 ***HN4***[] There is no general unqualified duty for a firm possessing monopoly power to cooperate with its business rivals. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600*.

6.2 A monopolist has no duty to reduce its prices in order to help consumers, *Berkey Photo, Inc. v. Eastman* ***[*26]*** *Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979)*, *cert. denied, 444 U.S. 1093 (1980)*, or any obligation to extend a helping hand to new market entrants or to help its competitors survive or expand their businesses, *California Computer Products, Inc. v. IBM, supra, 613 F.2d at 744*.

6.3 As the Ninth Circuit has recently acknowledged:

It is consistent neither with *Berkey Photo* nor with the body of ***antitrust law*** as a whole to say that a holder of lawful monopoly power must passively concede every time someone else demands the right to do some portion of what that firm does, regardless of whether the services at issue are performed within the scope of the lawfully acquired monopoly and regardless of whether the 'monopolist' is merely conducting itself in a way that any other (non-monopolist) firm would under the circumstances.

Catlin v. Washington Energy Co., 792 F.2d at 1347, quoting *Grason Electric Co. v. Sacramento Mun. Utility Dist., 571 F. Supp. 1504, 1517 n.17 (E.D. Cal. 1983)*.

6.4 There are certain occasions, however, when a court will impose affirmative obligations on a monopolist. *See*, *e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472* ***[*27]*** *U.S. at 601*. Where the monopolist's competitor is the monopolist's customer as well, the antitrust laws may impose duties on the monopolist to ensure that the monopolist's conduct does not unjustifiably impair its customer's ability to compete. *See* *Olympia Equipment Leasing, 797 F.2d at 376*; *Oahu Gas Serv., 838 F.2d at 368*.

6.5 Although affirmative duties are imposed on a monopolist, "these duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor." *Oahu Gas Service, supra, 838 F.2d at 368*; *Aspen Skiing, supra, 472 U.S. at 604-05*. Thus, even if the monopolist has affirmative duties to its competitors, if the monopolist had a legitimate business justification for its conduct, the plaintiff cannot prevail on its claim of a violation of § 2. *See, e.g.*, *Oahu Gas Service, supra, 838 F.2d at 368*; *Image Technical Service, Inc. v. Eastman Kodak Co., 90 Daily Journal D.A.R. 4702, 4705 (9th Cir. 1990)*; *Theee Movies of Tarzana v. Pacific Theatres, Inc., 828 F.2d 1395, 1400-1401 (9th Cir. 1987)*, *cert. denied, 108 S. Ct. 1028 (1988)*. *See also*, *Universal Analytics, supra, 707 F. Supp. at 1180*.

6.6 Under **[*28]** this standard, even the presence of a predatory motive "will not make otherwise lawful conduct (i.e., conduct engaged in for a legitimate business purpose) unlawful." Universal Analytics, supra, 707 F. Supp. at 1180 (citation omitted). As the Ninth Circuit in *Oahu Gas Service* stated:

Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L.Ed.2d 467 (1985); Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986); Drinkwine v. Federated Publications, Inc., 780 F.2d 735, 740 (9th Cir.), *cert. denied, 475 U.S. 1087, 106 S. Ct. 1471, 89 L.Ed.2d 727 (1986)*.

Oahu Gas Service, supra, 838 F.2d at 368.

6.7 Under this view of the legitimate business justification defense, the Ninth Circuit has found a variety of conduct not to be in violation of the antitrust laws. *See, e.g.*, Oahu Gas Service, 838 F.2d at 360 (monopolists-suppliers' decision not to expand refinery justified where **[*29]** investment required would have resulted in negative return because of price controls); The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1159-60 (9th Cir. 1988) (improvement of the defendant's distribution network); Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342, 1349 (9th Cir. 1987), *cert. denied, 109 S. Ct. 179 (1988)* ("Mozart") (quality control over the products and services provided by the defendant); Drinkwine v. Federated Publications, Inc., 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied, 475 U.S. 1087 (1986)* (same).

7. *THE CONDUCT CHALLENGED BY VERNON DOES NOT VIOLATE § 2 OF THE SHERMAN ACT*

(a) *Vernon's Relative Size Share Access Claim*

7.1 Even assuming that Edison has monopoly power and viewing Edison's transmission facilities and rights as an "essential facility", Vernon cannot sustain its allegations of an antitrust violation premised on Edison's refusal to provide relative size share transmission access. Under the essential facilities doctrine, Edison is only required to give Vernon reasonable access to its transmission network. *See*, *e.g.*, Southern Pacific Communications Co. v. AT&T Co., 740 F.2d at 1009; **[*30]** *In* Re Air Passenger Computer Reservations Systems Antitrust Litigation, 694 F. Supp. 1443, 1451 (C.D. Cal. 1988). Reasonable access does not include that which would harm Edison's other customers or which would be impractical. Southern Pacific Communications Co. v. AT&T Co., supra, 740 F.2d at 1009, quoting Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied, 436 U.S. 956 (1978)*.

7.2 Moreover, even complete denial of access to an essential facility is not an antitrust violation where there is a legitimate business justification for the denial. *See*, *e.g.*, Image Technical Service, Inc. v. Eastman Kodak Co., supra, 90 Daily Journal D.A.R. at 4705; Becker v. Egypt News Co., Inc., 713 F.2d 363, 366 (8th Cir. 1983); *Venture Technology, Inc. v. Nat'l Fuel Gas Co.,* 1980-81 Trade Cas. (CCH) para. 63,780, at 78-169 (W.D.N.Y. 1981), *rev'd on other grounds,* 685 F.2d 41 (2d Cir.), *cert. denied,* 459 U.S. 1007 (1982).

7.3 Under the standards articulated in the foregoing cases, Edison's failure to allow Vernon "relative size share" access to Edison's EHV lines is not unlawful anticompetitive conduct. Vernon has conceded that **[*31]** if Edison granted Vernon the access it has demanded, the costs for Edison's other customers would increase. Even assuming competition exists between Edison and Vernon, Edison is not obligated by the antitrust laws to confer a benefit on Vernon at the expense of its own customers. *Town of Massena v. Niagara Mohawk Power Corp.,* 1982-82 Trade Cases (CCH) para. 63,526 (N.D.N.Y. 1980), *see also,* Hect, 570 F.2d at 992-93 ("antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately").

7.4 Edison's justification for not granting Vernon relative size share access is distinguishable from that proffered by the utility, and rejected by the Supreme Court, in Otter Tail Power Co. v. United States, 410 U.S. 366, 372, *reh'g denied, 411 U.S. 910 (1973)*. In *Otter Tail,* the Court addressed a situation where the Otter Tail Power Company had refused to sell wholesale power to municipal systems and refused to wheel power as well. Otter Tail's total refusals were motivated by an intent to retain the municipals as all-requirements customers. This result was achieved **[*32]** by these absolute refusals to deal on an "essential facility." Otter Tail did not argue that it lacked excess transmission capacity to provide transmission service or that its transmission system could not accommodate new imports wheeled into its municipal customers. Otter Tail's only justification for its refusals to deal was the desire to keep its municipals (and future municipals) as captive customers.

7.5 The facts now before this Court are not analogous to those of *Otter Tail.* First, Edison has not refused to sell wholesale power to Vernon. Edison has had in place a partial requirements resale rate and there is no evidence that Edison ever threatened, or even suggested, that it would terminate that service. Second, Edison has not refused to wheel power to Vernon. As is stated above, Edison has provided Vernon with significant transmission service (or "wheeling") for outside resources, and as a result, Vernon is now buying relatively little power from Edison. Most of Vernon's power needs are being met from outside resources "wheeled" to Vernon by Edison. Third, Edison's denial of access to its transmission system was motivated by a desire to benefit its own customers rather **[*33]** than just Vernon. This is a legitimate business justification.

7.6 As a matter of law, Edison's conduct with respect to transmission has not been unreasonably exclusionary.

(b) *Vernon's IOA Claim*

7.7 The issue in regard to the IOA claim is not whether Edison can foreclose access to outside resources since it is clear that Edison has offered Vernon an IOA and access to outside resources. An IOA and access has been made available to Vernon on the same terms and conditions as for the other Resale Cities; Vernon made a decision to restrict its own IOA to its Palo Verde purchases.

7.8 As with Vernon's demand for relative size share access, to the extent that Edison had a duty to integrate Vernon's power purchases, that duty is not absolute; it is limited by Edison's legitimate business justifications.

7.9 Even assuming an obligation of Edison to furnish a different IOA than what was actually offered to Vernon, the Court concludes that Edison had a legitimate business justification for not providing Vernon with an IOA with only an 18-month notice period for capacity additions to the Edison control area.

7.10 The Court further notes that Vernon has previously asserted, and the FERC has **[*34]** concluded, that a three-year notice period is appropriate, and hence antitrust liability cannot be premised in this action based upon an IOA that has only an 18-month notice period.

7.11 Vernon's damage study improperly assumes that the failure of Edison to provide an IOA with an 18-month notice provision was unlawful, since the failure to provide Vernon with an IOA with an 18-month notice provision is not an antitrust violation.

7.12 Vernon has presented no evidence which raises a triable issue of fact with respect to the IOA.

(c) *Vernon's Special Condition 12 Claim*

7.13 In that the Court has concluded that there is and has been a legitimate business justification for Edison refusing to allow the import of capacity resources into the Edison control area on less than three-years' notice, the Court further concludes that Edison was under no obligation under the antitrust laws to offer Special Condition 12 to Vernon.

7.14 Vernon's Special Condition 12 claim is analogous to that raised by the plaintiff in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co., supra, 797 F.2d at 376*, and was rejected by the court in that case. In *Olympia,* the plaintiff alleged that **[*35]** Western Union's withdrawal of assistance in marketing telex equipment constituted a Sherman Act § 2 violation. The court rejected the plaintiff's contention. Reasoning that a monopolist has no generalized duty to extend a helping hand to its competitors. The court concluded that Western Union's withdrawal of voluntary assistance could not possibly constitute a § 2 violation.

If a monopolist does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does he incur antitrust liability? We think not . . . . Since Western Union had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation.

Id., 797 F.2d at 376.

7.15 This rationale applies equally to Vernon's contentions concerning the availability of Special Condition 12. Here, Edison had no duty under the antitrust laws to provide Special Condition 12 treatment to Vernon. Having no such obligation, its failure to provide Special Condition 12 earlier than it actually did cannot be the basis of a § 2 violation.

7.16 The Court concludes that Edison had a legitimate **[*36]** business justification for not implementing Special Condition 12 earlier than it did.

7.17 Vernon's damage study improperly assumes that the failure of Edison to initiate Special Condition 12 earlier than it did was unlawful, since the failure to initiate Special Condition 12 earlier was not an antitrust violation.

7.18 Vernon has presented no evidence which raises a triable issue of fact with respect to Special Condition 12.

7.19 Because two of Vernon's damage scenarios are predicated upon the existence of Special Condition 12 years before it was actually offered, the conduct underlying these scenarios is not a violation of § 2 of the Sherman Act.

(d) *Vernon's Interruptible Transmission Service Claim*

7.20 The granting of summary judgment with respect to Vernon's contentions based upon purportedly improper denials, interruptions, or curtailments of ITS for nonfirm energy is mandated on three separate grounds.

7.21 First, Vernon has failed to quantify any damages arising from any of these interruptions. As the Court explained in its "Memorandum of Decision" (at 14-16), a plaintiff must show some measurable damages flowing from an antitrust injury in order to meet the requirements **[*37]** of § 4 of the Clayton Act, *15 U.S.C. § 15*. Vernon has failed to make this showing.

7.22 Second, Vernon's concerns in regard to interruptions at best involve the interpretation of contract language giving Edison discretion as to when interruptions can be made. A contractual dispute as to the reasonableness of conduct is not enough to support an antitrust claim. *See* *Universal Analytics, supra, 707 F. Supp. 822, 828 (N.D. Cal. 1986)*. *See*, *also*, *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.,* 19892 Trade Cas. (CCH) para. 68,751, at 61,950 (10th Cir.).

7.23 Third, the Court concluded that Vernon has failed to demonstrate that Edison's reasons for interrupting were not legitimate.

8. *THE CHALLENGED CONDUCT VIEWED SEPARATELY AND AS A WHOLE*

8.1 In examining Edison's conduct that is alleged to give rise to damages, the Court has concluded that the challenged conduct does not constitute a violation of § 2 of the Sherman Act. None of the challenged conduct individually amounts to an antitrust violation and viewing the conduct in its totality does not change any of the conclusions as to the propriety of the conduct.

8.2 At times in its opposition, Vernon argued **[*38]** that a number of other Edison alleged acts or conduct constituted evidence of violations of the antitrust laws. Vernon, however, failed to link any of these other alleged acts to any quantifiable damages, and Vernon makes no claim of damages or injury arising from these alleged acts. Nor has Vernon presented any arguments to demonstrate that any such acts or conduct has any sort of synergistic effect when viewed as a whole.

8.3 Accordingly, for the reasons set out at pages 19-20 of the Court's Memorandum of Decision, the Court concludes that summary judgment in favor of Edison and against Vernon is appropriate.

9. *CONCLUSIONS*

9.1 To the extent that the foregoing Conclusions of Law are also Statements of Fact, they are intended to be Findings of Fact as well.

9.2 Defendant Edison is entitled to summary judgment on Vernon's foreclosure damage claims in this action.

9.3 Having granted summary judgment in favor of defendant Edison and against plaintiff Vernon on all damage claims in this action and made the above stated Findings and Conclusions, the Court asked plaintiff Vernon to advise the Court of what remained for trial. Vernon advised the Court that the foregoing Findings of **[*39]** Fact and Conclusions of Law address and dispose of all remaining claims of Vernon herein, including those in Claim I of the First Amended Complaint for which Vernon is seeking relief. As a consequence, judgment in this action should now be entered in favor of defendant Edison and against plaintiff Vernon, with Edison to recover its costs of suit herein.

JUDGMENT - August 30, 1990, Filed

The Court having granted Edison's Motions for Summary Judgment on plaintiff's foreclosure claims, rate claims and group boycott claims, and having filed its Memorandum of Decision and Findings of Fact and Conclusions of Law thereon, and the issues having been duly heard and a decision having been duly rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff City of Vernon take nothing in this action, that this action be dismissed on the merits and with prejudice, and that defendant Southern California Edison Company shall recover from plaintiff City of Vernon its costs in this action in the amount of $.

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Eureka Urethane, Inc. v. PBA, Inc.

United States District Court for the Eastern District of Missouri, Eastern Division

September 6, 1990, Decided ; September 6, 1990, Filed

No. 88-1026-C-5

Reporter

746 F. Supp. 915 *; 1990 U.S. Dist. LEXIS 11805 **; 1990-2 Trade Cas. (CCH) P69,220

EUREKA URETHANE, INC., Plaintiff, v. PBA, INC. and PROFESSIONAL BOWLERS ASSOCIATION OF AMERICA, Defendants

Core Terms

tournament, Ball, televised, advertising, bowlers, networks, bowling, logo, spot, competitors, sponsor, defendants', manufacturer, bowling ball, anticompetitive, broadcast, alleges, sells, Tank, anti trust law, products, monopoly power, monopolization, endorsement, decrease, rights, relevant market, appearance, membership, Counts

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is a harsh remedy which should only be granted when the moving party has established his right to judgment with such clarity as not to give rise to controversy.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Summary Judgment, Burdens of Proof**

A district court may grant a motion for summary judgment if all of the information before the court demonstrates that there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party. Once the moving party discharges this burden, the non-moving party must do more than show that there is some doubt as to the facts. Instead, the non-moving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN3[] **Summary Judgment, Entitlement as Matter of Law**

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that can logically be drawn from those facts. The court is required to resolve all conflicts of evidence in favor of the non-moving party.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN4[] **Relevant Market, Geographic Market Definition**

The relevant market is determined by reference to both the product market and the geographic market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN5[] **Regulated Practices, Market Definition**

The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for a party's product or service. This comparative analysis has been characterized as the reasonable interchangeability standard. Reasonable interchangeability may be gauged by (1) the product's uses, i.e., whether the substitute products or services can perform the same function, and/or (2) consumer response (cross-elasticity of demand).

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] **Regulated Practices, Market Definition**

Cross-elasticity of demand refers to the change in the demand by consumers for one product as the result of a change in the price of another product.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[HN7]() [] **Regulated Practices, Market Definition**

The market test may be utilized in conjunction with submarket criteria. A submarket may be determined by examining such practical indicia as (1) industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

[HN8]() [] **Regulated Practices, Market Definition**

Only reasonably interchangeable products may be included in the same market. A product is reasonably interchangeable for another if consumers of the products considered them to be reasonable substitutes.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

[HN9]() [] **Sherman Act, Claims**

To establish monopolization in violation of the Sherman Act, *15 U.S.C.S. § 2*, it must be shown that the accused party (1) possessed monopoly power in the relevant market; and (2) used its monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN10]() [] **Regulated Practices, Monopolies & Monopolization**

Monopoly power is defined as the power to control prices and exclude competition with respect to a particular product and within a particular geographic market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

[HN11]() [] **Actual Monopolization, Claims**

To prove a violation of *15 U.S.C.S. § 2*, whether based upon a claim of attempted or actual monopolization, a plaintiff must show that a defendant engaged in anticompetitive behavior, that is, a defendant used its monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN12[] **Monopolies & Monopolization, Actual Monopolization**

A mere showing of monopoly power unaccompanied by evidence of anticompetitive behavior is insufficient to support a claim for illegal monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN13[] **Monopolies & Monopolization, Actual Monopolization**

Anticompetitive conduct is conduct without legitimate business purpose. Such conduct makes sense only because it eliminates competition. Acts which are ordinary business practices typical of those used in a competitive market do not constitute anticompetitive conduct violative of the Sherman Act, *15 U.S.C.S. § 2*. To be labeled anticompetitive, the conduct involved must be such that its anticipated benefits were dependent on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN14[] **Monopolies & Monopolization, Actual Monopolization**

Under the essential facilities doctrine, those in possession of facilities which cannot practically be duplicated must share the facilities with their competitors on fair terms. The policy behind prohibiting denial of an essential facility to a competitor, at least in part, is to prevent a monopolist in a given market from using its power to inhibit competition in another market.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN15[] **Regulated Practices, Monopolies & Monopolization**

The essential facilities doctrine requires (1) control of an essential facility by a monopolist, (2) the inability to practically or economically duplicate the facility, and (3) the unreasonable denial of the use of the facility to a competitor when such use is economically and technically feasible.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN16[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is defined as the sale of one item, the tying product, on the condition that the buyer purchase a second product, the tied product, from the same source.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN17[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of the tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such forcing is present, competition on the merits in the market for the tied item is restrained and the Sherman Act, *15 U.S.C.S. §§ 1* and *2*, is violated.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN18[] **Private Actions, Standing**

The question of standing to sue under the Clayton and Sherman Acts is one of law. Antitrust standing requirements go beyond injury in fact. The court must also determine whether the plaintiff, even if injured, is the proper party to bring the action.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN19[] **Clayton Act, Claims**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, authorizes private damage suits for violations of federal antitrust laws by persons injured in their business or property by reason of anything forbidden in the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN20[] **Private Actions, Standing**

In order to establish standing, a plaintiff must demonstrate that the antitrust injury is of the type the antitrust laws were designed to prevent and that the injury flows from that which makes the defendant's acts unlawful. A mere causal connection between an antitrust violation and harm to plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect. To have standing to sue under the antitrust laws, the plaintiff must be the target of the anticompetitive activity, not one who has merely suffered indirect, secondary, or remote injury.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN21[] **Private Actions, Standing**

In order to determine if a party has standing, the court must first define the antitrust injury that the antitrust laws concerning tie-ins were designed to prevent. The anti-competitive effects of the tying agreement are two-fold. First, the tying agreement may force the party subject to the tie to give up substitutes for the tied product, or may force the party subject to the tie to purchase a product for which he has no use. Second, the tying agreement may destroy the free access into the market of suppliers of the tied product. Therefore, the court's focus is upon competition in the tied market. Because restraints on competition in the tied market affect consumers and competitors in the tied market, consumers and competitors in the tied market are the parties that have standing to sue.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN22[] **Remedies, Damages**

Section 16 of the Clayton Act, *15 U.S.C.S. § 26*, also authorizes private suits for injunctive relief against threatened loss or damage by a violation of the antitrust laws. Although the standing rules for suits under Section 4 and Section

16 of the Clayton Act are somewhat different, standing under Section 16 also requires that the plaintiff show a threatened antitrust injury to receive injunctive relief.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN23[] **Antitrust & Trade Law, Sherman Act**

Under the Sherman Act, *15 U.S.C.S. § 1*, every contract, combination, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] **Conspiracy to Monopolize, Sherman Act**

Under the Sherman Act, *15 U.S.C.S. § 1*, there are two essential elements of any *section 1* offense: (1) a contract, combination, or conspiracy, resulting in (2) an unreasonable restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN25[] **Antitrust & Trade Law, Sherman Act**

To find a violation of section 1of the Sherman Act, *15 U.S.C.S. §1*, a court must first find the existence of a contract, combination, or conspiracy. A conspiracy imports a plurality of persons acting in concert to attain a common goal or purpose. Neither independent nor unilateral action is proscribed.

Antitrust & Trade Law > Sherman Act > Claims

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

International Trade Law > General Overview

HN26[] Sherman Act, Claims

The second element of a *section 1* violation of the Sherman Act, *15 U.S.C.S. § 1*, unreasonable restraint of trade, may be established by proof that the conspiracy was of a type that the law finds to be inherently unreasonable, a per se violation, or it may rest on a showing of anticompetitive motive or effect in the particular case, a rule of reason violation.

Antitrust & Trade Law > Sherman Act > Claims

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN27[] Sherman Act, Claims

There are certain business combinations and practices which are so pernicious and devoid of redeeming attributes that they are considered to be unreasonable restraints on interstate or foreign commerce per se. If a party is injured as a result of a per se violation of *section 1* of the Sherman Act, *15 U.S.C.S. § 1*, he need not allege or prove any particular effect or impact of the violation on interstate or foreign commerce; the existence of such an effect or impact is conclusively presumed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN28[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A practice could only be considered a per se violation if its effect and purpose is to threaten the proper operation of our predominately free-market economy, that is, if the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. Thus, the per se label must be applied only after the courts have had considerable experience with the type of conduct challenged and application of the rule of reason has inevitably resulted in a finding of anticompetitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN29[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Certain categories of per se violations are well defined and include price fixing, certain concerted refusals to deal, horizontal market division, and certain types of tying agreements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

International Trade Law > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN30[] **Vertical Restraints, Price Fixing**

Illegal price fixing includes any combination formed for the purpose of and with the effect of raising, depressing, fixing, or stabilizing the price of a commodity or service in interstate or foreign commerce. Price fixing is per se illegal if it is done horizontally or vertically. Agreements between competitors that tamper with the selling or purchase price of commodities or services constitute horizontal price fixing. Agreements between persons in the chain of distribution that fix the resale price of a commodity or service constitute vertical price fixing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN31[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

If a business practice challenged has not been subject to any previous judicial experience, and if it does not appear that the practice would always or almost always tend to restrict competition, then the rule of reason should be applied rather than the per se rule.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN32[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In order to prevail in a cause of action alleging a conspiracy to restrain trade under the rule of reason, a plaintiff must establish: (1) an agreement among two or more persons or distinct business entities, (2) which is intended to harm or unreasonably restrain competition, and (3) which actually causes injury to competition.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Torts > ... > Business Relationships > Intentional Interference > Elements

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

HN33[] **Jurisdiction, Jurisdictional Sources**

28 U.S.C.S. § 1337 provides the court with original jurisdiction of any civil action arising under any act of Congress regulating commerce or protecting trade and commerce against restraint and monopolies.

Judges: [1]** Stephen N. Limbaugh, United States District Judge.

Opinion by: LIMBAUGH

Opinion

[*918] MEMORANDUM

STEPHEN N. LIMBAUGH, UNITED STATES DISTRICT JUDGE

Plaintiff filed an eight count complaint against defendants which arises out of defendants' refusal to sanction for tournament play a bowling ball manufactured by plaintiff. In Counts I - VII plaintiff alleges that defendants' refusal to sanction violated *Section 1* and *Section 2* of the Sherman Antitrust Act. In Count VIII plaintiff alleges that defendant is liable for tortious interference with business relations. This cause is before the Court on defendants' **[*919]** motion for summary judgment on Counts I - VII of plaintiff's complaint.

Summary Judgment Standard

Courts have repeatedly recognized that *HN1*[] summary judgment is a harsh remedy which should only be granted when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Life Ins. Co. v. Null, 554 F.2d 896, 901 (8th Cir. 1977)*. Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *City of Mt. Pleasant, Iowa v. Associated Electric **[**2]** Cooperative Inc., 838 F.2d 268, 273 (8th Cir. 1988)*.

Pursuant to *Fed.R.Civ.P. 56(c)*, *HN2*[] a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broadcasting System, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. The burden is on the moving party. *City of Mt. Pleasant, supra, 838 F.2d at 273*. Once the moving party discharges this burden, the non-moving party must do more than show that there is some doubt as to the facts. *Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986)*. Instead, the non-moving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)*.

HN3[] In passing on a motion for summary judgment, the court must review the facts in a light most favorable **[**3]** to the party opposing the motion and give that party the benefit of any inferences that can logically be drawn from those facts. *Buller v. Buechler, 706 F.2d 844, 846 (8th Cir. 1983)*. The court is required to resolve all conflicts of evidence in favor of the non-moving party. *Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207, 210 (8th Cir. 1976)*. With these principles in mind, the Court turns to an examination of the facts.

Statement of Facts

Plaintiff is a corporation which manufactures and sells urethane bowling balls. The Professional Bowlers Association of America is a nonprofit membership association. The Professional Bowlers Association, Inc. is a wholly owned subsidiary of the Professional Bowlers Association of America which organizes and promotes televised bowling tournaments throughout the United States. The Court will refer to both defendants as the "PBA" or "defendants" when it refers to them collectively.

The Professional Bowlers Association, Inc. sells approximately thirty-four national tournaments to the television networks and title sponsors every year. Each PBA tournament begins with a field of approximately 160 bowlers. After several **[**4]** rounds of play, only the top five bowlers remain. The final rounds of play among the top five bowlers are televised in a program which lasts approximately one and one-half hours. The bowlers compete for purses which range from $ 125,000 to $ 400,000. The money for the tournament purses comes from two sources. First, the PBA licenses to television networks the right to televise the final rounds of PBA national tournaments. The television networks pay the PBA a rights fee in exchange for the licenses. Second, the PBA sells to corporate sponsors the right to associate their name with particular tournaments.

The PBA sells its national tournaments to the networks in three packages, or tour segments. From January through April, ABC broadcasts the "Winter Tour". From June through August, ESPN broadcasts the "Summer Tour". From October through December, NBC broadcasts the "Fall Tour". The television networks purchase the rights to televise PBA tournaments because they can sell 30-second **[*920]** commercial spots to advertisers who wish to advertise their products during the broadcast of the final rounds of the tournaments.

Manufacturers of bowling balls, such as plaintiff, encourage professional bowlers **[**5]** to use their balls during the televised portion of the PBA tournaments. To entice professional bowlers to use their balls during televised tournament play, the manufacturers frequently establish an incentive program by which a manufacturer agrees to pay a certain sum to a professional bowler who uses that manufacturer's ball in the televised portion of the tournament.

In 1984 plaintiff introduced its first bowling ball known as the Blue Tank. Plaintiff submitted the Blue Tank ball to the PBA and in 1984 received approval for the use of the Blue Tank in PBA tournament play. The Blue Tank had a picture of a military tank on its side. Several manufacturers have named their balls and have placed a depiction of the name on the side of the ball. Plaintiff offered an incentive program for bowlers who used the Blue Tank during televised tournament play. The Tank was used three times during televised tournament play during the year of its introduction.

In 1985 plaintiff decided to introduce the "Bud Ball." Plaintiff obtained a license from Anheuser-Busch ("A-B"), a leading manufacturer of domestic beer, for the use of the Budweiser bow tie logo. To create the Bud Ball plaintiff placed the Budweiser **[**6]** bow tie logo on a bowling ball colored in Budweiser red. Plaintiff made arrangements with A-B to develop an incentive program for use of the Bud Ball which would substantially increase a bowler's earnings if he won a PBA tournament while using the Bud Ball.

The PBA promulgates rules and regulations ("PBA Rules") which regulate PBA tournaments and other aspects of the sport of professional bowling. The PBA Rules establish product standards for bowling balls and other bowling equipment. The PBA Rules also restrain PBA bowlers concerning their usage of bowling articles bearing commercial advertisements. The PBA Rules which are relevant to the instant action include:

> Rule VII, Section A [before any bowler can use any new equipment in PBA competition it must have PBA clearance].
>
> Rule VII, Section E [prohibits logos on bowling balls other than the original under which they were manufactured].
>
> Rule XI, Section I and J [before any bowler can avail himself of an incentive offer, it must have PBA approval].

Rule XVIII, Section D [proscribes speech by PBA bowlers during interviews of the name of a commercial organization or product unless it relates to the tournament's title sponsor].

[7]** Rule XX, Section A [logos competitive with a title sponsor are precluded from appearing on a player's shirt].

Manufacturers of bowling balls must apply to the PBA for certification of their balls before a bowling ball can be used in PBA tournament play. On July 16, 1986 Mr. Donald Budde of plaintiff wrote to Mr. Joseph Antenora, commissioner of the PBA, concerning the Bud Ball. Mr. Budde informed the PBA that plaintiff would be introducing the Bud Ball later in the summer for use during the 1986 Fall Tour on NBC. Mr. Antenora mentioned the Bud Ball to Mr. Eddie Elias. Mr. Elias negotiates on behalf of the PBA the sale of the PBA's television rights to the networks and the sale of title sponsorships to the corporations.

Mr. Elias was concerned that the appearance of the Bud Ball in the Fall Tour would cause friction with NBC. Mr. Elias contacted Mr. James Burnette, who was in charge of sales at NBC. Mr. Burnette informed Mr. Elias that NBC would refuse to show the Bud Ball if it were used in one of the tournaments televised by NBC during the Fall Tour. Mr. James Nottingham, an employee in NBC's standards and practices department, warned Mr. Antenora that NBC would consider it a breach **[**8]** of contract if the Bud Ball were used during one of its televised tournaments, and that NBC may not televise the tournaments if the Bud Ball were used. A-B contacted **[*921]** NBC in order to persuade NBC to change its position, but to no avail.

In 1983, NBC and the PBA executed a contract for the years 1984 and 1985 under which NBC provided the production crew for each event on the Fall Tour and paid the PBA a fixed rights fee to televise the tournaments. In 1986, NBC renewed its contract with the PBA on substantially different terms. For 1986 NBC insisted that the PBA assume the responsibility for producing its events. NBC did not pay to the PBA a fixed rights fee. Instead, the PBA had to sell 24 commercial spots (of 30 seconds' length each) per tournament for NBC. The funds from the sale of the commercial spots went directly from the advertiser to NBC. The PBA guaranteed that it would raise a certain sum from such sales. If the PBA was able to arrange for advertising income over this set amount, the PBA would keep the excess amount. However, if the PBA was not able to generate enough spot commercial sales to reach this level, the PBA would suffer a reduction in the rights fees paid to them **[**9]** by NBC to make up the shortfall.

The PBA sells sponsorships for its individual tournaments. Corporate sponsors pay the PBA a fee in order to associate their name with a particular tournament. The PBA was concerned that the Bud Ball would violate their contracts with sponsors such as Brunswick and AMF. Miller Brewing Company ("Miller") changed its sponsor contract in response to the Bud Ball. Miller's sponsor contract with the PBA gave Miller the right to exclude the appearance of advertising for products competitive with Miller during the broadcast of a tournament which Miller sponsored. After the Bud Ball was introduced, Miller changed the terms of the contract with the PBA to prohibit the use of any bowling items containing commercial logos during tournaments it sponsors.

On August 27, 1986 plaintiff made written application to the PBA for a determination that the Bud Ball conformed with PBA product specifications, and for certification of the Bud Ball for use by PBA members. Prior to the application for the Bud Ball, no other ball submitted to the PBA was ever denied clearance. On November 3, 1986 the PBA Executive Board refused to approve plaintiff's application for certification **[**10]** for PBA tournament use. Plaintiff was notified of the PBA Executive Board's action in a letter from Mr. Antenora dated December 8, 1986. The PBA Executive Board subsequently voted to "table clearance" of the Bud Ball. To date the Bud Ball has not been cleared for PBA use. The sole reason for the decision was the appearance of the commercial logo on the ball.

The Bud Ball was cleared for use by the American Bowling Congress on December 5, 1985 and June 20, 1986, and by the Ladies Professional Bowlers Tour ("LPBT") in November, 1986. The Bud Ball was used by bowlers in LPBT tournaments televised on ESPN.

The only other bowling ball manufactured by plaintiff is the Black Tank. The Black Tank is identical in construction and composition to the Bud Ball, but is different in appearance. The Black Tank is black and has a military tank pictured on it. Plaintiff sought and received clearance for use of the Black Tank in PBA tournament play beginning on April 18, 1988.

The PBA permits its members to wear commercial logos on their shirts and pants during televised tournament play. The PBA Rules permit professional bowlers to wear a total of three commercial logos on the shirt and pants. Professional **[**11]** bowlers must secure prior approval from the PBA for each logo they desire to wear.

The PBA has cleared a bowling ball for use in PBA tournament play that bears the name of a bowling alley - Timber Lanes. The bowling ball was approved for use during a regional tournament in the Northwest which was not televised. The Timber Lane ball, however, was not permitted to be used in a national televised tournament.

Relevant Market

Defendants assert that plaintiff's claims under *Section 1* and *2* must fail because defendants do not possess monopoly power in the relevant market. To determine **[*922]** whether competition has been harmed in violation of the antitrust laws, the Court must define the relevant market. ***HN4***[] The relevant market is determined by reference to both the product market and the geographic market. [1] *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)*. Plaintiff defines the relevant product market as items used by professional bowlers during televised tournament play. The Court suspects that plaintiff's definition of the relevant market is too narrowly drawn. Defendants, however, have failed to present the Court with sufficient evidence to expand **[**12]** the relevant product market to include other means of advertising a bowling ball.

HN5[] The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendants' product or service. *United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. This comparative analysis has been characterized as the "reasonable interchangeability" standard. The *DuPont* court noted that reasonable interchangeability may be gauged by (1) the product's uses, i.e., whether the substitute products or services can perform the same function, and/or (2) consumer response (cross-elasticity of demand). [2]

[13]** Furthermore, a market can be divided into several submarkets. ***HN7***[] The market test may be utilized in conjunction with the submarket criteria promulgated in *Brown Shoe Co. v. United States, supra.* A submarket may be determined by examining such practical indicia as (1) industry or public recognition of the submarket as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors. *370 U.S. at 325, 82 S. Ct. at 1523*.

In the instant matter the product market to be defined is that for the advertisement of a bowling ball. Defendant has attempted to define the product market as the advertisement of beer. Plaintiff manufactures and sells bowling balls, not beer. Although A-B manufactures and sells beer, A-B is not a party to this suit and does not claim that it was injured by defendants' refusal to sanction the Bud Ball. Furthermore, plaintiff seeks to advertise the Bud Ball in order to sell bowling balls, not beer. The mere fact that the bowling ball contains the logo of a beer manufacturer does not change the nature of the product **[**14]** from bowling balls to beer. Therefore, defendants arguments concerning the numerous avenues by which A-B advertises Budweiser beer are properly disregarded as immaterial.

Defendants assert that the plaintiff has many options for the advertisement of a bowling ball: (1) plaintiff may purchase commercial spots advertising the Bud Ball during televised PBA tournaments or other sporting events, (2) plaintiff may purchase the sponsorship of a PBA tournament, (3) plaintiff may purchase print advertisements in

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[1] There is no dispute over the definition of the relevant geographic market. Since defendants organize and promote tournaments throughout the United States, and the tournaments are televised nationwide, the Court assumes that the relevant geographic market is the United States.

[2] ***HN6***[] Cross-elasticity of demand refers to the change in the demand by consumers for one product as the result of a change in the price of another product. 2 P. Areeda & D. Turner, ***Antitrust Law*** 349 (1978).

bowling journals and other media, and (4) plaintiff may pay professional bowlers to endorse the Bud Ball. Defendants, however, did not carry their burden in broadening the relevant product market by merely listing the options by which plaintiff may advertise the Bud Ball.

HN8[] Only reasonably interchangeable products may be included in the same market. A product is reasonably interchangeable for another if consumers of the products considered them to be reasonable substitutes. The consumer of the product in the instant matter is a purchaser of advertising for a bowling ball. Therefore, the question is whether the purchaser of advertising for **[*923]** a bowling ball considers spot commercials, tournament **[**15]** sponsorships, print advertisements, and paid endorsements as reasonable substitutes for a professional bowler using the ball during a televised tournament. Defendants may prove products are reasonably interchangeable by presenting the Court with a measurement of their cross-elasticities of demand. For example, if the price of a spot commercial increases, do purchasers of advertising for sporting goods purchase endorsements from professional athletes instead. The Court has no evidence of cross-elasticity before it. Instead, defendants merely argue that plaintiff's definition of the relevant product market is untenable given its options in advertising. The Court disagrees.

As narrow as plaintiff's product market appears, plaintiff may still have defined a valid submarket. Professional bowlers are role models for the amateur bowlers who observe them during televised tournament play. The use of a bowling article during televised tournament play allows the viewing consumer to see that the product has the endorsement of the professional using the product. An amateur bowler who watches the televised tournament may place great significance on the bowling ball used by the successful professional **[**16]** bowlers of the day. Therefore, this endorsement can have a significant effect on the sale of the product so used.

Furthermore, the PBA is the sole sponsor of televised tournament play for men. Professional bowling does not attract live viewers in significant numbers, and gets no televised coverage except for the tours sponsored by defendants. If a professional bowler cannot use the Bud Ball during televised tournament play, his paid endorsement in a spot commercial or print advertisement would be discounted by the consumer who watches the televised tournament play. The viewer would question the quality of the ball when a professional bowler endorses the ball during a commercial advertisement but uses another ball during televised tournament play.

In sum, although the Court suspects that plaintiffs' submarket may be too narrowly defined, defendant has failed to carry its burden to broaden the relevant product market by proving the substitutability of other means of advertising. For the purposes of the motion for summary judgment, the Court will assume that the relevant product market is the items used by professional bowlers during televised tournament play. For the foregoing reasons, **[**17]** defendant's motion for summary judgment on the ground that it does not possess a monopoly in the relevant market is denied.

Section 2 Claims

In Counts III, IV, V, VI, and VII plaintiff alleges that defendants violated *Section 2* of the Sherman Act, *15 U.S.C. § 2*. The Court considers Count IV (essential facility) and Count VI (tying arrangement) separately, *infra*. The Court now addresses the merits of Counts III, V, and VII. The factual allegations underlying all three counts are the same. Professional bowlers must join the PBA to enter PBA tournaments. The PBA Rules, to which PBA members must adhere, proscribe the use of bowling balls which have not been sanctioned by the PBA. Because the Bud Ball was not sanctioned by the PBA, no professional bowler could use the Bud Ball during televised tournament play. In Count III plaintiff alleges that defendants monopolized or conspired to monopolize the market of commercial advertising on bowling articles used in televised tournament play. Plaintiff asserts that defendants have abused this monopoly power by unreasonably and arbitrarily excluding the Bud Ball from being used in tournament play. In Count V, plaintiff alleges that defendants **[**18]** have used their monopoly power over the administration of the sport of bowling to monopolize the adjacent market of advertising services applied to commercial bowling articles used in televised tournaments. In Count VII, plaintiff alleges that defendants have attempted to monopolize or conspired to attempt to monopolize the relevant market.

HN9[] To establish monopolization in violation of *Section 2* it must be shown that defendants (1) possessed monopoly power **[*924]** in the relevant market; and (2) used its monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor. *Trace X Chemical v. Canadian Industries, 738 F.2d 261, 265 (8th Cir. 1984)*, *cert. denied*, *469 U.S. 1160, 105 S. Ct. 911, 83 L. Ed. 2d 925 (1985)*.

A. *Monopoly Power*

For purposes of this motion for summary judgment the Court has accepted plaintiff's definition of the relevant market as being articles that a professional bowler uses during televised tournament play. *HN10*[] Monopoly power is defined as the power to control prices and exclude competition with respect to a particular product and within a particular geographic market. *United States v. E.I. DuPont de Nemours & Co., supra, 351 U.S. at 391, 76 S. Ct. at 1004*. **[**19]** Since defendants exercise absolute control over the articles professional bowlers may use during televised tournament play, and may prohibit the use of any article, defendants do possess monopoly power in the relevant market.

B. *Anti-Competitive Behavior*

HN11[] To prove a violation of *Section 2*, whether based upon a claim of attempted or actual monopolization, plaintiff must show defendants engaged in anticompetitive behavior, that is, defendants used their monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor. *Trace X Chemical v. Canadian Industries, supra, 738 F.2d at 265-66*. *HN12*[] A mere showing of monopoly power unaccompanied by evidence of anticompetitive behavior is insufficient to support a claim for illegal monopolization. *Id*. (*citing* *Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76 (2d Cir. 1981)*, *cert. denied*, *455 U.S. 943, 102 S. Ct. 1438, 71 L. Ed. 2d 654 (1982))*. If defendant's activities were not anticompetitive, defendant is absolved of liability for claims of monopolization and attempted monopolization. *Trace X Chemical, supra, 738 F.2d at 266*.

HN13[] Anticompetitive conduct is conduct **[**20]** without legitimate business purpose. *Id*. (*citing* *Becker v. Egypt News Co., 713 F.2d 363, 366 (8th Cir. 1983))*. Such conduct makes sense only because it eliminates competition. *Id*. Acts which are ordinary business practices typical of those used in a competitive market do not constitute anticompetitive conduct violative of *Section 2*. *Trace X Chemical, supra, 738 F.2d at 266* (*citing* *Telex Corp. v. IBM, 510 F.2d 894, 925-26 (10th Cir. 1975)*, *cert. denied*, *423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975))*. To be labeled anticompetitive, the conduct involved must be such that its "anticipated benefits were dependent on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power." *Trace X Chemical, supra, 738 F.2d at 267* (*quoting William Inglis v. ITT Continental Baking Co., 668 F.2d 1014, 1030 (9th Cir. 1982)*, *cert. denied*, *459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61, 103 S. Ct. 58 (1982))*.

There is little dispute between the parties as to why defendants refused to sanction the Bud Ball for PBA tournament play. The Court has closely examined the reasons proffered by defendants for their refusal **[**21]** to sanction the Bud Ball and concludes that defendants' actions were neither unreasonable nor anticompetitive but a valid exercise of business judgment to protect their enterprise.

First, defendants' refusal to sanction the Bud Ball was in response to NBC's negative reaction to the idea of a bowling ball bearing a commercial advertisement. NBC frowned upon the Bud Ball as a means of free advertising for A-B, and informed the defendants that it did not want the Bud Ball to appear during the 1986 Fall Tour. If defendants sanctioned the Bud Ball despite NBC's resistance, NBC may have considered defendants' action a breach of the contract and refused to televise the 1986 Fall Tour.

Defendants' ability to effectively serve the interests of professional bowlers is dependent upon defendants' obtaining television coverage of the tours. The purpose of PBA, Inc. is to organize and promote bowling tournaments in which its members compete for prize money. There are two **[*925]** sources of prize money: 1) corporations that sponsor tournaments, and 2) networks that pay defendants a licensing fee to televise the tournaments. [3] If the tournaments in the 1986 Fall Tour did not receive television coverage, **[**22]** the sources of prize money would disappear. NBC would not pay defendants a rights fee if it did not televise the tournaments. Also, the value of a corporate sponsorship for a particular tournament would decrease if the tournament was not nationally televised. Although defendants may have capitulated under pressure from NBC, a good working relationship with NBC and the other networks is crucial to defendants' ability to serve professional bowlers. The networks have control over defendants' lifeline through their televising of defendants' tours. Defendants, which had legitimate concerns over their vitality, did not behave anticompetitively because they succumbed under pressure from NBC concerning approval of the Bud Ball.

[23]** Second, defendants were concerned that the appearance of the Bud Ball on a tour would decrease the number of corporations willing to sponsor tournaments. Miller, one of defendants' regular tournament sponsors, did not want the products of a competitor to be advertised during a tournament it sponsored. Miller changed the terms of its sponsorship contract to prevent the use of any commercial logos on the articles worn or used by professional bowlers during the tournaments Miller sponsored. No corporate sponsor seeks to have the advertising value of its sponsorship diluted by the commercial logos of other companies.

Third, the presence of the Bud Ball in a tournament would decrease the value of spot commercial time. The price of a spot commercial decreases as the amount of intra-program advertising increases. Therefore, if beer is being advertised on the side of the bowling ball during the PBA tournament, the price of a spot commercial shown during a commercial break decreases.

In the 1986 Fall Tour defendants had an immediate concern over the price of spot commercial time. Defendants had to raise a certain amount of revenue from selling spot commercials or suffer a reduction in the **[**24]** rights fee. A decrease in the value of spot commercial time might translate into a direct monetary loss for defendants. Defendants are concerned about the price of spot commercial time even when defendants are not responsible for selling spot commercials. The networks pay defendants a rights fee to televise the tournaments because they can sell spot commercial time to advertisers who want to promote their products during the tournament. If the value of spot commercial time decreases for any reason (i.e. decrease in the number of viewers, change in the demographics of viewers, increase in advertising during the tournament), the networks will reduce the rights fee paid to defendants to televise the tournaments. Furthermore, if the price of spot commercial time decreases, the PBA tours become less attractive to the networks vis-a-vis other programs they can televise instead. Therefore, it is in the interest of defendants to maximize the value of spot commercial time so defendants are not lured to televise other programs.

Plaintiff asserts that defendants' refusal to sanction the Bud Ball was arbitrary. First, plaintiff points to other sports such as auto racing, boxing, tennis, and golf **[**25]** where the professional athletes are freely permitted to endorse products during the televised broadcast of the sporting event. For example, the cars in televised auto races are covered with commercial logos. Defendants assert that their decision is to keep the sport of professional bowling "clean", that is, free from the numerous intra-program commercial advertisements **[*926]** that bombard the television viewer of an auto race. The Court agrees that defendants have discretion over whether to permit commercial advertising during the sports event on the equipment that athletes use, or keep the sport "clean" and maximize the price of advertising for spot commercials. The Court will not grant potential advertisers the power to determine the amount and type of advertising that the sport must allow.

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[3] For the 1986 Fall Tour there was a third possible source of revenue. As was explained *supra*, for the 1986 Fall Tour NBC did not pay a fixed rights fee. Instead, the PBA had to sell 24 commercial spots (of 30 seconds' length each) per tournament for NBC. The PBA guaranteed that it would raise a certain sum from such sales. If the PBA was able to arrange for advertising income over this set amount, the PBA would keep the excess amount. However, if the PBA was not able to generate enough spot commercial sales to reach this level, the PBA would suffer a reduction in the rights fees paid to them by NBC to make up the shortfall.

Second, the PBA Rules permit professional bowlers during televised tournament play to wear a maximum of three commercial logos on their shirt and pants. For example, the PBA Rules may permit a professional bowler to wear an A-B logo on the sleeve of his shirt during televised tournament play. Defendants receive no compensation from either the professional bowler or the advertiser when the logo is worn. **[**26]** Defendants have drawn a line between commercial logos on clothing and commercial logos on the bowling ball. First, the networks have not voiced any opposition to logos worn on the professional bowlers' clothing. Second, defendants perceive a distinction between wearing a logo on a shirt, and placing a logo on a bowling ball. Because defendants have discretion over the type of advertising they will allow during their tournaments, defendants may be arbitrary in permitting logos on one article but not on another without violating the antitrust laws. Plaintiff also argues that defendants sanctioned a bowling ball with the name of a bowling alley - Timber Lanes - emblazoned on its side. Defendants' approval of the Timber Lanes Ball is distinguishable. The Timber Lanes ball was used during a regional tournament which did not receive any television coverage. Defendants refused to sanction the Timber Lanes ball for use during a televised tournament.

Plaintiff asserts that defendants made no effort to negotiate with plaintiff concerning the approval of the Bud Ball. Defendants never offered to sanction the Bud Ball on the condition that the television camera shoot around it. Also, defendants **[**27]** could have shown the Bud Ball but concealed the A-B logo. This argument contravenes the raison d'etre of the lawsuit. Plaintiff argues that the success of the Bud Ball was dependent on defendants' approval of the ball for use in televised PBA tournaments. Plaintiff sought approval for the Bud Ball so television viewers of the tournaments would see the great bowlers of the day using the Bud Ball and purchase it for themselves. If the network shot around the Bud Ball or made it unrecognizable to the television viewer, plaintiff would not receive the valuable endorsement they contend is necessary for the successful marketing of the ball. [4]

Plaintiffs depict defendants' refusal to sanction the Bud Ball as **[**28]** anticompetitive. The Court, however, views defendants' action as a sound exercise of business judgment calculated to preserve their ability to serve the interests of professional bowlers. For the foregoing reasons, the Court enters summary judgment in favor of defendants and against plaintiff on the merits of Count III, Count V, and Count VII of plaintiff's complaint.

Essential Facilities

In Count IV plaintiff alleges that defendants have denied plaintiff an essential facility in violation of *15 U.S.C. § 2*. Plaintiff defines the facility as the items which professional bowlers may use during televised tournament play. Defendants, through their rules which regulate the equipment a bowler may use during televised tournament play, has monopoly power over this facility. Plaintiff alleges that access to this facility is essential for the effective promotion of its commercial bowling articles.

HN14[] Under the essential facilities doctrine, those in possession of facilities which cannot practically be duplicated must **[*927]** share the facilities with their competitors on fair terms. *City of Malden, Mo. v. Union Electric Company, 887 F.2d 157, 160 (8th Cir. 1989)*. The policy behind prohibiting denial **[**29]** of an essential facility to a competitor, at least in part, is to prevent a monopolist in a given market from using its power to inhibit competition in another market. *Twin Laboratories v. Weider Health & Fitness, 900 F.2d 566, 568 (2nd Cir. 1990)*. ***HN15***[] The essential facilities doctrine requires (1) control of an essential facility by a monopolist, (2) the inability to practically or economically duplicate the facility, and (3) the unreasonable denial of the use of the facility *to a competitor* when such use is economically and technically feasible. *City of Malden, Mo. v. Union Electric Company, supra, 887 F.2d at 160* (Emphasis added).

For this motion the Court will assume the existence of the first two factors. The third factor, however, is not satisfied because plaintiff and defendant are not competitors in any market. Plaintiff manufactures and sells bowling balls. For the purposes of this action, plaintiff also competes with other businesses which seek to advertise their products

[4] Also, plaintiff alleges that defendant never offered to sanction the Bud Ball for a price. This argument is directly related to plaintiff's essential facilities claim, which is discussed, *infra*. Unless defendants' control an essential facility, defendants have no obligation to deal with plaintiff on any terms.

during the PBA tour. The PBA organizes and promotes televised bowling tournaments throughout the United States. Defendants sell to networks the right to televise the tournaments. Defendants compete **[**30]** with other sporting events and non-sport programs which seek to be televised by the networks. Also, defendants sell to corporations the right to associate their name with a particular tournament. Defendants compete with other events that seek corporate sponsorship. It is clear that plaintiff and defendant are not competitors.

The Court has surveyed the relevant cases for applications of the essential facilities doctrine to the field of advertising. The Court has found several cases that are distinguishable from the instant matter. In *Soap Opera Now, Inc. v. Network Publishing Corp., 737 F. Supp. 1338 (S.D.N.Y. 1990)*, plaintiff and defendant both published a periodical which focused on daytime soap opera news, gossip, and coming attractions. Plaintiff published its periodical in the form of a short newsletter; defendant's periodical was a 150 page color magazine. When defendant refused to permit plaintiff to advertise plaintiff's newsletter in defendant's magazine, plaintiff sued defendant for a violation of the essential facilities doctrine. The court dismissed the essential facilities claim because plaintiff and defendant were not competitors. The court stated:

> Even assuming **[**31]** that the [defendant] possesses market power in its product market, plaintiff's monopolization and attempted monopolization claims premised upon an essential facilities theory must fail. Plaintiff's attempt claim is deficient because [plaintiff] and [defendant] do not compete in any market. For the same reason, any other possible claim under an essential facilities theory must fail. In order to make out a claim under the essential facilities doctrine, a plaintiff must demonstrate "a competitor's inability practically or reasonably to duplicate the essential facility," and "the denial of the use of the facility to a competitor." [Citations omitted]. Because plaintiff has not raised a factual issue as to whether the [defendant] denied its services "to a competitor," any claim based upon the denial of an essential facility must be dismissed.

737 F. Supp. at 1348-49.

In *Twin Laboratories v. Weider Health & Fitness, supra*, the plaintiff and defendant both produced nutritional supplements for body builders. Both parties also published bodybuilding magazines. Defendant published two magazines which were universally acknowledged to be the leading magazines in the bodybuilding field; **[**32]** plaintiff's magazine had a much smaller circulation. When defendant terminated plaintiff's ability to purchase advertising spots for nutritional supplements in defendant's magazines, plaintiff brought an action against defendant claiming a violation of the essential facilities doctrine. In *Twin Laboratories* the essential facilities doctrine properly applied because the plaintiff and defendant were competitors in the sale of nutritional supplements. The advertising **[*928]** space sought in by plaintiff in defendant's magazines was to be used to advertise a product in direct competition with a product manufactured by defendant. [5] In the instant matter, plaintiff and defendant are not competitors.

Plaintiff asserts that plaintiff and defendants are potential competitors because defendants may, at some future time, require or entice bowlers to wear clothing and use equipment **[**33]** bearing defendants' logo during televised PBA tournaments. Therefore, plaintiff and defendant would compete to get professional bowlers to display products with their respective logos. Plaintiff's argument is without merit. Although possible or prospective competition between the parties may satisfy the competition element of an essential facilities claim, there must be a link between the possible or prospective competition and the reason defendants denied plaintiff access to the essential facility.

Defendants did not refuse to sanction the Bud Ball because they would like to place their logo on bowling balls instead. Defendant refused to sanction the Bud Ball because it contained the logo of A-B which is not the manufacturer of the ball. Bowling balls adorned with the manufacturer's logo have been sanctioned by defendants. Also, bowling balls adorned with a depiction of the name of the ball, such as plaintiff's Blue Tank and Black Tank balls, have been sanctioned by defendants. Plaintiff's Black Tank ball was sanctioned after the plaintiff's failed

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5 The Court held that the essential facilities doctrine was not violated because plaintiff failed to show that it had suffered any economic loss due to defendant's actions.

attempt to introduce the Bud Ball. Although the PBA has discussed the possibility of having professional bowlers wear its logo or use **[**34]** equipment with its logo, these discussions are remote from defendants' refusal to sanction the Bud Ball. The Court will not permit plaintiff to circumvent the requirement of competition between the parties by setting forth a purely speculative source of competition between plaintiff and defendants which is unrelated to defendants' denial of the alleged essential facility.

For the foregoing reasons, the Court enters summary judgment in favor of defendant and against plaintiff on Count IV of plaintiff's complaint.

Tying Claim

In Count VI plaintiff alleges that defendants violated *15 U.S.C. §§ 1* and *2* by the employment of an illegal tying arrangement. Plaintiff seeks monetary relief under *15 U.S.C. § 15* and injunctive relief under *15 U.S.C. § 26*. In order to enter a tournament sponsored by defendant, a professional bowler must purchase a membership to the PBA. As a member of the PBA, the professional bowler must adhere to the PBA Rules. The PBA Rules restrict the items a professional bowler may use during a tournament by requiring prior approval by the PBA. A professional bowler who joins the PBA is subject to disciplinary sanctions if he disobeys the PBA Rules.

"***HN16***[] A tying arrangement **[**35]** is defined as the sale of one item (the tying product) on the condition that the buyer purchase a second product (the tied product) from the same source." *Rosebrough Monument Co. v. Memorial Park Cemetery Association, 666 F.2d 1130, 1140 (8th Cir. 1981)*, *cert. denied*, *457 U.S. 1111, 102 S. Ct. 2915, 73 L. Ed. 2d 1321 (1982)*. In *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1985)*, the Supreme Court explained:

> ***HN17***[] The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of the tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

466 U.S. at 12, 104 S. Ct. at 1558.

Plaintiff defines the tying product as the right to enter PBA sponsored tournaments, and the tied product as the membership in the PBA. In order to participate in the **[*929]** PBA sponsored tournament, the professional bowler must purchase a membership in the PBA. **[**36]** [6] Professional bowlers might forego membership in the PBA, and all the restrictions on their conduct that PBA membership entails, if entry into PBA sponsored tournaments was not "tied" to PBA membership.

Defendants argue that plaintiff lacks standing to bring a claim for a tying arrangement. ***HN18***[] The question of standing to sue under the Clayton and Sherman Acts is one of law. In *Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 535 n. 31, 103 S. Ct. 897, 907 n. 31, 74 L. Ed. 2d 723 (1983)*, the Supreme Court explained that antitrust standing requirements go beyond injury in fact. The court must also determine whether the plaintiff, even if injured, is the proper party to bring the action.

A. *Section 4*

HN19[] Section 4 of the Clayton Act, *15 U.S.C. § 15*, authorizes private damage suits for violations of federal antitrust laws by persons injured in their "business or property by reason of anything forbidden in the antitrust **[**37]** laws. . . ." The language of this section, if interpreted expansively, provides any party which can show a causal link between the injury and violation, no matter how remote, with standing to sue. Numerous courts,

[6] Professional bowlers must also pay a fee to enter a PBA tournament.

however, have narrowed the potential scope of Section 4 to prevent unfair and oppressive results. *Midwest Communications v. Minnesota Twins, 779 F.2d 444, 450 (8th Cir. 1985)*, *cert. denied*, *476 U.S. 1163, 106 S. Ct. 2289, 90 L. Ed. 2d 730 (1986)*.

HN20[] The plaintiff must demonstrate that the antitrust injury is of the type the antitrust laws were designed to prevent and that the injury flows from that which makes the defendant's acts unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*. "[A] mere causal connection between an antitrust violation and harm to plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect." *McDonald v. Johnson & Johnson, 722 F.2d 1370, 1374* (8th Cir.), *cert. denied*, *469 U.S. 870, 105 S. Ct. 219, 83 L. Ed. 2d 149 (1984)*. To have standing to sue under the antitrust laws, the plaintiff must **[**38]** be the target of the anticompetitive activity, "not one who has merely suffered indirect, secondary, or remote injury. . . ." *Midwest Communications v. Minnesota Twins, supra, 779 F.2d at 451 (8th Cir. 1985)* (*quoting* *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710 (11th Cir. 1984))*.

HN21[] The Court must first define the antitrust injury that the antitrust laws concerning tie-ins were designed to prevent. The anti-competitive effects of the tying agreement are two fold. First, the tying agreement may force the party subject to the tie to give up substitutes for the tied product, or may force the party subject to the tie to purchase a product for which he has no use. Second, the tying agreement may destroy the free access into the market of suppliers of the tied product. *United States v. Loew's, Incorporated, 371 U.S. 38, 45, 83 S. Ct. 97, 102, 9 L. Ed. 2d 11, 18 (1962)*. Therefore, the court's focus is upon competition in the tied market. Because restraints on competition in the tied market affect consumers and competitors in the tied market, consumers and competitors in the tied market are the parties that have standing to sue. *Bell v. Dow Chemical Co., 847 F.2d 1179, 1183* ***[**39]*** *(5th Cir. 1988)* (Citations omitted).

In the instant matter the consumers of the tied product are the professional bowlers who must purchase a PBA membership in order to enter PBA tournaments. Although plaintiff is a member of the PBA, plaintiff's membership was apparently voluntary and certainly not the result of coercion in connection with the tying arrangement alleged in this action. Therefore, plaintiff is not a purchaser or potential purchaser of the tied product. Plaintiff is also not a competitor in the market for the tied product. Plaintiff neither sells memberships **[*930]** to professional bowlers nor sponsors tournaments.

B. *Section 16*

HN22[] Section 16 of the Clayton Act, *15 U.S.C. § 26*, also authorizes private suits for injunctive relief "against threatened loss or damage by a violation of the antitrust laws. . . ." Although the standing rules for suits under Section 4 and Section 16 of the Clayton Act are somewhat different, standing under Section 16 also requires that the plaintiff show a threatened antitrust injury to receive injunctive relief. As was explained *supra*, the injury to which plaintiff is threatened is not one which the ***antitrust law*** against tying arrangements **[**40]** was designed to protect.

In sum, the laws against tie-in arrangements were designed to protect competition in the tied market. Although plaintiff's injury may be causally related to the alleged illegal tie-in, plaintiff's injury is only tangential to that which the antitrust laws were designed to protect. For the foregoing reasons, the Court enters summary judgment in favor of defendants and against plaintiff on Count VI of plaintiff's complaint.

Section 1 Claims

In Counts I and II of its complaint plaintiff alleges that defendant violated *Section 1* of the Sherman Act, ***HN23***[] *15 U.S.C. § 1*. *Section 1* of the Sherman Act provides in part:

> Every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

HN24[] *15 U.S.C. § 1*. There are two essential elements of any *Section 1* offense: (1) a contract, combination, or conspiracy, resulting in (2) an unreasonable restraint of trade. *Pumps & Power Co. v. Southern States Industries, 787 F.2d 1252, 1256 (8th Cir. 1986)*; *Overseas Motors, Inc. v. Import Motors Limited, Inc., 375 F. Supp. 499, 531 (E.D. Mich. 1974)*, *aff'd* *519 F.2d 119* (6th **[**41]** Cir.), *cert. denied 423 U.S. 987, 96 S. Ct. 395, 46 L. Ed. 2d 304 (1975)*.

A. *Proof of Combination or Conspiracy*

HN25[] To find a violation of *Section 1*, the Court must first find the existence of a contract, combination, or conspiracy. *International Travel Arrangers, Inc. v. Western Airlines, 623 F.2d 1255, 1265* (8th Cir.), *cert. denied 449 U.S. 1063, 101 S. Ct. 787, 66 L. Ed. 2d 605 (1980)*. A conspiracy imports a plurality of persons acting in concert to attain a common goal or purpose. *White v. Hearst Corp., 669 F.2d 14, 18 (1st Cir. 1982)*. Neither independent nor unilateral action is proscribed. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775*, *reh'g denied*, *466 U.S. 994, 104 S. Ct. 2378, 80 L. Ed. 2d 850 (1984)*; *Pumps & Power Co. v. Southern States Industries, supra, 787 F.2d at 1256 (8th Cir. 1986)*. Plaintiff alleges that the Professional Bowlers Association, some of its Executive Board members, Professional Bowlers Association, Inc., Miller as a advertising sponsor, NBC, ABC, and professional bowlers who are members of the Professional Bowlers Association conspired to exclude the Bud Ball from tournament appearances.

[42]** First, Miller was not a participant in any concerted action. Miller's sponsor contract with the PBA gave it the right to exclude the appearance of advertising for products competitive with Miller during the broadcast of a tournament which Miller sponsored. After the Bud Ball was introduced, Miller changed the terms of the contract with the PBA to prohibit the use of any bowling items containing commercial logos. There is no evidence of concerted activity on the part of Miller. Prior to the inception of the Bud Ball Miller would not have allowed the advertising of a competitor, such as A-B, during a tournament that Miller sponsored. After the inception of the Bud Ball, Miller altered its contract to exclude advertising of all non-Miller products. The action of Miller to alter its sponsorship contract was taken independently and unilaterally.

With the exception of Miller, the Court will assume, for purposes of defendant's motion, that plaintiff has alleged sufficient **[*931]** facts to prove a conspiracy involving defendants.

B. *Unreasonable Restraint of Trade*

HN26[] The second element of a *Section 1* violation, unreasonable restraint of trade, may be established by proof that the conspiracy was **[**43]** of a type that the law finds to be inherently unreasonable (a *per se* violation), or it may rest on a showing of anticompetitive motive or effect in the particular case (a rule of reason violation). *Overseas Motors, Inc. v. Import Motors Limited, Inc., supra, 375 F. Supp. at 531*.

1. Per Se Analysis

"*HN27*[] There are certain business combinations and practices which are so pernicious and devoid of redeeming attributes that they are considered to be unreasonable restraints on interstate or foreign commerce per se." *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, 578 F.2d 1256, 1259 (8th Cir. 1978)*. If a party is injured as a result of a per se violation of *§ 1* of the Sherman Act, he need not allege or prove any particular effect or impact of the violation on interstate or foreign commerce; the existence of such an effect or impact is conclusively presumed. *Id*.

As the Supreme Court stated in *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19, 20, 99 S. Ct. 1551, 1562-63, 60 L. Ed. 2d 1 (1979)*, *HN28*[] a practice could only be considered a *per se* violation if its effect and purpose was "to threaten the proper operation of our predominately free-market economy," that is, if the practice "facially **[**44]** appears to be one that would always or almost always tend to restrict competition and decrease output." Thus, the *per se* label must be applied only after the courts have had considerable experience with the type of conduct challenged and application of the rule of reason has inevitably resulted in a finding of anticompetitive effects. *Havoco v. Am. Ltd. v. Shell Oil Co., 626 F.2d 549, 553 (7th Cir. 1980)*.

HN29[] Certain categories of per se violations are well defined and include price fixing, certain concerted refusals to deal, horizontal market division, and certain types of tying agreements. *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, supra, 578 F.2d at 1259*; *Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1186, 1190 (W.D.N.C. 1988)*.

I. Group Boycott

In Count I plaintiff alleges that defendant participated in a group boycott in violation of *Section 1*. Plaintiff's claim concerning a group boycott does not set forth a *per se* violation of the antitrust laws. Group boycotts are considered to be per se illegal only when they are engaged in by competitors of the plaintiff. In *F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d* ***[**45]*** *445 (1986)*, the Court stated:

> As we observed last Term in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, [86 L. Ed. 2d 202, 105 S. Ct. 2613]* (1985), the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor. . . .

106 S. Ct. at 2018.

In *Lomar Wholesale Grocery v. Dieter's Gourmet Foods, 824 F.2d 582 (8th Cir. 1987)*, *cert. denied*, *484 U.S. 1010, 108 S. Ct. 707, 98 L. Ed. 2d 658 (1988)*, the Court stated:

> We believe that absent any collusion at some horizontal level, "[]the rule of reason provides a more discriminating way of differentiating" the procompetitive refusal to deal from the anticompetitive one. Because [plaintiff's] complaint alleged no combination between horizontal competitors, the District Court did not err . . . in awarding summary judgment to defendants on [plaintiff's] claim that defendants violated the per se rule by engaging in a group boycott.

824 F.2d at 595 (*quoting* *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 132* ***[**46]*** *n. 6 (2d Cir. 1978))*.

[*932] In the instant matter, neither defendants nor the networks are competitors of plaintiff. Plaintiff seeks to place advertisements on bowling balls used by professional bowlers during televised tournaments. Plaintiff asserts that the placement of an advertisement on a bowling ball would make it a competitor of defendants and the networks because the advertisement on the bowling ball would compete with defendants and the networks' sale of spot commercial time during the broadcast of the tournament. Thus, plaintiff and defendants are horizontal competitors and the alleged group boycott should be determined on a *per se* theory of liability.

The Court rejects plaintiff's characterization of this relationship as competition. The networks sell spot commercial time to be aired during the broadcast of PBA tournaments; for the 1986 Fall Tour defendants sold commercial time to be aired during the broadcast of PBA tournaments. Plaintiff, which seeks to advertise during the broadcast, has devised a gimmick which will provide both plaintiff and a separate commercial enterprise with a means of advertising during the broadcast of the tournament for which neither will have to **[**47]** pay the networks. This is not a source of competition between the parties; plaintiff does not seek to enter the business of selling advertising. [7] Instead, plaintiff, which would normally be a purchaser of advertising from the networks, seeks to obtain for free a service for which the networks earn their revenue by selling.

II. Price Fixing

In Count II plaintiff alleges that defendant entered an agreement affecting prices in *per se* violation of *Section 1* of the Sherman Act. Plaintiff alleges that by excluding advertising on bowling balls, defendants and the networks can maintain an artificially high level of advertising prices for spot commercials. If commercial advertising were permitted on the side of a bowling ball, the networks would earn less money from the sale of spot commercials, and defendants would earn less money from the sale of the rights to televise the tournaments.

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[7] In fact, plaintiff paid to A-B a licensing fee for the use of its logo on the Bud Ball.

The Supreme Court has defined *HN30*[] illegal price **[**48]** fixing to include any "combination formed for the purpose of and with the effect of raising, depressing, fixing, or stabilizing the price of a commodity" or service in interstate or foreign commerce. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 844, 84 L. Ed. 1129*, *reh'g. denied*, *310 U.S. 658, 60 S. Ct. 1091, 84 L. Ed. 1421 (1940)*; *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*. Price fixing is *per se* illegal if it is done horizontally or vertically. Agreements between competitors that tamper with the selling or purchase price of commodities or services constitute horizontal price fixing. Agreements between persons in the chain of distribution that fix the resale price of a commodity or service constitute vertical price fixing.

In the instant matter the alleged agreement cannot be identified as classic horizontal or vertical price fixing. The Court cannot characterize the price restraint as horizontal because the alleged coconspirators are not competitors of each other or of the plaintiff. The Court cannot characterize the price restraint as classically vertical because defendants do not sell to the networks a product or service for which a resale **[**49]** price is fixed. Defendants sell to the networks the right to broadcast the final rounds of the tournaments. The networks, in turn, sell to advertisers 30 second time spots to be aired during the broadcast of the tournament. Although defendants and the networks each have an interest in maximizing the price of a spot commercial during a tournament broadcast, the product of advertising time is not being transferred from defendants to the networks with an agreement as to what to charge for it. Rather, by refusing to sanction the Bud Ball, defendants have maintained their product in a manner that will enable the network to command a higher price for the advertising than if the Bud Ball appeared in the tournaments. Furthermore, the alleged **[*933]** agreement does not fix the prices of advertising. Instead, the alleged agreement has a positive effect on the prices of spot commercials.

HN31[] If the business practice challenged has not been subject to any previous judicial experience, and if it does not appear that the practice would always or almost always tend to restrict competition, then the rule of reason should be applied rather than the per se rule. *Havoco v. Am. Ltd. v. Shell Oil Co., supra,* ***[**50]*** *626 F.2d at 553*. The Court has not encountered a restraint of this nature. Due to the unique relationship between defendants and the networks, and the unique characteristics of the sport of professional bowling, the Court is unable to characterize the restraint as one that is inherently pernicious.

Therefore, the Court concludes that the alleged price restraint is not a *per se* violation of *Section 1* and will instead proceed to a rule of reason analysis.

2. Rule of Reason Analysis

HN32[] In order to prevail in a cause of action alleging a conspiracy to restrain trade under the rule of reason, plaintiff must establish: (1) an agreement among two or more persons or distinct business entities, (2) which is intended to harm or unreasonably restrain competition, and (3) which actually causes injury to competition. *Rosebrough Monument Co. v. Memorial Park Cemetery, supra, 666 F.2d at 1138* (citations omitted). The primary considerations in determining whether a restraint of trade is unreasonable are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anticompetitive effects. *Id*. As was explained *supra*, the intention of defendants **[**51]** was not to harm or unreasonably restrain competition. Instead, defendants refusal to sanction the Bud Ball was a sound exercise of business judgment designed to secure its continued efficacy in serving the interests of professional bowlers.

The restraint does have an anticompetitive effect in that it forecloses the Bud Ball from entry into the submarket defined, *supra*. The Court, however, has weighed the anticompetitive effects of the foreclosure against the rights of defendants to administer the sport of professional bowling and the networks to earn revenue from the sale of advertising spots, and concludes that any anticompetitive effects are not significant. The Court has considered the ramifications of plaintiff's position to the television broadcasts of sporting or other events. The heart of this suit is not a conflict between plaintiff, a manufacturer of sporting goods, and defendant, an organizer and promoter of sporting events. Instead, the conflict is between plaintiff and the networks that televise sporting events. Plaintiff's position is that the athlete in a televised sporting event should be able to endorse the product of a sporting goods manufacturer by his use of **[**52]** the product. The sporting goods manufacturer receives a valuable endorsement from the athlete; the athlete is handsomely paid by the manufacturer in the form of an incentive payment. Therefore, both the sporting goods manufacturer and the athlete benefit by this arrangement. The networks, which are in the business of selling advertising, suffer in two ways. First, the networks are compelled to permit advertising during their telecast for which they are not compensated. Second, the intra-program advertising decreases the price of spot-commercial programming. The antitrust laws do not require, and this Court will not compel, the networks to give away the product or service that they are in the business of selling.

For the foregoing reasons, defendants' motion for summary judgment concerning Count I and Count II of plaintiff's complaint is granted.

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

In Count VIII plaintiff alleges that defendants are liable for the state law tort of tortious interference with business relations. In Counts I-VII plaintiff alleged violations of the federal antitrust laws. The Court exercised jurisdiction over Counts I-VII under ***HN33***[] *28 U.S.C. § 1337*, which provides **[**53]** the court with "original jurisdiction **[*934]** of any civil action . . . arising under any act of Congress regulating commerce or protecting trade and commerce against restraint and monopolies. . . ." The Court exercised pendent jurisdiction over plaintiff's state law claim. [8]

The Court has entered summary judgment in favor of defendant and against plaintiff on the merits of Counts I-VII of plaintiff's complaint. The Court exercises its discretion to dismiss Count VIII for lack of subject matter jurisdiction pursuant to *Fed.R.Civ.P. 12(b)(1)*. *Rosado v. Wyman, 397 U.S. 397, 402-405, 90 S. Ct. 1207, 1212-14, 25 L. Ed. 2d 442 (1970)*; *Koke v. Stifel, Nicolaus, & Co., 620 F.2d 1340, 1346-1347 (8th Cir. 1980)*.

Dated this 6th day of September, 1990.

ORDER - September 6, 1990, Filed

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendants' motion for summary judgment on Counts I - **[**54]** VII is GRANTED. Judgment is entered in favor of defendants and against plaintiff on the merits of Count I, Count II, Count III, Count IV, Count V, Count VI, and Count VII of plaintiff's complaint.

IT IS FURTHER ORDERED that Count VIII of plaintiff's complaint is DISMISSED for lack of subject matter jurisdiction.

Dated this 6th day of September, 1990.

End of Document

[8] Plaintiff did not allege diversity of the parties as an independent source of federal jurisdiction.

In re Wyoming Tight Sands Antitrust Cases

United States District Court for the District of Kansas

September 6, 1990, Decided ; September 6, 1990, Filed

Case No. 85-2349 and Consolidated Cases

Reporter

1990 U.S. Dist. LEXIS 13576 *; 1990 WL 155542

IN RE: WYOMING TIGHT SANDS ANTITRUST CASES

Core Terms

defendants', plaintiffs', contracts, Pipeline, antitrust, lost profits, overcharge, damages, natural gas, prices, agrees, witnesses, parties, cases, residential, purchasers, antitrust claim, consumers, exclude evidence, motion in limine, pretrial order, Designation, prejudicial, denies, customers, sands, tight, attorney general, case in chief, good faith

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN1[] **Private Actions, Remedies**

When a plaintiff establishes that it has been damaged as a proximate result of the defendants' violation of the antitrust laws, then the amount of its damages may be proven by any reasonable theory. The essential requirement is only that it is plaintiff's burden to develop a reasonable theory for calculating the amount of damages.

Civil Procedure > Pretrial Matters > Motions in Limine > General Overview

Civil Procedure > Trials > Opening Statements > General Overview

HN2[] **Pretrial Matters, Motions in Limine**

The primary purpose of a motion in limine is to prevent prejudice at trial by either (1) precluding an opponent from mentioning potentially inadmissible evidence in his opening statement, or eliciting such evidence from a witness until the court has had the opportunity to rule on its admissibility, or (2) procuring a definitive ruling on the admissibility of evidence at the outset of the trial. Under federal law, motions in limine are generally disfavored. This is because prior to trial, the court cannot know whether or for what purpose the evidence will be offered during the trial. Further, the absence of a contextual setting makes it particularly difficult for the court to render definitive rulings at this stage of the proceedings. Thus, where the parties have often sought to exclude broad categories of evidence, the court has generally denied the motions.

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Regulated Industries > General Overview

HN3[] **Clayton Act, Defenses**

There is ample authority that where antitrust claims arise in the context of a regulated industry, the antitrust defendant is entitled to raise and have considered its good faith adherence to regulatory obligations as an antitrust defense. For the regulatory justification defense to apply, the defendant must first be able to point to a regulatory basis that is reasonable in the sense of being concrete articulable and recognized as legitimate by the appropriate regulatory agency.

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

HN4[] **Methods of Discovery, Expert Witness Discovery**

Fed. R. Civ. P. 26(b)(4)(B) deals with the ability of a party to discover information about or from an adversary's nonwitness experts, and not with the admissibility at trial of collateral information regarding experts retained by a co-defendant.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN5[] **Private Actions, Purchasers**

The status of assignments under the Sherman and Clayton Acts is a matter of federal law. In determining the validity of assignments of federal antitrust claims from direct to indirect purchasers, the court must examine any potential conflict. If the assignments serve to exacerbate any of the primary concerns underlying these decisions, the assignments must be rejected, at least insofar as they might affect the conduct of the trial.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN6[] **Private Actions, Remedies**

Considerable latitude is allowed in proving various elements of antitrust injury, including lost profits. This is because damage issues in antitrust cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. Thus, if the fact of lost profits is demonstrated, the actual amount need not be proven to an absolute certainty, since in such cases economic harm is frequently intangible and difficult to quantify.

Civil Procedure > Pretrial Matters > Conferences > Final Pretrial Conferences

Civil Procedure > Pretrial Matters > General Overview

Civil Procedure > Pretrial Matters > Conferences > General Overview

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN7[] **Conferences, Final Pretrial Conferences**

Under the Federal Rules, the pretrial order supersedes the pleadings and controls the subsequent course of litigation. *Fed. R. Civ. P. 16(e)*. Generally, claims of parties which are not included in the final pretrial order cannot be asserted at trial except to prevent manifest injustice. The trial court has the discretion to exclude from trial those issues and claims not found in the pretrial order.

Commercial Law (UCC) > General Provisions (Article 1) > General Provisions

Contracts Law > Breach > General Overview

Commercial Law (UCC) > General Provisions (Article 1) > Application & Construction > General Overview

Commercial Law (UCC) > ... > Application & Construction > Remedies > Damages

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

HN8[] **General Provisions (Article 1), General Provisions**

The Uniform Commercial Code (U.C.C.) embodies general common law principles of contract damages which seek to place the aggrieved party in as good a position as if the other party had fully performed the contract. Where the contract claim involves an alleged breach of the duty of good faith fair dealing, the U.C.C. provides no additional remedy. *Kan. Stat. Ann. § 84-1-106*.

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Judges: Earl E. O'Connor, Chief United States District Judge.

Opinion by: O'CONNOR

Opinion

MEMORANDUM AND ORDER

In these consolidated cases, three utilities, the Kansas Power and Light Company (KPL), the Kansas Gas and Electric Company (KGE), and Utilicorp United, Inc. (Utilicorp), the states of Kansas and Missouri, and Farmland Industries (Farmland), brought actions against three natural gas producers, Amoco Production Company (Amoco), Cities Service Oil and Gas Corporation (Cities), CSG Exploration Company (Exploration), and one pipeline, Williams Natural Gas Company (Pipeline), [1] asserting claims under federal and state antitrust laws, RICO, and various common-law claims. **[*4]**

Now before the court are defendants' motion for summary judgment on plaintiffs' "Section 104" damage theory and numerous motions in limine filed by both sides. As was the case in the court's August 2, 1990, order, due to time constraints, the court will announce its rulings in abbreviated form.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF KANSAS, MISSOURI, AND FARMLAND'S "SECTION 104" DAMAGE THEORY

Plaintiffs' "Section 104" antitrust damage theory, first introduced into this case late in 1989, is based on language contained in the 1978 Federal Energy Regulatory Commission's (FERC) order authorizing construction of the Rawlins-Hesston Pipeline, which provides:

(E) The filing of related producer certificate applications or written commitments to sell the gas covered by such application to the Applicant is required. These commitments shall be verified under oath by a responsible **[*5]** official of the company and shall be filed in the pipeline's docket. The commitment shall contain the producer's agreements to:

(1) Accept a certificate at the *applicable just and reasonable rate* as determined by the Commission, or the contract rate, whichever is lower. . .

(Emphasis supplied)

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[1] The court granted summary judgment in favor of two other defendants, the Moxa and Wamsutter Limited Partnerships, on August 2, 1990.

Kansas, Missouri and Farmland construe this language to limit Amoco to the wellhead prices allowed producers of Wamsutter gas under the NGA, prior to passage of the NGPA. [2] These NGA producer prices are carried forward in Section 104 of the NGPA, (codified at *15 U.S.C. § 3314*), and are even lower than the Section 102 or 103, (codified at *15 U.S.C. §§ 3312*, *3313*), rates that would have applied to the Wyoming gas if tight sands incentive prices had not been paid. By contending that the Pipeline should have established the price of Wamsutter and Amoco tight sands gas under Section 104, rather than Section 102 and 103 of the NGPA, plaintiffs' damage claims are effectively doubled.

[*6] ***HN1***[] When a plaintiff establishes that it has been damaged as a proximate result of the defendants' violation of the antitrust laws, then the amount of its damages may be proven by any reasonable theory. *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)*. The essential requirement is only that it is plaintiff's burden to develop a reasonable theory for calculating the amount of damages. *Knutson v. Daily Review, Inc., 468 F.Supp 226, 230 (N.D.Cal.1979)*, *aff'd*, *664 F.2d 1120 (9th Cir.1981)*, *citing* *Lehrman v. Gulf Oil Corp., 500 F.2d 659, 668 (5th Cir. 1974)*, *reh. denied*, *503 F.2d 1403*, *cert. denied*, *420 U.S. 929 (1975)*; L. Sullivan, *Handbook of the Law of Antitrust*, § 251 at 786 (1977).

Defendants oppose the Section 104 theory on two grounds. First, defendants contend that assertion of the theory in the instant case is unreasonable since, in the nearly twelve years since the Rawlins-Hesston certificate was issued, neither plaintiffs nor any other party has raised this pricing theory before the FERC. Opportunities where the Section 104 theory might logically have been raised include the time period from 1979 to 1988, when the Pipeline made purchased gas adjustment **[*7]** (PGA) filings every six months at the FERC to determine the means by which changes in gas purchase costs would be passed on to customers. During that time, neither plaintiffs nor any other party claimed the Pipeline should be limited to payment of Section 104 prices for Wamsutter and Amoco gas. Further, in numerous other rate proceedings before the FERC dealing with the Pipeline's payment of Section 102 and 103 prices, the Section 104 issue was not raised. On this basis, defendants also claim that raising the Section 104 theory at this time is an impermissible collateral attack upon prior FERC orders.

Second, defendants argue the Section 104 theory fails as a matter of FERC law. They claim that, although the same language relied upon by plaintiffs was used in over 50 FPC and FERC certificates, FERC has not interpreted any of these certificates (1) to require the payment of Section 104 prices for gas that qualifies under Sections 102, 103, or 107(c)(5) of the NGPA or (2) to mean that gas flowing through a pipeline subject to such a condition may not be sold or purchased at prices above Section 104 rates. Defendants further assert that, even if the FERC had previously been inclined **[*8]** to enforce the claimed Section 104 pricing provision, this enforcement power was lost when the NGA was superseded by the NGPA.

In response, plaintiffs have completely failed to carry their burden under summary judgment standards, to rebut or even dispute any of the above arguments. The gist of plaintiffs' response is merely that the Section 104 theory is "an entirely permissible calculation." Although plaintiffs' attempt to raise the Section 104 theory may not rise to the level of an "impermissible collateral attack" on the prior FERC orders approving the Section 102 and 103 prices, on the record presently before the court, we conclude plaintiffs have not met their burden to show the reasonableness of the Section 104 theory. Accordingly, defendants' motion is granted.

MOTIONS IN LIMINE

HN2[] The primary purpose of a motion in limine is to prevent prejudice at trial by either (1) precluding an opponent from mentioning potentially inadmissible evidence in his opening statement, or eliciting such evidence from a witness until the court has had the opportunity to rule on its admissibility, or (2) procuring a definitive ruling on the admissibility of evidence at the outset of the trial. **[*9]** *See Annot.*, 63 A.L.R.3d 311 (1975); 21 Wright & Graham, *Federal Practice and Procedure*, § 5037, p. 193-94 (1977). Under federal law, motions in limine are

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[2] Plaintiffs do not contend Section 104 prices apply to Moxa gas, since this gas was not transported by the Rawlins-Hesston Pipeline.

generally disfavored. *Scarboro v. Travellers Ins. Co., 91 F.R.D. 21, 22 (E.D.Tenn. 1981)*. The better practice is to deal with questions of admissibility of evidence as they arise during trial. *Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712* (6th Cir.), *cert. den.*, *423 U.S. 987 (1975)*. This is because prior to trial, the court cannot know whether or for what purpose the evidence will be offered during the trial. Further, the absence of a contextual setting makes it particularly difficult for the court to render definitive rulings at this stage of the proceedings. Thus, where the parties have often sought to exclude broad categories of evidence, the court has generally denied the motions.

PLAINTIFF'S MOTIONS IN LIMINE

I. *Motion to Exclude All Evidence of Failure of Utilities to be Damaged Because Overcharges Were Passed On To Customers*

Plaintiffs move to preclude defendants from arguing that the utilities suffered no antitrust injury, since their overcharges were passed on to their customers. **[*10]** Defendants concede that under *Kansas v. Utilicorp United, Inc., 110 S.Ct. 2807 (1990)*, this defense is prohibited and, accordingly, the court grants plaintiffs' motion in this respect. The court's ruling does not, however, preclude all reference to the passthrough where it might otherwise be relevant.

II. *Plaintiffs' Motion to Exclude Evidence of FERC Policies and Practices*

Plaintiffs argue, with no supporting authority, that evidence of defendants' compliance with FERC policy and practices should be excluded on the basis of this court's prior rulings on the exclusive and primary jurisdiction issues. Plaintiffs also contend this evidence is "irrelevant, prejudicial, confusing and misleading."

HN3[] There is ample authority that "where antitrust claims arise in the context of a regulated industry, the antitrust defendant is entitled to raise and have considered its 'good faith adherence to regulatory obligations as an antitrust defense.'" *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line, 730 F.Supp. 826, 933 (C.D. Ill. 1990)*, *citing* *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1109-10* (7th Cir.), *cert. denied*, *464 U.S. 891 (1983)*. **[*11]** We agree that "for this regulatory justification defense to apply, the defendant must first be able to point to a regulatory basis that is reasonable in the sense of being 'concrete articulable and recognized as legitimate' by the appropriate regulatory agency." *Id.*

Further, evidence of regulatory compliance is relevant to the issue of monopolization, since it may demonstrate that the alleged monopolistic activities are, in fact, procompetitive. Moreover, evidence of good-faith compliance with regulatory mandates may be relevant to defendants' alleged motivation to restrain competition.

Finally, in the instant case, it is plaintiffs who have raised the issue of regulation by claiming defendants' anticompetitive goal was to evade regulatory control over affiliate transactions. Having raised this issue, plaintiffs cannot now be allowed to exclude defendants' evidence to the contrary. Accordingly, plaintiffs' motion is denied.

III. *Motion to Exclude Testimony of Expert, C. Michael Butler, III*

Plaintiffs argue that any testimony by Butler regarding FERC Order 99 and FERC policies and practices in the late 1970's and early 1980's should be excluded because it reflects his opinion **[*12]** and because Butler does not (by his own admission) speak for the FERC. Nevertheless, plaintiffs argue since Butler's deposition testimony gives the impression that he is a spokesperson for FERC, his testimony will confuse the jury. Plaintiffs also contend Butler's testimony is excludable, since it includes legal opinions "telling the jury what result to reach." These arguments lack substance.

Here, plaintiffs have put in issue the defendants' motivation. In determining whether defendants' conduct was proper, the duties and obligations of defendants under FERC regulation must be considered in determining whether defendants' conduct was undertaken in furtherance of legitimate business or regulatory objectives. *See* *State of Ill. ex rel. Hartigan v. Panhandle Eastern Pipeline Co., supra at 908*. Plaintiffs have not disputed Butler's expert qualifications to assist the jury by testifying to these facts and, accordingly, the court denies plaintiffs' motion. *Rule 702, Fed R. Evid.*

IV. *Motion to Exclude Internal Memorandum Prepared by KPL Outside Legal Counsel*

Plaintiffs seek to exclude an internal memorandum, prepared as an initial analysis of the complaint filed in the MGUA **[*13]** proceeding by an attorney for KPL, which was inadvertently produced in discovery in this case. Plaintiffs argue this evidence is irrelevant, is not admissible as lay or expert testimony, and would confuse and mislead the jury.

We agree that the memorandum, which contains tentative impressions and initial legal conclusions as to claims filed in another proceeding, is irrelevant and, even if relevant, we conclude that any probative value the evidence might possess is outweighed by the substantial prejudice to plaintiffs, which would result from its introduction. *Rules 401*, *403, Fed. R. Evid.* Accordingly, plaintiffs' motion is granted.

V. *Motion to Exclude Testimony of FERC Staff Attorney Regarding Proposed FERC Rule*

Plaintiffs move to exclude the statements made to Amoco in 1980 by FERC staff attorney Leslie Lawner regarding the proposed FERC rule on tight sands pricing eligibility (Order No. 99). Lawner told Amoco that no negotiations and no consideration would be necessary to obtain tight sands pricing -- but rather that the contracts could be amended as a "pro forma act." Plaintiffs argue for exclusion on the basis that this opinion interpreted the proposed Rule and not actual **[*14]** Order No. 99 which followed later. Plaintiffs also argue that since Lawner's testimony will be introduced through a third party, it is excludable as hearsay.

The court agrees with defendants that Lawner's statements are not offered for their truth, but are offered and are relevant to prove (1) Amoco's state of mind in pursuing tight sands amendments with Pipeline, i.e. whether the amendments were executed with anticompetitive purpose or for legitimate business motives, and (2) lack of fraudulent intent. On this basis, the court denies plaintiffs' motion.

VI. *Motion to Exclude Evidence of Pipeline's Reliance on Advice of Counsel*

Plaintiffs contend the court should exclude any evidence relating to the Pipeline's reliance upon advice of counsel, since (1) Pipeline has disclaimed any intent to rely on an advice of counsel defense, and (2) because the evidence is not relevant and, even if relevant, is highly prejudicial. [3] Defendants counter that the evidence is admissible, even though not claimed as an affirmative defense, since it is relevant to prove (1) defendants' good faith and/or lack of required intent for violations of the antitrust, fraud and mail fraud (RICO) statutes, **[*15]** and (2) lack of anticompetitive purpose in amending the gas purchase contracts. Further, defendants assert the evidence is relevant to plaintiffs' claim of breach of the contractual duty of good faith and fair dealing.

The court agrees with defendants that this evidence is relevant to issues of anticompetitive motive and/or intent as well as to the issue of good faith and fair dealing. The court notes further, that in nearly all of the cases cited by plaintiffs, such evidence was admitted. Accordingly, plaintiffs' motion is denied.

VII. *Motion to Exclude Evidence of Plaintiff Utilities' Designation and Later Withdrawal of Designation of John Wilson and George Donkin as Expert Witnesses*

John Wilson and **[*16]** George Donkin were originally designated as experts by KPL, KG&E, and Utilicorp. These designations were later withdrawn, and both Wilson and Donkin will now testify for Kansas, Missouri and Farmland. Plaintiffs seek to preclude defendants from raising the issue of these experts' prior designation and subsequent withdrawal by the utilities under *Rules 103*, *402*, *403*, and 26(b)(4)(B), Federal Rules of Evidence.

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[3] Plaintiffs' other objections to this evidence, i.e. the alleged bias of the counsel in question and the lack of specificity of the advice, go more to the weight of the evidence than its admissibility. The court also finds that defendants did not prohibit or limit discovery to the extent claimed by plaintiffs.

The court finds no basis for exclusion under the rules cited by plaintiffs. ***HN4***[] Rule 26(b)(4)(B) deals with the ability of a party to discover information about or from an adversary's nonwitness experts, and not with the admissibility at trial of collateral information regarding experts retained by a co-defendant. For similar reasons, the cases cited by plaintiffs, *Steele v. Seglie, 1986 WL 30765* (D. Kan. March 27, 1886), and *Ager v. Stormont Hosp., 622 F.2d 496 (10th Cir.1980)*, are inapposite. Although the court has reservations about the relevance of the testimony at issue, at this point the court denies plaintiffs' motion. [4]

[*17] VIII. *Motion to Exclude Evidence of Alleged Poor Management of Gas Service Company (GSC) Prior to Acquisition by KPL*

Pursuant to *Rules 401*, *402* and *403, Federal Rules of Evidence*, plaintiffs move to exclude "any evidence related to any aspect of GSC management," including the following: attitudes by William LaLonde (former GSC president) towards low-income consumers; management study by the Arthur Anderson company, which "can be read to be critical of management in certain respects"; and internal memoranda of GSC regarding operations and management after KPL's acquisition of GSC.

Defendants assert that the motion is overbroad and, further, that the evidence regarding alleged poor management of GSC is relevant to several issues, including (1) the lost profits claim (as an alternate reason for lost profits); (2) market power issues, insofar as GSC was criticized for not taking advantage of alternate intrastate gas supplies; and (3) fraud and concealment, insofar as GSC's lack of knowledge of details of the Wyoming program was due to lack of diligence on management's part.

We agree with defendants that the motion is overbroad, and also find that the evidence at issue possesses relevance **[*18]** to the issues noted by defendants. Accordingly, plaintiffs motion is denied.

IX. *Motion to Exclude Evidence of Natural Gas Explosions and Electric Contact Accidents*

Plaintiffs contend evidence of natural gas explosions and electric contact accidents is irrelevant to any issue in case and even if relevant, is highly prejudicial, and will serve only to inflame the jury. Defendants assert that, although they do not intend to offer evidence of details of these accidents, they may wish to offer evidence of these occurrences to counter plaintiffs' claims for lost profits. Defendants argue that some of the lost profits claimed by plaintiffs may be due to a costly repair program initiated subsequent to these accidents, and also due to KPL's deferral of a rate increase request because of safety questions arising from these explosions.

The court agrees with plaintiffs that detailed evidence of the accidents is prejudicial and irrelevant. However, if plaintiffs claim their lost profits are due solely to price of natural gas, the court believes defendants should be allowed to bring in other sources of lost profits and would allow evidence of the accidents for this limited purpose. Accordingly, **[*19]** plaintiffs' motion is denied.

X. *Motion to Exclude Evidence of Present Status of Two Former Kansas Corporation Commission Chairmen as District Judges*.

Here, plaintiffs note that defendants have listed two current federal district judges, both former chairmen of the Kansas Corporation Commission (KCC), as witnesses, and have also listed documents referring to or authored by these judges as trial exhibits. Plaintiffs move to exclude any reference to their current status as district judges.

Defendants state they have no intention of offering evidence of the status of these judges and, in addition, have no expectation of calling them as live witnesses, although they may use the testimony of each while chairman of the

[4] Defendants also counter that interrogatories have indicated that testimony of these two experts will be used by the States to support antitrust claims purportedly assigned by utilities to states. In view of the court's ruling on the assignment issue, this motion may be moot.

KCC. We agree with plaintiffs that reference to these witnesses' current status as district judges is irrelevant and prejudicial and, accordingly, grant plaintiffs' motion. *Rules 401*, *403, Fed. R. Evid.*

XI. *Motion to Exclude Evidence Relating to Wolf Creek Nuclear Generation Facility*

Plaintiffs move to exclude evidence of KG&E's involvement in the construction of the Wolf Creek Nuclear Generation Facility (Wolf Creek), specifically the facility's construction **[*20]** cost and the KCC's initial decision to exclude certain of these costs from KG&E's rate base. Plaintiffs claim this evidence is irrelevant and highly prejudicial, due to public hostility to KG&E engendered during the Wolf Creek hearings.

Defendants counter that the testimony is relevant to the issue of relevant market (to show that defendants' natural gas competes with alternative sources of fuel including nuclear energy), and equally relevant to rebut plaintiffs' allegation that the natural gas shortage was over by 1980 (to show that KG&E began to build Wolf Creek in the 1970's due to the gas shortage and remained committed to construction of facility in 1980 and 1981 because of stated "uncertain long-term gas supplies"). We agree with defendants that this evidence is relevant to the limited issues cited, especially to plaintiffs' claim regarding the supply of gas. Accordingly, plaintiffs motion is denied.

XII. *Motion to Exclude Expert Arthur Seder's Opinion as to the Reasonableness of Defendants' Acts*

Plaintiffs move to exclude defendants' expert, Arthur Seder, from offering "any opinion as to the reasonableness of defendants' conduct" with respect to the antitrust claims. Plaintiffs **[*21]** claim this testimony is irrelevant, unfairly prejudicial, and would not assist the jury in determining any material fact at issue. Defendants assert that Seder's testimony, based on his experience as an attorney and former officer of a major interstate pipeline, is relevant to support defendants' claims that their conduct (1) lacked anti-competitive effect and intent, and (2) resulted from legitimate business objectives.

The court agrees with defendants that this expert's testimony will assist the trier of fact in developing the relevant factors pertaining to the economic and competitive conditions in the industry in the relevant time period, factors which the court, in its August 2, 1990, order, deemed essential for resolution of the antitrust issues in this case. Accordingly, the court denies plaintiffs' motion.

XIII. *Motion to Condition Attendance of Certain of Defendants' Witnesses on Their Appearance in Plaintiffs' Case in Chief, and to Designate Counsel for Examination of Witnesses*

Plaintiffs move for an order (1) requiring defendants to make certain of their present and former employees available for live testimony during plaintiffs' case in chief, if defendants intend **[*22]** to have those witnesses testify live in defendants' case in chief; and (2) requiring plaintiffs and defendants to designate a single attorney per witness for direct and cross examination of all witnesses. As the parties were informed in the August 21, 1990, hearing, the court grants these motions in part.

First, witnesses employed by defendants, who will testify live in defendants' case in chief, must be produced for live testimony in plaintiffs' case in chief. [5] The court orders defendants to respond to plaintiffs' requests for these witnesses by September 10, 1990, and further orders plaintiffs to furnish defendants with the dates these witnesses will be called in plaintiffs' case in chief by September 17, 1990. The court expects counsel to comply with the letter and spirit of this ruling in order to effect the expeditious presentation of evidence without needless repetitive calling of witnesses. Following these witnesses' direct testimony, the court will allow defendants a broadened scope of cross examination. Second, the parties will designate one attorney as lead counsel for direct and cross examination of each witness. Following initial examination, each party will be permitted **[*23]** supplementary questions as needed, subject to rulings on cumulativeness and redundancy.

DEFENDANTS' MOTIONS IN LIMINE

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[5] The category of witnesses under the defendants' "present employ or direct control" includes employees only, and would generally not include retirees. Disputes concerning witnesses employed as consultants will be dealt with as they arise.

I. *Motion to Invalidate the Sharing and Partial Assignment Agreements Between KPL and Kansas/Missouri*

Defendants move to invalidate the Sharing and Partial Assignment Agreements (assignments) between KPL and the Attorneys General of Kansas and Missouri. In the alternative, defendants move for an order that "any trial be conducted as if the assignments did not exist."

The tights sands gas at issue in these cases was sold by the Pipeline, in part, to local distribution companies (LDC's). Plaintiff KPL is an LDC and resold the gas to its own customers, including industrial, commercial, and residential users in Kansas, Missouri, Oklahoma, and Nebraska. KPL also **[*24]** purchased gas for its own use. KPL claims, as damages, an alleged overcharge for each unit of gas purchased, including gas resold to others. KPL also claims lost profits resulting from the alleged overcharge.

The complaints of the States, through their Attorneys General, originally included claims of residential users and governmental entities in Kansas and Missouri who purchased gas, either directly or indirectly (through an LDC), from the Pipeline. In *In re Wyoming Tight Sands Cases, 695 F.Supp. 1109 (D.Kan. 1988)*, the district court dismissed the states' *parens patrie* claims on behalf of residential users based on *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)*, and *Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)*, in which the Supreme Court held that the direct purchaser of a product and no other in the distribution chain is the "party injured" within the meaning of section 4 of the Clayton Antitrust Act. [6] Therefore, only the direct purchaser, here, KPL, may sue to recover the full amount of any alleged illegal overcharges. The district court was subsequently affirmed by the Tenth Circuit, *In re Wyoming Tight Sands Antitrust Cases* ***[*25]*** *, 866 F.2d 1286 (10th Cir. 1989)*, and the Supreme Court, *Kansas v. Utilicorp United Inc., 110 S.Ct 2807 (1990)*, which declined to create an exception to the rule for regulated industries.

[*26] Two months after the Supreme Court granted certiorari to review the direct purchaser issue in this case, KPL entered into agreements, each styled "Sharing and Partial Assignment Agreement," with the Missouri and Kansas Attorneys General. In these agreements, the parties state that it is "in their interests to resolve" who is "the most appropriate party to advance claims in [this] litigation relating to natural gas resold by KPL to residential consumers of natural gas." Further, the parties agreed as follows:

1. KPL agreed to assign its claims against defendants for illegal antitrust overcharges attributable to natural gas resold by KPL to residential consumers of natural gas in Missouri and Kansas to the states, so that "those claims may be prosecuted by [Missouri and Kansas] with the same rights as KPL would have."

2. In return, the States agreed to dismiss, with prejudice, the appeals against KPL then pending before the Supreme Court.

3. Further, the States agreed to "support KPL in its claims for lost earnings, not to exceed $ 15,000,000, attorney's fees and out-of pocket expenses incurred in KPL's prosecution of the [litigation]," wherever the claims may be presented "whether **[*27]** by settlement, in court, or before the [Missouri Public Service Commission or Kansas

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[6] In *Hanover Shoe*, plaintiff alleged that defendant United had monopolized the shoe manufacturing machinery industry and sought treble damages for overcharges paid in leasing machinery from defendant. United defended, in part on the ground that Hanover had passed on the overcharge to its customers and, as a result, had suffered no injury. The Supreme Court disallowed the defense, concluding that (1) establishing the amount of the overcharge shifted to indirect purchase "would normally prove insurmountable," *392 U.S. at 493*, and (2) allowing a pass-on defense" would reduce the effectiveness of antitrust actions by diminishing the recovery available to any potential plaintiff. *See id. at 494*.

In *Illinois Brick*, the Court reached a similar result. In that case, the State of Illinois sued concrete block manufacturers for alleged antitrust violations. The status of Illinois was that of an indirect purchaser. The Court rejected the claim, holding that since, under *Hanover Shoe*, the defendants could not use a pass-on defense in an action by direct purchasers, offensive use of the pass-on theory by an indirect purchaser would implicate similar risks of complicated proof as well as risks of multiple liability. *431 U.S. at 730-31*.

Corporation Commission]. The parties also agreed that they would cooperate in the prosecution of their claims and with regard to disbursement of any damages.

4. The parties then agreed, "unless inconsistent with a final order of the applicable court in this case," that [Missouri and Kansas] would at trial offer evidence of (a) purchase of gas by residential consumers; (b) operation of relevant PGA (purchase gas adjustment clauses; and (c) "other evidence relating to natural gas purchases by [Missouri and Kansas] residents."

5. The parties agreed the assignment would be valid and enforceable "regardless of the outcome" of the Supreme Court decision then pending.

Generally, ***HN5***[] the status of assignments under the Sherman and Clayton Acts is a matter of federal law. [7] *In re Fine Paper Litigation State of Washington, 632 F.2d 1081, 1090 (3d Cir. 1980)*. Thus, in determining the validity of assignments of federal antitrust claims from direct to indirect purchasers, the court must examine any potential conflict with the Supreme Court's decisions in *Hanover Shoe*, *Illinois Brick*, and *Kansas v. Utilicorp* **[*28]** *United*. If the assignments serve to exacerbate any of the primary concerns underlying these decisions, the assignments must be rejected, at least insofar as they might affect the conduct of the trial.

Central to the holding of *Illinois Brick* was the Supreme Court's concern with (1) the difficulty of apportioning damage overcharges between direct and indirect purchasers; (2) the increase in complexity in already complicated treble damage suits; and (3) the risk of multiple recoveries. The court agrees with defendants that, here, the assignments implicate each of these concerns. In these respects, the instant case differs from *In re Fine Paper Litigation State of Washington, supra*, where the court upheld the validity of assignments of federal antitrust claims to indirect purchasers. In that case, the **[*29]** assignments arose in the context of a settlement and the court found they would "provide defendant with assurances against multiple liability" and "[would] not add to the complexity of the lawsuit." *632 F.2d at 1090*. Here, in the context of a trial involving multiple claims of five plaintiffs against four defendants, the increase in complexity is much more serious. [8]

Moreover, while the court in *In re Fine Paper* found no apportionment problems, here, such complications exist. First, apportionment would be necessary to separate damages suffered by residential consumers in the states of Kansas, Missouri, Nebraska and Oklahoma. Second, apportionment would be necessary to the extent KPL is entitled **[*30]** to claim any portion of the overcharge it may have absorbed. [9] As the Supreme Court indicated, the necessity of devising such an apportionment formula to account for these variables is "the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid." *Kansas v. Utilicorp United, supra, 110 S.Ct. at 2809*.

Finally, allowing the assignments here would increase the likelihood of multiple and overlapping recoveries. Presently, KPL claims damages for breach of resale contracts to residential consumers which parallel the federal antitrust claims of residential consumers. We agree with the Supreme Court that "the task of disentangling **[*31]** overlapping damage claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system. *Id. at 2814*, *quoting* *Blue Shield of Virginia v. McCready, 457 U.S. 465, 475, n.11 (1982)*.

For all the above reasons, the court declines to confer validity on those portions of the assignments which purport to allow the states of Kansas and Missouri to prosecute, at trial, the claims of residential consumers (indirect

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[7] Since the briefs of the parties fail to adequately address the assignments as they pertain to KPL's state antitrust claims, the court decides here only the issue of assignment of federal antitrust claims.

[8] For example, as defendants argue, this case could be further complicated, since even if the States could represent consumers residing in Kansas and Missouri, they could not represent consumers from other states. These unrepresented consumers could then seek intervention and further delay the resolution of the action.

[9] The absorption of overcharges could occur due to (1) the extent market conditions and state regulation would have allowed the utility to raise its rates prior to the overcharge, and (2) because state regulation might have prevented an immediate or complete passthrough of gas purchase costs. *See* *Kansas and Missouri v. Utilicorp United, Inc., supra, 110 S. Ct at 2813*.

purchasers of natural gas) in their respective states. Trial will therefore proceed as if the assignments did not exist. [10] **[*32]** Specifically, we grant defendants' request that the assignments not affect the presentation of evidence, arguments of counsel, use of expert witnesses, and requests for damages by the respective plaintiffs during the trial. To hold otherwise, would be to allow the States, as indirect purchasers, to accomplish by assignment that which the Supreme Court has clearly prohibited. [11]

II. *Motion To Preclude the Utilities' Lost Profit Damages*

Under their federal antitrust claims, plaintiffs KPL and Utilicorp seek overcharge damages for natural gas, as well as lost profits on the gas these companies would have sold had the alleged unlawful 107(c)(5) prices not been charged by the Pipeline. To estimate these lost profits, plaintiffs intend to estimate the additional sales the utilities would have made, but for the alleged overcharge, and then multiply these lost sales by the per-unit profit margin allowed under their actual rate structure.

Defendants move for an order precluding claims for lost profits, because (1) allowing them would violate the policy underlying *Kansas v. Utilicorp United* and *Illinois Brick*; (2) the assumptions upon which the calculations for lost profits are based are "inherently speculative"; and (3) regulation of the utilities complicates a lost profits analysis.

Defendants' contentions **[*33]** have no merit. First, in both cited cases, the Supreme Court recognized the potential of recovery of lost profits as a separate element of antitrust damages, *Kansas v. Utilicorp United, 110 S.Ct at 2813* ("an overcharge may injure a utility, *apart from the question of lost business*, even if the utility raises its rates to offset its increased costs"); *Illinois Brick 431 U.S. at 733 n.13, 743 n.27* (injury from reduction in sales volume may be claimed above and beyond overcharge damage).

Second, neither in these two cases, nor in *Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968)*, did the Supreme Court expressly disapprove the use of economic formulas devised by experts to prove the element of lost profits. In fact, it has long been a cardinal principle of ***antitrust law*** that ***HN6***[] considerable latitude is allowed in proving various elements of antitrust injury, including lost profits. This is because "damage issues in [antitrust cases] are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts . . . ," *World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1478* (10th Cir), *cert. den.*, *474 U.S. 823* ***[*34]*** *1985)*, *quoting* *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969)*. Thus, if the fact of lost profits is demonstrated, the actual amount need not be proven to an absolute certainty, since in such cases economic harm is "frequently intangible and difficult to quantify." *Id.*, *citing King v. King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1157 (10th Cir. 1981)*, *cert. denied*, *454 U.S. 1164 (1982)*.

Third, we reject defendants' contention that the regulatory complications of a lost profits analysis warrants precluding the introduction of such evidence. In essence, defendants' claim here is that plaintiffs' economic model supporting the lost profits theory is flawed, because it fails to account for the impact of the state regulatory agencies, i.e. whether or not the profits allegedly lost would have been permitted or approved. Even if defendants are correct, their objections go more to the weight of the evidence than its admissibility. It will be up to the trier of fact to determine the reasonableness of the economic model offered to support the lost profits claim. [12] Accordingly, defendants' motion is denied.

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[10] As defendants argue, the States have not moved for substitution of parties as required by *Rule 25(c), Fed. R. Civ. P.*, which applies to "any transfer of interest" during the pendency of an action. Although the court has decided the instant motion on the merits, we note that, had the motion for substitution been made, it is unlikely that we would have determined that the substitution would "facilitate the conduct of the litigation." *See* 7C Wright, Miller & Kane, *Federal Practice and Procedure*, § 1958, p. 557 (1986).

[11] We note, however, that our ruling does not, at this time, affect the assignments as they pertain to the post-trial apportionment between the parties of any damages.

[12] In addition, as the court stated in its August 2, 1990, order, any damages which are essentially duplicative will be thoroughly scrutinized at trial.

[*35] III. *Motion to Prohibit Introduction of Certain Damage Evidence by Kansas and Missouri*

As a "housekeeping matter," defendants move to preclude introduction of certain evidence relating to damages. First, based on *Kansas v. Utilicorp United, supra*, defendants argue that any damage calculation introduced by the States based on total volume of gas the Pipeline sold to LDC's for resale to residential consumers/indirect purchasers is improper. The States agree and have already indicated their intention to rely solely on overcharges born by state governmental direct purchasers. Accordingly, the court grants this portion of defendants' motion. [13]

Next, defendants contend the States may not assert new antitrust or breach of contract damage claims on behalf of municipal distribution customers. With respect to the antitrust claims, the **[*36]** court finds Kansas has only asserted, and continues only to assert claims on behalf of municipal utilities for gas purchased for their own use and not for resale. Since Kansas has not attempted to assert new antitrust claims, this portion of the motion is moot. On the other hand, in its response, Missouri concedes that it wishes to assert claims for breaches of contract for three municipalities (Granby, Oronogo, and Plattsburg) which were not included in the pretrial order. [14] Missouri now moves for modification of the pretrial order to include these claims, asserting that, since defendants have known of these claims "for years," Missouri's "inadvertent failure to include them in the pretrial order should not be dispositive."

As the parties are well aware, ***HN7***[] under the Federal Rules, the pretrial order supersedes the pleadings and controls the subsequent course of litigation. *Fed. R. Civ.* ***[*37]*** *P. 16(e)*. Generally, claims of parties which are not included in the final pretrial order cannot be asserted at trial except to prevent manifest injustice. *Id. See Hernandez v. Alexander, 671 F.2d 402, 407 (10th Cir. 1982)*. Moreover, the trial court has the discretion to exclude from trial those issues and claims not found in the pretrial order. *Randolph County v. Alabama Power Co., 784 F.2d 1067, 1072 (11th Cir. 1986)*, *modified on other grounds*, *798 F.2d 425 (1986)*, *cert. denied*, *479 U.S. 1032 (1987)*.

Here, the court agrees with defendants that the size and scope of the litigation are factors to be considered in granting a motion to modify a pretrial order. Taking into consideration the magnitude and complexity of this case, as well as the impending trial date, and given the fact that Missouri has not demonstrated any excuse for its neglect in failing to modify the pretrial order at an earlier time, we grant defendants' motion.

Finally, defendants move for an order precluding the State Attorneys General from seeking breach of contract and/or fraud damages on behalf of cities within those states. Defendants argue that neither Attorney General is authorized to bring **[*38]** an action on behalf of a city on a matter of local (rather than state-wide) concern since, under the home rule provisions of the respective states, a city has the exclusive right to govern its own affairs where purely local matters are concerned.

Although styled as a motion in limine, the court concludes that the ruling sought by defendants in this motion is a dispositive one. Since the deadline for filing dispositive motions was May 1, 1991, and given the fact that defendants have not moved for leave to file out of time, the court denies this portion of the motion as untimely.

Moreover, the court finds defendants' argument fails on the merits. Although both Kansas and Missouri have empowered municipalities, through their city attorneys, to prosecute actions to which the city is a party, the court finds nothing in either state's statutes which would preclude the state attorneys general from prosecuting such suits in appropriate cases. *See K.S.A. 75-702* (attorney general may appear in cases "in which the state shall be interested or a party"); *R.S.Mo. § 27.060* (attorney general may appear "to protect the rights and interest of the state). *See also Clark Oil & Refining Corp. v.* ***[*39]*** *Ashcroft, 639 S.W.2d 594, 595-97 (Mo. 1982)* (relevant inquiry is not whether state law allows challenged exercise of attorney general's power, but rather whether it prohibits it);

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[13] The court, however, declines at this time to grant defendants' motion with respect to the state's "mention" of evidence of the full amount of alleged overcharges in this case.

[14] The pretrial order identifies only three contracts, two for direct sale and one for resale, all involving the city of Springfield.

Memorial Hospital Assoc. v. Knutson, 239 Kan. 663, 667, 722 P.2d 1093, 1097 (1986) (attorney general's powers are as broad as the common law unless restricted or modified by statute).

IV. *Motion to Preclude the Introduction of Overcharge Damages in Connection With Non-Antitrust Claims*

Defendants seek to preclude plaintiffs from claiming damages for overcharges on their claims for breach of contract against the Pipeline. [15] Defendants assert that, since a portion of the alleged overcharges was passed on to customers, allowing plaintiffs to collect the total amount of these damages would constitute a windfall. The court agrees.

[*40] ***HN8***[] The Uniform Commercial Code embodies general common law principles of contract damages which seek to place "the aggrieved party in as good a position as if the other party had fully performed [the contract]." *See* K.S.A. 84-1-106; R.S.Mo. 400.1-106(1). Where the contract claim involves an alleged breach of the duty of good faith fair dealing, the UCC provides no additional remedy. *See*, *e.g.*, Rigby Corporation v. Boatmen's Bank & Trust Co., 713 S.W.2d 517, 536 (Mo. Ct. App. 1986) (no other remedy for breach of obligation of good faith than for plaintiff to be restored to *status quo ante*). The court agrees with defendants that contract claims for overcharges not absorbed by plaintiffs would place plaintiffs in a better position than that which plaintiffs would have occupied but for the breach. The court further agrees that the policies which allow the collection of such damages in antitrust cases are not applicable in the contract context. Accordingly, the court grants defendants' motion as to those breach of contract claims for overcharges which were passed on to customers.

V. *Motion to Bar Multiple Damage Theories*

Defendants seek to limit plaintiffs' presentation **[*41]** of expert evidence regarding multiple theories of antitrust overcharge damages to the damage theory which produces the "lowest overcharge figure." Plaintiffs' differing damage theories are posited on various hypothetical competitive alternatives available to the Pipeline at the time it agreed to the payment of Section 107(c)(5) tight sands prices. [16]

The parties agree that the traditional recovery in antitrust cases is the amount **[*42]** by which the unlawful price charged exceeds the price that would have been charged in the absence of the alleged violations. Defendants cite no applicable authority which would require the court to limit plaintiffs' damage theories at this time. The court agrees with plaintiffs that, as long as each theory is a reasonable approximation of competitive terms which Pipeline could have been expected to demand at the time, it is for the jury to decide which theory to apply. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) (proper to submit antitrust claim to jury under two damage scenarios yielding two different amounts). Accordingly, defendants' motion is denied.

VI. *Motion to Prevent Expert George Donkin's Testimony Regarding the Competitiveness of Defendants' Contracts*

Here, defendants seek to exclude testimony by Kansas, Missouri and Farmland's expert, George Donkin, relating to the competitiveness of defendants' gas purchase contracts. They contend Donkin's opinion is based on his review of contracts between other non-party pipelines and producers in the Rocky Mountain area in the relevant time period. These contracts were produced in discovery in the *Midwest* **[*43]** *Gas Users Association* (MGUA) proceeding and are subject to a protective order, including a ruling that the contracts could not be used in the instant case unless obtained through separate discovery. Defendants contend that, since the plaintiffs did not conduct separate discovery, they are attempting to circumvent this ruling through the testimony of expert Donkin,

[15] Defendants also seek to preclude plaintiffs from claiming damages for overcharges on their tortious interference claim. Since the court granted defendants' motion for summary judgment on that claim in its August 2, 1990, order, this motion is moot.

[16] The "No 107" estimate assumes the Pipeline would have refused to pay 107(c)(5) prices and would have instead paid § 102 or § 103 prices. The "market-out" estimate assumes the Pipeline would have negotiated for immediately exercisable market-out provisions. Finally, the "base case" estimate is derived from assumptions that the Pipeline would have chosen different pricing alternatives based on the year the gas was produced.

With respect to the utilities' expert Dr. Kretz, these plaintiffs have represented to the court that Dr. Kretz intends to rely solely on the "base rate" theory of damages.

who gained access to the contracts as a witness in the MGUA proceeding. Defendants state that Donkin's deposition indicates that, in reaching his conclusion regarding the competitiveness of defendants' contracts in the instant case, he "could not remove from [his] mind the information that applies under those [MGUA] contracts and transactions in arriving at opinions and conclusion in this antitrust litigation." Defendants further argue that, if defendants attempt to cross examine Donkin on the basis for his opinions in order to discredit his reliance on these contracts, Donkin will hide behind the FERC protective order to avoid questions about the contracts' terms.

Plaintiffs counter that (1) Donkin will not testify at trial regarding the MGUA contracts; (2) his opinion regarding competitiveness of defendants' contracts **[*44]** is based on substantial admissible evidence apart from the MGUA contracts; and (3) because the admissible contracts constitute a sufficient basis for Donkin's opinion, that opinion is admissible regardless of his awareness of the protected MGUA contracts. Further, plaintiffs contend that, since they do not intend to elicit the MGUA contracts as a basis for Donkin's opinion, if defendants wish to do so, it is defendants' burden to seek relief from the FERC protective order or seek discovery of the contracts in this case. [17]

Here, the court agrees with plaintiffs that Donkin has testified that the MGUA contracts served merely as "input into [his] overall opinion, but only in the sense that [they] are further support for the opinions and conclusions that [he] otherwise would **[*45]** have if that information did not exist." Therefore, if Donkin testifies that his opinion regarding competitiveness is based upon contracts other than the MGUA contracts, and if plaintiffs do not elicit testimony regarding the MGUA contracts from Donkin, the burden then falls upon defendants (should they dispute Donkin's testimony and seek to establish that his opinion was, in fact, based on the MGUA contracts) to seek relief from the protective order or seek separate discovery. Accordingly, the court denies this motion.

VII. *Motion to Preclude Plaintiffs from Mischaracterizing Ongoing FERC Proceedings*

Defendants move to preclude plaintiffs from arguing to the jury that FERC has decided the "arm's-length bargaining" issue adverse to defendants. Clearly, as plaintiffs concede, such reference would be improper, as that issue is still pending before the administrative agency.

Accordingly, the court grants defendants' motion.

VIII. *Motion to Preclude Plaintiffs' Experts from Offering Factual Conclusions*

Defendants seek to preclude plaintiffs' experts Wilson, Donkin, and Leitzinger from testifying about (1) the proper weight to be given conflicting evidence on disputed issues **[*46]** of fact and (2) witness credibility. Although the court agrees with the general principles underlying this motion, the court finds this motion overbroad. While experts may be precluded from testifying regarding the truthfulness of specific witnesses, an expert may render an opinion based on a review of the disputed evidence in the case. Accordingly, the court denies this motion and will, instead, rule on specific objections as they are raised at trial.

IX. *Motion to Preclude Reference to Out of State Residence of Counsel*

Defendants seek to preclude reference, during trial or voir dire, to the out-of-state residence of numerous counsel in this case, contending such reference would be irrelevant and prejudicial. The court agrees with plaintiffs that pursuant to *Rule 47(a), Federal Rules of Civil Procedure*, courts and counsel uniformly pose questions about the jury's relationships with various parties and their attorneys. *See*, *e.g.*, *Progner v. Eagle, 377 F.2d 461, 462 (4th Cir. 1967)*. Accordingly, the court denies this motion, since any improper attempt to prejudice jurors due to employment of out-of-state counsel can be adequately dealt with at trial.

X. *Motion* **[*47]** *to Prohibit Appealing to Self-Interest of Jurors as Ratepayers and Taxpayers*

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[17] Plaintiffs' argument is also based on *Rule 703, Fed. R. Evid.*, which provides that an expert may rely on inadmissible facts or data in forming his opinion, as long as they are "of a type reasonably relied upon by experts in the particular field."

Defendants move to exclude any appeal by plaintiffs to a potential financial stake jurors, as ratepayers, might have in the outcome of this case. Clearly, such an appeal is strictly prohibited and plaintiffs state they have no intention of making such an appeal. Accordingly, the court grants defendants' motion.

In summary, defendants' motion for summary judgment on plaintiffs' "Section 104" damage theory (Doc. #1292) is granted, and the motions in limine filed by plaintiffs and defendants (Doc. #1361, #1422, and #1433) are granted in part and denied in part, as set forth above.

IT IS SO ORDERED.

Dated this 6th day of September, 1990, at Kansas City, Kansas.

Desai v. Impacta, S.A.

United States District Court for the District of New Jersey

September 7, 1990, Decided ; September 7, 1990, Filed

Civil Action No. 89-4817

Reporter
1990 U.S. Dist. LEXIS 11892 *

NAVIN DESAI, et al., Plaintiffs, v. IMPACTA, S.A., et al., Defendants

Notice: [*1] NOT FOR PUBLICATION.

Core Terms

second amended complaint, tubes, flexible, submarket, relevant market, plaintiffs', products, monopolization, import, aerosol, allegations, Sherman Act, defendants', conspiracy, Counts, manufactured, summary judgment, monopoly power, market share, parties, purposes, matter of law, automotive, geographic, aluminum, industrial, marketing, automotive-industrial, antitrust, effects

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

To determine the sufficiency of pleadings under a *Fed. R. Civ. P. 12(b)(6)* standard, the court must take the allegations of the complaint as true and give the plaintiff the benefit of all inferences which fairly may be drawn from the liberally viewed complaint. The complaint cannot be dismissed unless plaintiff can prove no set of facts that would entitle the plaintiff to relief. However, the rule also provides that if on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in *Fed. R. Civ. P. 56*, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by R. 56. Fed. R. Civ. P 12(b).

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Summary Judgment, Motions for Summary Judgment**

Summary judgment is disfavored in antitrust cases. However, in the context of an antitrust case, to survive a motion for summary judgment, the non-moving party must establish that there is a genuine issue of material fact as to whether the moving party entered into an illegal conspiracy that caused the non-moving party to suffer a cognizable injury. *Fed. R. Civ. P. 56(e)*. This showing has two components. First, the non-moving party must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Second, the issue of fact must be "genuine." *Fed. R. Civ. P. 56(c)*, *(e)*. When the moving party has carried its burden under R. 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Therefore, when the non-moving party's evidence is merely "colorable" or "not significantly probative," the court may grant summary judgment.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN3[] **Monopolies & Monopolization, Actual Monopolization**

There are two main elements in monopolization: (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. These two elements actually comprise a three-pronged standard. First, a plaintiff must define the relevant market, which has been allegedly monopolized by the defendant. Next, the plaintiff must show that the defendant possesses monopoly power within that relevant market. Lastly, the plaintiff must show that the defendant willfully acquired and maintained that power, as opposed to having attained that position through legitimate means or circumstances.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN4[] **Relevant Market, Geographic Market Definition**

The relevant market for the purposes of determining monopolization under the antitrust laws is the market for comparable products or lines of products in a particular geographic sales area.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN5[] **Relevant Market, Product Market Definition**

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors. The definition of the relevant geographic market must correspond to the commercial realities of the industry and be economically significant.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] **Regulated Practices, Market Definition**

In general, products which have a high cross-elasticity of demand are included in the same product market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power is the power to control prices or exclude competition. The existence of such power may be inferred from the predominant share of the market. However, no precise standards for the percentage of market share that a defendant must have, absent direct evidence of monopoly power, before being found guilty of monopolization have been defined. Several courts have held that absent special circumstances, a defendant must have a market share of at least 50 percent before he can be found guilty of monopolization.

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN8[] **Attempt, Elements**

The two elements of an attempted monopolization offense: (1) the actor must have a specific intent to monopolize the relevant market, and (2) the actor must have sufficient market power to come dangerously close to success. As with a claim of actual monopolization, market share is a critical consideration. A market share of less than 50 percent may support an attempted monopolization claim if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present. However, while the exact market share percentage necessary to prove attempt to monopolize may vary under differing market conditions, absent a showing of special market conditions, a market share of less than 10 percent, as a matter of law, usually will not support a finding of attempt to monopolize.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN9[] **Actual Monopolization, Claims**

One element of a conspiracy to monopolize offense is a specific intent to monopolize the relevant market. In addition, such intent may be inferred from the proof of actual monopoly power. Conspiracy claims under the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, must be reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > Interlocking Directorates

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN10[] **Antitrust & Trade Law, Sherman Act**

Vertical agreements on resale prices are per se illegal. Within the context of vertical nonprice restraints, however, the scope of per se illegality is much narrower. This distinction is based on the conclusion that vertical nonprice restraints have not been shown to have such a "pernicious effect on competition" and to be so "lacking in redeeming value" as to justify per se illegality.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN11[] **Sherman Act, Claims**

To sustain a claim under the Sherman Act, *15 U.S.C.S. § 1*, plaintiffs must allege and prove: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Constitutional Law > The Judiciary > Congressional Limits

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Jurisdiction

HN12[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

Pendent jurisdiction exists whenever there is a claim arising under the U.S. Const., the laws of the United States, and treaties made, or which shall be made, under their authority of the *U.S. Const., art. III, § 2*, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion.

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Judges: Alfred M. Wolin, United States District Judge.

Opinion by: WOLIN

Opinion

OPINION

Plaintiffs Navin Desai and Bramer Aluminum Corporation originally brought their Complaint in this action on November 20, 1989. Without any defendant having yet answered, Desai filed their First Amended Complaint on February 6, 1990. The First Amended Complaint differed from the original Complaint only in the addition of 411 International, Inc., as a party-plaintiff. Desai's First Amended Complaint asserted claims for the violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and asserted several contract and state law tort claims.

Defendants Impacta, S.A. and Geoffrey **[*2]** M. Thomas ("the Brazilian defendants") then moved to dismiss the complaint pursuant to Fed. R. Civ. P 12 (b) (6) or for summary judgment pursuant to *Fed. R. Civ. P. 56*. By letter of counsel, filed March 6, 1990, defendants Amber International, Inc., James Krah and John Grim ("the New Jersey defendants") requested to join in the motion filed by the Brazilian defendants to dismiss the complaint or for summary judgment. The Court granted the New Jersey defendants permission to join in the original motion to dismiss at the hearing held before the Court in this matter on April 9, 1990. In addition to the arguments raised by the Brazilian defendants, the New Jersey defendants also contend that any claims against them are barred by the entire controversy doctrine and by a prior settlement reached among the various parties in a prior state court action.

The Court heard argument on the contentions raised by the New Jersey defendants on April 9, 1990 and reserved decision in light of the disposition of the Brazilian defendants' motion. After having reviewed the submissions of plaintiffs and the Brazilian defendants, the Court carried the motion of the Brazilian defendants until June 25, 1990, **[*3]** and allowed plaintiffs to file a second amended complaint to which the motion would then be addressed. The permission to file a second amended complaint was granted on the condition that should the pending *Rule 12 (b) (6)* motion be granted, the grant would be with prejudice. Plaintiffs filed a Second Amended Complaint on May 8, 1990. Supplemental certifications and affidavits were submitted by the parties and the Court heard oral argument on June 25, 1990. After reviewing the original and supplemental submissions of the parties and hearing the arguments of counsel, for the reasons set out below, the Court will grant the motion of all defendants and dismiss plaintiffs' Second Amended Complaint in its entirety. Counts One through Five will be dismissed with prejudice and Counts Six through Ten will be dismissed without prejudice.

I. *BACKGROUND*

Plaintiffs' Second Amended Complaint consists of ten counts. Counts One through Four allege violations of *Sections 1* and *2* of the Sherman Act. Counts One and Two are alleged solely against defendant Impacta, S.A. Counts Three and Four name all defendants. Count Five seeks injunctive relief for all defendants' alleged violations of the antitrust **[*4]** laws. Counts Six through Ten allege various state law causes of action against one or the other, or both, of the Brazilian defendants.

Plaintiff Bramer Aluminum Corp. ("Bramer") is a New Jersey corporation incorporated in 1982. Bramer is a distributor of flexible and rigid extruded aluminum tubes. Bramer is a wholly-owned subsidiary of plaintiff 411 International, Inc. ("411"), a holding company incorporated in 1985. Plaintiff Navin Desai is the owner of a majority interest in 411. Defendant Impacta, S.A. ("Impacta") is a Brazilian manufacturer of flexible and rigid extruded aluminum tubes. For the purposes of this opinion, the Court will refer to flexible extruded aluminum tubes as flexible tubes and will refer to rigid extruded aluminum tubes as aerosol cans. Defendant Geoffrey M. Thomas was at all times relevant to this action the Managing Director of Impacta and was, at all relevant times, responsible for Impacta's sales and distributor relationship with plaintiffs. Defendants James Krah and John Grim were employees of Bramer until approximately April 12, 1988, when they left Bramer to form defendant Amber International, Inc. ("Amber").

Plaintiffs allege in their Second Amended **[*5]** Complaint that the jurisdiction of this Court over all defendants is founded on the existence of a federal question relating to defendants alleged violations of the antitrust laws. Plaintiffs' allege that this Court has pendent jurisdiction over the common law counts asserted in the complaint against defendants Impacta and Thomas. [1] Plaintiffs' claims can be sorted into three distinct categories. First, plaintiffs have alleged that defendants have violated *Section 2* of the Sherman Act by monopolizing, attempting to monopolize and conspiring to monopolize the relevant market set out in the Second Amended Complaint. Second, plaintiffs have alleged that defendants have violated *Section 1* of the Sherman Act by conspiring to eliminate Bramer as a distributer of flexible tubes and aerosol cans. Third, plaintiffs have alleged that defendants Impacta and Thomas are liable under several state law causes of action which were previously brought against and settled with defendants Amber, Krah and Grim in a previous state court action. Defendants have moved to dismiss the complaint in its entirety prior to submitting their answer because they believe that plaintiffs have yet to allege a valid **[*6]** and enforceable cause of action after three attempts. All parties have submitted material outside the pleadings which the Court has accepted for the purposes of this determination. The Court will discuss and analyze plaintiffs allegations within the rubric of the three broad categories set out above.

[1] Defendants Amber, Krah and Grim are all citizens of New Jersey, plaintiffs' state of citizenship. Therefore, there is not complete diversity between all plaintiffs and all defendants. Accordingly, this Court may not exercise jurisdiction over this action on the basis of diversity.

II. *DISCUSSION*

Defendants originally moved pursuant to *Fed. R. Civ. P. 12 (b) (6)* and *Fed. R. Civ. P. 56* to dismiss the complaint with prejudice or, in the alternative, for summary judgment. ***HN1***[] To determine the sufficiency of pleadings under a *Rule 12 (b) (6)* standard, the Court must take the allegations of the complaint as true and give the plaintiff the benefit of all inferences which fairly may be drawn from the liberally viewed complaint. **[*7]** *Wilson v. Rackmill, 878 F.2d 772, 775 (3d Cir. 1989)*. The complaint cannot be dismissed unless plaintiff can prove no set of facts that would entitle the plaintiff to relief. Id.; *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957)*.

However, *Rule 12* also provides that:

If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in *Rule 56*, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by *Rule 56*.

Fed. R. Civ. P 12(b). At the hearing on April 9, 1990, the Court informed all parties that the Court would carry defendants' motion until June 25, 1990, and allow plaintiffs to file a second amended complaint to which the motion would then be addressed. The Court advised all parties that should the pending *Fed. R. Civ. P. 12 (b) (6)* motion be granted, the grant would be with prejudice. Plaintiffs and the Brazilian defendants each submitted additional memoranda, affidavits, **[*8]** certifications and declarations in support of their positions. These submissions supplemented prior submissions outside the pleadings which the parties had placed before the Court. The Court finds that the parties have had sufficient opportunity to present the materials pertinent to a motion for summary judgment pursuant to *Fed. R. Civ. P. 56*, and therefore, will treat defendants' motion as one for summary judgment and dispose of that motion as provided in *Fed. R. Civ. P. 56*.

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *Hersch v. Allen Products Co., 789 F.2d 230, 232 (3d Cir. 1986)*. The Supreme Court has indicated that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986)*. In making this determination, **[*9]** a court must make all reasonable inferences in favor of the non-moving party. *Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 n.2 (3d Cir. 1983)*, *cert. dismissed,* *465 U.S. 1091 (1984)*. Only then may summary judgment be granted if no reasonable trier of fact could find for the non-moving party.

The Third Circuit has repeatedly stated that ***HN2***[] summary judgment is disfavored in antitrust cases. *See* *Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 572 (3d Cir. 1986)*, and cases cited therein. However, the Supreme Court has stated in the context of an antitrust case that:

[t]o survive [a] motion for summary judgment, [the non-moving party] must establish that there is a genuine issue of material fact as to whether [the moving party] entered into an illegal conspiracy that caused [the non-moving party] to suffer a cognizable injury. *Fed.Rule Civ.Proc. 56(e)*; *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)*. This showing has two components. First, [the non-moving party] must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal **[*10]** conduct. . . . Second, the issue of fact must be 'genuine.' Fed.Rules Civ.Proc 56(c), (e). When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 1355-56 (1986) (footnotes omitted). Therefore, when the non-moving party's evidence is merely "colorable" or "not significantly probative," the Court may grant summary judgment. *Anderson, 477 U.S. at 249-50, 106 S. Ct. at 2511*.

A. *Plaintiffs' Claims Under Section 2 of the Sherman Act*

Plaintiffs' Second Amended Complaint asserts three claims under *Section 2* of the Sherman Act, *15 U.S.C. § 2*, which proscribes three separate offenses: (1) actual monopolization, (2) attempted monopolization and (3) combinations or conspiracies to monopolize. *See, e.g., Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 474 (3d Cir. 1985)*. Plaintiffs claim that defendants have violated *Section 2* in all three ways. Count One alleges that Impacta:

held a monopoly (as of April through December, 1988 and extending to the date of the filing **[*11]** of this Second Amended Complaint) in the Brazilian import submarket of [flexible tubes] and aerosol [cans] imported into the United States for automotive and industrial end uses [and that] Defendant Impacta exercised that monopoly power to exclude Plaintiff Bramer from competing with Defendant Amber in the marketing of such [flexible tubes] and aerosol [cans] to customers in interstate commerce in the U.S. for automotive and industrial end uses.

Second Amended Complaint, para. 21(a). Count Two alleges that the conduct of Impacta also constituted an attempt to monopolize the Brazilian import submarket for automotive and industrial end uses by its refusal to provide Bramer with flexible tubes and aerosol cans in order to compete with Amber in December, 1988. Second Amended Complaint, para. 22(a,). Count Three alleges that all defendants have engaged in a conspiracy to monopolize the Brazilian import submarket. The alleged purpose of this conspiracy has been to exclude Bramer from competing with Amber in the marketing of products in that submarket. Second Amended Complaint, para. 23(b). Each Count alleges that the public at large has suffered an antitrust injury in that consumers in **[*12]** interstate commerce have been deprived of competition between Bramer and Amber on the basis of price and services. Second Amended Complaint, para. 21(c) (incorporated by reference into each Count). The Court will consider each *§ 2* claim separately.

1. *Actual Monopolization*

In *Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802, 808 (3d Cir. 1984)*, *cert. denied, 477 U.S. 908 (1986)*, the Third Circuit explained the key components of a monopolization claim:

HN3[] There are two main elements in monopolization (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

Id. (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704 (1966))*. *See also* *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 117 (3d Cir. 1980)*, *cert. denied, 451 U.S. 911 (1981)* (citing to *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 n.17 (3d Cir. 1975)* which "expressly held that definition of the relevant market was critical in *§ 2* attempt cases").

[*13] These two elements actually comprise a three-pronged standard. First, a plaintiff must define the relevant market which has been allegedly monopolized by the defendant. Next, the plaintiff must show that the defendant possesses monopoly power within that relevant market. Lastly, the plaintiff must show that the defendant willfully acquired and maintained that power, as opposed to having attained that position through legitimate means or circumstances. Therefore, the Court will first address the question of whether defendants, in fact, have monopoly power in a relevant market. Only if that hurdle is jumped will the Court turn to question of how that monopoly power was obtained and maintained.

(a) *Relevant Market*

The first step in determining whether a *§ 2* violation has occurred is to define the "relevant market." A relevant market has two dimensions. One, the plaintiff must identify the group of products with which the defendant's products effectively compete, termed the relevant product market. Two, the plaintiff must identify the geographic area within which the defendant competes in marketing those products, termed the relevant geographic market. Thus, ***HN4***[] the relevant market for **[*14]** the purposes of determining monopolization under the antitrust laws is the market for comparable products or lines of products in a particular geographic sales area.

In *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 1523-24 (1962)*, the Supreme Court stated that ***HN5***[] "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id*. (footnote omitted). The Court went on to add that:

[W]ithin this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-595, 77 S. Ct. 872, 877* [(1957)]. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

Brown Shoe Co., 370 U.S. at 325, 82 S. Ct. at 1524 (footnote omitted). Concerning **[*15]** the definition of the relevant geographic market, the Court stated that it must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe Co., 370 U.S. at 336-37, 82 S. Ct. at 1530* (citation omitted). Although *Brown Shoe Co.* dealt with a case arising under § 7 of the Clayton Act, the Supreme Court has found its analysis of the relevant product and geographic markets to also apply to cases arising under *§ 2* of the Sherman Act. *Grinnell Corp., 384 U.S. at 572, 86 S. Ct. at 1704*; *see* *Edward J. Sweeney & Sons, Inc., 637 F.2d at 117*.

Plaintiffs' Second Amended Complaint, with its incorporated affidavits, defines the relevant market in this case as the "Brazilian import submarket." Plaintiffs allege that the primary product market in this action is that of flexible tubes and aerosol cans. Second Amended Complaint, para. 4(b). Within that primary market, plaintiffs have carved out and defined an alleged submarket. Plaintiffs have termed this submarket the "Brazilian import submarket." Second Amended Complaint, para. 4(d). The Brazilian import submarket consists of the flexible tubes and aerosol cans that are imported to the United **[*16]** States from Brazil for use by automotive-industrial end users. *See* Second Amended Complaint, paras. 4(e) and (f).

This submarket is alleged to have several distinguishing features. First, plaintiffs allege that there are a distinctive group of purchasers for the imported flexible tubes from Brazil. Plaintiffs claim that whereas only automotive-industrial end users purchase the Brazilian flexible tubes, the overall market embraces purchases by cosmetic, pharmaceutical and automotive-industrial end users. Second Amended Complaint, para. 4(e) (i) (a). Second, plaintiffs allege that the quality of the Brazilian flexible tubes is uniformly lower than that of domestically produced flexible tubes. Second Amended Complaint, para. 4(e) (i) (a). Third, plaintiffs allege that the price of the Brazilian flexible tubes is approximately 30% to 35% lower than that of flexible tubes manufactured in the United States, Canada and Europe. Second Amended Complaint, paras. 4(e) (ii), (iii). Fourth, plaintiffs contend that the unique manner in which Impacta and Bramer (and now Amber) have marketed the Brazilian flexible tubes has distinguished the submarket from the overall United States' market for **[*17]** flexible tubes. *See* Second Amended Complaint, paras. 4(e) (v) (b), (vii) and (viii) (a). Fifth, plaintiffs allege that, although the submarket for aerosol cans is smaller than that of flexible tubes, there is a limited market for the Brazilian aerosol cans for automotive-industrial uses. Second Amended Complaint, para. 4(f) (ii). Lastly, plaintiffs allege that:

The price and service advantages made available to customers within the U.S. (in the automotive and industrial end uses of these products [flexible tubes and aerosol cans]) and the unique system of vendors (such as Bramer) servicing the Brazilian import submarket extended to both products imported into the U.S. from Brazil in the Brazilian import submarket, squeezetubes [flexible tubes] and aerosol tubes [cans].

Second Amended Complaint, para. 4(f) (iii). In support of their definition of the relevant market, plaintiffs have submitted the Affidavit of John Richard Breen ("Breen Aff.") and the Affidavit of Joe L. Abbott ("Abbott Aff.") with their Second Amended Complaint and have incorporated those affidavits in their Second Amended Complaint. Second Amended Complaint, para. 4(e) n. 1. Previously, plaintiffs submitted **[*18]** affidavits of Navin Desai in support of their definition of the relevant market.

For the purposes of this motion, defendants have assumed that the market percentages that plaintiffs have employed in their complaints and other submissions are correct. Plaintiffs contend that "[t]he Brazilian import submarket into the U.S. of [flexible tubes] is supplied 100% by a single manufacturer, Defendant Impacta." Second Amended Complaint, para. 4(e) (ix); Breen Aff., para. 11; Abbott Aff., para. 7. Plaintiffs also contend that Impacta produces the entire supply of aerosol cans for the Brazilian import submarket. *See* Second Amended Complaint, para. 4(f) (ii) . Plaintiffs also allege that either Bramer or Amber have been the exclusive distributors for the Brazilian import submarket. Plaintiffs assert that as of April 1988, the period of time when the allegedly illegal conduct took place, "Bramer held a market share of approximately 5% of all [flexible tubes] sold to the automotive and industrial trades in the U.S." Second Amended Complaint, para. 4(e)(xi). In addition, "[t]he share held by the Brazilian import market (which is supplied by Impacta) is no more than 2% of the total use of aerosol **[*19]** [cans] within the U.S.; it is confined, as noted, to automotive and industrial end uses." Second Amended Complaint, para. 4(f) (ii). Somewhat inconsistently, plaintiffs allege in the same paragraph that "Impacta holds a 50% or slightly larger market share in this limited market [for aerosol cans for non-cosmetic, automotive and industrial uses]." *Id*. The Court will adopt the larger, 2%, figure as Impacta's market share of the total United States market for the purposes of this antitrust analysis.

The Second Amended Complaint is plaintiffs' third attempt to state causes of action against the defendants in this case. After corresponding with the Brazilian defendants concerning the informal objections of the Brazilian defendants to the original complaint, plaintiffs filed a First Amended Complaint which differed from their original complaint only in the addition of 411 as a party-plaintiff. After a complete briefing of defendants' motion to dismiss, and the Court's admonition that a subsequent dismissal would be with prejudice, plaintiffs submitted the Second Amended Complaint. Plaintiffs state that:

The Second Amended Complaint differs from the First Amended Complaint (before **[*20]** the Court on April 9) solely in the more detailed definition of the market involved in this case and in additions to the First Four Counts of charges which explicitly allege injury to the public (separately and apart from injury to these plaintiffs) resulting from the conduct of the Defendants herein. . . . It should be emphasized that no new facts are added to the thrust of Plaintiffs' position before this Court.

Plaintiffs' Supplemental Memorandum ("P. Supp. Mem."), p. 1. Solely, for the purpose of this motion, defendants' assume that plaintiffs' allegations regarding the quality of the Brazilian products, the limitation of the Brazilian import submarket to automotive-industrial end uses, and the limitation of the product market to aluminum tubes, as opposed to other types of flexible tubes, are true. Brazilian Defendants' Supplemental Memorandum, p. 2 n. * The Court is presented with the situation where the material facts of the case are either undisputed or assumed true. Therefore, the Court will determine whether, as a matter of law, plaintiffs state a claim under *Section 2* of the Sherman Act for which relief can be granted on the basis of the relevant market definition contained **[*21]** in the Second Amended Complaint and plaintiffs' other submissions.

To begin with, the Court notes that plaintiffs have not explicitly described a relevant geographic market in any of their submissions to the Court. However, in their overall description of the product market it is apparent that plaintiffs' consider the entire United States as the potential market for the sale of Impacta's flexible tubes and aerosol cans. There have been no allegations that the importation of the Brazilian products has in any way been limited to a specific geographic region in this country. In fact, plaintiffs' have described the primary market in this action as the market for flexible and rigid extruded aluminum containers used in basic United States industries. *See* Second Amended Complaint, para. 4(b). Accordingly, the Court finds 16 that the relevant geographic market for the primary market for flexible tubes and aerosol cans, as well as any submarkets for the same products, is the entire United States.

Now the Court must determine the relevant product market within which defendant Impacta is alleged to have exercised monopoly power. As set out above, plaintiffs have defined the relevant product **[*22]** market narrowly. The issue before the Court is whether plaintiffs' definition is valid as a matter of law. The Supreme Court has indicated that the boundaries of the relevant product market are determined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co., 370 U.S. at 325, 82 S. Ct. at 1524* (footnote omitted). A product market may be a submarket for antitrust purposes if, as a practical matter, that submarket operates as a separate and distinct economic entity. *Id*. The Supreme Court listed several indicia, recited above, which may be considered by the Court in making the determination as to what constitutes a relevant product market. *Id*. These factors are intended as practical guides to aid the Court in its assessment of the degree of interchangeability of use and cross elasticity of demand between different products. In essence, the Court's determination of a relevant market seeks to discover what products may be reasonably substituted for each other by the parties who consume them.

Plaintiffs have posited a narrow product submarket which essentially consists of Impacta's flexible **[*23]** tubes and aerosol cans which are imported into the United States for use in the automotive and industrial industries. Defendants assert that, as a matter of law, Impacta cannot monopolize the product market which consists solely of a portion of Impacta's own products. To support their contention, defendants direct the Court's attention to the Supreme Court and Third Circuit authorities cited above. The Court finds that regardless of plaintiffs' desire to define a primary product market or a submarket, plaintiffs may not define a relevant market which excludes products which are used indiscriminately and interchangeably with Impacta's products.

Plaintiffs attempt to distinguish their Brazilian import submarket from the general, primary market for flexible tubes and aerosol cans by alleging that the Brazilian import submarket has a distinctive group of purchasers, the Brazilian manufactured products are of lower quality than domestically manufactured equivalents (rendering the products unsuitable for the pharmaceutical industry), the price for the Brazilian products is 30% to 35% lower than similar products manufactured in the United States, Canada and Europe, and that there are marketing **[*24]** services which are unique to the Brazilian import submarket. Because plaintiffs' definition of the Brazilian import submarket only includes the Brazilian products that are sold to automotive-industrial end users, the fact that Impacta's products may not be of sufficient quality to be used in the pharmaceutical industry is of no consequence. Essentially then, plaintiffs contend that this submarket is distinct based on the fact that Impacta's products are priced lower than similar products manufactured in the United States, Canada and Europe and are marketed by Bramer and Amber with the provision of certain ancillary services. The Court finds as a matter of law, that these two allegations are insufficient to distinguish the Brazilian import submarket as a relevant product market for the purposes of the antitrust laws.

The Supreme Court, in *Brown Shoe Co.,* held that the division of a product market on the basis of "low-priced" and "medium-priced" shoes was unrealistic. *Brown Shoe Co., 370 U.S. at 326, 82 S. Ct. at 1524-25*. The Supreme Court held that:

the boundaries of the relevant market must be drawn with sufficient breadth to . . . recognize competition where, in fact, competition **[*25]** exists.

Id. at 326, 82 S. Ct. at 1524. The mere fact that Impacta may sell its products at a price 30% to 35% less than that of domestic, Canadian or European manufacturers does not warrant a finding that no other products are interchangeable with Impacta's. Plaintiffs have indicated in their Second Amended Complaint that "[t]here exist six major domestic suppliers producing aluminum [flexible tubes] for the U.S. market." Second Amended Complaint, para. 4(e) (ii); Breen Aff., para. 6. Plaintiffs admit that Canadian and European manufacturers supply flexible tubes for general use to the United States market. Second Amended Complaint, para. 4(e) (iii) . Plaintiffs also implicitly acknowledge that other, similar flexible tubes are available to and used by consumers for the same purposes. *See*

Second Amended Complaint, para. 4(e) (v) (a) (The price for Impacta's flexible tubes was "less than the price paid by customers of the same product for the same uses who purchased the product from American manufacturers."); Breen Aff., para. 10. Plaintiffs also admit that the Brazilian import submarket is highly price sensitive, that any substantial elevation of the price by Impacta would **[*26]** cut its share of the submarket drastically. Second Amended Complaint, para. 4(e) (viii) (a). ***HN6***[] In general, products which have a high cross-elasticity of demand are included in the same product market. *See* *E.I. du Pont de Nemours & Co., Inc., 351 U.S. 377, 400, 76 S. Ct. 994, (1956)*.

Additionally, the Court finds no logic in the argument that the very services which Bramer provided in order to allow Impacta's products just to compete effectively with the products of other manufacturers have created a distinct product market. Plaintiffs allege that without the marketing services provided by Bramer and Amber, American customers would not have endured the troubles of purchasing Impacta's products, regardless of their lower price. Second Amended Complaint, para. 4(e) (vii). The Court finds that the facts pled by plaintiffs, and sworn to in the affidavits and certifications submitted by plaintiffs in opposition to defendants' motion fail to allege a narrow Brazilian import submarket. Accordingly, the Court holds that the relevant product market for flexible tubes and aerosol cans encompasses at least the products manufactured by Impacta, the six domestic manufacturers, and the Canadian **[*27]** and European manufacturers for use by automotive-industrial end users in the United States. [2] Consequently, the Court finds that plaintiffs have failed to satisfy the first element of a *§ 2* claim for monopolization because they have not sufficiently pled a relevant market within which to judge monopoly power.

(b) *Monopoly Power; Acquisition and Maintenance*

In *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 1005 (1956)*, the Supreme Court defined ***HN7***[] monopoly power as "the power to control prices or exclude competition." *Id*. "The **[*28]** existence of such power may be inferred from the predominant share of the market." *Grinnell Corp., 384 U.S. at 571, 86 S. Ct. at 1704*. However, no precise standards for the percentage of market share that a defendant must have, absent direct evidence of monopoly power, before being found guilty of monopolization have been defined. In *United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945)*, *approved and adopted,* *American Tobacco Co. v. United States, 328 U.S. 781, 811-14, 66 S. Ct. 1125, 1139-41 (1946)*, Judge Learned Hand created the widely accepted rule of thumb that while ninety percent:

is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly, thirty-three percent is not.

Aluminum Co. of America, 148 F.2d at 424. Supreme Court cases, as well as cases from this circuit, suggest that absent special circumstances, a defendant must have a market share of at least fifty percent before he can be found guilty of monopolization. It is undisputed that defendants have an approximate market share of 5% of the relevant market for flexible tubes and 2% of the relevant market for aerosol cans. The **[*29]** Court holds that Impacta's market share in either of the relevant markets is too small, as a matter of law, to enable Impacta to commit the offense of monopolization proscribed by *§ 2* of the Sherman Act. Therefore, the Court will dismiss Count One of plaintiffs' Second Amended Complaint with prejudice.

2. *Attempted Monopolization*

In *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975)*, the Third Circuit articulated ***HN8***[] the two elements of an attempted monopolization offense: (1) "the actor [must] have a specific intent to monopolize the relevant market, and (2) the actor [must] have sufficient market power to come dangerously close to success." *Id. at*

[2] In the case of *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 488 (5th Cir. 1984)*, the Fifth Circuit held that "absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market." In that case, the court rejected plaintiff's argument that the relevant product market was Holiday Inn hotel rooms, rather than hotel rooms, as defined by the district court. *Id. at 487-89*.

1348. Thus, as with a claim of actual monopolization, market share is a critical consideration. The case law suggests that a market share of less than 50 percent may support an attempted monopolization claim "if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present." *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 490 (5th Cir. 1984)* (footnote and citations omitted). However,

[w]hile **[*30]** the exact market share percentage necessary to prove attempt to monopolize may vary under differing market conditions, absent a showing of special market conditions, a market share of less than ten percent, as a matter of law, usually will not support a finding of attempt to monopolize.

Id. at 491 (citations omitted).

Under this standard, it is clear that Impacta's market share of the relevant market mandates a finding that an attempt to monopolize the relevant market would not have a "dangerous probability of success." The Court finds that plaintiffs have failed to allege an essential element of their *§ 2* attempted monopolization claim. Therefore, the Court will grant defendants' motion and dismiss Count Two of the Second Amended Complaint with prejudice.

3. *Conspiracy to Monopolize*

HN9[] One element of a conspiracy to monopolize offense is a "[s]pecific intent to monopolize the relevant market." *Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 153 (3d Cir. 1981)*, *cert. denied, 455 U.S. 1019 (1982)*. [3] In addition, "[s]uch intent may be inferred . . . from the proof of actual monopoly power." *Id. at 154*. In *American Tobacco Co. v. United States, 328 U.S.* ***[*31]*** *781, 66 S. Ct. 1125 (1946)*, the Supreme Court added the requirement that conspiracy claims under *§§ 1* and *2* of the Sherman Act must be "reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap." *Id*. at 788, 66 S. Ct. at ; *See* *Regency Oldsmobile, Inc. v. General Motors Corp., 723 F. Supp. 250, 269-70 (D.N.J. 1989)* (Wolin, J.).

As noted above, Impacta did not possess monopoly power over the relevant market in flexible tubes and aerosol cans. Thus, plaintiffs must prove their conspiracy to monopolize claim by presenting evidence that Impacta and the New Jersey defendants conspired with a specific **[*32]** intent to monopolize the relevant market. [4] Plaintiffs' evidence to support this claim is identical to the evidence presented in support of its *§ 1* claim. Plaintiffs contend that the one conspiracy which they allege is "a restraint of trade proscribed by *Section 1* of the Sherman Act and is also violative of *Section 2* of Sherman [sic]." Second Amended Complaint, para. 24. Although it is possible to state a claim for violations of both sections of the Sherman Act in the same action, and the objects of the conspiracy may overlap, the claims for conspiracy under *§§ 1* and *2* must be distinguishable from and independent of each other.

[*33] Plaintiffs' conspiracy to monopolize claim under *§ 2* is exactly the same as its *§ 1* claim. For that reason alone, the Court must dismiss plaintiffs' claim under *§ 2*. Moreover, plaintiffs have not proffered sufficient allegations or offered adequate evidence to support an inference of a conspiracy to monopolize. Plaintiffs allege only that defendants intended to oust Bramer as a competitor in the United States market for flexible tubes and aerosol cans. At most, this allegation might state a claim under *§ 1* for restraint of trade. In light of the market power of defendant

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[3] *See also* *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 889 (1953)*; *American Tobacco Co. v. United States, 328 U.S. 781, 789, 66 S. Ct. 1125, 1129 (1946)*; *V. &* *L. Cicione, Inc. v. C. Schmidt & Sons, Inc., 403 F. Supp. 643, 651 (E.D. Pa. 1975)*, *aff'd without opinion,* ***565 F.2d 154 (3d Cir. 1977)***.

[4] The Court finds that although defendant Thomas is named as a member of the alleged conspiracy to monopolize in Count Three, and a member of the conspiracy to violate *§ 1* in Count Four, as the General Manager of defendant Impacta, Thomas cannot be held to have conspired with his corporate employer. *See* *Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 894* (3d Cir.), *cert. denied,* ***454 U.S. 893 (1981)***; *Copperweld Corp. v. Independence Tube Co., 467 U.S. 752, 769, 104 S. Ct. 2731, 2740-41 (1984)*.

Impacta, it cannot be inferred that defendants intended such a restraint to lead to the monopolization of the relevant market. Therefore, for that reason as well, the Court will grant defendants' motion and dismiss Count Three of the Second Amended Complaint with prejudice.

B. *Plaintiffs' Claim Under Section I of the Sherman Act*

HN10[] Vertical agreements on resale prices are *per se* illegal. *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407-08, 31 S. Ct. 376, (1911)*. Within the context of vertical nonprice restraints, however, the scope of *per se* illegality is much narrower. *Continental* **[*34]** *T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 57-59, 97 S. Ct. 2549, 2561-62 (1977)*. This distinction is based on the Supreme Court's conclusion "that vertical nonprice restraints ha[ve] not been shown to have such a 'pernicious effect on competition' and to be so 'lack[ing] [in] . . . redeeming value' as to justify *per se* illegality." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 724, 108 S. Ct. 1515, 1519 (1988)* (quoting *GTE Sylvania, 433 U.S. at 58, 97 S. Ct. at 2561* (quoting *Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518 (1958)))*. Moreover, in *Business Electronics Corp.* the Supreme Court noted that:

We have been solicitous to assure that the market-freeing effect of our decision in *GTE Sylvania* is not frustrated by related legal rules. In *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763, [104 S. Ct. 1464, 1470]* (1984), which addressed the evidentiary showing necessary to establish vertical concerted action, we expressed concern that '[i]f an inference of such an agreement may be drawn from highly ambiguous evidence, there is considerable danger that the doctrin[e] enunciated in *[GTE]* **[*35]** *Sylvania* . . . will be seriously eroded.' See also *id., at 761, n. 6, [104 S. Ct. at 1469, n. 6*.] We eschewed adoption of an evidentiary standard that 'could deter or penalize perfectly legitimate conduct' or 'would create an irrational dislocation in the market' by preventing legitimate communication between a manufacturer and its distributors. *Id. at 763, 764, [104 S. Ct. at 1470*].

Business Electronics Corp., 485 U.S. at 726, 108 S. Ct. at 1520. Plaintiffs erroneously contend that their *§ 1* claim alleges a *per se* violation of the Sherman Act because they have alleged in general terms that the public is injured by the alleged conduct of defendants. Plaintiffs allege that defendants have engaged in a conspiracy to eliminate Bramer as a competitor to Amber by Impacta's refusal to deal with Bramer. This case falls squarely within the confines of the Supreme Court's holding in *Business Electronics Corp.* Accordingly, plaintiffs' claim of a *§ 1* vertical nonprice restraint must be analyzed pursuant to the rule of reason standard "which proscribes only those agreements that restrain trade unreasonably." *Fleer Corp., 658 F.2d at 147* (citations omitted).

In the Third **[*36]** Circuit, in order ***HN11***[] to sustain a *§ 1* claim, plaintiffs must allege and prove:

(1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Fleer Corp., 658 F.2d at 147 (citing to *Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81 (3d Cir. 1977)*, *cert. denied, 436 U.S. 913 (1978))*. For the reasons which follow, the Court holds that plaintiffs have failed to allege or to prove sufficient facts to make out a claim pursuant to *§ 1* of the Sherman Act. Therefore, defendants' motion will be granted and the Court will dismiss Count Four of the Second Amended Complaint.

1. *Effects Within the Relevant Market*

As the Court has determined above, the relevant market for the purposes of plaintiffs' antitrust claims is the market for flexible tubes and aerosol cans within the United States to be used by automotive and industrial end users. Plaintiffs have **[*37]** failed to allege how, in any manner, this market has been effected in an anti-competitive fashion by the introduction of a new distributor of Impacta's products. Although plaintiffs allege a vague injury to the public of decreased competition between Bramer and Amber in the areas of price and services, plaintiffs do not allege that there have been any anti-competitive effects on the price of Impacta's products or on the services which have been provided by Bramer and Amber. Furthermore, there have been no allegations of any adverse effects on interbrand competition. *See* Business Electronics Corp., 485 U.S. at 724, 108 S. Ct. at 1519 (the primary concern of ***antitrust law*** has been safeguarding interbrand competition). The Court finds that plaintiffs' vague allegations are insufficient as a matter of law to allege adverse, anti-competitive effects on the relevant market in this case.

2. *Illegal Conduct By Defendants*

Plaintiffs' allegations concerning the illegality of defendants' alleged conduct in refusing to deal with plaintiffs lack one key element. Plaintiffs have failed to allege that Impacta has refused to honor an order for Impacta's products. In fact, plaintiffs have **[*38]** failed to dispute the assertions made by Thomas in his Supplemental Declaration of May 31, 1990. Thomas indicates that Bramer has received Several shipments of aerosol cans during 1989. SUpplement para. Declaration of Thomas dated May 31, 1990, para. 7. Also, plaintiffs have failed to dispute the assertion made by Thomas in his Affidavit of March 30, 1990, that neither 411 nor Desai have ordered any flexible tubes Since December, 1988. P. Supp. Mem., p. 19. Plaintiffs' ask this Court to infer that had plaintiffs ordered any flexible tubes, defendants would have refused to supply them. *Id*. It is Unreasonable to request the Court to infer Specific allegations of illegal conduct when it was within plaintiffs power to provide the basis for Specific allegations by merely ordering flexible tubes from Impacta sometime after December, 1988. The Court finds that plaintiffs' allegations are insufficient as a matter of law to allege that the objects of and the conduct pursuant to the alleged conspiracy were illegal.

3. *Other Elements*

Because the Court finds that plaintiffs have failed to allege sufficient facts to establish that the alleged conspiracy produced adverse, anti-competitive **[*39]** effects within the relevant markets, or that defendants' conduct was illegal, it will not be necessary to determine whether plaintiffs have alleged Sufficient facts from which a trier of fact could reasonably determine that the first and fourth elements of the *§ 1* claim have been Satisfied. However, the Court notes that even if plaintiffs were found to have produced SUfficient evidence of an effect within the relevant market, it is doubtful whether plaintiffs have pled or proven sufficient facts from which the Court could reasonably infer the existence of a conspiracy.

C. *Plaintiffs' Claim for Injunctive Relief*

Because of the Court's prior determinations dismissing Counts One, Two, Three and Four of the Second Amended Complaint for failure to allege a violation of *§§ 1* and *2* of the Sherman Act, Count Five of the Second Amended Complaint, requesting injunctive relief for those alleged violations, must also be dismissed.

D. *The New Jersey Defendants' Motion to Dismiss*

In light of the disposition of the motion brought by the Brazilian defendants, and joined by the New Jersey defendants, the separate motion of the New Jersey defendants to dismiss the action as against them **[*40]** on the basis of the New Jersey Entire Controversy doctrine and on the basis of a prior settlement agreement will be dismissed as moot.

E. *Plaintiffs' Pendent State Law Causes of Action*

Counts Six through Ten of plaintiffs' Second Amended Complaint allege various state law causes of action against defendants Impacta and Thomas. These claims were originally before the Court pursuant to the exercise of pendent jurisdiction. The Supreme Court has held that:

HN12[] Pendent jurisdiction . . . exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *,' *U.S. Const., Art. III, § 2*, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court.

United Mine Workers of America v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138 (1966). The Supreme Court went on to state that "[i]t has consistently been recognized that pendent jurisdiction is a doctrine of discretion[.]" *Id. at **[*41]** 726, 86 S. Ct. at 1139*; *Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 196* (3d Cir. 976). Considering the posture of the instant case, the Court finds that it would best serve the interests of judicial economy and fairness to the litigants to decline to exercise jurisdiction over the remaining state law claims in this action. In light of he Court's determination that the facts alleged do not state a claim under federal law for which relief can be granted, at this early stage of the proceeding it would best serve the interests of the parties to allow plaintiffs an opportunity to refile their state law claims in an appropriate forum if those claims can be eformulated to obviate the necessity of relying on allegations which have already been determined to be insufficient. Therefore, the Court will decline to exercise pendent jurisdiction over plaintiffs' remaining state law claims and will dismiss Counts Six through Ten without prejudice.

III. *CONCLUSION*

For the reasons stated above, the Court will grant all defendants' motion to dismiss the complaint, or for summary judgment and will dismiss the Second Amended Complaint in its entirety. Counts One, Two, Three, Four and Five **[*42]** will be dismissed with prejudice. Counts Six, Seven, Eight, Nine and Ten will be dismissed without prejudice. The separate motion of defendants Amber, Krah and Grim will be dismissed as moot in light of the disposition of all defendants' motion.

An appropriate order is attached.

Dated: September 7, 1990.

ORDER

In accordance with the Court's opinion filed herewith,

It is on this 7th day of September, 1990,

ORDERED that the motion of all defendants to dismiss the complaint, or for summary judgment is granted; and it is further

ORDERED that the Second Amended Complaint is dismissed in its entirety; and it is further

ORDERED that Counts One, Two, Three, Four and Five are dismissed with prejudice; and it is further

ORDERED that Counts Six, Seven, Eight, Nine and Ten are dismissed without prejudice; and it is further

ORDERED that the separate motion of defendants Amber, Krah and Grim is dismissed as moot in light of the disposition of the motion of all defendants.

Musick v. Burke

United States Court of Appeals for the Ninth Circuit

May 10, 1990, Argued and Submitted ; September 7, 1990, Filed

No. 89-55310

Reporter
913 F.2d 1390 *; 1990 U.S. App. LEXIS 15671 **; 1990-2 Trade Cas. (CCH) P69,176

Lowell Musick and Sharlene Musick, et al., Plaintiffs-Appellants, v. Gene Burke, Burke Vending and Catering Corporation, et al., Defendants-Appellees

Prior History: **[**1]** Appeal from the United States District Court for the Central District of California; A. Wallace Tashima, District Judge, Presiding; D.C. No. 88-0544 AWT.

Disposition: Affirmed.

Core Terms

interstate commerce, out-of-state, district court, Sherman Act, antitrust, commerce, products, catering, summary judgment, trucks, racketeering, federal jurisdiction, interstate, employees, disposal, genuine, pendent, sales, grant of summary judgment, local activity, customers, summary judgment motion, business activity, state law claim, material fact, anticompetitive, competitors, defendants', ingredients, harassment

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Discovery, Methods of Discovery**

Under *Fed. R. Civ. P. 56(c)*, summary judgment may be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] Summary Judgment, Motions for Summary Judgment

In a motion for summary judgment, if the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact, then the nonmoving party must set forth, by affidavit or as otherwise provided in *Fed. R. Civ. P. 56*, specific facts showing that there is a genuine issue for trial.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN3[] Standards of Review, De Novo Review

The grant of summary judgment is reviewed de novo. When judging the evidence at the summary judgment stage, the trial court is not to make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the nonmoving party.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN4[] Sherman Act, Scope

15 U.S.C.S. § 1 of the Sherman Act makes unlawful combinations in restraint of interstate commerce. Attempts to monopolize any part of interstate trade or commerce, whether alone or in a combination or conspiracy, are also unlawful under *15 U.S.C.S. § 2*. Thus, involvement of interstate commerce in defendant's activities is a jurisdictional requirement to actions filed under the Sherman Act.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Sherman Act, Jurisdiction

In determining jurisdiction under the Sherman Act, the focus of the inquiry is defendant's business activities. Plaintiffs must make a showing of a substantial effect on interstate commerce generated either by defendants' general business activities or by the alleged antitrust violations themselves, which provide a strong indicator that defendant's business has an interstate impact. To make this showing plaintiffs must first identify the relevant aspect of interstate commerce; it is not sufficient to presume an interrelationship of the local activity to some unspecified aspect of interstate commerce. Then the plaintiffs must demonstrate that defendants' local activity has an effect on some other appreciable activity demonstrably in interstate commerce. This effect must be, as a matter of practical economics not insubstantial. Whether the defendants' activities sufficiently affect interstate commerce to create Sherman Act jurisdiction is a highly fact-based question calling for common sense judgment. Applying such common sense judgment means that while no specific dollar amount need be alleged and plaintiffs may show aggregate effects on commerce of defendants' activities, the alleged effect must still be considered in proportion to the parties' businesses as a whole.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > Inferences

HN6[] **Antitrust & Trade Law, Sherman Act**

While jurisdiction is not defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact of defendant's conduct, plaintiff's evidence must at least support an inference that some quantifiable effect on commerce of defendant's intended interference with plaintiff's business has occurred.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

To prevail on a claim under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. S. § 1962*, plaintiffs must demonstrate that the enterprise which is involved in or benefits from the racketeering activity is one engaged in, or having an effect on, interstate commerce. This nexus may be "minimal," but constitutes part of plaintiffs' burden to prevail. Specifically, the effect on commerce must be shown. It is not necessary for plaintiffs to demonstrate that the predicate acts themselves had an interstate effect.

Constitutional Law > Congressional Duties & Powers > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Transportation Law > Interstate Commerce > Federal Powers

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Limitations

Transportation Law > Interstate Commerce > Balancing Tests

HN8[] **Constitutional Law, Congressional Duties & Powers**

A "minimal" interstate nexus to establish jurisdiction under RICO can be no less than that required for the Sherman Act. That is to say, RICO jurisdiction ends where local activities have incidental effects on interstate commerce, exactly at the point where Sherman Act jurisdiction ends.

Counsel: Michael G. Portner, Los Angeles, California, for the Plaintiffs-Appellants.

James L. Seal, Rosenfeld, Meyer & Susman, Beverly Hills, California, for the Defendants-Appellees.

Judges: Procter Hug, Jr. and Stephen S. Trott, Circuit Judges, and D. Lowell Jensen, [*] District Judge.

Opinion by: JENSEN

Opinion

[*1391] JENSEN, District Judge

In this action alleging federal antitrust and racketeering law violations and pendent state law tort claims, the individual plaintiffs [1] appeal the grant of summary judgment in favor of defendants [2] (collectively referred to as "Burke Vending") and dismissal of the pendent state law claims for lack of jurisdiction in the district court. The issues are (1) whether plaintiffs have demonstrated that Burke Vending's activities have an effect upon interstate commerce sufficient to come within the scope of either federal antitrust laws or **[**2]** the Racketeer Influenced and Corrupt Organization Act, *18 U.S.C. § 1961 et seq.* ("RICO"); (2) whether even if such effect were demonstrated, defendants possess **[*1392]** sufficient market power to render their activities unlawful under the antitrust rule of reason; and (3) whether the district court erred in finding that defendants had committed no acts of extortion or intimidation against plaintiffs as competitors or prospective witnesses. We affirm the judgment.

[3]** I. FACTS AND PROCEDURAL HISTORY

A. The Complaint

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[*] The Honorable D. Lowell Jensen, United States District Judge for the Northern District of California, sitting by designation.

[1] The plaintiffs are Lowell Musick and Sharlene Musick, dba Chow Biz; Tom Manus; Cheryl Tombaugh; and George Parlee. All are citizens of California engaged in the business of commercial catering in the Santa Clarita Valley area of Los Angeles County.

[2] The named defendants are Gene Burke, president and major shareholder of corporate defendant Burke Vending and Catering Corporation, a California corporation; David C. Smith; Lafayette Smith; Phil Smith; Rafael Espinoza; Barry Cisneros; David Manning; Don Ternario; Don Wheeler; Orlando Rivas; Peter Limon; Marco Lefferman; Edward Corner; John Sheehy; Steve Sanchez; Jane Collier; Mark Sullivan; and Derrick Kroll. Corporate defendant Michael's Catering is alleged to be a California corporation but is identified by defendants as a dba of Burke Vending and Catering Corporation. The individual defendants are alleged to be agents or employees of each other.

This dispute concerns alleged antitrust and racketeering law violations in claimed acts of violence and extortion by Burke Vending against its competitors, plaintiffs/appellants, in the mobile catering service industry in the Santa Clarita Valley area of Los Angeles, California. Plaintiffs allege that during the period from 1985 to 1988 each of them was threatened and harassed by employees or agents of Burke Vending while attempting to serve customers at various business locations throughout the Santa Clarita Valley area, and that Burke Vending engaged in price discrimination and entered into agreements to sell goods on the basis of refusal to use goods of its competitors.

The Complaint alleges that the purpose of this harassment, unlawful price discrimination, and agreement not to use goods of competitors was to restrain competition in the market area and obtain a monopoly, all in violation of the Sherman Act, *15 U.S.C. §§ 1*, *2*; the Wilson Tariff Act, *15 U.S.C. § 8*; the Clayton Act, *15 U.S.C. §§ 14*, *15*; and the Robinson-Patman Price Discrimination Act, **[**4]** *15 U.S.C. § 13*. The threats and harassment were further alleged to have amounted to a pattern of racketeering activity conducted for the benefit of defendant Gene Burke's mobile catering business, [3] in violation of Racketeer Influenced and Corrupt Organization Act, *18 U.S.C. § 1961* ("RICO"). Pendent state law tort claims were also asserted for interference with business advantage, assault and battery, and intentional infliction of emotional distress.

B. Disposition in the District Court

In the district court, defendants brought motions for summary judgment against each of the federal claims asserting lack of jurisdiction, in that defendants' activities were neither in commerce nor had an effect on interstate commerce as required under the statutes. Defendants also moved for dismissal of the state law **[**5]** claims for lack of pendent jurisdiction, should summary judgment be granted.

The district court granted the motions for summary judgment on the federal law claims and adopted defendants' proposed findings of fact as uncontroverted facts of the action. The district court found that defendants' activities were wholly local, without effect on interstate commerce; and that even if federal jurisdiction existed, defendants did not have sufficient market power to render their conduct unlawful under the rule of reason.

As to the RICO claim, the district court found that Burke Vending's activities were local and had only an incidental effect on interstate commerce. The district court further found that even if the jurisdictional effect on interstate commerce existed, plaintiffs had failed to show evidence of any predicate acts for purposes of establishing RICO liability. Although it was not a necessary basis of summary judgment, the district court found that no employee or lessee of Burke Vending had engaged in extortion, intimidation or retaliation against plaintiffs or their witnesses. Finally, having granted summary judgment for defendants on the federal claims, the district court dismissed **[**6]** the state law claims for lack of pendent jurisdiction, without prejudice to bringing these claims in state court.

For the reasons set forth below, the panel affirms the grant of summary judgment and dismissal of the pendent state law claims for lack of jurisdiction.

C. Facts

The parties to this action are each engaged in the business of commercial mobile **[*1393]** catering in the Santa Clarita Valley area of Los Angeles County. Their operations include driving catering trucks to businesses and construction locations throughout the area to sell a variety of prepared food or food products, snacks, drinks, and other products to employees at those business or construction sites. The products are purchased wholesale from local distributors who obtain many products from out-of-state manufacturers and suppliers, and are then resold at retail prices to the employee-consumers. The catering trucks the businesses use are assembled and customized from standard parts, some of which are manufactured outside of California.

Defendant Burke Vending owns 18 catering trucks, 3 of which are driven by employees and 15 of which are leased to independent operators who also purchase their **[**7]** products from Burke Vending for resale. Plaintiff Lowell

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[3] Burke Vending and Michael's Catering are alleged to be the enterprises benefitting from the pattern of racketeering activity alleged in the RICO claim.

Musick operates four to five catering trucks in the Santa Clarita Valley area, with a total annual business volume of approximately $800,000. Musick asserts that $500,000 of his annual sales volume is derived from sales of products imported from out-of-state. Burke Vending asserts that all of its products are purchased from local distributors. No figures are available for the volume of business Burke Vending does per year, nor the amount of that business that is derived from products shipped in interstate commerce. Plaintiffs also offer no figures for the number of catering trucks or volume of business operated by the other individual plaintiffs.

While the Santa Clarita market area is approximately 25 miles from the nearest sizeable city, there are no geographic barriers to competition from outside the area. Within the market area there are in addition to catering trucks, fast food restaurants and convenience stores which offer substantially the same products as are offered by the parties' mobile catering services. The only difference among these businesses is that the mobile catering services deliver the products directly **[**8]** to the customers' worksites, while employees would have to leave their worksites to reach the fixed distribution outlets. Plaintiffs assert that it is impossible for these employees to leave their worksites during the day but offer no supporting evidence on this point.

In a series of declarations submitted in opposition to the motions for summary judgment, plaintiffs allege that certain Burke Vending agents, defendants Lafayette Smith, David Smith and Don Wheeler, would follow them to worksites and forcibly interfere with their attempts to serve customers. This forcible interference included verbal threats and orders to leave, blocking customer access to plaintiffs' trucks with their own vehicles, throwing nails and other debris in the paths of plaintiffs' trucks, and at least one incident of physical assault. Non-forcible interference was also described, in the form of following plaintiffs to worksites and giving food and other products away to undercut plaintiffs' sales at those sites. Plaintiffs allege that they and their customers were placed in fear by the nature and manner of defendants' activities. Their declarations also support an inference that defendants suggested this **[**9]** harassment would cease if plaintiffs abandoned their attempts to service the locations at which the incidents occurred. At least three of the plaintiffs state in their declarations that they abandoned one or more service locations as a result of the harassment activities.

Defendant Gene Burke stated in his declaration in support of the motions for summary judgment that he had no knowledge of acts of violence or intimidation by his employees, and that such acts would be contrary to Burke Vending policies.

II. JURISDICTION OF ANTITRUST CLAIMS

A. Standard for Summary Judgment

HN1[] Under *Rule 56(c) of the Federal Rules of Civil Procedure*, summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law."

[*1394] ***HN2***[] In a motion for summary judgment, "if the party moving for summary **[**10]** judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," then "the nonmoving party must set forth, by affidavit or as otherwise provided in *Rule 56*, '*specific facts* showing that there is a genuine issue for trial.'" *T.W. Electric Service, Inc. v. Pacific Elec. Contractors, 809 F.2d 626, 630 (9th Cir. 1987)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1983)*; *Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04* (9th Cir.), *cert. denied*, *479 U.S. 949, 107 S. Ct. 435, 93 L. Ed. 2d 384 (1986))* (emphasis in original).

Plaintiffs opposing summary judgment may not rest on their pleadings. *Fed. R. Civ. P. 56(e)*. Although reference is made to the moving party's "burden" under this rule, *Rule 56* places no evidentiary burden on a moving defendant beyond that which is required for him to prevail at trial. Therefore, while it is incumbent upon the adverse plaintiff to offer evidence sufficient to raise a genuine issue of fact on an **[**11]** issue on which the plaintiff has the burden of proof, the moving defendant need provide nothing more than a reference to those materials on file in the case which support the movant's belief that there is an absence of any genuine issues of material fact.

HN3[] The district court's grant of summary judgment is reviewed de novo. *Kaiser Cement, 793 F.2d at 1103*; *Lew v. Kona Hosp., 754 F.2d 1420, 1423 (9th Cir. 1985)*. When judging the evidence at the summary judgment stage, the district court is not to make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the nonmoving party. *T.W. Electric, 809 F.2d at 630-31* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986))*. The Court of Appeals applies the same standard upon review. *Kaiser Cement, 793 F.2d at 1103*; *Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1362 (9th Cir. 1985)*.

Summary judgment **[**12]** may issue "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp., 106 S. Ct. at 2552*. The standard for judging either a defendant's or plaintiff's motion for summary judgment is the same standard used to judge a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986)*.

*B. Jurisdictional Reach of Federal **Antitrust Law***

1. Statutory Requirements.

HN4[] The Sherman Act makes unlawful combinations in restraint of interstate commerce. *15 U.S.C. § 1*. Attempts to monopolize any part of interstate trade or commerce, whether alone or in a combination or conspiracy, are also unlawful. *15 U.S.C. § 2*. **[**13]** Thus involvement of interstate commerce in a defendant's activities is a jurisdictional requirement to actions filed under the Sherman Act. *E.g., McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241, 100 S. Ct. 502, 508, 62 L. Ed. 2d 441 (1980)* (considering whether local real estate brokerage activities have an effect on interstate commerce sufficient to satisfy the jurisdictional element).

Before proceeding with our consideration of the reach of the Sherman Act, however, we note that the Wilson Tariff Act, the Clayton Act and the Robinson-Patman Act each contain a more stringent jurisdictional requirement, in that the defendant must be alleged to be itself engaged in interstate or import commerce. *See Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 95 S. Ct. 392, 398, 42 L. Ed. 2d 378 (1974)*; *15 U.S.C. §§ 8*, *13*, *14*. **[*1395]** Appellant makes no attempt to show that Burke Vending is in any way engaged in interstate commerce; indeed, to the extent that Burke Vending purchases products and truck parts manufactured out-of-state, it obtains such products and parts strictly from local distributors. Therefore, **[**14]** as an initial matter, the grant of summary judgment as to the Fourth and Fifth Causes of Action, for violation of the Clayton Act and Robinson-Patman Act, must be affirmed.

2. Effect on Interstate Commerce Under the Sherman Act.

As the power of Congress to regulate interstate commerce reaches beyond activities actually in commerce to those local activities which substantially affect interstate commerce, so the reach of the Sherman Act is correspondingly broad. *McLain, 444 U.S. at 241, 100 S. Ct. at 508*. Congress intended the Sherman Act to be "as inclusive as the constitutional limits of Congress' power to regulate commerce." Report of the Attorney General's National Committee to Study the Antitrust Laws 62 (1955), *quoted in Rasmussen v. American Dairy Ass'n., 472 F.2d 517, 526* (9th Cir.), *cert. denied*, *412 U.S. 950, 37 L. Ed. 2d 1003, 93 S. Ct. 3014 (1973)*.

HN5[] In determining jurisdiction under the Sherman Act, the focus of the inquiry is the defendant's business activities. *Western Waste Serv. v. Universal Waste Control, 616 F.2d 1094, 1097 n. 2* **[**15]** (9th Cir.), *cert. denied*, *449 U.S. 869, 101 S. Ct. 205, 66 L. Ed. 2d 88 (1980)* (citing *McLain, supra*). Appellants must make a showing of a substantial effect on interstate commerce generated either by appellees' general business activities, *McLain, 444 U.S. at 242, 100 S. Ct. at 509*, or by the alleged antitrust violations themselves, which provide "a strong indicator that the defendant's business has an interstate impact." *Western Waste, 616 F.2d at 1097*; *see also Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 744, 96 S. Ct. 1848, 1852, 48 L. Ed. 2d 338 (1976)* (hereafter *Rex*

Hospital) (allegation that defendant's interference with plaintiff's expansion plans substantially affected interstate commerce sufficient to meet jurisdictional requirement).

To make this showing appellants must first identify the relevant aspect of interstate commerce; it is not sufficient to presume an interrelationship of the local activity to some unspecified aspect of interstate commerce. *McLain, 444 U.S. at 242, 100 S. Ct. at 509*. Then the appellants must demonstrate that appellees' local activity **[**16]** has "an effect on some other appreciable activity demonstrably in interstate commerce." *Id.* This effect must be, "as a matter of practical economics . . . not insubstantial." *Id. at 246, 100 S. Ct. at 511* (and citations therein); *Palmer v. Roosevelt Lake Log Owners Ass'n., 651 F.2d 1289, 1291 (9th Cir. 1981)*.

Whether the defendant's "activities sufficiently affect interstate commerce to create Sherman Act jurisdiction is a highly fact-based question calling for common sense judgment." *Mitchell v. Frank R. Howard Memorial Hosp., 853 F.2d 762, 765 (9th Cir. 1988)*, *cert. denied*, *489 U.S. 1013, 109 S. Ct. 1123, 103 L. Ed. 2d 186 (1989)*; *see also* *Rasmussen v. American Dairy Ass'n., 472 F.2d 517, 526* (9th Cir.), *cert. denied*, *412 U.S. 950, 37 L. Ed. 2d 1003, 93 S. Ct. 3014 (1973)* ("In this area perhaps more than in most, each case must turn on its own facts."). Applying such common sense judgment means that while no specific dollar amount need be alleged and a plaintiff may show aggregate effects on commerce of defendant's activities, the alleged effect must still be considered **[**17]** in proportion to the parties' businesses as a whole.

In *Rex Hospital, supra*, the Supreme Court held that defendant's activities had a sufficient effect on interstate commerce where they would, if successful, (1) prevent millions of dollars in construction funding from out-of-state sources from flowing to plaintiff's hospital; (2) reduce plaintiff's purchases of out-of-state supplies and its revenues from out-of-state insurance companies by "thousands or perhaps hundreds of thousands of dollars;" and (3) reduce management fees plaintiff would pay to its out-of-state corporate parent. *425 U.S. at* ***[*1396]*** *744*. The Court held that this combination of factors created a sufficient allegation of effect on interstate commerce to satisfy the Sherman Act jurisdiction requirement. There is no indication in *Rex Hospital*, however, that any one of these factors would have been sufficient on its own.

In *Burke v. Ford, 389 U.S. 320, 88 S. Ct. 443, 19 L. Ed. 2d 554 (1967)*, the Supreme Court found that state-wide market division by liquor wholesalers in Oklahoma would necessarily affect interstate commerce, because Oklahoma had no in-state **[**18]** liquor distillers and therefore all of the liquor in the state was supplied from outside the state. This single fact necessarily meant that any reduction of competition among wholesalers within the state would have a direct effect on out-of-state suppliers. *Id. at 321-22, 88 S. Ct. at 444*.

The Ninth Circuit held that a defendant's business activities, both generally and those specifically alleged to have an anticompetitive effect, satisfied the jurisdiction requirement in *Western Waste, supra.* That case involved competition between waste disposal businesses in the Phoenix, Arizona, market. Plaintiff Western Waste Service System alleged that defendant Universal Waste Control provided waste disposal services substantially below cost and conspired with other competitors, in order to drive Western Waste from the waste disposal business in the area and obtain a monopoly. *616 F.2d at 1095*. The district court granted a motion to dismiss for lack of jurisdiction, relying on the holding of *Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969)*, that a wholly local garbage disposal business which **[**19]** supplied its business with equipment from out of state remained a local activity not subject to Sherman Act jurisdiction. *Id. at 343*.

The Ninth Circuit reversed, finding *Sun Valley* overruled by *McLain* to the extent that it required a plaintiff to show that the effect of defendant's alleged antitrust violation, rather than defendant's business activities as a whole, had the necessary effect on interstate commerce. *Western Waste, 616 F.2d at 1098*. However, as to *Sun* Valley's holding that purchase of out-of-state equipment was inadequate by itself to allege facts supporting federal jurisdiction, the *Western Waste* Court did not overrule this holding but rather found it factually distinguishable from the case before it. While the *Western Waste* parties' total out-of-state purchases amounted to almost $ 500,000 in the most recent year, the Court relied on the following additional facts to determine that a sufficient allegation of jurisdiction was made: (1) defendant's direct restraint of interstate commerce by using its market power to have plaintiff's dealership of out-of-state garbage compaction equipment cancelled; (2) defendant's **[**20]** business activity of providing scrap materials to brokers for shipment out of state; and (3) defendant's financing of its equipment purchases with funds borrowed from its out-of-state corporate parent. 616 F.2d at 1098-99. [4] These additional factors were found to constitute "material differences" between the facts of *Western* Waste and those of Sun Valley. Id. at 1099.

Therefore, there remains undiminished authority in the Ninth Circuit that a showing of purchase of supplies and equipment **[**21]** from out of state, *by itself*, is insufficient to identify a relevant aspect of interstate commerce substantially affected by an antitrust defendant's business activities. Even the broadest statement of Sherman Act jurisdiction to be found in the Ninth Circuit, *Rasmussen v. American Dairy Ass'n., 472 F.2d 517, 526* (9th Cir.), *cert. denied*, *412 U.S. 950, 37 L. Ed. 2d 1003, 93 S. Ct. 3014 (1973)*, acknowledges that the reach of federal jurisdiction is limited when local businesses merely purchase some **[*1397]** business inventory and equipment from the stream of interstate commerce.

Rasmussen dealt with the effect on interstate commerce of interference with sales of a filled milk product which was processed and sold entirely within the State of Arizona. 472 F.2d at 524-25. In holding that sales of the filled milk were the end of a line of commerce leading from outside the state through the in-state processor to in-state consumers, the Ninth Circuit focused on the fact that the nonfat dried milk and all the other ingredients used in processing the product, except for local water, came from out of state: "Thus, for all practical **[**22]** purposes, the out-of-state ingredients *are* [the filled milk product] . . . In economic terms [the filled milk] consists almost wholly of ingredients that move in interstate commerce." *Id. at 525* (emphasis in original). Significantly, on the facts before it, the Court could be certain that the ingredients themselves had traveled in commerce, and were not merely articles of a type inferentially found in commerce. *Id.* Thus the case closely resembled *Burke v. Ford*, discussed *supra*, in turning on the necessary impact on out-of-state suppliers of interference with wholly in-state businesses.

Certainly defining a product as "in commerce" even though it never leaves the state, due solely to its composition of out-of-state ingredients, offers a very broad rule if generally applied. Therefore, the *Rasmussen* Court sought to limit the application of its holding when applied in other factual situations. *Id. at 526*. Recognizing both the fact-reliant nature of each case involving effects on commerce and the limits of federal jurisdiction, the Court harmonized the holding in *Sun Valley*:

> Since every enterprise, however localized, **[**23]** inevitably has some effect, however remote, on the flow of commerce among the states, some "localness," "remoteness," or "de minimis" factor must intervene or federal regulation is boundless.
> * * *
>
> . . . *Sun Valley Disposal* involved local businesses using supplies drawn from the stream of interstate commerce. We recognized that interference with those businesses inevitably had some interstate effect. We held, nonetheless, that this effect was "incidental," and did not justify federal regulation of competitive restraints imposed on businesses that were "wholly local in character." *See Sun Valley Disposal Co. v. Silver State Disposal Co.*, [] *420 F.2d at 343*.

472 F.2d at 526 [footnote omitted].

It appears that the case before the panel today describes exactly that sort of incidental effect on interstate commerce which does not warrant federal intervention. It is undisputed that the parties conduct their catering services in one limited area of Los Angeles County, serving local businesses and their employees. Appellants base their claim of effect on interstate commerce on the sole fact that a majority of the products they purchase **[**24]** for

[4] On this last fact, compare *Western Waste* with *McLain, supra, 444 U.S. at 245* ("appreciable amount" of hundreds of millions of dollars involved in subject real estate market's financing was obtained from out-of-state lenders) and *Rex Hospital, supra, 425 U.S. at 744* ("large portion" of multimillion dollar planned expansion by plaintiff to be financed by out-of-state lenders and management fee paid by plaintiff to out-of-state corporate parent).

resale are drawn from interstate commerce, as are some of their truck parts. Appellants also ask that we infer that the same must be true for Burke Vending, as its business is so similar to appellants'.

As the above discussion shows, this single factor, i.e., equipment and supplies drawn generally from the stream of interstate commerce, is qualitatively insufficient to establish Sherman Act jurisdiction. Furthermore, assuming arguendo that some showing of this type could be sufficient, the amount of interference with commerce identified by appellants is de minimis. Even viewing appellants' evidence in the light most favorable to them, it is difficult to perceive, "as a matter of practical economics," any substantial impact on interstate commerce of Burke Vending's alleged interference with appellants' sales of out-of-state goods.

Appellant Lowell Musick states that his business makes sales of approximately $ 500,000 per year in goods ultimately drawn from out-of-state. The other appellants do not offer evidence regarding the extent of their sales of goods from out-of-state. There is no evidentiary showing that Musick's business in the Santa Clarita Valley area has been reduced **[**25]** or eliminated as a result of Burke Vending's conduct, **[*1398]** and therefore it is virtually impossible to assess the impact on interstate commerce of Burke Vending's activities. Other appellants have stated that they quit or reduced selling in the Newhall (Santa Clarita) area as a result of the violence and threats directed against them, but they do not indicate the geographical extent of the limitations on their business, nor the resultant effect on their sales of out-of-state goods.

HN6[] While "jurisdiction [is not] defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact of defendant's conduct [citations]," *McLain, supra, 444 U.S. at 243*, plaintiff's evidence must at least support an inference that some quantifiable effect on commerce of defendant's intended interference with plaintiff's business has occurred. The record here does not support such an inference, because there is no indication that appellants have been disabled in any way from selling their out-of-state goods in the Santa Clarita Valley. Certainly the conduct of Burke Vending's agents, if proved, is wrongfully anticompetitive and rightfully **[**26]** subject to condemnation; however, even vicious anticompetitive activity is beyond the reach of the Sherman Act if it is wholly local in character.

Therefore, the district court properly found that appellants had failed to raise a genuine issue of material fact that Burke Vending's activities affect interstate commerce as a matter of practical economics. In view of our determination that appellants failed to make the necessary showing as to jurisdiction, we need not reach the question of the market power of Burke Vending. The grant of summary judgment as to the First, Second and Third Causes of Action under the Sherman Act is affirmed.

III. JURISDICTION UNDER RICO

HN7[] To prevail on a claim under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1962* ("RICO"), plaintiffs must demonstrate that the enterprise which is involved in or benefits from the racketeering activity is one engaged in, or having an effect on, interstate commerce. *United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979)*, *cert. denied sub nom. Little v. U.S., 445 U.S. 946, 100 S. Ct. 1345, 63 L. Ed. 2d 780 (1980)*; **[**27]** *18 U.S.C. § 1962(c)*. This nexus may be "minimal," but constitutes part of plaintiffs' burden to prevail in this action. *Id.* Specifically, the effect on commerce must be shown. *United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981)*, *cert. denied sub nom. Walgren v. U.S., 456 U.S. 962, 72 L. Ed. 2d 487, 102 S. Ct. 2040 (1982)*. It is not necessary for plaintiffs to demonstrate that the predicate acts themselves had an interstate effect. *Rone, 598 F.2d at 573*; *Bagnariol, 665 F.2d at 892*.

As discussed above, the jurisdictional reach of the Sherman Antitrust Act extends to the constitutional limits of Congress' power to regulate interstate commerce. *United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944)*; *Western Waste, supra, 616 F.2d at 1096*. Therefore, we are persuaded that ***HN8***[] a "minimal" interstate nexus to establish jurisdiction under RICO can be no less than that required for the Sherman Act. That is to say, RICO jurisdiction ends where local activities have incidental effects on interstate **[**28]** commerce, exactly at the point where Sherman Act jurisdiction ends.

The evidence of interstate effect of the Burke Vending enterprise that appellants offer for their RICO claim is identical to that offered for their antitrust claims. Even accepting that the parties all offer out-of-state goods in the amounts asserted by appellant Lowell Musick, there is no basis on which to conclude that these sales create RICO jurisdiction where they are insufficient as a matter of law to create federal jurisdiction under the antitrust statutes.

For this reason, the district court properly found that appellants had failed to raise a genuine issue of material fact that Burke Vending's activities affected interstate commerce sufficiently to invoke RICO jurisdiction, and summary judgment for appellees **[*1399]** on the Sixth Cause of Action is affirmed.

IV. DISTRICT COURT'S FINDINGS OF FACT

In granting the motions for summary judgment, the district court issued findings of fact and conclusions of law related to each cause of action in the Complaint, although such findings and conclusions are not required on decision of a motion under *Rule 56*. *Fed. R. Civ. P. 52(a)*.

In its conclusions of **[**29]** law, the district court found that defendants Burke Vending and Michael's Catering were neither engaged in interstate commerce nor in local activities appreciably affecting interstate commerce. Therefore, the district court concluded that defendants' activities were not subject to the jurisdiction of either federal ***antitrust law*** or federal racketeering law.

As the above discussion shows, this conclusion was correct and provided proper basis for the district court's grant of summary judgment on the antitrust and RICO claims. Because federal jurisdiction is lacking in this action, the panel notes that the district court's Findings of Fact and Conclusions of Law on the merits of this case have no precedential, res judicata, or collateral estoppel effect.

V. CONCLUSION

The district court's finding that federal jurisdiction did not exist over appellants' antitrust and RICO claims was proper, because the record fails to provide sufficient evidence of a substantial effect on interstate commerce of either Burke Vending's anticompetitive activities or its commercial activities as a whole. Therefore dismissal of the pendent state law claims was also proper. The findings and conclusions **[**30]** of the district court bearing on the merits of the controversy are of no legal or precedential effect.

AFFIRMED.

Alpha Lyracom Space Communs. v. Communications Satellite Corp.

United States District Court for the Southern District of New York

September 13, 1990, Decided ; September 13, 1990, Filed

No. 89 Civ. 5021 (JFK)

Reporter

1990 U.S. Dist. LEXIS 11964 *; 1990-2 Trade Cas. (CCH) P69,188; 68 Rad. Reg. 2d (P & F) 405

ALPHA LYRACOM SPACE COMMUNICATIONS, INC., a Delaware corporation, and REYNOLD V. ANSELMO, an individual, doing business as PAN AMERICAN SATELLITE, a sole proprietorship, Plaintiffs, v. COMMUNICATIONS SATELLITE CORPORATION, Defendant

Core Terms

Parties, member-nations, Signatories, satellite, consultations, immunity, antitrust, global, communications, anti trust law, telecommunications, satellite systems, common carrier, authorization, allegations, ownership, domestic, communications satellite, foreign nation, organizations, plaintiffs', designated, two-thirds, functions, monopoly, directs, joined, foreign policy, indispensable, injunctive

LexisNexis® Headnotes

International Law > Foreign & International Immunity > Consuls & Diplomats

Torts > Public Entity Liability > Immunities > Judicial Immunity

Administrative Law > Sovereign Immunity

International Law > Dispute Resolution > Remedies > General Overview

International Law > Foreign & International Immunity > General Overview

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

International Law > Foreign & International Immunity > Sovereign Immunity > International Organizations

HN1[] **Foreign & International Immunity, Consuls & Diplomats**

The International Organizations Immunities Act, *22 U.S.C.S. §§ 288 et seq.* (IOIA), confers immunity from suit every form of judicial process on international organizations designated by the President. The IOIA also provides that foreign officers and employees of international organizations are immune from suit and legal process relating to acts performed in their official capacity. *22 U.S.C.S. § 288d(b)*. Further, the IOIA provides that the archives of international organizations shall be inviolable. *22 U.S.C.S. § 288a(c)*.

Governments > Federal Government > Executive Offices

HN2[] Federal Government, Executive Offices

Exec. Order No. 12,046 dictates that with respect to telecommunications, the Secretary of State shall exercise primary authority for the conduct of foreign policy, including the determination of United States positions in negotiations with foreign governments and international bodies.

Communications Law > Federal Acts > Communications Satellite Act

Contracts Law > Remedies > Ratification

HN3[] Federal Acts, Communications Satellite Act

Before the Federal Communications Commission may grant final authorization for a proposed separate satellite system, (1) the applicant must first obtain the authorization of each affected foreign country for the use of the system within that country and enter into Article XIV(d) of the Definitive Agreement consultations, and (2) then the United States government must undertake and complete the consultation procedures within Intelsat's Assembly of Parties, which are the member-nations, as required by Article XIV(d) of the Definitive Agreement.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN4[] Motions to Dismiss, Failure to State Claim

A motion to dismiss for failure to state a claim may be granted only if it appears certain that no relief could be granted under any set of facts that could be proved consistent with the allegations. The factual allegations set forth in the complaint of counterclaim must be accepted as true, and the court must view the allegations in the light most favorable to the pleader. Even if it appears on the face of the pleadings that recovery is remote, the claim will withstand the motion to dismiss as long as the pleader retains a possibility of success. Dismissals on the pleadings are especially disfavored in antitrust cases.

Governments > Legislation > Interpretation

HN5[] Legislation, Interpretation

The antitrust laws must be construed liberally and that antitrust immunity is disfavored.

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

Communications Law > Federal Acts > Communications Satellite Act

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Banking Law > Regulators > US Federal Reserve System > Extensions of Credit

Governments > Federal Government > Executive Offices

Governments > Legislation > Enactment

HN6[] Public Enforcement, US Department of Justice Actions

To further the national policy of establishing a global communications network in conjunction and in cooperation with other countries, *47 U.S.C.S. § 701(a)*, Congress established the Communications Satellite Corporation (Comsat) as a government-created monopoly and as the official United States participant in the global system. *47 U.S.C.S. § 701(c)*. Congress created detailed supervision and regulation of Comsat's activities, with particular emphasis on the Executive Branch's responsibility to ensure that Comsat's relationships with foreign governments and international organizations shall be consistent with the national interest and foreign policy of the United States. U.S.C.S. *§ 721(a)(4)*. Executive Order No. 12,046, 3 C.F.R. 158, § 5-201 (1978), invests the Secretary of State with the responsibility for instructing Comsat in its role as the United States representative to the International Telecommunications Satellite Organization. That Executive Order No. 12,046, 3 C.F.R. 158, § 5-201 (1978), also directs the Secretary of Commerce to conduct a "continuous review" of the satellite communications system, including Comsat's activities, and to ensure effective compliance at all times with the Communications Satellite Act of 1962, *47 U.S.C.S. § 701 et seq.* 3 C.F.R. 158, § 2-301(b), (c).

Communications Law > Federal Acts > Communications Satellite Act

HN7[] Federal Acts, Communications Satellite Act

Section 701(c) of the Communications Satellite Act of 1962, *47 U.S.C.S. §§ 701 et seq.*, applies to the Communications Satellite Corporation in its capacity as common carrier, not in its role as signatory to the International Telecommunications Satellite Organization.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN8[] Subject Matter Jurisdiction, Jurisdiction Over Actions

Fed. R. Civ. P. 19(a) requires joinder of parties whose inclusion will not defeat subject matter jurisdiction if (1) in their absence complete relief cannot be accorded among those already parties, or (2) their absence will impair their ability to protect their interest in the subject of the case or create a substantial risk of subjecting parties already joined to multiple or inconsistent obligations. *Fed. R. Civ. P. 19(a)*. If such parties exist and are unable to be joined, the court must determine whether in equity and good conscience the action should proceed without the absent parties or be dismissed because the absent parties are indispensable. *Fed. R. Civ. P. 19(b)*.In making that determination, the court must consider (1) the prejudicial effect to the joined or absent parties of the indispensable parties' absence; (2) the feasibility of diminishing the prejudicial effect by including "protective provisions" in the judgment; (3) whether the judgment rendered in the case could be adequate; and (4) whether an adequate remedy is available to plaintiff after dismissal. *Fed. R. Civ. P. 19(b)*.

Evidence > Inferences & Presumptions > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN9[] **Evidence, Inferences & Presumptions**

In order to establish a prima facie case of a New York state law claim for interference with prospective advantage, plaintiff must plead (1) a prospective contractual relationship with a third party; (2) that would have been consummated (3) but for the defendant's interference by wrongful means or malicious intent (4) without justification. The "but-for" requirement is a strict one as it is more stringent than "being reasonably certain" or "having a reasonable expectation." The motive and justification requirements also are strictly construed. Defendant's motive in interfering must be entirely malicious, without any secondary purpose such as advancing competing economic interests.

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Judges: John F. Keenan, United States District Judge.

Opinion by: KEENAN

Opinion

OPINION and ORDER

Plaintiff filed this antitrust suit under *sections 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1*, *2 (1982 & Supp. 1990)* seeking injunctive relief and treble damages pursuant to sections 4 and 16 of the Clayton Antitrust Act, *15 U.S.C. §§ 15*, *26*. Defendant has moved to dismiss the complaint for lack of subject matter jurisdiction, failure to state a claim, and failure to join a necessary and indispensable party. Fed. A. Civ. P. 12(b)(1),(6),(7). For the reasons discussed below, **[*2]** the Court grants the motion and dismisses the complaint.

FACTS

Reynold Anselmo is a Connecticut citizen doing business as Alpha Lyracom, a sole proprietorship, which in turn does business as Pan American Satellite ("PAS"). Alpha Lyracom owns and operates the first international commercial communications satellite outside the International Telecommunications Satellite Organization ("Intelsat"). Alpha Lyracom provides its services through a space telecommunications satellite called PAS I, which was launched in 1988.

Intelsat consists of 117 nations and their official representatives. Its origins are in a 1961 U.N. resolution calling for international cooperation in developing a global communications system. *See* G.A. Res. 1721, 1 U.N. GAOR Supp. (No. 17) at 6, U.N. Doc. A/5100 (1962). The resolution voiced the common objective of the United Nations' member-nations that "communication by means of satellite should be available to the nations of the world . . . on a global and non-discriminatory basis." *Id.* at 7.

To facilitate the United States' participation in the contemplated global system, Congress enacted the Communications Satellite Act of 1962, *47 U.S.C. §§ 701 et seq.* **[*3]** ("CSA"). The CSA created a private corporation, defendant Communications Satellite Corp. ("Comsat"), and designated it as the United States representative or signatory to Intelsat. Pursuant to that designation, Comsat is subject to extensive Presidential supervision "to assure that [Comsat's relations with foreign governments and international organizations] shall be consistent with the national interest and foreign policy of the United States." *47 U.S.C. § 721(a)(4)*.

In addition, Congress sought to ensure that:

all authorized users shall have nondiscriminatory access to the system; that maximum competition be maintained in the provision of equipment and services utilized by the system; that the corporation created under this chapter be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public; and that the activities of the corporation created under this chapter and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws.

Id. *§ 701(c)*.

The United States, through the vehicle of Comsat, joined Intelsat in 1964. Today Intelsat owns and **[*4]** operates a global system of communications satellites that provides international telecommunications services to more than 170 countries, territories and dependencies, and domestic telecommunications services to over thirty countries. International agreements prescribe the functions and authority of Intelsat, as well as the relations among the United States Government, Intelsat and the other member-nations. [1]

A. *The Intelsat sat Agreements*

In 1971, the member-nations executed two pacts known as the Definitive Agreement and the Operating Agreement. The Definitive Agreement **[*5]** was executed by the Government of each member-nation, the Operating Agreement was executed by the signatory or representative of each member-nation. Comsat signed the Operating Agreement as the United States signatory.

The Preamble to the Definitive Agreement expresses the commitment of each member-nation to "the aim of achieving a single global commercial telecommunications satellite system as part of an improved global telecommunications network . . . which will contribute to world peace and understanding." The Definitive Agreement entrusts the carrying out of this goal to Intelsat. Art. II(a).

In 1976 the United States, as host country, also entered into the Headquarters Agreement with Intelsat ("HQ Agreement").

1. *Intelsat's Organizational Structure*

a. *Assembly of Parties*

The Definitive Agreement provides that Intelsat's Assembly of Parties shall consist of all member-nations, including the United States. The Assembly of Parties convenes every two years to consider aspects of Intelsat that bear upon

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[1] International Executive agreements to which the United States is a party, such as the Intelsat Agreements, constitute the law of the United States, *Weinberger v. Rossi, 456 U.S. 25, 31 (1982)*; *Dames & Moore v. Regan, 453 U.S. 654, 677 (1981)*, and are subject to the same rules of construction applicable to treaties. *United States v. Pink, 315 U.S. 203, 223-24, 227-30 (1942)*; *United States v. Belmont, 301 U.S. 324, 330-32 (1937)*.

the nations as sovereigns. It is also charged with establishing the long-term objectives of Intelsat. Pursuant to Article XIV(d) of the Definitive Agreement, any member-nation **[*6]** wishing to establish or use a non-Intelsat international satellite system (such as plaintiff's) must first consult with the Assembly of Parties, which must declare that the system will not be antithetical to Intelsat's objectives in order for the system to be approved.

b. *Meeting of Signatories*

Under the Definitive Agreement, the designated representatives of each member-nation meet annually. The majority of member-nations other than the United States have designated a government agency or the government itself as its representative. Each representative has one vote at the meetings. A majority of representatives must be present to constitute a Drum. Decisions on substantive matters, when made on other than a consensus basis, require an affirmative vote of two-thirds of the voting representatives.

c. *Board of Governors*

The Board of Governors, presently composed of 29 persons representing 103 signatories, is responsible for the day-to-day conduct of Intelsat. The Chief Executive of Intelsat is the Director General, who is responsible to the Board for the performance of all managerial functions.

2. *Intelsat's Functions and Procedures*

While Intelsat was created by its member-nations **[*7]** to establish a single global satellite communications system, procedures were also provided in the event any member-nation wished to establish separate, non-Intelsat, international or domestic satellite communications services. These procedures, known as the consultation process set forth in article XIV of the Definitive Agreement, must be followed by the member-nations to ensure that any separate system is compatible with Intelsat and its international mission.

The consultation procedures distinguish between separate satellite systems for domestic and for international public communications services in terms of both the governing body responsible for consultation and the applicable standards that must be satisfied. Proposals for domestic systems (Art. XIV(c)) are initiated by the nation in which service will be utilized and are subject to review only for technical compatibility with the Intelsat system. That review is performed by the Board of Governors, and findings are made in the form of recommendations.

On the other hand, when a separate system is proposed by a nation to meet its international communications services requirements (Art. XIV(d)), the final assessment of both the **[*8]** technical compatibility and economic impact of the proposed system on Intelsat must be made *by the Assembly of Parties.* Since international systems implicate the foreign relations and foreign policies of Intelsat's member-nations, it is those member-nations, sitting as the Assembly of Parties, which have the responsibility and authority for concluding the consultation process and for issuing, by a two-thirds majority, the requisite findings.

The Definitive Agreement directs that rates for use of Intelsat satellites must be uniform and, in the aggregate cover the costs of operating the system. Rates are established by the Board, not individual signatories such as Comsat.

3. *Immunities*

Article XV of the Definitive Agreement requires that each member-nation grant appropriate privileges, exemptions and immunities to Intelsat, to the member-nations (Parties) and their representatives; and to the Signatories and representatives of Signatories, relating to their conduct in carrying out their functions and duties. Pursuant to that directive, the United States entered into the HQ Agreement with Intelsat in 1976. Paragraph 16 provides that:

"[t]he officers and employees of Intelsat, **[*9]** representatives of the Parties and of the Signatories . . . shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions . . . ."

HN1[] The International Organizations Immunities Act, *22 U.S.C. §§ 288 et seq. (1982 and Supp. V 1987)* ("IOIA") confers immunity from suit every form of judicial process on international organizations designated by the

President. Intelsat, since its inception, has been designated by the President of the United States as an international organization entitled to the immunities provided in the IOIA, with the current designation set forth in Executive Order No. 11,966, signed by President Ford in 1977. Executive Order No. 11,966, 3 C.F.R. 90 (1978) (App. H). The IOIA also provides that foreign officers and employees of international organizations such as Intelsat are immune from suit and legal process relating to acts performed in their official capacity. *22 U.S.C. § 288d(b)*. Further, the IOIA provides that "the archives of international organizations shall be inviolable." *22 U.S.C. § 288a(c)*.

4. *Executive Branch Control of Comsat as U.S. Signatory to Intelsat*

The Executive Branch **[*10]** exercises considerable control over Comsat's participation in Intelsat. ***HN2***[] Exec. Order No. 12,046 dictates that "with respect to telecommunications, the Secretary of State shall exercise primary authority for the conduct of foreign policy, including the determination of United States positions . . . in negotiations with foreign governments and international bodies." The instructional process through which the Secretary directs Comsat's participation in Intelsat is formalized in written procedures. The procedures recognize that as U.S. representative to Intelsat, "Comsat exercises . . . an important foreign policy function on behalf of the U.S." Before each Intelsat meeting, Comsat must circulate the agenda of the meeting to State Department officials who are charged with the responsibility of issuing instructions to Comsat on how to approach the agenda.

5. *Development of U.S. Policy on Separate, non Intelsat Systems*

Although Intelsat has inarguably functioned as the preeminent global satellite system for member-nations, in 1983 the FCC received several applications to operate non Intelsat systems from United States companies. The influx of applications occasioned President Reagan **[*11]** to issue Presidential Determination No. 85-2, pursuant to his responsibility to determine whether additional international satellite systems were "required in the national interest" under *sections 701(d)* and *721(a)* of the Communications Satellite Act. The President decided it was in the nation's interest to allow the development of separate systems, but directed the United States to consult with Intelsat before final authorization of any separate system in order to meet the United States' obligations under the Definitive Agreement. The President also instructed the Secretaries of State and Commerce to style criteria for the FCC which would insure that the United States met its international obligations. Two criteria were then prescribed that must be satisfied prior to final FCC authorization to commence a separate system.

First, each new system must be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public - switched message networks. Second, one or more foreign authorities are to authorize use of each system and enter into consultation procedures with the United States Party **[*12]** under Article XIV(d) of the Definitive Agreement to ensure technical compatibility and to avoid economic harm to Intelsat.

Thus, ***HN3***[] before the FCC may grant final authorization for a proposed separate system, such as plaintiffs', (1) the applicant must first obtain the authorization of each affected foreign country for the use of the system within that country and enter into Article XIV(d) consultations, and (2) then the United States government must undertake and complete the consultation procedures within Intelsat's Assembly of Parties (*i.e.*, member-nations) as required by Article XIV(d) of the Definitive Agreement.

Congress ratified the President's accommodation of the competing interests of Intelsat and fostering United States companies' entrance into the telecommunications industry in the Foreign Relations Authorization Act, Fiscal Years 1986-87 ("FRAA"), Pub. L. No. 99-93, 99 Stat. 405, 425-2 (1985).

The FCC issued a Report and Order regarding the applications for separate systems on July 25, 1985. *In re Establishment of Satellite Systems Providing International Communications,* FCC Docket No. 84-1299 (July 25, 1985) ("Report and Order"). The FCC Report and Order adhered **[*13]** to the separate systems policy articulated by the President and the Secretaries of State and Commerce and ratified by Congress. Thus, while the FCC noted that separate satellite systems would benefit users of international communications services, it concluded that "it [is] necessary to impose the Executive branch restrictions on the authorization of these systems in order to meet our international obligations under the Intelsat Agreement." *Id.* at 5. The FCC Report and Order did not constitute final approval of any particular separate system. Rather, it expressly stated that the Commission will not issue a final license for the operation of any separate system "until the United States has completed coordination of that system with Intelsat pursuant to Article XIV(d) of the Intelsat Agreement and we have been informed by the Department of State that the United States has fulfilled its obligation under Article XIV(d)." *Id.* at 143. In short, the FCC recognized that United States' support for separate systems must proceed with the Intelsat framework to which the political branches of our government are expressly committed.

6. *Introduction of PAS I*

The FCC preliminarily approved **[*14]** plaintiffs' application in September 1985 to construct and operate a subregional Western Hemisphere satellite system. Following Art. XIV(d) consultations and a favorable resolution by the Assembly of Parties, plaintiffs received final FCC approval in September 1987 to launch its satellite PAS I for communications between the United States and Peru; the satellite was launched in June 1988. In 1988 the Board of Governors, following Art. XIV(c) consultations approved requests by the United Kingdom and Chile for use of plaintiffs' services in domestic communications. In 1988 and 1989, the Assembly of Parties, following Art. XIV(d) consultations, approved plaintiffs' services in international communications in the United Kingdom, Germany, Ireland and several Central and South American countries.

The Complaint

In brief, plaintiffs allege that Comsat, as United States signatory to Intelsat, is responsible for conducting Article XIV(d) consultations on PAS' behalf. Compl. para. 23. Plaintiff maintains that rather than performing this duty, Comsat has engaged in anticompetitive conduct to thwart plaintiffs' successful entry into the domestic and international telecommunications markets. **[*15]** Paragraphs 27 and 28 of the complaint contain the core allegations of conduct constituting restraint of trade and monopolization in violation of *sections 1* and *2* of the Sherman Antitrust Act.

As defendant points out with alacrity, most of the allegations assert that Comsat conspired with Intelsat and its representatives to delay plaintiffs' entry into the market. See, e.g., 28(d),(g),(h),(i),(k-n), (p-r). Plaintiffs do, however, allege substantial unilateral anticompetitive action by Comsat. *See, e.g.,* para. 28(b),(c),(e),(f),(g),(o),(s),(w),(xy).

HN4[] A motion to dismiss for failure to state a claim may be granted only if it appears certain that no relief could be granted under any set of facts that could be proved consistent with the allegations. See *Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984)*; *Lipsky v. Commonwealth United Corp., 551 F.2d 887, 894 (2d Cir. 1976)*; *Burger v. Health Ins. Plan of Greater New York, 684 F. Supp. 46, 49 (S.D.N.Y. 1988)*. The factual allegations set forth in the complaint of counterclaim must be accepted as true, see *Zinermon v. Burch, 110 S.Ct. 975, 979 (1990)*, and the Court must view the allegations in the light most favorable to **[*16]** the pleader. See *Scheuer v. Rhodes, 416 U.S. 232, 237 (1974)*; *Yoder v. Orthomolecular Nutrition Inst., Inc., 751 F.2d 555, 562 (2d Cir. 1985)*. Even if it appears on the face of the pleadings that recovery is remote, the claim will withstand the motion to dismiss as long as the pleader retains a possibility of success. *Scheuer, 416 U.S. at 237*. To this landscape must be added the caveat that ""dismissals on the pleadings are especially disfavored in antitrust cases." *Schwartz v. Jamesway Corp., 660 F. Supp. 138, 141 (E.D.N.Y. 1987)* (citing *Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 746 (1976))*.

Defendant argues forcefully that it is immune from suit by reason of the IOIA and the Intelsat Agreements. Plaintiffs respond that *§ 701(c)* of the CSA reflects the clear intention of Congress to subject Comsat to the ***antitrust law***. In considering these positions, the Court bears in mind ***HN5***[] that the antitrust laws must be construed liberally and that antitrust immunity is disfavored. See *National Gerimedical Hosp. v. Blue Cross of Kansas City, 452 U.S. 378, 388-89 (1981)*; *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979)*.

In order to **[*17]** allow Intelsat to function outside the unpredictable legal standards of some nations, the United States and the other member-nations accorded Intelsat and its constituent parts immunity from suit. Article XV(c) of the Definitive Agreement directed that a Headquarters Agreement be executed by the U.S. as host-nation with Intelsat which would grant appropriate immunities. Paragraph 16 of the HQ Agreement provides immunity from suit to Intelsat, *"the representatives of the Parties* and of the Signatories . . . ." (emphasis added). Plaintiffs first seek to circumvent this straightforward grant of immunity to Comsat by embracing a strict interpretation of this language. They argue that they have sued a party and signatory itself, not its representatives. This argument is unpersuasive for two reasons. First, plaintiffs in their complaint acknowledge that Comsat is the representative of the United States Party to Intelsat. Compl. para. 11, 23. Second, plaintiffs ignore that paragraph 16 of the HQ Agreement implements the directive of Art. XV(c) of the Definitive Agreement to the United States to confer "appropriate privileges and immunities to Intelsat . . . to Parties . . . [and] to **[*18]** Signatories [e.g., Comsat] and representatives of Signatories."

Plaintiff next points out that paragraph 16 of the HQ Agreement states that its grant of immunity "may be waived by . . . the Parties and Signatories for their representatives." They assert that Congress, on behalf of the United States Party, waived Comsat's immunity from the antitrust laws in *section 701(c)* of the CSA, which provides that the activities of Comsat "shall be consistent with the antitrust laws." Defendant maintains that review of the pertinent legislative history reveals that Congressional concern with potential anticompetitive conduct was confined to the fact that communications common carriers (such as AT&T) would own large amounts of Comsat stock. Because "[r]egard for [the statutory] purposes should infuse construction of the legislation," the Court next parses *section 701(c)* and its legislative history. *United States v. Dotterweich, 320 U.S. 277, 280 (1943)*.

HN6[] To further the national policy of establishing a global communications network "in conjunction and in cooperation with other countries," *47 U.S.C. § 701(a)*, Congress established Comsat as a government-created monopoly and as the official "United **[*19]** States participa[nt] in the global system." *47 U.S.C. § 701(c)*. Congress created detailed supervision and regulation of Comsat's activities, with particular emphasis on the Executive Branch's responsibility to ensure that Comsat's relationships with foreign governments and international organizations "shall be consistent with the national interest and foreign policy of the United States." U.S.C. *§ 721(a)(4)*. Executive Order No. 12,046, 3 C.F.R. 158, § 5-201 (1978) invests the Secretary of State with the responsibility "for instructing [Comsat] in its role" as the United States representative to Intelsat. That Order also directs the Secretary of Commerce to conduct a "continuous review" of the satellite communications system, including Comsat's activities, and to ensure "effective compliance at all times with the" CSA. *Id.* § 2-301(b),(c).

Despite the intricate legal framework and supervision governing Comsat to ensure a course of action consistent with the objectives of Intelsat, plaintiffs seek to expose Comsat to antitrust liability whenever Comsat votes on resolutions at Intelsat meetings, participates in Article XIV consultations as the representative of the United States government **[*20]** or participates in Intelsat pricing or procurement decisions. Those actions, however, are plainly within the Congressional grant of authority to Comsat to "plan, initiate, construct, own, manage, and operate" a communications satellite system "in conjunction with foreign governments or business entities . . . ." *47 U.S.C. § 735(a)(1)*. Congress could not have intended to require Comsat to participate in Intelsat subject to Executive Branch directives and, at the same time, have intended that Comsat proceed at its own antitrust peril in carrying out that official role.

The legislative history of the CSA confirms that Congress did not intend to subject Comsat to the antitrust laws with respect to its activities as Signatory to Intelsat. Rather, Congress envisioned a far narrower scope for the "antitrust consistency" language in *Section 701(c)* than plaintiffs suggest. First, the Senate report confirms that Congress intended to establish, through a global system, a single provider of international satellite services to and from the United States. S. Rep. No. 1584, 87th Cong., 2d Sess. 28 (1962) ("such a system is by nature a Government-created monopoly"); *id. at 30* ("establishment **[*21]** of a communications satellite system involves the creation of such a monopoly"). There was agreement with the need to create a monopoly to achieve the Act's policy objectives, [2] but significant debate focused on the nature of that monopoly.

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[2] The legislative history contains many indications that the existence of more than one public satellite system was not contemplated or even regarded as feasible. For example, the Assistant Attorney General, Antitrust Division, testified at the Congressional hearings that,

[*22] While the view prevailed that the sole United States participant in the global system should be a government-created but privately-owned corporation subject to stringent regulation, there were antitrust concerns about whether and to what extent communications common carriers should be permitted to participate in the ownership of the corporation. Congress displayed concern that the newly-created corporation would be dominated by common carriers such as AT&T, and that such ownership would permit them to collude or subvert Comsat for private gain. [3] **[*23]** In particular, there was concern that large common carrier shareholders could control Comsat's procurement of goods and services or access to Comsat's international satellite services to the disadvantage of competing common carriers. In short, Congress' antitrust concerns related to the activities of Comsat and its owners as communications common carriers and not to Comsat's activities as United States representative to the global satellite system subject to Executive Branch regulation. [4]

Seeking to allay Congressional concern, the Department of Justice explained to Congress how it could fashion a plan that would be consistent with the antitrust laws

"[T]he Department of Justice believes that to be *consistent with the antitrust laws* any plan adopted must meet certain conditions. These conditions are:

(1) All interested communication common carriers be given an opportunity to participate in the ownership of the system;

(2) All interested communication common carriers be given unrestricted use on nondiscriminatory terms of the facilities of the system whether or not they elect to participate in ownership;

[*24] (3) All interested parties engaged in the production and sale of communication and related equipment be given an opportunity to participate in ownership of the system; and

(4) All interested parties engaged in the production and sale of communication and related equipment be given unrestricted opportunity to furnish such equipment to the system whether or not they elect to participate in ownership."

Space Satellite Communications: Hearings Before the Subcomm. on Monopoly of the Select Comm. on Small Business, 29 (Aug. 2, 1961) (statement of Lee Loevinger, Assistant Attorney General, Antitrust Division) (emphasis added).

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for numerous technical reasons we are not going to permit [competing satellite systems], we are going to permit one system and we are going to say who can put it up and under what circumstances; *anyone who later wants to come along and engage in that long-distance communication must use the established facility.*

Communications Satellites: Hearings Before the House Comm. on Interstate and Foreign Commerce, 146 (July 26, 1961) (statement of Lee Loevinger) (emphasis added).

Similarly, Nicholas Katzenbach, Assistant Attorney General, Office of Legal Counsel, testified that "the capacity of a single satellite system would be adequate to handle all of the communication possibilities that one can foresee." *Communications Satellites: Hearings Before the House Comm. on Science and Astronautics,* 722 (Aug. 1, 1961).

[3] Section 734(b)(2) of the CSA contains detailed provisions governing the extent to which communications common carriers may own Comsat's shares. Indeed, as originally enacted, this section reserved 50% of Comsat's shares for purchase by communications common carriers. Pub. 1. No. 87-624, § 304(b)(2), 76 Stat. 419, 424 (1962), *amended by* Pub. L. No. 97-410, 96 Stat. 2043, 2045 (1983).

[4] The Senate report commented on these specific antitrust concerns. S. Rep. No. 1584, 87th Cong., 2d Sess. 11 (1962) (provisions enacted to "prevent any single interest or group of interests from dominating the activities of the corporation"; statute's competitive objectives were to ensure (1) competition in the procurement of equipment and services and (2) non-discriminatory access to international satellite system for communications common carriers); *id*. at 13.

Having been advised by the Justice Department of the safeguards needed to ensure that Comsat and its owners operate in a manner "consistent with the [Federal] antitrust laws," Congress later added that phrase to the statute. Thus, the substance and chronology of the legislative history compel the conclusion dictated by the fundamental objectives of the Act, namely, that Congress did not intend the "antitrust consistency" phrase to authorize private lawsuits against Comsat *in its role as the United States representative to Intelsat.* [5]

[*25] The Court declines to discern a Congressional purpose "'to paralyze with one hand what it sought to promote with the other.'" *Weinberger v. Hanson, Westcott & Dunning, Inc., 412 U.S. 609, 631 (1973)* (citation omitted). ***HN7***[] *Section 701(c)* applies to Comsat in its capacity as common carrier, not in its role as signatory to Intelsat. Accordingly, paragraph 16 of the HQ Agreement, in conjunction with Art. XV(c) of the Definitive Agreement requires this Court to recognize defendant's immunity from this action.

Because the Court rules that the immunity conferred on defendant under the HQ Agreement bars this suit, it need not reach all of defendant's arguments in favor of dismissal. Two of these arguments, however, warrant discussion.

The Court believes that dismissal is appropriate in the alternative under *Fed. R. Civ. P. 12(b)(7)* for failure to join necessary and indispensable parties under *Rule 19*. ***HN8***[] *Rule 19(a)* requires joinder of parties whose inclusion will not defeat subject matter jurisdiction "if (1) in [their] absence complete relief cannot be accorded among those already parties, or (2)" their absence will impair their ability to protect their interest in the subject of the case **[*26]** or create a substantial risk of subjecting parties already joined to multiple or inconsistent obligations." *Rule 19(a)*. If such parties exist and are unable to be joined, the Court must "determine whether in equity and good conscience" the action should proceed without the absent parties or be dismissed because the absent parties are indispensable. *Rule 19(b)*.

In making that determination, the Court must consider (1) the prejudicial effect to the joined or absent parties of the indispensable parties' absence; (2) the feasibility of diminishing the prejudicial effect by including "protective provisions" in the judgment; (3) whether the judgment rendered in the case could be adequate; and (4) whether an adequate remedy is available to plaintiff after dismissal. *Id.*

Plainly, Intelsat and its member-nation are "necessary" parties under *Rule 19(a)*. It taxes credulity to suggest that complete relief can be granted as between plaintiffs and Comsat. The lion's share of the complaint's allegations depict concerted action between Comsat and Intelsat's member-nations to restrain trade and monopolize the international telecommunications market. Moreover, as discussed below, the Court could **[*27]** not meaningfully grant plaintiff's request for injunctive relief without the presence of Intelsat and of the governments and their official representatives which purportedly engaged in violations of the antitrust laws.

The United States has one vote in Intelsat's Assembly of Parties and Comsat has but one vote as the United States representative in the Meeting of Signatories. In these bodies as well as the Board of Governors, substantive matters require a two-thirds majority vote. Therefore, for injunctive relief to be effective, the Court would have to enjoin (1) at least two-thirds of the 117 Signatories from committing the kind of acts alleged to have injured PAS (e.g., certain resolutions); (2) at least two-thirds of the 117 member-nations in the Assembly of Parties from engaging in the kind

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[5] Congress understood that Comsat would not be subject to an antitrust suit for functioning as the sole United States participant in what was to become the Intelsat global system. When asked by Senator Kefauver whether the government could "bring an antitrust suit against [Comsat] under *Section 2* monopolization -- of the Sherman Act," the Assistant Attorney General in charge of the Antitrust Division replied that "for purposes of this discussion we should assume that we cannot." *Antitrust Problems of the Space Satellite Communications System: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary* 160 (April 4, 1962). The Department of Justice had also expressly advised Congress that "the mere doing what [Comsat is] permitted to do under this bill is not itself going to result in an offense against the Sherman Act." *Antitrust Problems of the Space Satellite Communication System: Hearings Before The Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary* 58 (March 29, *1962) (testimony* of Assistant Attorney General Katzenbach). See *Communications Satellites: Hearings Before the House Comm. on Interstate and Foreign Commerce* 153 (July 26, 1961) (testimony of Assistant Attorney General Loevinger) (where the government "grants an exclusive right to any company to do a particular thing, . . . the exercise of this Government-granted right, is not an antitrust violation . . .").

of conduct alleged to have injured PAS (e.g., denials or delays in Article XIV consultations); and (3) members of Intelsat's Board of Governors representing in the aggregate at least two-thirds of the ownership of Intelsat from engaging in the type of conduct alleged to have injured PAS (e.g., predatory rates and procurement decisions).

Moreover, Comsat has no role in many of the kinds of **[*28]** actions alleged to have injured PAS and to have been undertaken by individual foreign nations or groups of foreign nations. For example, the alleged denials or delays of the necessary operating agreements is a matter solely within the control of those nations in which PanAmSat wishes to send and disseminate satellite signals (see Compl. 28(f), (h) and (t); the alleged denials or delays in granting Article XIV(c) consultations for wholly foreign domestic service are matters within the control of the foreign nations concerned (*see* Compl. paras. 28(d)-(f), (h), (j)-(n), (p)-(r), and (t)); and the alleged denials or delays of Article XIV(d) consultations for satellite services between or among two or more foreign nations are matters within the control of those particular foreign nations (see Compl. 28(d)-(f), (h), (j)-(n), (p)-(r) and (t)). Thus, for an injunction to be effective in prohibiting these types of alleged unlawful acts, it would need to be directed not only at Comsat, but at those individual foreign nations or groups of nations which have responsibility for the alleged unlawful activities.

Plaintiffs note that they could recover on their claim for money damages without **[*29]** the presence of Intelsat and its member-nations because joint tortfeasors are not indispensable parties. See *Samaha v. Presbyterian Hosp. in City of New York, 757 F.2d 529, 531 (2d Cir. 1985)*. While this is correct, it does not surmount the obstacle which prevents this Court from issuing effective injunctive relief: the absence of Intelsat and its member-nations, whose conduct permeates the allegations even under the most liberal reading of the complaint. [6]

[*30] Plaintiff's New York State law claim for interference with prospective advantage must be dismissed for an independent reason. ***HN9***[] In order to establish a *prima facie* case, plaintiff must plead (1) a prospective contractual relationship with a third party; (2) that would have been consummated (3) but for the defendant's interference by wrongful means or malicious intent (4) without justification. See *Optivision, Inc. v. Syracuse Shopping Center Assoc's, 472 F. Supp. 665, 685 (N.D.N.Y. 1979)*.

The "but-for" requirement "is a strict one as it is more stringent than 'being reasonably certain' or 'having a reasonable expectation." *Id.* (citations omitted). The motive and justification requirements also are strictly construed. Defendant's motive in interfering must be entirely malicious, without any secondary purpose such as advancing competing economic interests. See *PPX Enters., Inc. v. Audio Fidelity Enters., Inc., 818 F.2d 266, 269 (2d Cir. 1987)*.

Plaintiff alleges in paragraph 30 of the Complaint that but for Comsat's actions, PAS would have sold the entire capacity of PAS I by the time it launched the satellite. This allegation is deficient under New York law because plaintiffs **[*31]** do not specify with whom a prospective contractual relation was lost. Concomitantly, plaintiffs are also unable to satisfy the strict "but for" pleading requirement.

CONCLUSION

For the reasons described above, the Court dismisses the complaint. This action is ordered removed from the active docket of this Court.

SO ORDERED

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[6] In some cases it may not be necessary to join additional parties with respect to equitable claims because Rule 65(d) permits injunctions to be enforced not only against parties, but also against others "in active concert or participation with them who receive actual notice of the order by personal service or otherwise." *Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129* (2d Cir. l979). But Rule 65(d), which may avoid the indispensable party issue in other contexts, is inapplicable here. The alleged co-conspirators who would be essential to the entry of effective injunctive relief -- Intelsat, its member-nations and their representatives -- are immune from process.

Dated: New York, New York

September 13, 1990

Universal Analytics, Inc. v. MacNeal-Schwendler Corp.

United States Court of Appeals for the Ninth Circuit

March 5, 1990, Argued and Submitted, Pasadena, California ; September 14, 1990, Filed

No. 89-55062

Reporter
914 F.2d 1256 *; 1990 U.S. App. LEXIS 16073 **; 1990-2 Trade Cas. (CCH) P69,180

Universal Analytics, Inc., Plaintiff-Appellant, v. MacNeal-Schwendler Corporation; Dr. Joseph Gloudeman; Dr. Richard MacNeal, Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Central District of California; Stephen V. Wilson, District Judge, Presiding; D.C. No. CV-87-6285-SVW.

Disposition: AFFIRMED.

Core Terms

hiring, predatory, employees, district court, talent, exclusionary, monopolist, antitrust, memo

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Sherman Act, Claims**

Monopolization claims under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, are composed of three elements: (1) the defendant's possession of monopoly power in the relevant market; (2) the defendant's willful acquisition or maintenance of such power; and (3) causal antitrust injury.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN3[] **Summary Judgment, Entitlement as Matter of Law**

When a district court resolves a case on summary judgment for the defendant after full discovery, the appellate court asks whether the non-moving party has presented a record adequate to support a favorable finding.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Monopolies & Monopolization, Actual Monopolization**

An antitrust defendant's conduct is redeemed by a legitimate business purpose. The key is whether the conduct was an attempt to exclude rivals on some basis other than efficiency.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] **Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes**

Unlawful predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor. Such cases can be proved by showing the hiring was made with such predatory intent, i.e. to harm the competition without helping the monopolist, or by showing a clear nonuse in fact. Absent either of those circumstances employment should not be held exclusionary.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN6[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Acquiring talent not to use it but to deny it to possible rivals is exclusionary. Such an arrangement has the same harmful tendency and the same lack of redeeming virtue as the promise by a non-employee that he will not compete with the monopolist. But unlike the latter agreement whose existence or non-existence is a rather clear-cut question, exclusionary employment would be hard to identify. A monopolist would probably use important talent once acquired. And the court should not try to judge whether the acquired talent was used more effectively than readily available alternative personnel. Nor should it try to do so when the defendant pursues a hard-to-match, if not unmatchable, program of recruiting, say, young researchers in his field. In the absence, therefore, of the monopolist's proved subjective intent to hire talent preclusively or of clear non-use in fact, employment should not be held exclusionary.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN7[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Business justification is not legitimate if only a pretext for exclusionary conduct.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN8[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The burden of proving intent to monopolize and lack of legitimate business justifications lies with plaintiff.

Counsel: Bruce L. Gelb and Kenneth E. Chyten, Torrance, California, for the Plaintiff-Appellant.

Robert E. Hinerfeld, Manatt, Phelps, Rothenberg & Phillips, Los Angeles, California, for the Defendants-Appellees.

Judges: Procter Hug, Jr., Mary M. Schroeder and Cynthia Holcomb Hall, Circuit Judges.

Opinion by: PER CURIAM

Opinion

[*1257] This is an appeal from entry of summary judgment in favor of the defendant in a private antitrust action claiming monopolization violations of *section 2* of the Sherman Act, *15 U.S.C. § 2 (1988)*. [1] Plaintiff-appellant is Universal Analytics, Inc. ("UAI") and the defendant-appellee is MacNeal-Schwendler Corp. ("MSC"). Both parties occupy a small corner of the aerospace technology field, producing computer software programs called NASTRAN. The programs were originally developed by the National Aeronautics and Space Administration with which MSC contracted. We assume, as did the district court, that for purposes of deciding defendant's summary judgment

[1] This section provides:

HN1[] **Monopolizing trade a misdemeanor; penalty**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

motion, **[**2]** the relevant market is NASTRAN programs. We also assume that entry barriers to the market are substantial.

UAI filed this action in 1987, alleging various violations of federal antitrust and state laws. The district court granted summary judgment for the defendant-appellee in a comprehensive opinion which describes **[**3]** the nature of all of the allegations and the reasons why the district court concluded there were no material issues of fact with respect to any of them. The district court's opinion is reported at *707 F. Supp. 1170 (C.D. Cal. 1989)*.

In this appeal, appellant provides us with no basis for overturning any of the rulings of the district court. The one issue which warrants our discussion is whether there were any genuine issues of material fact with respect to UAI's claim that MSC's hiring of five of UAI's six key technical employees in 1986 and 1987 was predatory in violation of *section 2* of the Sherman Act. As the district court pointed out, that claim was the "thrust of this lawsuit." *707 F. Supp. at 1176*.

HN2[] Monopolization claims under *section 2* of the Sherman Act are composed of three elements: (1) the defendant's possession of monopoly power in the relevant market; (2) the defendant's willful acquisition or maintenance of such power; and (3) causal antitrust injury. *The Movie 1 & 2 v. United Artists, 909 F.2d 1245, 1254* (9th Cir. 1990, as amended **[**4]** July 25, 1990); *see Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 363* (9th Cir.), *cert. denied*, *488 U.S. 870, 102 L. Ed. 2d 149, 109 S. Ct. 180 (1988)*.

The facts, which we must view most favorably to UAI, *see State Farm Fire and Cas. Co. v. Martin, 872 F.2d 319, 320 (9th Cir. 1989)* (per curiam); *Fed. R. Civ. P. 56(c)*, show beyond question that MSC did hire five key employees from UAI, and that the employees were difficult to replace because the training in this particular area requires two years. We also assume the hiring did result in some decrease in UAI's ability to compete with MSC, and UAI was MSC's only competitor of any significance. At all times relevant to this suit, MSC had approximately 90 percent of the market, and UAI, which entered the market in the early 1980s, about five percent. [2] Thus, we assume the first element of a *section 2* claim was met. *See 707 F. Supp. at 1173*.

[5]** This brings us to the second element, whether UAI willfully maintained its monopoly power by illegally raiding UAI's employees. *See Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1174 (9th Cir. 1988)*. ***HN3***[] Because the district court resolved this case on summary judgment for the defendant after full discovery, we ask whether the non-moving party (here UAI) has presented a record adequate to support a favorable finding. *See Thurman **[*1258]** Industries, Inc. v. Pay ' N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989)*. We find that UAI has not met this burden, and that the evidence is so one-sided that MSC must prevail as a matter of law. *See Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. No reasonable jury could find that MSC illegally restricted competition.

The leading Supreme Court decision in recent years on monopolization is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*, in which the Supreme **[**6]** Court reasoned that ***HN4***[] an antitrust defendant's conduct is redeemed by a legitimate business purpose. *Id. at 608-10*; *see* Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 849 (1990); *see also United States v. Grinnell, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. *Cf. Oahu Gas Service, 838 F.2d at 368* (legitimate business justification immunizes monopolist against claim by competitor that it failed to aid). As the Supreme Court said, the key is whether the conduct was an attempt "to exclude rivals on some basis other than efficiency." *Aspen Skiing, 472 U.S. at 605* (quotation and footnote omitted).

So far as we have been able to determine, this is the first reported case of a claimed violation of *section 2* as a result of alleged employee raiding or predatory hiring. The conventional allegations of predatory conduct relate to pricing or refusals to deal. *See* L. Sullivan, *Handbook of the Law of Antitrust* 112 (1977); *see, e.g.,* **[**7]** *Image Technical Service, Inc. v. Eastman Kodak Co., 903 F.2d 612 (9th Cir. 1990)* (refusal to deal); *William Inglis v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981)* (predatory pricing). We agree with the district court that the

[2] The remaining five percent of the market was split among five competitors.

allegations of predatory hiring stated a claim capable of surviving a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, *see* III P. Areeda & D. Turner, ***Antitrust Law*** Paras. 702(a)-702(c) at 108-110 (1978), and that the case therefore turned on whether there were any genuine issues of material fact concerning UAI's allegations that the hirings were predatory. The most helpful and comprehensive discussion of the concept of predatory hiring is in Areeda and Turner, *supra*. ***HN5***[] Unlawful predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor. Such cases can be proved by showing the hiring was made with such predatory intent, i.e. to harm the competition without helping the monopolist, or by showing a clear nonuse in fact. [3] **[**8]** Absent either of those circumstances, according to Professors Areeda and Turner, employment should not be held exclusionary.

> ***HN6***[] Acquiring talent not to use it but to deny it to possible rivals is exclusionary. Such an arrangement has the same harmful tendency and the same lack of redeeming virtue as the promise by a non-employee that he will not compete with the monopolist. But unlike the latter agreement whose existence or non-existence is a rather clear-cut question, exclusionary employment would be hard to identify. A monopolist would probably use important talent once acquired. And the court should not try to judge whether the acquired talent was used more effectively than readily available alternative personnel. Nor should it try to do so when the defendant pursues a hard-to-match, if not unmatchable, program of recruiting, say, young researchers in his field. In the absence, therefore, of the monopolist's proved subjective intent to hire talent preclusively or of clear non-use in fact, employment should not be held exclusionary.

Id. at 110 (footnote omitted).

[9]** Here UAI claims it demonstrated predatory intent. The principal evidence offered by UAI to support its contention that MSC was guilty of predatory hiring was a memo from Michael Gockel, the Executive Vice **[*1259]** President of MSC, to Joseph Gloudeman, MSC's Chief Executive Officer, written before the third of the five UAI employees was hired. It read:

> Do not put this in personnel folder -- throw out.
> Joe:
> This guy came through some months ago, and we turned him down because he didn't give us a warm feeling. In your case, he made reference to Stuttgart connection, which you found implausible.
>
> Since then, Nima B. [an earlier UAI employee] has given him a strong endorsement. As Nima is a winner, this is important. Also *we wound UAI again*, and Layfield has shown that he is hard-nosed enough to fire someone who does not work out.
> I recommend a hire.
> MG
> (emphasis added).

These four words, "we wound UAI again," UAI insists, is alone sufficient to create a genuine issue of material fact as to the lawfulness of the hirings. We disagree. The memo shows that one reason for the hirings was to disadvantage the competition, but that MSC's primary motivation **[**10]** was to obtain a productive employee for itself, and that MSC had no intention of retaining the employee unproductively. The district court also had uncontroverted evidence that the employees were hired primarily for their programming competence in their specialized areas, the salary paid them by MSC was no more than a 20% increase over the wage they earned at UAI (amounting to, at most, $ 6,000), and all but one of them expressed frustration and unhappiness working for UAI. In no case did MSC seek out the UAI employees; each of the programmers made an independent effort to seek employment from MSC, largely through independent employment agencies. Additionally, each of the employees was free to leave MSC and return to UAI. MSC did not require any of the employees to sign covenants not to compete or otherwise bind them to continued employment with MSC. Further, each of the UAI employees

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[3] UAI might also have succeeded had it been able to demonstrate that MSC intended to pay the UAI programmers more than MSC could reasonably expect as a return from their work.

were immediately put to work in their area of specialization. None was permitted to languish in nonproductive or underproductive capacities.

The "wound memo" evidence was insufficient for a jury to find the requisite elements of predatory conduct on the part of MSC. The memo at most shows that a secondary **[**11]** motivation of the hiring was to disadvantage the competition. The memo does not undermine MSC's legitimate business reasons for hiring much needed and competent computer programmers, or permit a jury to find that any of MSC's reasons for hiring the programmers was pretextual. [4] See *Technical Services, Inc., 903 F.2d at 620* (***HN7***[] business justification is not legitimate if only a pretext for exclusionary conduct).

Thus, the **[**12]** district court was correct that UAI failed to make a showing sufficient to establish the elements essential to its cause of action. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *see also Technical Services, 903 F.2d at 620* & n.9 (***HN8***[] burden of proving intent and lack of legitimate business justifications lies with plaintiff).

AFFIRMED.

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[4] UAI also points us to the memorandum of an employee of MSC which noted, inter alia, that two UAI programmers seeking employment at MSC "represent two of the three remaining nonmanagement programmers at UAI." However, as in the case of the "wound memo," the rest of the memorandum indicates that MSC's primary motivation was to hire employees with general NASTRAN experience, which UAI concedes are highly-prized in the industry. Thus, this memo does not make UAI's case any stronger.

Consolidated Gas Co. v. City Gas Co.

United States Court of Appeals for the Eleventh Circuit

September 19, 1990

No. 87-6108

Reporter

912 F.2d 1262 *; 1990 U.S. App. LEXIS 16430 **; 1990-2 Trade Cas. (CCH) P69,186; 118 P.U.R.4th 287

CONSOLIDATED GAS COMPANY OF FLORIDA, INC., Plaintiff-Appellee, v. CITY GAS COMPANY OF FLORIDA, A Florida Corporation, Defendant-Appellant

Subsequent History: **[**1]** As Amended.

Prior History: Appeal from the United States District Court for the Southern District of Florida. No. 83-1010-Civ-SM; Marcus, Judge.

Disposition: AFFIRMED.

Core Terms

district court, natural gas, wholesale, territorial, present case, cases, monopoly power, terminal, retail, anticompetitive, customers, facilities, newspaper, monopoly, anti trust law, compete, essential facilities doctrine, supervision, monopolist, injunction, courts, rates, consumers, competitor, railroads, damages, profits, circumstances, distributor, prong

Counsel: James J. Kenny, Scott E. Perwin, Michael Nachwalter, Miami, Florida, for Defendant-Appellant.

For Fla. Power, Amicus: Sylvia H. Walbolt, Tampa, Florida.

For Fl. Pub. Ser. Comm, Amicus: William H. Harrold, Tallahassee, Florida.

For Fl. Power & Light, Amicus: James R. Atwood, Washington, District of Columbia.

Philip A. Allen III, Edward T. O'Donnell, William J. Dunaj, Teresa Ragatz, Miami, Florida, for Plaintiff-Appellee.

For Union Carbide, Amicus: Dulaney L. O'Roark, Sutherland, Asbill & Brennan, James R. McGibbon, Atlanta, Georgia.

Judges: Tjoflat, Chief Judge, Fay, Kravitch, Johnson, Hatchett, Anderson, Edmondson, Cox, Circuit Judges, Lewis R. Morgan and Paul H. Roney, Senior Circuit Judges. * Johnson, Circuit Judge, concurring in part and dissenting in part in which Kravitch, Circuit Judge, joins. Tjoflat, Chief Judge, dissenting. Anderson, Circuit Judge, dissenting. Edmondson, Circuit Judge, dissenting. **[**2]**

Opinion by: PER CURIAM

Opinion

* Circuit Judges Thomas A. Clark and Stanley F. Birch did not participate in this decision. Senior Circuit Judges Lewis R. Morgan and Paul H. Roney elected to participate in this decision, pursuant to 28 U.S.C.A. § 46(c).

[*1262] City Gas Company of Florida appealed from a $ 4.76 million judgment entered against it after the district court found that City Gas had violated federal antitrust laws. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla., 665 F. Supp. 1493 (S.D.Fla. 1987)*. A panel of this court affirmed. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla., 880 F.2d 297 (11th Cir. 1989)*. A majority of the active judges in regular active service ordered that the appeal be reheard by the court of appeals en banc. This order vacated the panel opinion. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla., 889 F.2d 264 (11th Cir. 1989)*.

Having considered the briefs and heard oral argument in the case en banc, the court now reinstates the panel's opinion reported at *880 F.2d 297*, affirming the judgment of the district court. [**]

[3]** AFFIRMED.

Concur by: JOHNSON (In Part)

Dissent by: JOHNSON (In Part); TJOFLAT; ANDERSON; EDMONDSON

Dissent

JOHNSON, Circuit Judge, concurring in part and dissenting in part in which KRAVITCH, Circuit Judge, joins:

While I concur in the Court's opinion that City Gas Company of Florida refused to deal in violation of *section 2* of the Sherman Act, *15 U.S.C.A. § 2* ("*section 2*"), I am constrained to dissent from the Court's holding that the territorial agreement between City Gas and Peoples Gas Systems, Inc. ("Peoples") is not immune from *section 2* liability under the state action doctrine.

I. FACTS

A. *Background*

City Gas is a major distributor of natural gas in southern Florida. City Gas purchases natural gas from Florida Gas Transmission Company ("FGT"). [1] City Gas then distributes the gas to its approximately 100,000 customers through a network of pipes. City Gas and Peoples are the two largest natural gas utilities in Florida. Both entered the natural gas business in 1960, when they applied for and received **[*1263]** allocations (i.e., permits) from the Federal Energy Regulatory Commission ("FERC") to purchase and resell natural gas from FGT. [2] **[**4]**

After a brief period of competition for customers, City Gas and Peoples entered into an agreement not to compete ("the territorial agreement"). The territorial agreement provided each party with a service area where the other would not solicit customers. City Gas and Peoples submitted the territorial agreement to the Florida Public Service Commission ("FPSC"), [3] and on November 9, 1960, the FPSC entered an order stating:

[**] Judges Johnson and Kravitch, concurring in part and dissenting in part, concur in affirmance of the judgment of the district court. Thus, a majority of seven judges agrees to affirm the judgment of the district court.

[1] FGT operates the only pipeline transporting natural gas into Florida.

[2] The natural gas industry in Florida is regulated by the FERC and the Florida Public Service Commission ("FPSC"). At the federal level, the FERC regulates the wellhead cost of natural gas (i.e., cost from the producer to the wholesaler) and the wholesale price paid by retail distributors such as City Gas. At the state level, the FPSC regulates the retail rates charged by distributors such as City Gas. Retail rates are determined through a process known as a "rate case."

[3] The FPSC was formerly the Florida Railroad and Public Utilities Commission.

> It is our opinion that territorial **[**5]** agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansion into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating public utilities in the public interest.

Florida Railroad and Public Utilities Commission, Order No. 3051 (November 9, 1960) [hereinafter "*Order*"].

Chapter 366 of the Florida Statutes ("chapter 366") empowers the FPSC "to regulate and supervise each public utility with respect to its rates and service and the issuance and sale of its securities." *Fla.Stat.Ann. § 366.04*. [4] In fixing rates, the FPSC is authorized to consider "the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and **[**6]** the value of such service to the public; [and] the ability of the utility to improve such service and facilities. . . ." *Id.* at § 366.041. The FPSC may also "require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public. . . ." *Id.* at § 366.05.

After 1974, the Florida statute expressly provided the FPSC with the power to authorize territorial agreements between electric utilities. *Section 366.04(2)* provided: "In the exercise of its jurisdiction, the [FPSC] shall have power over rural electric cooperatives and municipal electric utilities for the following purposes: . . . (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction." **[**7]** *Id.* at *§ 366.04(2)* (West Supp. 1989). The statute said nothing about territorial agreements among natural gas utilities such as City Gas and Peoples. [5] In 1965, however, the Florida Supreme Court held that the FPSC had implied authority under chapter 366 to approve or forbid the territorial agreement between Peoples and City Gas. *City Gas Co. v. Peoples Gas System, Inc., 182 So.2d 429, 436 (Fla. 1965)*. [6]

[8]**

B. *Procedural History*

1. District Court

On April 23, 1983, Consolidated filed its complaint in the present action. The **[*1264]** amended complaint alleged that City Gas's actions constituted an attempt to monopolize and monopolization in violation of *section 2*. Consolidated asked for treble damages under *15 U.S.C.A. § 15* and injunctive relief under *15 U.S.C.A. § 26*. City Gas counterclaimed that Consolidated's restrictive covenants and easements in Bel Aire precluded City Gas from competing for Consolidated's customers in violation of *15 U.S.C.A. §§ 1*, *2*, and *14*.

The district court held a nine-day bench trial in October 1985. The court determined that the territorial agreement violated *section 2* and rejected City Gas's defense that because the FPSC approved the agreement the territorial agreement was exempt from antitrust liability under the state action doctrine of *Parker v. Brown, 317 U.S. 341, 351, 63 S. Ct. 307, 313, 87 L. Ed. 315 (1943)*. *Consolidated Gas Co. v. City Gas Co., 665 F. Supp. 1493 (S.D. Fla. 1987)*.

2. Panel Opinion

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[4] The statute defines "public utility" as including natural gas distributors, but not LP gas distributors. *Fla.Stat.Ann. § 366.02*.

[5] *Section 366.04* was revised in 1989 and the new statute expressly empowers the FPSC to approve territorial agreements between natural gas utilities. *See* 1989 Fla.Sess.Law Serv. 89-292 *§ 2* (West).

[6] In *City Gas Co.*, Peoples had sued under the territorial agreement to prevent City Gas from selling bottled gas in Peoples service area. City Gas's answer claimed that the territorial agreement was void under state and federal antitrust laws. *City Gas Co., 182 So.2d at 431*. The Florida Supreme Court held that because the FPSC had the authority to approve the territorial agreement the agreement was not invalid under Florida antitrust laws. The court did not reach the federal issues. *Id. at 436*.

On appeal, City Gas argued **[**9]** that it was immune from antitrust liability for the territorial agreement and the refusal to deal with Consolidated under the state action doctrine. The panel unanimously rejected these arguments and affirmed the district court. The panel held that because chapter 366 explicitly authorized territorial agreements between electric utilities without mentioning gas utilities, the statute did not clearly articulate a state policy favoring territorial agreements among gas utilities and, therefore, state action immunity could not apply. *Consolidated Gas Co. v. City Gas Co., 880 F.2d 297, 301-02 (11th Cir. 1989)*. The panel rejected City Gas's argument that the Florida Supreme Court decision in *City Gas Co.*, holding that chapter 366 impliedly authorized territorial agreements among gas companies, was sufficient to invoke the state action doctrine. *Id. at 303*.

II. ANALYSIS

A person (or corporation) violates *section 2* when he (1) possesses monopoly power in the relevant market and (2) willfully acquires or maintains that power through means other than growth or development as a consequence of superior products, business acumen, or historical accident. **[**10]** *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778 (1966)*. In *Parker*, however, the Supreme Court recognized that in passing the Sherman Act Congress did not intend to restrain state action or official action directed by a state to restrain competition. *Parker, 317 U.S. at 351, 63 S. Ct. at 313*.

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*, the Supreme Court found that the *Parker* doctrine applied to private parties who restrain competition in violation of the Sherman Act if (1) the challenged restraint was implemented pursuant to a clearly articulated and affirmatively expressed state policy, and (2) the policy was actively supervised by the state. *Id. at 105, 100 S. Ct. at 943*. In *Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*, the Supreme Court reaffirmed the applicability of the *Midcal* two-pronged test to private parties' claims of state action immunity and held that a state policy that permits **[**11]** but does not compel anticompetitive conduct may be clearly articulated for purposes of the first prong of Midcal. *Id., 471 U.S. at 61, 105 S. Ct. at 1729*.

City Gas argues that the territorial agreement is immune from antitrust liability under *Midcal* and *Southern Motor Carriers*. Consolidated argues that the territorial agreement is not entitled to immunity because chapter 366 does not constitute a clearly articulated state policy authorizing such agreements and the state does not actively supervise such a policy.

1. Clearly Articulated State Policy

In *Southern Motor Carriers*, the United States sued two rate bureaus -- groups of private carriers that jointly set rates -- for violations of the antitrust laws. *Southern Motor Carriers, 471 U.S. at 50, 105 S. Ct. at 1723*. The rate bureaus submitted their **[*1265]** rate proposals to the public service commissions in each state for approval or rejection. *Id.* Of the four states involved, three had statutes explicitly permitting collective ratemaking. *Id. at 63, 105 S. Ct. at 1730*. The Court held that these statutes satisfied the first prong of *Midcal. Id.* **[**12]** The fourth state, Mississippi, had no statute addressing collective ratemaking. Mississippi statutes did, however, authorize the State Public Service Commission to regulate common carriers and to prescribe just and reasonable rates. *Id.* (citing *Miss.Code Ann. §§ 77-7-1*, 221). The Court held that this statute made clear the legislature's intent that rates should be determined by a regulatory agency rather than by the market. *Id. at 63-64, 105 S. Ct. at 1730*. This intent, the Court held, was sufficient to pass the first prong of *Midcal. Id. at 64-65, 105 S. Ct. at 1730-31*.

> A private party acting pursuant to an anticompetitive regulatory program need not "point to specific, detailed legislative authorization" for its challenged conduct. As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.

Id. at 64, 105 S. Ct. at 1730. The Court noted that requiring express statutory authorization of every action that an agency might take to implement a policy would diminish the flexibility of agencies **[**13]** and consequently their usefulness to state governments. *Id.*

In the present case, chapter 366 grants the FPSC broad powers to regulate public utilities, including natural gas distributors. Section 366.05 authorizes the FPSC to regulate repairs and extensions of facilities. *See* *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42, 105 S. Ct. 1713, 1718, 85 L. Ed. 2d 24 (1985)* (statute authorizing city to provide sewage services and to determine the areas to be served would logically result in anticompetitive conduct, and, therefore, the legislature must have intended such conduct). The Florida Supreme Court has interpreted chapter 366 to empower the FPSC to authorize territorial agreements between natural gas distributors. *City Gas Co., 182 So.2d at 436*. This statute, as interpreted by the Florida courts, demonstrates the Florida legislature's intent to displace competition with a regulatory scheme. Chapter 366, therefore, satisfies the first prong of *Midcal*.

The Court holds today that the Florida Supreme Court opinion in *City Gas Co.* is irrelevant under the first prong of *Midcal* because the applicability of federal ***antitrust law*** **[**14]** is an issue of federal law. The Court is correct in part; the issue of whether *Midcal* is satisfied is one of federal law. The content, however, of the state law to which the federal courts apply the *Midcal* test is determined under state law. *See* *Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, 667 (11th Cir. 1984)*. Accordingly, this Court must apply the *Midcal* test to the Florida statute as interpreted by the Florida courts. *See* *City of Eau Claire, 471 U.S. at 44-45 n. 8, 105 S. Ct. at 1719 n. 8* ("Although the Wisconsin Supreme Court's opinion does not, of course, decide the question presented here of the city's immunity under the *federal* antitrust laws, it is instructive on the question of the state legislature's intent in enacting the statutes. . . ." (emphasis in original)). The Court concludes that the Florida Supreme Court should not have the last word on the proper interpretation of chapter 366 and endorses the district court's critique of the Florida Supreme Court's analysis of the Florida statute. *Consolidated Gas, 880 F.2d at 303* (recounting district court's analysis of chapter 366's language). Because **[**15]** the Florida Supreme Court is the final authority on the meaning of chapter 366, we should not endorse such a critique. *Cotton States, 749 F.2d at 667* ("'state courts have a right to construe their own statutes,' and federal courts are bound by that state interpretation." (citation omitted)).

2. Active Supervision

The Court also holds that the agreement was not actively supervised by the state. The active supervision prong of *Midcal* stems from the Supreme Court's recognition that where private parties engage in **[*1266]** anticompetitive conduct they are likely to act in their own interests rather than in the interests of the state. *Patrick v. Burget, 486 U.S. 94, 100, 108 S. Ct. 1658, 1662, 100 L. Ed. 2d 83 (1988)*. The active supervision prong ensures that the state action doctrine will immunize only the particular activities of private parties that, in the judgment of the state, further state regulatory policies. *Id.* In *Patrick*, the Supreme Court stated that in order to satisfy the active supervision requirement, the state must exercise "ultimate control over challenged anticompetitive conduct." *Id. at 101, 108 S. Ct. at 1663*. **[**16]**

> The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Id.

In *Patrick*, the plaintiff challenged the peer-review process in a hospital after a peer-review panel threatened to revoke his hospital privileges. *Id. at 97, 108 S. Ct. at 1661*. The Supreme Court held that the peer-review process was not entitled to state action immunity because there was no active supervision by the state. *Id. at 100, 108 S. Ct. at 1662*. The Court rejected the defendants' arguments that the state actively supervised the peer-review process through the State Health Division, the State Board of Medical Examiners, and the state judiciary because the defendants failed to show that any of these state entities actually reviewed, or even could review, peer-review decisions regarding hospital **[**17]** privileges. *Id. at 101, 108 S. Ct. at 1663*. [7]

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[7] The Court found that the judiciary was an inadequate supervisor because no statute expressly provided for judicial review of privilege terminations, and because state courts did not review privilege terminations on the merits for compliance with state policy. *Patrick, 486 U.S. at 104-05, 108 S. Ct. at 1664-65*.

In the present case, I would hold that the state actively supervised the territorial agreement. The FPSC actually reviewed the territorial agreement and approved it. First, the FPSC found that it had the authority to accept or reject the territorial agreement. The *Order* stated that because the territorial agreement purported to impinge on the FPSC's authority to order additions and extensions to plant and equipment of Peoples and City Gas, the territorial agreement could not be valid without the FPSC's approval. *Order* at 1. Second, the *Order* approved the territorial agreement; the FPSC found that the **[**18]** territorial agreement was consistent with the state's policy of procuring for the public essential utility services at reasonable costs. *Id.* Accordingly, FPSC's *Order* satisfies the active supervision requirement of *Midcal*. [8]

[19]** III. CONCLUSION

Because the Florida regulatory scheme satisfied both prongs of *Midcal*, I believe that the district court erred in holding that the territorial agreement is not entitled to state action immunity.

TJOFLAT, Chief Judge, dissenting:

I. INTRODUCTION

At first blush, this case appears to involve a straightforward application of *section 2* of the Sherman Act, *15 U.S.C. § 2 (1988)*. A natural gas utility, City Gas Company (City Gas), with an apparent monopoly **[*1267]** in the natural gas business in south Florida, refused to sell wholesale natural gas to another company, Consolidated Gas Company (Consolidated), that wanted to enter the natural gas business too. Consolidated brought suit under *sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15(a)*, *26 (1988)*, [1] claiming that City Gas refused to deal in violation of *section 2* and thus requesting an injunction ordering City Gas to supply wholesale natural gas to Consolidated and damages. The district court held in favor of Consolidated and granted the requested relief.

[20]** On closer inspection, however, the case's stripes begin to change. Because of certain factual peculiarities of this case -- peculiarities that the district court deemphasized -- established theories of liability under *section 2* simply do not apply. To begin with, City Gas operates only at the retail distribution level of the natural gas business; the company does not, and never has, operated at the wholesale level of that business. That is, City Gas obtains a supply of gas from the region's only wholesale supplier, Florida Gas Transmission Company (FGT), and then distributes that gas to commercial and residential customers. City Gas has chosen to operate only on that level, and its natural gas rates -- which are set by the Florida Public Service Commission (FPSC) based on a detailed analysis of City Gas' operation, *see* 1989 Fla.Stat. ch. 366, *infra* 5218-5219, -- reflect the specifics of its operation *on the retail level*. For City Gas to enter the wholesale supply business as well as the retail distribution business would fundamentally change the nature of its operation and thus the structure of its rate base. Consolidated, however, wanted City Gas to alter the **[**21]** nature of its operation and enter the wholesale natural gas business. Consolidated, moreover, wanted City Gas to make this change so that Consolidated could itself enter the retail

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[8] The FPSC has reviewed the validity of the territorial agreement on two subsequent occasions. First, in 1965, the FPSC entered an order withdrawing part of its approval of the territorial agreement. ***Peoples Gas System, Inc. v. Mason, 187 So.2d 335, 337 (Fla. 1966)***. The Florida Supreme Court overturned the FPSC's decision because there was no showing of changed circumstances from 1960, when the FPSC promulgated the *Order.* ***Id. at 339*** (FPSC may withdraw or modify its approval only after proper notice and hearing, and upon a showing of changed circumstances). Second, in 1972 the FPSC rescinded and then reaffirmed its approval of the territorial agreement. FPSC Order Nos. 5495, 5800. Accordingly, the FPSC's active supervision is continuing.

[1] These sections of the Clayton Act authorize private actions under the antitrust laws. *Section 4* authorizes private actions for treble damages and provides in pertinent part: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ." *15 U.S.C. § 15(a)*. *Section 16* authorizes private actions for injunctive relief, and provides in pertinent part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . ." *Id. § 26*.

distribution business and compete with City Gas. And Consolidated thought that City Gas should do this, not because competition would necessarily benefit natural gas consumers in general, but because City Gas provided the most economical source of wholesale gas *for Consolidated*. According to Consolidated, under these circumstances, *section 2* of the Sherman Act required City Gas to do what Consolidated wanted.

Unbelievably enough, Consolidated persuaded the district court that City Gas should be required fundamentally to change the nature of its operation and sell wholesale natural gas to Consolidated so that Consolidated could compete against City Gas in the retail distribution business. Consolidated also persuaded the district court that established theories of liability under *section 2* mandated this result. What is even more unbelievable, Consolidated has also persuaded this court, sitting en banc, on these same points. This court, therefore, affirms the district court's decision. [2]

[22]** With all due respect, I strongly dissent. In my view, the district court's decision is unsupported by established ***antitrust law***. Because the district court did not take proper account of the fact that City Gas *was not* in the business of selling natural gas at wholesale, the district court improperly concluded that City Gas possessed monopoly power in the relevant market for purposes of *section 2*. Based on that erroneous conclusion, the district court also improperly applied to these facts the primary theories of liability under *section 2* -- namely, the "essential facilities doctrine" **[*1268]** and the "intent test." The district court's decision, therefore, has no basis in established ***antitrust law***.

Instead, the district court in effect created a new rule of liability under *section 2*. Neither the district court, nor this court today, however, has considered the practical implications of this rule. Having failed to do so, the district court could not have properly applied this new rule in the present case. Even if today's court upholds this new rule, therefore, I would reverse the district court's decision and remand for further proceedings as required by the rule. In my **[**23]** view, though, a thorough consideration of the new rule's practical implications leads unavoidably to the conclusion that this new rule should be struck down. In attempting to apply the rule, the district courts of this circuit will face insurmountable difficulties in fashioning and implementing effective remedies. Even if the courts can overcome these difficulties, which I doubt, the rule will lead to results that will be flatly inconsistent with the policies behind the antitrust laws.

In addition to these fundamental points, I also dissent from the district court's conclusion that the state-action immunity doctrine of *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, did not protect City Gas' conduct from antitrust liability. I dissent as well from the district court's conclusion that a 1960 territorial agreement between City Gas and Peoples Gas, Inc. (Peoples Gas), another retail distributor of natural gas in Florida, provided an alternate basis for liability under *section 2*.

This dissent is organized as follows: in part II, I restate the factual background of the case. In part III, I demonstrate that City Gas' territorial agreement with Peoples **[**24]** Gas provides no basis for liability. I then turn to the more fundamental problems with the district court's decision.

In part IV, I criticize the district court's conclusion that City Gas possessed monopoly power in the relevant market. In part V, I discuss the formulas for determining liability on which the district court relied: the essential facilities doctrine and the intent test. As I demonstrate, none of these formulas provides a basis for liability here. I then discuss some recent Supreme Court and lower court decisions also relied on by the district court. None of these decisions control the present case either.

Next, having established that the district court's decision has no basis in established ***antitrust law***, I assume that the district court established a new rule of ***antitrust law*** and, in part VI, consider the practical implications of that rule. As this part shows, the rule will be impossible to apply, and even if it can be applied, it will produce results that are inconsistent with the policies behind the antitrust laws. For those reasons, I conclude that Congress could not

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[2] The panel, and this court today, have adopted the district court's findings of facts and conclusions of law. For the sake of convenience, therefore, I refer throughout this dissent to the district court's decision.

have intended such a rule to be developed under *section 2*. Because the court today nevertheless **[**25]** upholds this rule, I also demonstrate that the district court failed to apply it properly in the present case. On that basis, I would vacate the district court's decision and would remand the case for further proceedings as I describe.

In part VII, I then take up the issue of state-action immunity, demonstrating that in this case, the doctrine protects City Gas from antitrust liability. Finally, I conclude the dissent in part VIII.

II. BACKGROUND

This case involves two retail distributors of natural gas in Florida. Consolidated, the plaintiff in this case, entered the gas distribution business in the early 1960s and decided to distribute LP gas. Consolidated received its LP gas by rail or truck from wholesale suppliers and stored it in its own tanks. Consolidated then transported the LP gas from its storage tanks to its customers through a series of underground pipes located in easements. City Gas, the defendant in this case, entered the retail gas business in 1949, also as an LP gas company. In the early 1960s, however, when natural gas became available for resale in Florida, City Gas began to supply natural gas as well. Natural gas differs from LP gas in that it is transportable **[**26]** only by pipeline. In addition, unlike the unregulated interstate trade of LP gas, the Federal **[*1269]** Energy Regulatory Commission (FERC) regulates the transportation of wholesale natural gas through interstate pipelines. FGT owns the interstate pipeline supplying wholesale gas in Florida. In order to acquire a supply of natural gas for resale from FGT, therefore, City Gas had to obtain FERC authorization, which it did. City Gas also had to build a lateral pipe to connect the pipesystem that it used to transport LP gas to FGT's pipeline. [3]

In September 1960, City Gas also **[**27]** entered into a territorial agreement with Peoples Gas, another natural gas retail supplier in Florida. Pursuant to this agreement, the two companies determined which territories each would serve and agreed not to compete with one another in those territories. The companies requested, and received, approval of this agreement by the FPSC, which was charged by statute to supervise and regulate public utilities, *see* Fla.Stat. ch. 366 (1987). [4] In subsequent litigation between the two companies, the Florida Supreme Court upheld the agreement as consistent with state antitrust laws and also held that the FPSC had authority under chapter 366 of the Florida Statutes, *see id.*, to approve such agreements. *See* *City Gas Co. v. Peoples Gas Sys., 182 So.2d 429, 435-36 (Fla. 1965)*.

When **[**28]** City Gas entered the natural gas business, the price of natural gas was higher than that of LP gas, but both were relatively low. That remained the case until 1973, when the Arab Oil Embargo (an event beyond City Gas' control) skyrocketed world oil prices, including the price of LP gas. Until the early 1980s, however, natural gas suppliers were not in much better shape. Although federal regulation of wholesale rates kept the price of natural gas relatively low, a national shortage of natural gas severely limited its availability for resale. By 1981, things began to change: a natural gas surplus developed. As a result, LP distributors such as Consolidated found themselves unable to compete with natural gas prices; they were forced to convert to natural gas, a process that Consolidated began in early March 1982. On the other hand, those companies such as City Gas, which had risked entering the natural gas business at a time when the future of natural gas was relatively uncertain, found themselves in a position to enjoy the benefits of their initiative. A combination of historical accident (the rise in oil prices as the result of events in the Arab world) and business initiative (investing **[**29]** in the natural gas trade) resulted in economic benefits for companies such as City Gas.

In February 1982, one month before Consolidated undertook its conversion, City Gas began to market its natural gas to Consolidated's LP gas customers. These marketing efforts included door-to-door solicitations, mailing

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[3] The district court made much of the fact that FGT assumed the lateral pipe costs. Given the uncertain state of the natural gas market in the 1960s, however, *see infra* slip op. at 5137, , that fact is of little significance. Because the natural gas market was limited and its future uncertain, City Gas still took a large degree of initiative and assumed substantial risk in devoting its resources to natural gas distribution.

[4] The statute has been amended. *See* 1989 Fla.Laws ch. 89-292 (codified as amended, Fla.Stat. ch. 366 (1989)). See *infra* note 86, for a discussion of the amendment and its relevance to the present case.

campaigns, and newspaper advertisements. As a result of these efforts, City Gas signed several customers that Consolidated had previously served. [5] **[**30]** **[*1270]** In order to serve these customers, City Gas expanded its pipeline into Consolidated's service area. [6]

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[5] The district court put an unwarranted spin on its characterization of these facts. Adopting a good-guys/bad-guys motif, the district court cast Consolidated as the good guys and City Gas as the bad guys. Everything that City Gas did was bad -- part of large-scale and well-planned effort to drive out all competition from the natural gas industry and thereby grease the wheels of its large, rumbling monopoly. As the good guys, Consolidated naturally suffered, finding itself the weak and unwitting victim of the monstrous monopolist.

In my view, this characterization was unjustified. Viewed objectively, City Gas' conduct was that of a rational business actor. It adopted an aggressive marketing campaign to increase its customer base -- activity that epitomizes competition but that the district court labeled anticompetitive because the conduct was a competitive success. Consider the district court's characterization of City Gas' marketing efforts. The district court noted that, shortly before undertaking this marketing and expansion effort, City Gas' Board of Directors met and considered acquiring Consolidated -- which was then simply a struggling LP gas company -- a consideration that hardly constitutes anticompetitive conduct. The district court then stated:

> City Gas' solicitations and pipeline extensions were not simply ordinary business expansions, but rather, were basic components of City Gas' strategy to force Consolidated to sell out. This conclusion is further supported, we think, by the fact that City Gas had to duplicate a portion of Consolidated's pipeline in order to serve the eighteen Consolidated customers it had recently signed. Yet if City Gas had expected to reach a purchase agreement with Consolidated, it would have acquired Consolidated's pipelines and would not have had to incur this expense. City Gas' action of duplicating these pipelines before notifying Consolidated of its interest in acquiring the company seems to have been designed to force Consolidated to sell at a low price or face the resultant certainty of losing its customers and their value as quickly as City Gas could serve them.

This characterization of these events is, in my view, absurd. As the Supreme Court stated in *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)*, what violates section 2 of the Sherman Act is "the willful acquisition or maintenance of [monopoly] power *as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident*." (Emphasis added.) City Gas' successful expansion effort was clearly the latter: the very type of growth or development that defines competition. If the courts were to characterize as anticompetitive conduct every effort that businesses undertook to expand their business through advertising and building facilities, we would soon find ourselves in a competitive crisis. And surely the district court did not mean to argue that because City Gas legitimately intended to compete for Consolidated's business -- which would in turn reduce the value of Consolidated's assets -- City Gas' conduct suddenly became anticompetitive. I can think of no legitimately competitive conduct that, when successful, does not adversely affect a less-successful competitor's assets: when one cola company captures a higher percentage of the market, another cola company's market share slips.

Nor was the district court justified in characterizing Consolidated as a victim because, in attempting to enter the natural gas market as a retail distributor, it had to face City Gas as a competitor. Consider these passages from the district court's opinion:

> In deciding to convert from LP gas to natural gas in 1982, Consolidated suddenly found itself in potential competition with City Gas, which had grown to be a giant in the south Florida area.
>
> > . . . .
> >
> > . . . Consequently, Consolidated was forced to compete with City Gas in order to retain its customers or else see them go to City Gas for *more economical* gas service.
> >
> > . . . .
> >
> > . . . Thus, it became crucial that Consolidated convert to natural gas for as low a cost as possible in order to be able to offer rates that were competitive with those City Gas could offer.

Consolidated undertook to convert to natural gas. On March 9, 1982, Consolidated "wrote a letter to FGT requesting that FGT begin providing it with natural gas, and that FGT construct the necessary pipeline facilities." *Consolidated Gas Co. v. City Gas Co., 665 F. Supp. 1493, 1504 (S.D.Fla. 1987)*. As the district court found, FGT responded on April 2, 1982, stating that Consolidated would need a natural gas allocation from FERC in order to purchase wholesale gas from FGT and that Consolidated would have to reimburse FGT approximately $ 250,000 for the cost of connecting to FGT's pipeline. FGT suggested that Consolidated instead arrange to connect to City Gas' pipesystem. **[**31]** On May 21, 1982, Consolidated applied to FERC for the allocation approving its connection to FGT's pipeline. On June 21, 1982, City Gas **[*1271]** filed a petition to intervene in the application proceedings in order to oppose Consolidated's requested allocation. City Gas questioned whether Consolidated's LP gas distribution system could operate at the pressures required for natural gas delivery and also whether FGT's natural gas supply was adequate to serve Consolidated as well as City Gas. On November 21, 1983, an administrative law judge granted Consolidated's application, and FERC affirmed on September 19, 1984. FERC ruled, however, that FGT had to pay the connection costs. The entire administrative process lasted approximately twenty-eight months.

The district court found that City Gas' intervention in the FERC proceedings delayed the approval process for approximately one year. According to the district court, if City Gas had not intervened, the entire process would have taken only six to nine months, and Consolidated would have received a temporary allocation within ninety days of filing its application. The district court further found that, as a result of City Gas' intervention **[**32]** and the resulting delay in the proceedings, Consolidated's business was "severely hurt": "During the course of the proceedings, City Gas began providing service to seven of Consolidated's eight commercial customers and the bulk of its residential customers." *Id. at 1510*. Presumably, City Gas' provision of service to Consolidated's customers resulted from City Gas' marketing efforts and the fact that (because of historical accident and its own business initiative) it was equipped to expand and supply natural gas to those customers. The district court, however, concluded these activities "were not simply ordinary business expansions, but rather, were basic components of City Gas' strategy to force Consolidated to sell out." *Id. at 1507*. [7] **[**33]** Based on these facts, the district court

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665 F. Supp. at 1505-06 (emphasis added). City Gas had the foresight and took the initiative to enter the natural gas business at an early stage. By 1982, as the result of "growth [and] development as a consequence of a superior product, business acumen, [and] historic accident," *Grinnell, 384 U.S. at 570-71, 86 S. Ct. at 1704*, City Gas found itself in a highly competitive position. For that, City Gas need not feel guilty. And for having failed to jump that train itself, Consolidated can claim no sympathy.

By holding that under these circumstances Consolidated can invoke the antitrust laws to require City Gas to underwrite Consolidated's entry into the natural gas market, the district court, affirmed by the court today, embarked on an entirely unprecedented course. Before embarking, however, we should be entirely clear that under established law, City Gas *has done nothing wrong*.

[6] This expansion effort triggered a lawsuit by Consolidated, seeking an injunction to prevent City Gas from laying pipe in certain utility easements over which Consolidated claimed an exclusive right. The State Circuit Court granted Consolidated a preliminary injunction but then dissolved it, and the State Court of Appeal affirmed the dissolution, holding that Consolidated had no exclusive right to the easement.

[7] The district court again applied its good-guys/bad-guys characterization to City Gas' intervention into the FERC proceedings. Although the district court held that City Gas' intervention did not itself constitute a violation of *section 2*, the court suggested that the action was evidence of City Gas' bad motives. This was so for two reasons: "first, Consolidated was severely damaged by the delay which occurred as a direct result of City Gas' intervention; and, second, City Gas' reason for opposing Consolidated's application was to protect its own domain." *665 F. Supp. at 1542*. Neither the district court, nor any one else, ever indicated that City Gas had committed an abuse of process by intervening into the FERC proceeding. On the contrary, City Gas, along with some other intervening natural gas suppliers, had legitimate concerns relating to Consolidated's requested allocation. In my view, a rational business actor has a strong interest in "protect[ing] its own domain." *Id.* Thus, City Gas did nothing wrong in intervening in the proceedings. If Consolidated's request for an allocation took longer than Consolidated expected, that may have harmed Consolidated but the fault is certainly not attributable to City Gas, which merely exercised its right to petition in a legitimate way. Perhaps the problem was that Consolidated's expectations, which the district court seems to have adopted, were entirely unreasonable.

found that "Consolidated was left with only [one] alternative if it was to remain in business: the purchase of natural gas directly from City Gas." *Id. at 1510*.[8]

[34]**

[*1272] City Gas and Consolidated had already entered into negotiations regarding the possibility of such purchases. They could not, however, arrive at an acceptable price for the transaction. City Gas initially offered to sell gas for resale at cost plus ten cents per therm [9] and later at cost plus five cents per therm. Consolidated rejected the offers as unreasonable and brought suit under *sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15(a)*, *26*, claiming that City Gas' conduct constituted a refusal to deal in violation of *section 2* of the Sherman Act. The district court agreed with Consolidated and held that City Gas' offered prices were unreasonably high, thus constituting a refusal to deal in violation of *section 2*.

[35]** The district court also found, however, that City Gas had never before sold gas at wholesale. Although it had entered into a contract in 1965 to sell wholesale gas to another retail distributor, Florida Gas, that contract was abandoned by the parties and City Gas never performed under it. Aside from that isolated (and unperformed) contract, City Gas operated entirely at the retail level.

Consolidated claimed that City Gas violated *section 2* of the Sherman Act both by offering to sell gas to Consolidated at unreasonably high prices, which constituted a refusal to deal under *section 2*, and by entering into a territorial agreement with Peoples Gas. In part III, I consider the territorial agreement and show that it provides no basis for liability in the present case. In parts IV through VI, I then turn to the purported refusal to deal, demonstrating that it provides no basis for liability either. Finally in part VII, I show that even if City Gas' conduct justifies the imposition of liability under *section 2*, City Gas is immune under the state-action immunity doctrine of *Parker, 317 U.S. at 341, 63 S. Ct. at 307*.

III. THE TERRITORIAL AGREEMENT

The court today **[**36]** adopts the district court's holding that City Gas' territorial agreement with Peoples Gas constituted a violation of *section 2*. I disagree with that holding and would reverse on that basis.

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[8] As the district court noted, shortly before undertaking this marketing and expansion effort, City Gas' Board of Directors had met and passed a resolution to acquire "the assets of Consolidated Gas Company and take whatever steps with respect thereto, as they deem appropriate." *665 F. Supp. at 1507*. Based on these facts, the district court concluded

> that City Gas' solicitations and pipeline extensions were not simply ordinary business expansions, but rather, were basic components of City Gas' strategy to force Consolidated to sell out. This conclusion is further supported, we think, by the fact that City Gas had to duplicate a portion of Consolidated's pipeline in order to serve the eighteen Consolidated customers it had recently signed. Yet if City Gas had expected to reach a purchase agreement with Consolidated, it would have acquired Consolidated's pipelines and would not have had to incur this expense. City Gas' action of duplicating these pipelines before notifying Consolidated of its interest in acquiring the company seems to have been designed to force Consolidated to sell at a low price or face the resultant certainty of losing its customers and their value as quickly as City Gas could serve them.

Id. at 1507-08.

Faced with this situation, Consolidated began its effort to convert to natural gas. As the district court stated: "In deciding to convert from LP gas to natural gas in 1982, Consolidated suddenly found itself in potential competition with City Gas, which had grown to be a giant in the south Florida area." *Id. at 1505*.

[9] "Therm," as defined in the FPSC's regulations under chapter 366, "denote[s] a unit of heating value equivalent to one hundred thousand (100,000) British thermal units." 1986 Fla.Admin.Code Ann. 25-7.003(15). A British thermal unit is, of course, "the quantity of heat required to raise the temperature of one pound of water one degree Fahrenheit." *Id. at 25-7*.003(14).

Section 2 of the Sherman Act provides in pertinent part: "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." *15 U.S.C. § 2 (1988)*. As the Supreme Court stated in *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)*:

> The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

The district court analyzed the territorial agreement under this standard and held that it constituted a "willful acquisition" of monopoly power under the second prong. **[**37]** As I discuss below, the district court should never have reached this issue in the first place because City Gas did not possess monopoly power in the relevant market. *See infra* slip op at 5150-5160, . Putting the monopoly power issue aside for the moment, however, the district court erred in holding City Gas liable under *section 2* based on the territorial agreement.

Section 2 itself provides no cause of action for a private plaintiff. Private plaintiffs bring such actions under *section 4* of the Clayton Act, *15 U.S.C. § 15*, which provides an action for treble damages for "any person who shall be injured in his business or property by reason of anything forbidden **[*1273]** in the antitrust laws." [10] **[**38]** Before a private plaintiff can challenge a monopolist's conduct under *section 2* of the Sherman Act, therefore, it must satisfy the requirements of *section 4* of the Clayton Act. [11]

Although *section 4* is broadly worded, courts have interpreted the section's "injured . . . by reason of" language as imposing a causation requirement on the private plaintiff. As this court has stated, the plaintiff must show "a causal relationship between the antitrust violation [alleged] and the injury [sustained]." *Cable Holdings, Inc. v. Home Video, Inc., 825 F.2d 1559, 1561 (11th Cir. 1987)* (quoting *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 607 (11th Cir. 1984)*, **[**39]** *cert. denied*, *471 U.S. 1056, 105 S. Ct. 2120, 85 L. Ed. 2d 484 (1985))*. To satisfy this "causal relationship" requirement, the plaintiff must show that the violation is "a material cause of," *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S. Ct. 1562, 1571 n. 9, 23 L. Ed. 2d 129 (1969)*, or "materially contributed to," *Cable Holdings, 825 F.2d at 1562*, its injury. Beyond this obvious requirement, the plaintiff must also prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)* (emphasis original); *see Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 539-40, 103 S. Ct. 897, 909, 74 L. Ed. 2d 723 (1983)* (refining *Brunswick* test); *Blue Shield v. McCready, 457 U.S. 465, 476-78, 102 S. Ct. 2540, 2546-48, 73 L. Ed. 2d 149 (1982)* (same); *see also* *Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 113-15, 107 S.*

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[10] *Section 16* of the Clayton Act also provides that "any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. As I discuss below, *see infra* slip op. at 5146-5150, , courts have interpreted *section 16* as imposing a causation requirement that is similar to *section 4*'s. For purposes of convenience, I refer only to the requirement under *section 4*, but the discussion also applies to Consolidated's request for injunctive relief under *section 16* to the extent that its request is based on the territorial agreement.

[11] The Government brings civil enforcement actions under *section 4* of the Sherman Act, *15 U.S.C. § 4*, which provides, in pertinent part:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of *sections 1 to 7* of the title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . .

Ct. 484, 491, 93 L. Ed. 2d 427 (1986) **[**40]** (antitrust injury requirement also applies in suits for injunctive relief under *section 16* of Clayton Act). [12]

Although the antitrust injury analysis is somewhat complex, I do not belabor it here. In my view, Consolidated has not satisfied even the basic element of the causation requirement with respect to the territorial agreement: that agreement is simply not a material cause of Consolidated's injury. Without giving any apparent thought to this causation requirement, the district court summarily concluded **[**41]** that the territorial agreement constituted a "willful acquisition . . . of monopoly power" under the second prong of the *Grinnell* standard and, on that basis, imposed liability on City Gas under *section 2*. Whether or not the agreement constituted a "willful acquisition" under the *Grinnell* standard, [13] the agreement also had to satisfy the causal connection requirement of *section 4*. As I demonstrate now, it did not do so.

[*1274] Consolidated's injury, as stated in its amended complaint, was the economic loss that followed from its inability to enter the natural gas market as a retail gas distributor. Consolidated, of course, traced that injury to conduct by City Gas. The district court considered two specific forms of conduct by City Gas: (1) its refusal to supply wholesale gas to Consolidated; and (2) its territorial **[**42]** agreement with Peoples Gas. Putting aside the issue of liability under *section 2*, [14] the refusal to deal would be a material cause of Consolidated's injury: Consolidated could not enter the retail gas market without a supply of gas; City Gas refused to provide such a supply; Consolidated, therefore, could not enter the market and suffered economic loss as a result.

No such causal connection exists, however, between Consolidated's injury and the territorial agreement. That agreement relates to competition between City Gas and Peoples Gas, two retail distributors **[**43]** of natural gas. Pursuant to the agreement, each company took control of a given distribution area and agreed not to compete for control of the other company's distribution area. [15] The direct causal result of the agreement, therefore, was that City Gas could operate in its distribution area without competition from Peoples Gas. Given that no other competitor seriously challenged City Gas' control of that distribution area, the agreement may have ensured City Gas' acquisition of monopoly power in that distribution area. Even without the agreement, however, a single company would eventually have gained control over what became City Gas' territory. After an initial period of competition, a single natural gas distributor almost inevitably acquires a natural monopoly in a given distribution area. Although the territorial agreement might have affected this process in the present case, I doubt that its absence would have changed the present situation. City Gas, as the company already operating in its current area, would probably have acquired the natural monopoly over service in that area, and if City Gas had not, another company would have done so. With or without the territorial agreement, **[**44]** Consolidated would still have been in the same position: trying to enter the retail distribution market in an area under the control of a monopolist.

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[12] In the *Brunswick* case, for example, the plaintiff had already proved that its loss "occurred 'by reason of' the unlawful [conduct]," or as a material result of that conduct, but the Court held that the plaintiff had not proved that the loss occurred "'by reason of' that which made the [conduct] unlawful." *Brunswick, 429 U.S. at 488, 97 S. Ct. at 697*. In short, not every injury materially caused by conduct proscribed by the antitrust laws will justify a recovery under those laws.

[13] As I discuss below, the district court was also off target in attempting to fit this case into the "willful acquisition" prong of the *Grinnell* standard. *See infra* part V.

[14] Consolidated raised only a *section 2* claim, charging in its amended complaint that City Gas' conduct constituted an attempt to monopolize and monopolization under *section 2* of the Sherman Act. Consolidated has not presented a claim under *section 1* of the Sherman Act, *15 U.S.C. § 1*, attacking City Gas' conduct as part of a conspiracy in restraint of trade. The territorial agreement might have been relevant to such a claim.

[15] Consolidated claimed that this agreement was a horizontal market division. As the Court explained in *United States v. Topco Assocs., 405 U.S. 596, 608, 92 S. Ct. 1126, 1133, 31 L. Ed. 2d 515 (1972)*, a horizontal market division is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, *e.g.*, manufacturers and distributors, which are termed "vertical" restraints.

Even if the territorial agreement was a material cause of City Gas' acquisition of monopoly power, it still would not have been a material cause of Consolidated's injury: City Gas' possession of monopoly power did not cause Consolidated's injury. **[**45]** Rather, that injury was caused by how City Gas chose to *exercise* its monopoly power. Of course, the fact that City Gas had monopoly power was an important condition underlying the whole case. That power led Consolidated to request a supply of wholesale gas from City Gas in the first place and gave City Gas the choice whether or not to sell the gas in the second place. That power, standing alone, however, did not injure Consolidated. City Gas could just as easily have used its monopoly power to help Consolidated as to hurt Consolidated. City Gas' decision about how to exercise its monopoly power, therefore, determined whether or not Consolidated was injured. [16] Thus, the territorial agreement, **[*1275]** even if it was a material cause of City Gas' acquisition of monopoly power, was not a material cause behind City Gas' decision on how to exercise that power or behind that decision's result -- i.e., Consolidated's injury.

[46]** The district court's improper treatment of the territorial agreement in this case resulted, in my view, from a failure to grasp the distinction between a private antitrust suit under *section 4* of the Clayton Act, which challenges conduct as violative of *section 2* of the Sherman Act, and a government enforcement action brought directly under the Sherman Act, *see supra* notes 1, 10-11. The *Grinnell* case, for example, involved a government action. The district court, however, cited *Grinnell* (and only *Grinnell*) for the proposition that "if as a result of horizontal market division a company acquires monopoly power, it . . . violates *§ 2* of the Sherman Act." *665 F. Supp. at 1523* (citing *Grinnell, 384 U.S. at 576, 86 S. Ct. at 1706-07*). Because *Grinnell* involved a government enforcement action, it does not support the application of this rule to the present case, which of course is a private action. The government in *Grinnell* brought suit directly under *section 2* and therefore did not need to prove that an injury was causally related to the defendant's conduct. It merely needed to prove an antitrust violation in and of itself. The **[**47]** "willful acquisition" component of *Grinnell* reflects the specifics of that kind of a case: the government could make a case by proving that the defendant had improperly acquired its monopoly power, whether or not the defendant had actually *used* that power anticompetitively to injure a competitor. Thus, the government must prove, under the second prong of the *Grinnell* standard, only that the company with monopoly power acted anticompetitively in a general way. A showing that the company engaged in "the willful acquisition . . . of monopoly power," *Grinnell, 384 U.S. at 570-71, 86 S. Ct. at 1704*, would satisfy that requirement in a case like *Grinnell*. [17]

[48]** In a private action under *section 2*, however, such a showing would not be sufficient to prove liability, unless the company's "willful acquisition" directly caused the plaintiff's injury. In order to satisfy *section 4*'s causation requirement in the present case, therefore, Consolidated would have to show a causal relationship between the territorial agreement and its injury. [18] Because Consolidated has made no such showing, nor in my view could it

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[16] In this respect, *section 4*'s causation requirement parallels the elements of liability under *section 2*. As courts have stated, monopoly power alone provides no basis for liability under *section 2*; rather, the improper exercise of that power justifies the imposition of liability. *See, e.g., Byars v. Bluff City News Co., 609 F.2d 843, 853 (6th Cir. 1979)*; *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979)* (citing *Standard Oil Co. v. United States, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 55 L. Ed. 619 (1911))*, *cert. denied*, ***444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)***; *see infra* slip op. at 5160, .

[17] As the passage from *Grinnell* cited by the district court indicates, however, the restrictive agreement in that case was only one of the exclusionary practices supporting the government's case. *See Grinnell, 384 U.S. at 576, 86 S. Ct. at 1706-07*. Whether that agreement, standing alone, would have provided an independent basis for liability even in *Grinnell* remains uncertain.

[18] Even if Consolidated could satisfy the injury requirement with respect to the territorial agreement, I doubt that the agreement would provide a basis for liability *under section 2* of the Sherman Act. As I note above, *see supra* note 15, Consolidated properly characterized the agreement as a "horizontal market division." A horizontal market division can, of course, provide the basis for liability *under section 1* of the Sherman Act. *See, e.g., Topco, 405 U.S. at 596, 92 S. Ct. at 1126*. I have found no support for the proposition that a horizontal market division could also provide a basis for liability *under section 2*. The district court here did not address this point; it merely stated that "a territorial agreement, even between regulated utilities, is a per se violation of the Sherman Act" and concluded that City Gas "has violated *§ 2* of the Sherman Act." *665 F. Supp. at 1532*. In support of this proposition, however, the district court cited three cases in which territorial agreements were held to violate *section 1*, and not *section 2*, of the Sherman Act. These *section 1* cases, in my view, do not control in this *section 2* case. Thus, the district court's

make such a showing, I would reverse the district court's holding that the territorial agreement provided a basis for imposing liability on City Gas under section 2.

[49]**

IV. MONOPOLY POWER

Putting aside the issue of the territorial agreement, the court today also adopts the **[*1276]** district court's holding that City Gas refused to deal in violation of section 2 of the Sherman Act. Again, as the Supreme Court stated in Grinnell, 384 U.S. at 570-71, 86 S. Ct. at 1704:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

The district court held that City Gas' conduct implicated both of these elements and thus constituted an antitrust violation. I first analyze the district court's discussion of City Gas' monopoly power; then, in Part V, I address the district court's discussion of the "willful acquisition or maintenance" element.

The district court held, and the court today agrees, that City Gas possessed monopoly power in both the wholesale and retail natural gas markets. I agree that City Gas had monopoly power in the retail natural gas market; **[**50]** however, I question whether City Gas had monopoly power in the *wholesale* natural gas market. That City Gas had such power in the wholesale market, moreover, is crucial to the theories on which the district court and this court today have based City Gas' antitrust liability.

In conducting its monopoly power analysis, the district court followed the standard approach, first defining the relevant product and geographic markets and then determining whether City Gas possessed monopoly power within those markets. With respect to the relevant product market, the district court restated the Supreme Court's holding in United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 1012, 100 L. Ed. 1264 (1956), that the "market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." 665 F. Supp. at 1516 (quoting *DuPont*). The district court concluded that the relevant product market was limited to natural gas and did not include LP gas because of its prohibitive expense. The district court then defined the relevant geographic market as "the area **[**51]** of effective competition in the known line of commerce . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." Id. at 1518 (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 628, 5 L. Ed. 2d 580 (1961)). Applying this definition, the district court concluded that the relevant geographic market was City Gas' service area and was not limited to Consolidated's service area.

The district court next considered whether City Gas possessed monopoly power within this market. The district court defined monopoly power as "the 'power to control prices or exclude competition,'" id. at 1519 (quoting Grinnell, 384 U.S. at 571, 86 S. Ct. at 1704), and stated that "frequently courts have approached the problem by defining first the relevant product and geographic markets and then computing the defendants' market share from this statistical data," *id.* The district court then found that "in the wholesale market, City Gas sold 100% of the natural gas requested for resale in its service area." *Id.* Based on this finding, the district court held that City Gas possessed **[**52]** monopoly power within the wholesale natural gas market. On appeal, the panel adopted this holding as well. *See* Consolidated Gas Co. v. City Gas Co., 880 F.2d 297, 300-01 (11th Cir. 1989).

City Gas has challenged this holding, contending that it could not possibly have monopoly power because it sold *no* wholesale gas whatsoever. Rather, City Gas claims, FGT sells 100% of the gas for resale in the relevant service area. In response to this argument, the panel reasoned that although City Gas had never sold gas for resale, it had

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holding that the territorial agreement provided a basis for liability under section 2 -- even if Consolidated could satisfy the Clayton Act's causation requirement -- lacks supporting authority.

power to do so and had in fact entered into a contract (in 1965) to supply gas for resale to a retail natural gas distributor named Florida Gas. That contract, however, was abandoned by the parties, and it is undisputed that City Gas never actually sold gas at wholesale -- either to Florida Gas or to anyone else. **[*1277]** Putting the Florida Gas contract aside for a moment, I first demonstrate in section A that City Gas could not have possessed monopoly power in the relevant market defined by the district court because City Gas never actually operated in that market. I then consider in section B the abandoned contract and conclude **[**53]** that it has no relevance to the issue of whether City Gas possessed monopoly power in the wholesale market in this case.

A. *The Relevant Market*.

I suggest that the monopoly power issue is more complicated than the district court's analysis reflects. Consider first the complexities of the factual situation here. Consolidated wants gas for resale. FGT supplies gas for resale, but in order to acquire gas from FGT, City Gas must spend $ 250,000 to construct a lateral pipeline and must wait approximately two years for a FERC allocation. City Gas distributes gas at retail but also has the "power" to supply gas for resale to Consolidated. City Gas, however, has never actually sold gas for resale, although it considered doing so and even went as far as entering into a contract to do so (which was subsequently abandoned and never performed, *see infra* slip op. at 5158-5160,). Now, assuming for the moment that Consolidated really did not have the option of obtaining gas from FGT -- the cost and delay involved were just too prohibitive -- Consolidated must then acquire gas from City Gas or it will be unable to compete. It would seem, therefore, that City Gas has the power to **[**54]** control prices and exclude competition in the relevant market. At least with respect to Consolidated, City Gas does not compete with any other wholesale supplier: City Gas can independently set the wholesale price and restrict (or deny entirely) Consolidated's ability to acquire a wholesale supply. This is exactly the conclusion that the district court reached. This conclusion assumes, however, that City Gas *is* a wholesale gas supplier. We know that City Gas has the *power* to supply gas at wholesale -- the panel emphasized that point -- but (as the district court itself found) City Gas has chosen not to exercise that power. It has the potential to sell gas at wholesale, but it simply has not yet undertaken to exercise that potential. In my view, this fact must be addressed before the district court can conclude that City Gas has monopoly power in the wholesale market. Neither the district court nor the court today has adequately addressed this point, though; nor, in my view, could they do so. The district court has defined a market that simply does not exist. In support of my conclusion, in subsection 1, I first consider a basic but very important issue: what is a market? I **[**55]** then show in subsection 2 that the district court's construction of the relevant market is inconsistent with the basic notion of a market. I focus specifically on the district court's conclusion regarding the relevant geographic market in this case.

1. The Concept of a Market.

Economists hold that a market exists when buyers and sellers exchange goods or services. *See, e.g.*, The MIT Dictionary of Modern Economics 263 (D. Pearce ed. 1986) (market is "any context in which the sale and purchase of goods and services takes place"); J. Hanson, A Dictionary of Economics and Commerce 255 (6th ed. 1986) ("In a wider sense, however, a market can signify any area in which buyers and sellers are in contact with one another. . . ."); *see also* C. Ferguson & J. Gould, Microeconomic Theory 259 (4th ed. 1975). [19] This idea of exchange can also be defined in terms of supply and demand: an exchange can occur if a buyer wants goods or services that a seller can supply. However defined, exchange is a function of price. A buyer's desire to buy and a seller's desire to sell are qualified by price: the parties desire to proceed *only at a certain price, or within a certain range of prices* **[**56]** . Beyond that price, or outside of that range of prices, the parties do not desire to proceed **[*1278]** with the transaction at issue. The market, then, is the mechanism by which price is established. The market serves as such a mechanism by providing a history of transactions (both complete and incomplete) in the context of which parties negotiate their price. [20]

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[19] These definitions contain a resonance of what a market historically was: a physical location where merchants sold their goods. The definitions, however, use terms of location that are at once more modern and more abstract, referring to "any context" or "any area."

[20] This description would apply as well to the historical market -- the physical location where merchants hawk their goods. The mere existence of such a physical market did not guarantee a "market" in the sense of a mechanism for negotiating price. The

[57]**

A market, obviously, exists independently of whether or not a given transaction is completed -- i.e., whether the parties agree to a price. A failed transaction merely becomes part of the history that serves as the context for future negotiations. The present case, however, involves something entirely different than a failed transaction in an established market. In the present case, no market existed in which the parties could reach an acceptable price. Neither City Gas nor any other retail distributor in the region has ever sold gas at wholesale to another retail supplier. The parties in this case could refer to no history of transactions (or prices) as a basis for setting a price term for their potential transaction. When the transaction failed in this case, therefore, its failure reflected the absence of an established market that could have enabled the parties to negotiate an exchange. The transaction's failure, moreover, meant that no such market came into existence as a result of the transaction. Thus, the absence of a market for the transaction at issue in the present case explains, at least in part, the inability of City Gas and Consolidated to agree to a transaction price. **[**58]** More importantly, the absence of a market -- both as a context for the transaction or as a result of the transaction -- meant that the district court here could not determine what the transaction price should have been.

Consider a hypothetical situation: in 1970, Senior Partner at a large law firm with a respected antitrust practice strolls into the office of Acme Rocket and Spaceship's President. Acme, of course, built the spacecraft that recently landed on the moon. President greets Senior Partner (they went to college together) and asks him what's on his mind. Senior Partner (who has been billing 3000 hours a year for thirty-five years) tells President that he wants a branch office orbiting the moon and would like Acme to supply a spaceship for that purpose. Senior Partner also indicates that he can find no other company capable of building such a spaceship for him. President says that Acme can do the job, and the two begin to discuss a price. Senior Partner says that his firm will be willing to pay five million dollars. President smiles politely and gently suggests that the required spaceship would cost nearly a billion dollars to design and build. Senior Partner responds that **[**59]** at most his firm could manage to pay ten million. President then says that because Senior Partner is such an old friend, and the publicity from the spaceship would be so good, Acme could build it for half price, or $ 500 million. Senior Partner says he understands and resigns himself to spending the rest of his career in his two-floor corner office in New York. President claps him **[*1279]** on the back, and the two head off to the golf course.

As this negotiation suggests, no "market" for private spaceships existed at the time. True, Senior Partner wanted a spaceship, and Acme could theoretically have built one -- that is, a supply and demand existed for private spaceships. But no history of a price existed for such a transaction, and the negotiation obviously failed to establish one. No price existed because no market existed -- no mechanism by which the parties to this potential transaction could establish a price. Following the district court's reasoning in the present case, however, one would have to conclude that a market for private spaceships did exist in 1970 and, in addition, that Acme possessed monopoly power in that market. These conclusions are obviously ludicrous, **[**60]** but they necessarily follow from the district court's definition of a market: *potential* demand plus *potential* supply.

2. The District Court's Analysis.

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physical market meant that parties to a potential transaction had a place where they could conduct their negotiations, but it did not necessarily provide the parties with a history of transactions in the context of which they could negotiate a price.

For example, imagine strolling through the agora on a classically beautiful day in ancient Athens. Merchants are selling olives, retsina, and goats. Suddenly, a mysterious looking figure appears in the center of the agora with a creature resembling a goat, but golden in color and with a single, spiral horn rising from the top of its head. The figure announces that this creature is for sale, and a crowd begins to gather. A goatherd, whose interest has been piqued, offers to buy the beast for five drachmas, the going rate for a ram. The mysterious figure laughs and instead offers to sell the unicorn in exchange for the goatherd's entire herd. The goatherd, along with the rest of the crowd, looks at the figure in surprise. Clearly, they have never tried to buy a unicorn before. The figure scans the crowd, but no one attempts another offer. With a sudden wave of his arm, the figure opens a path through the crowd and departs, as quickly as he came.

The historical market, thus, provides a stage for this scene. The history of transactions incorporated in that market, however, are useless as a basis for arriving at a price for a unicorn.

With this discussion of the idea of a market in mind, I now consider the district court's specific conclusions regarding the relevant market in this case. I focus on the district court's analysis of the relevant geographic market. As I discuss above, the district court defined the relevant geographic market as "the area of effective competition in the known line of commerce . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." *665 F. Supp. at 1518* (quoting *Tampa Electric, 365 U.S. at 327, 81 S. Ct. at 628*). This definition consists of two parts: defining the relevant area first in terms of where the seller sells and then in terms of where the purchaser can go to purchase. Both parts emphasize a market's practical realities: with respect to the seller, the inquiry looks to the "area of *effective* competition," and with respect to the purchaser, the inquiry looks to the area where the purchaser "can *practicably* turn for supplies." *Tampa Electric, 365 U.S. at 327, 81 S. Ct. at 628* **[**61]** (emphasis added).

Two questions arise from the district court's application of this inquiry. First, I question whether a firm could in fact be a "seller" under this definition if the firm does not operate, and has never operated, in the "area of effective competition" at issue. I doubt that a firm can properly be labeled a wholesale "seller" of a product if that firm sells that product only on the retail level. Second, I question whether a firm wanting to purchase supplies at wholesale can "practicably turn" to an entity that does not deal in the product at issue. The district court, however, answered both of these questions in the affirmative, and in so doing developed a new rule of antitrust liability. That is, if given the circumstances of a market, a purchaser can "practicably turn" nowhere for its supplies, then a court is justified to compel another entity, even though it is not in the supply business at issue, to enter that business in order to provide the purchaser with its supplies.

At bottom, this is the principle underlying the district court's analysis of the monopoly power issue in the present case. The district court backed into its holding that City Gas possessed **[**62]** monopoly power after concluding that Consolidated had no other practicable source of supply. Not only is that conclusion itself erroneous, as I discuss below, *see infra* slip op. at 5150-5160, , but as a result of that conclusion, the district court constructed the relevant geographic market so as to cut out FGT -- the regional wholesale supplier of natural gas. In my view, a properly constructed wholesale market in this case would necessarily include FGT. The relevant market must include FGT because City Gas is not a "seller" as defined in *Tampa Electric*. Thus, Consolidated could not practicably turn to City Gas for its supply. Without FGT's presence, therefore, no wholesale market would exist. This would be the case, moreover, whether or not Consolidated could practicably turn to FGT for its natural gas supply. As I suggest below, however, the district court erred in concluding that Consolidated could not have done so.

Based on its findings of fact, as I discuss above, the district court concluded that "Consolidated was left with only [one] alternative if it was to remain in business: **[*1280]** the purchase of natural gas directly from City Gas." *665 F. Supp. at 1510*. **[**63]** The district court reached this conclusion based on considerations of cost, time, and competition. In the district court's view, the $ 250,000 cost of interconnecting to FGT's pipeline posed a substantial barrier to Consolidated's entry into the natural gas market. In addition, until November 1984, Consolidated lacked the FERC allocation necessary to allow it to interconnect with the FGT pipeline at all. Thus, from the fall of 1982 (that is, after the approximately three-to-six months that approval of the FERC allocation would have required, according to the district court, had City Gas not intervened in the FERC proceedings) until November 1984, Consolidated could have purchased gas only from City Gas. The district court also emphasized the competition between Consolidated and City Gas. When Consolidated decided to convert from LP to natural gas, it was, as the district court put it, "forced to compete with City Gas in order to retain its customers or else see them go to City Gas for more economical gas service." *Id. at 1505*. In the district court's view, as a result of this competition, "it became crucial that Consolidated convert to natural gas for as low a cost **[**64]** as possible in order to be able to offer rates that were competitive with those City Gas could offer." *Id. at 1506*.

The district court then translated these conclusions into a hypothetical relevant market. More specifically, the district court took its findings concerning the conditions necessary to enable Consolidated to compete with City Gas and used them as a basis for constructing a relevant (but hypothetical) market. The district court's effort in constructing this market, however, was propelled by the assumption that Consolidated was entitled to compete. Driven by this assumption, the district court disregarded as features of the market some of the very conditions stipulated by its findings -- namely, the entry barriers in terms of time, cost, and competition.

Rather than structuring a hypothetical market according to the terms that would be necessary to enable Consolidated to compete on equal footing with firms already operating in that market, the district court should have examined the structure of the market as it actually existed (entry barriers and all). Based on that structure, the district court should then have analyzed whether City Gas actually **[**65]** possessed monopoly power and whether it had in fact used that power to prevent Consolidated from competing. The focus of the antitrust laws is to prevent anticompetitive conduct by monopolists, but not to enable an entity to compete whether or not a monopolist acts anticompetitively. The antitrust laws are designed to create an equal *opportunity* for competition, *see* *Charles A. Ramsay Co. v. Associated Bill Posters of United States & Canada, 260 U.S. 501, 512, 43 S. Ct. 167, 168, 67 L. Ed. 368 (1923)*; they do not create an absolute entitlement to compete successfully. Given this distinction, we must be very careful here in ascribing to City Gas responsibility for the entrance barriers to the *retail* natural gas business. If those entry barriers (in terms of time, cost, and competition) are simply too high to enable Consolidated to compete (independent of whether City Gas possessed monopoly power or has used that power anticompetitively), then the district court cannot mandate that City Gas underwrite Consolidated's entry into the retail natural gas market, especially when that mandate would require City Gas to undertake a new level of operation and limit its **[**66]** own legitimate opportunities for expansion.

As it actually exists, then, the relevant geographic market, or "the area of effective competition in the known line of commerce . . . in which the seller operates, and to which the purchaser can practicably turn for supplies," *665 F. Supp. at 1518* (quoting *Tampa Electric, 365 U.S. at 327, 81 S. Ct. at 628*), necessarily included FGT's pipeline. In a case such as this one, where entities exist that are actually engaged in the "line of commerce" at issue, the district court erred in holding that the "effective competition in the known line of commerce . . . in which the seller operates" consisted of another entity that was not actually engaged in that "line of commerce" even if that entity could hypothetically be engaged in **[*1281]** such commerce and even if that entity would provide the antitrust plaintiff with the most economically feasible supply.

As this discussion demonstrates, therefore, the district court's finding that City Gas possessed a 100% share of this market is clearly erroneous. Because the district court misconceived the nature of the relevant market, its finding regarding City Gas' share **[**67]** of that market is meaningless. Within the actual wholesale market, FGT clearly possessed the inordinate share, and City Gas possessed virtually none, if any at all.

In addition, the district court erred in concluding that Consolidated could not "practicably" have turned to FGT for its supply. The district court, as I discuss in detail above, *see supra* slip op. at 5144-5146, , made three findings on this point: (1) the FERC proceedings, which resulted in an order granting Consolidated's request for an allocation to interconnect to FGT's pipeline, lasted approximately twenty-eight months; (2) construction of the interconnection would cost Consolidated $ 250,000; and (3) Consolidated would have to compete with City Gas. These findings, however, do not support the conclusion that Consolidated could not practicably have turned to FGT for a wholesale gas supply. Taking these same factors into account, the FERC order issued September 19, 1984, which granted the allocation, held that FGT was "the applicant's most feasible source of supply." [21] As the district court itself restated, the FERC order opined that, although competition with City Gas would be difficult, Consolidated's **[**68]** entry into the natural gas distribution market -- with FGT as its supplier -- was economically feasible. When FERC issued its order, the delay in gaining approval of the allocation had already occurred. Similarly, City Gas had already placed itself in a strong competitive position; indeed, City Gas had accomplished that well before Consolidated even began its conversion to natural gas. Thus, from Consolidated's perspective, the only practical difference between turning to FGT as opposed to City Gas for a wholesale gas supply was that the first option would cost Consolidated an additional $ 250,000.

The record on appeal in this case further indicates that, in light of Consolidated's assets and its projected profits and business opportunities, **[**69]** it was economically feasible for Consolidated to cover the $ 250,000 expense of interconnecting to FGT's pipeline. I test this conclusion by considering whether, given the evidence Consolidated

[21] That criterion must be satisfied before the FERC can order an allocation under Section 7(a) of the Natural Gas Act, *15 U.S.C. § 717f(a) (1988)*, which requires that the allocation be "necessary or desirable in the public interest" standard.

presented at trial concerning its expected future profits as a natural gas company with a supply of gas, Consolidated could feasibly have obtained underwriting for a bond issuance in the amount of $ 250,000 in order to fund the cost of hooking up to FGT. At trial, Consolidated called an expert witness, Ben Ball, to the stand to render an opinion regarding the company's present value with a natural gas supply. This value was, in effect, what a willing buyer, fully informed of all relevant facts, would pay a willing seller, also so informed. Ball assumed that Consolidated could indefinitely obtain a "competitively priced source of natural gas," *665 F. Supp. at 1514*, and could continue to operate profitably, with that supply of gas, for twenty years. [22] **[**71]** He then estimated Consolidated's annual profits for that period, including profits that it would have made by servicing former customers that had been captured by City Gas. From those profits, he deducted the expenses that Consolidated **[**70]** would have incurred in transforming its operation to natural gas distribution; this deduction included the approximately $ 20,000 **[*1282]** cost of hooking up to City Gas' pipesystem. Ball assumed that the hypothetical buyer would expect a ten-percent return on its investment, and, using this rate, he found the present value of the projected stream of profits over the twenty-year period: the figure was $ 2,275,130. *Id. at 1515*. From these figures, it follows that Consolidated would generate annual profits of approximately $ 267,000 (i.e., a willing buyer would pay $ 2,275,130, at a ten-percent interest rate, for a twenty-year annuity paying $ 267,000 a year). [23]

Now, assume that Consolidated issues a $ 250,000 bond, to mature in twenty years, and pays interest at a high rate, say fifteen percent annually. Given that rate, Consolidated's nominal annual interest payments would be $ 37,500. Because Consolidated could deduct those interest payments from its taxes -- paid at a corporate rate of thirty-four percent, *see* *I.R.C. § 11(b)(1) (1988)* -- its real interest expense would be $ 24,750 annually. After paying this amount (which would represent a mere 9.3% of Consolidated's annual profits of $ 267,000), Consolidated would still generate annual profits in the amount of $ 242,250, and its present value as a company generating $ 242,250 in annual profits over the next twenty years (assuming a ten-percent interest rate) would be roughly $ 2,060,000. In addition, given the amount of its projected future profits, one would expect Consolidated to have little difficulty in paying back $ 250,000 in principal **[**72]** at the end of twenty years.

As these figures suggest, a reasonable underwriter would obviously have found these hypothetical bonds to be a safe investment and would have underwritten them. Consolidated, therefore, could have "practicably turned" to FGT for a supply of wholesale gas. As a result, the district court erred in excluding FGT from the relevant geographic market, and if FGT had been included in the relevant market, the district court obviously could not have held that City Gas possessed monopoly power in that market, even if City Gas did sell at wholesale. The fact remains, however, that City Gas never sold natural gas at wholesale. In essence, then, the issue whether Consolidated could practicably have purchased wholesale gas from FGT is irrelevant to this case. Whatever sources Consolidated may or may not have found, City Gas was not one of them. City Gas simply did not participate in the relevant market.

B. *The Florida Gas Contract*.

In addition, City Gas' contract with Florida Gas has no significance for the issue of monopoly power. To begin with, the contract was abandoned, and City Gas never performed. The panel acknowledged that "City Gas never actually sold **[**73]** any gas under this agreement" but stressed that "it had the *power* to do so." *880 F.2d at 301* (emphasis in original). I agree. The fact that City Gas had the power to sell at wholesale, however, does not mean that it had monopoly power in the wholesale market, that it was actually in the wholesale market, or that a wholesale market even existed. The abandoned contract has no relevance to these issues. On the contrary, the fact that the contract was abandoned, as the district court agreed, indicates that City Gas never actually sold at wholesale, choosing for whatever reason not to exercise its hypothetical power in the wholesale market. In my view, that is the significant

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[22] Ball based his "competitively priced source of gas" figure on the price City Gas paid for wholesale gas from FGT. As I discuss below, *see infra* notes 60-61 & accompanying text, that figure provided an improper basis for calculating Consolidated's future profits *if Consolidated purchased gas from City Gas*. These figures, on the other hand, would provide a proper basis for calculating Consolidated's future profits *if Consolidated purchased gas from FGT*, which is the focus of my discussion here.

[23] The source of these and other present-value figures in this opinion is L. Gitman, Principles of Managerial Finance app. A, tbl. A-4 (3d ed. 1982).

point: that City Gas *legitimately decided not to exercise* its power -- not selling to Consolidated, to Florida Gas, or to any other firm. Pursuant to this decision, City Gas did not operate as a wholesale natural gas supplier.

In addition, the abandoned contract provided no evidence that the wholesale market, as defined by the district court, was anything more than hypothetical. As I discuss above, *see supra* slip op. at 5151-5154, , a market is a mechanism for establishing price; a **[**74]** wholesale price, therefore, provides evidence that a wholesale market exists for a given product in a given geographical area. Thus, the Florida Gas contract could provide evidence that a wholesale natural gas **[*1283]** market existed only if the contract contained a reliable price term. If the contract did not contain a reliable price term, then it could provide no evidence that the parties to the contract were able to negotiate a price term -- i.e., that a market existed. I suggest that the district court in this case implicitly found that the contract did not contain a reliable price term. That is, the district court did not look to the price term in this contract as a basis for deciding that the price that City Gas quoted to Consolidated was unreasonable, thus constituting a refusal to deal, or as a basis for setting the price at which City Gas had to sell to Consolidated as ordered in the district court's injunction. In fact, the district court never decided what a reasonable price would be in the present case and instead delegated to the FPSC the task of setting a price for the forced sale. *Id. at 1512, 1534, 1545*. The district court, therefore, could not have had much **[**75]** confidence in the price term set in City Gas' contract with Florida Gas. And this is not surprising, given that the contract was abandoned. Because the contract did not contain a reliable price term, therefore, it could not provide evidence that a wholesale market actually existed -- let alone that City Gas operated in that market.

Even if the district court found that the contract did contain a reliable price term, indeed even if City Gas had actually performed under the contract, in my view the contract would still be irrelevant to the issue whether City Gas possessed monopoly power in the relevant market. City Gas' transaction with Florida Gas would not have occurred in the relevant geographic market, accepting for the sake of discussion the district court's definition of that market here.

The district court found that the relevant geographic market consisted of City Gas' service area, Consolidated's service area, and unserved portions of southwest Dade County. 665 F. Supp. at 1518-19. Thus, the district court defined the relevant area in terms of where Consolidated could look for its gas supply and where it could look to distribute that gas. The compatible area **[**76]** in Florida Gas' case would be totally different. Florida Gas operated in a different area of Dade County than the area in which Consolidated operated, and Florida Gas did not look to expand into southwest Dade County as did Consolidated. The only area of overlap between the geographic areas involved in the Florida Gas contract and in the present case would be City Gas' service area. Even that area, however, differs in the two situations. The contract with Florida Gas dates back to 1965; Consolidated did not begin its efforts to enter the natural gas business until 1982. Between 1965 and 1982, City Gas' service area changed significantly. As the district court itself emphasized, the size of that service area is an important factor in defining the relevant geographic market:

> the relevant geographic market should encompass all of the service area City Gas serves. . . . The effects of demand and cost are spread throughout City Gas' service area through the rate regulation process. Thus, City Gas can cross-subsidize prices or costs in any one part of its territory with revenues earned in the rest of its service area.

665 F. Supp. at 1518. For purposes **[**77]** of establishing the relevant geographic market, therefore, City Gas' service area *in 1982* had no relation to its service area *in 1965* at the time of the Florida Gas contract.

Even applying the factors used by the district court to define the relevant geographic market in the present case, it is apparent that the relevant geographic market for the Florida Gas contract was entirely different. Even if the parties had not abandoned that contract, it would have been performed in a different relevant market than the one involved here and therefore would have had no bearing on the question whether City Gas operated in the relevant market, let alone possessed monopoly power in that market.

For these reasons, in my view, the district court erred in holding that City Gas possessed monopoly power in the wholesale natural gas market.

V. LIABILITY UNDER SECTION 2

A. *Legal background*.

Section 2 of the Sherman Act provides in pertinent part: "Every person who shall **[*1284]** monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2 (1988). As **[**78]** the Supreme Court has stated:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966). In order to violate section 2, therefore, the monopolist must possess monopoly power and must also use that power anticompetitively. Section 2 does not prohibit the possession of monopoly power in and of itself -- of "monopoly in the concrete." Standard Oil Co. v. United States, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 55 L. Ed. 619 (1911); *see* Byars v. Bluff City News Co., 609 F.2d 843, 853 (6th Cir. 1979); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979) (citing *Standard Oil*), *cert. denied*, *444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)*.

In *United States v. Griffith*, the Supreme Court addressed the **[**79]** requirement of anticompetitive conduct and characterized it as "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor." 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L. Ed. 1236 (1948). In determining what conduct falls into this category, the idea of intent has always been central. As the Court stated in United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919): "in the absence of any *purpose* to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (Emphasis added.) The Court also emphasized the importance of intent in *Griffith*, when it indicated that mere possession of monopoly power could "itself [be] a violation of § 2, provided it is coupled with *the purpose or intent* to exercise that power" to foreclose competition. 334 U.S. at 107, 68 S. Ct. at 945 (emphasis added).

As the Court has recognized, however, "no **[**80]** monopolist monopolizes unconscious of what he is doing." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 n. 28, 105 S. Ct. 2847, 2857 n. 28, 86 L. Ed. 2d 467 (1985) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945) (L. Hand, J.)). The effects of a defendant's conduct on competitors and, more importantly, on consumers and on competition in general are also important factors in evaluating whether the conduct at issue is anticompetitive. *See* id. at 605, 105 S. Ct. at 2858-59. This point merely suggests that, as an evidentiary matter, "the requisite intent [under section 2] can be inferred if a defendant maintains his power by conscious and willful business policies, however legal, that inevitably result in the exclusion or limitation of actual or potential competition." Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 990 (D.C.Cir. 1977) (citing Aluminum Co., 148 F.2d at 428-31), *cert. denied*, *436 U.S. 956, 98 S. Ct. 3069, 57 L. Ed. 2d 1121 (1978)*.

A primary type of anticompetitive conduct in section 2 cases -- and the type **[**81]** of conduct at issue here -- is a defendant's refusal to deal with a competitor or potential competitor. Such refusals to deal fall into one of two general categories. One category involves monopoly leveraging. Monopoly leveraging occurs when a vertically integrated monopolist -- i.e., a monopolist that operates on several levels of the market -- uses its monopoly power on one level of the market to gain a competitive advantage on another level of the market. [24] For example, in *United States v. Terminal R.R. Ass'n, 224 U.S. 383, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912)*, a group of railroads servicing **[*1285]** the St. Louis area also owned the only railroad terminal that provided access to the city. The terminal owners used their monopoly power over the terminal to overcharge other railroads for access to the terminal and thereby to gain a competitive advantage in the downstream market for railroad service in St. Louis. The majority of refusal-to-deal cases under *section 2* fall into this monopoly-leveraging category. *See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*; *Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*; **[**82]** *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684 (1927)*; *Terminal R.R., 224 U.S. at 383, 32 S. Ct. at 507*; *Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)*; *Olympia Equip. Leasing Co. v. Western Union Tele. Co., 797 F.2d 370 (7th Cir. 1986)*, *cert. denied*, *480 U.S. 934, 107 S. Ct. 1574, 94 L. Ed. 2d 765 (1987)*; *Catlin v. Washington Energy Co., 791 F.2d 1343 (9th Cir. 1986)*; *Paschall v. Kansas City Star Co., 727 F.2d 692* (8th Cir.), *cert. denied*, *469 U.S. 872, 105 S. Ct. 222, 83 L. Ed. 2d 152 (1984)*; *MCI Communications Corp. v. AT & T, 708 F.2d 1081* (7th Cir.), *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*; *Byars, 609 F.2d at 843*; *Berkey Photo, 603 F.2d at 263*; *Hecht, 570 F.2d at 982*; *Poster Exch., Inc. v. National Screen Serv. Corp., 431 F.2d 334 (5th Cir. 1970)*, *cert. denied*, *401 U.S. 912, 91 S. Ct. 880, 27 L. Ed. 2d 811 (1971)*.

[83]** The second category of refusal-to-deal cases under *section 2* does not involve monopoly leveraging, but rather involves a monopolist's use of its monopoly power on one level of the market to maintain or expand its power on that same level of the market. For example, in *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*, a single newspaper in a small town had a monopoly over the newspaper advertising business in that town. When a local radio station began to sell radio advertising, the newspaper refused to sell advertising space to anyone also advertising on the radio. The newspaper thus anticompetitively used its monopoly power on one level of the market to maintain its power on that same level by preventing the radio from competing for advertisements. Although the majority of *section 2* cases fall into the first category, some important cases are of this second type. *See, e.g., Aspen, 472 U.S. at 585, 105 S. Ct. at 2847*; *Lorain Journal, 342 U.S. at 143, 72 S. Ct. at 181*; *Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980)*, *cert. denied*, *450 U.S. 917, 101 S. Ct. 1362, 67 L. Ed. 2d 343 (1981)*. **[**84]**

The key to both categories of refusal-to-deal cases -- whether they involve monopoly leveraging or exercises of monopoly power on a single level of the market -- is that the circumstances surrounding the refusal to deal must give rise to an inference of anticompetitive intent. Intent is rarely established by direct evidence; almost invariably, it is established by circumstantial evidence: the nature of the defendant's conduct and its effect on competition in the market demonstrate that the defendant intended to foreclose competition in the relevant market. In order to decide whether a refusal to deal of either type constitutes anticompetitive conduct under *section 2*, courts have developed two formulas for analyzing the circumstantial evidence in a given case: (1) the "essential facilities doctrine" and (2) the "intent test." These formulas aid the court in weighing and evaluating the circumstantial evidence in a given case to determine whether that evidence yields an inference of an intent to foreclose competition.

The first formula, the essential facilities doctrine, holds that an antitrust defendant may have acted anticompetitively if the circumstances of a case satisfy a four-part **[**85]** test: (1) the defendant is a monopolist in control of a facility or resource that is essential to a competitor's operation; (2) the facility or resource cannot practically or reasonably be duplicated by competitors; (3) the monopolist refuses to deal with competitors; and (4) the monopolist could feasibly deal with competitors. *See MCI, 708 F.2d at 1081*; *Hecht, 570 F.2d at 982*. If the four elements of this standard are satisfied, **[*1286]** an inference of the defendant's anticompetitive intent may arise and thus justify the imposition of liability under *section 2*.

The second formula, the intent test, directly addresses the issue of intent by evaluating the monopolist's conduct and determining whether, under the circumstances of the case, the conduct at issue demonstrates an illegal intent to destroy competition. If the conduct gives rise to an inference of anticompetitive intent, then the monopolist is

[24] Monopoly leveraging also refers to a monopolist's conduct in attempting to integrate vertically, by using its established monopoly power (on a given level of the market) to leverage its way into another level of the market.

subject to liability under *section 2*. *See* *Lorain Journal, 342 U.S. at 152-53, 72 S. Ct. at 186*; *Eastman Kodak, 273 U.S. at 375, 47 S. Ct. at 404*; *MCI, 708 F.2d at 1148-49*; *Poster Exchange, 431 F.2d at 339-40*. **[**86]**

In defining the character and limits of these tests, it is essential to understand their function as mechanisms for evaluating circumstantial evidence to determine whether the defendant acted -- i.e., refused to deal -- with an anticompetitive intent. The tests have validity only to the extent that they enable such a determination. Even if a court, for example, could mechanically apply the elements of the essential facilities doctrine to a given case, if that application would not support an inference of anticompetitive intent, then the test would not justify the imposition of liability under *section 2*. Indeed, as an analysis of the essential facilities cases demonstrates, liability in those cases is supported by more than the mechanical application of the doctrine's four-part test. The cases all possess certain features (beyond the test's four elements) that support an inference of anticompetitive intent.

One primary feature of the essential facilities cases is that they all involve monopoly leveraging. *See, e.g.,* *Otter Tail, 410 U.S. at 366, 93 S. Ct. at 1022*; *Associated Press, 326 U.S. at 1, 65 S. Ct. at 1416*; *Terminal R.R., 224 U.S. at 383, 32 S. Ct. at 507*; **[**87]** *Fishman, 807 F.2d at 520*; *MCI, 708 F.2d at 1081*; *Byars, 609 F.2d at 843*; *Berkey, 603 F.2d at 263*; *Hecht, 570 F.2d at 982*. [25] In fact, the courts in these cases, after stating the four elements of the doctrine, generally explain that the doctrine's underlying rationale is a concern about monopoly leveraging. The *MCI* court, for example, after describing the four-part test, stated that "such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another." *708 F.2d at 1132*.

[88]** Another distinguishing feature of the essential facilities cases is that, before the defendant refused to deal with the firm at issue, the defendant was already engaged in the business of providing the service at issue or access to the facility at issue, either to the refused firm itself or to other, similarly situated firms. Thus, in refusing to deal with a given firm, the defendant discriminates between customers. That discrimination, moreover, has an anticompetitive motivation. For example, in *Terminal R.R.*, the terminal owners were in the business of providing railroads with access to the terminal. The terminal owners allowed railroads that did not compete in St. Louis to use the facility at a non-extortionate charge. The terminal owners, however, allowed railroads that *did* compete in St. Louis to use that facility only at extortionate rates.

Because essential facilities cases generally involve these two features -- monopoly leveraging and discrimination -- the four elements of the doctrine merely provide a shorthand formula for inferring the presence of anticompetitive intent when the circumstances of a case follow a certain pattern. When the case does not follow that **[**89]** pattern and does not involve those same features, however, the essential facilities **[*1287]** doctrine is not a reliable means of analysis. [26]

The monopoly-leveraging feature of these cases, moreover, is itself such a powerful indication of anticompetitive intent that courts have frequently held it to be a sufficient basis, independent of the essential facilities doctrine, for imposing liability under *section 2*. *See, e.g.,* *Otter Tail, 410 U.S. at 366, 93 S. Ct. at 1022*; *Eastman Kodak, 273 U.S. at 359, 47 S. Ct. at 400*; **[**90]** *Olympia, 797 F.2d at 370*; *Catlin, 791 F.2d at 1343*; *Paschall, 727 F.2d at 692*; *Berkey, 603 F.2d at 263*; *Poster Exchange, 431 F.2d at 334*. These courts thus refer to the "monopoly-leveraging theory" as a third formula for evaluating anticompetitive intent. [27] Of course, the rationale for imposing liability in

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[25] *But see* *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984)*, *aff'd*, *472 U.S. at 585, 105 S. Ct. at 2847*. The Tenth Circuit there applied the essential facilities doctrine to a refusal to deal that did not involve monopoly leveraging. See *infra* slip op. at 5184-5187, , for a discussion of the case. In affirming the Tenth Circuit, however, the Supreme Court did not analyze the case under the essential facilities doctrine. In my view, this case is not properly classified as an essential facilities case.

[26] As Areeda and Hovenkamp note, the essential facilities doctrine can be mechanically applied to a broad range of situations: "the 'essential facility' is just an epithet describing the monopolist's situation: he possesses something the plaintiff wants. It is not an independent tool of analysis but only a label -- a label that beguiles some commentators and courts into pronouncing a duty to deal without analyzing the implications. . . ." P. Areeda & H. Hovenkamp, ***Antitrust Law***, para. 736.1a, at 701 (Supp. 1989).

these cases is the same as the principal rationale for imposing liability under the essential facilities doctrine: a monopolist's extension of power from one stage of the market into another provides a strong indication of anticompetitive intent and thus justifies the imposition of liability under section 2. The cases applying this "monopoly-leveraging theory" could also be characterized as "intent test" cases: they merely hold that the conduct of monopoly leveraging is sufficient evidence of an illegal intent to justify the imposition of liability under section 2. Indeed, some of these cases -- such as *Eastman Kodak* and *Poster Exchange* -- are generally cited in connection with the intent test.

[91]** The so-called "intent test" also provides an appropriate analytical tool in refusal-to-deal cases that do not involve monopoly leveraging and to which the essential facilities doctrine does not apply. In these cases, a monopolist with monopoly power in one level of a market refuses to deal with a competitor or potential competitor in order to gain a competitive advantage in that same market rather than in another level of the market. Under the intent test, a court can infer an anticompetitive intent from such conduct if, for example, the conduct represents a significant departure from the monopolist's normal pattern of business. That was the case in *Lorain Journal, 342 U.S. at 148-50, 72 S. Ct. at 183-84*, where a newspaper in the business of selling advertising refused to sell advertising space to certain customers; it was also the case in *Aspen, 472 U.S. at 589-93, 105 S. Ct. at 2850-52*, where an owner of a several ski areas in Aspen decided no longer to participate in an all-Aspen ski ticket after years of participating in the ticket. Because the intent test, like the essential facilities doctrine, is nothing more than a means of evaluating circumstantial **[**92]** evidence, however, it justifies the imposition of liability under section 2 only when, under the circumstances of the case, an anticompetitive intent is clearly inferable.

In the following sections, I analyze the present case under this general legal framework. In my view, City Gas' conduct did not constitute an antitrust violation under section 2. As I discuss in section B, this case is not a monopoly-leveraging case: City Gas is simply not a vertically integrated company; it operates only on one level of the natural gas market and has never attempted to extend its operation into another level of that market. For this reason, in section C, I distinguish the present case from the line of cases in which courts have imposed section 2 liability under the monopoly-leveraging theory.

In section D, I then discuss the essential facilities doctrine, which does not apply to **[*1288]** the present case either. In subsection 1, I assume for the sake of discussion that the essential facilities doctrine could apply to the present category of case, but show that the doctrine's four-part test would still not be satisfied under the circumstances here. In subsection 2, I show that the doctrine **[**93]** does not properly apply to the present type of case. To that end, I analyze the early Supreme Court cases on which the doctrine is based and then discuss the characteristics and limits of the doctrine as developed in those cases. On that basis, I conclude that this case is not an essential facilities case.

In section E, I analyze the case under the intent test. I first examine the Supreme Court's decision in *Lorain Journal* and discuss the characteristics and limits of the so-called intent test as it derives from that case. I then demonstrate that this theory is inapplicable to the present case.

In section F, I address two more recent Supreme Court cases -- *Aspen* and *Otter Tail* -- on which the district court heavily relied in the present case. Although neither of these cases expressly applies either the essential facilities doctrine or the intent test, they are still understandable in the context of the preceding sections' discussion. As I show, moreover, neither case justifies the imposition of liability here.

Finally in section G, I consider the Seventh Circuit's decision in *MCI*, which the district court also used as a basis for liability here. Although one **[**94]** holding in *MCI* (on which the district court, and the panel, relied) does not apply,

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[27] To summarize briefly the terminology, refusal to deal cases under section 2 involve two types of conduct, either monopoly leveraging or non-monopoly leveraging. Courts have developed a variety of formulas for analyzing the circumstantial evidence in these refusal-to-deal cases in order to determine whether the evidence gives rise to an inference of anticompetitive intent. These formulas include the essential facilities doctrine, the intent test, and the monopoly-leveraging theory.

another holding of the *MCI* case does apply, and under that holding, City Gas' conduct does not constitute a violation of *section 2*.

B. *Vertical Integration*.

Before addressing the issue of liability under *section 2*, I pause to discuss the concept of vertical integration, which underlies the idea of monopoly leveraging. On the subject of vertical integration, Areeda and Turner have this to say:

> Vertical integration, simply put, is the inclusion within a single firm of two or more stages in the production and distribution of an end-product. A firm integrates "upstream" or "backward" when it undertakes to produce raw materials or semi-fabricated components which have been or could be supplied by independent producers. A firm integrates "downstream" or "forward" when it undertakes further processing or distribution of products which have been or could be sold to independent producers or distributors.

3 P. Areeda & D. Turner, ***Antitrust Law*** para. 723 (1978). According to this definition, I cannot conceive of City Gas as a vertically integrated company. The natural gas business **[**95]** involves a relatively simple technology. At the far end of the production stream, natural gas reserves are located, and the gas is pumped from the ground. The natural gas is then transported through interstate pipelines from the reserves to new areas for distribution. Once the natural gas reaches these distribution areas, it is transferred to local pipesystems, which move the gas from the pipelines to the customers and thereby supply the gas on a retail level. Thus, three levels of operation exist in the natural gas business: (1) drilling gas, (2) transporting the gas for resale, and (3) supplying the gas to customers at retail. In the present case, City Gas is involved solely in the third level of operation -- supplying gas at retail. City Gas is therefore not a vertically integrated company. [28]

Even if City Gas on occasion had actually sold natural gas at wholesale **[**96]** to other retail distributors, I question whether that would have constituted vertical integration into another level of operation. Given FGT's predominance in the wholesale market, City Gas' participation in that market would have lacked antitrust significance: City Gas would still have lacked the market power to act anticompetitively under *section 2*. *See supra* slip op. at 5150-5160, . In addition, **[*1289]** the sale of some surplus gas by one natural gas retail supplier to another retail supplier would hardly constitute an integration by the first supplier into an upstream market. In my view, one could not seriously contend that City Gas' potential sales of its surplus gas to another retail supplier would constitute integration into the second level of the market -- the interstate transportation level on which FGT operates. Clearly, City Gas would in no way displace FGT's operation; on the contrary, all of the gas involved in City Gas' trade would still come from FGT. If City Gas' potential sales of gas for resale constituted vertical integration, the integration would have to occur on a sublevel of the retail distribution level of the market.

Although integration into **[**97]** such a sublevel could theoretically occur, practically it could not. Any potential sublevels of the supply operation would be so interrelated with each other that it would not be reasonable to consider them as severable. *See, e.g., Berkey Photo, 603 F.2d at 276-79* (describing features of "integrated firm"). Although a retail distributor generally has its own pipesystem, which picks up a supply of natural gas from a wholesale source and then distributes it to retail customers, the distribution at the back end of this process is not severable from the supply process at the front end of the operation. In order to distribute gas to customers, a retail distributor must have a pipesystem, and the pipesystem must have gas in it. Thus, the pipesystem must connect with a source of natural gas. Variations in the nature of the source, the size of the pipesystem, or even the character of the customers do not, I suggest, alter the degree of vertical integration of a retail (whether wholly retail or merely predominately retail) supplier of natural gas. In terms of the level of vertical integration, City Gas' operation is identical to what Consolidated's operation would (hypothetically) **[**98]** be. Both companies would possess pipesystems that distribute natural gas from a supply source to their customers. In my view, neither the fact that Consolidated's source might have been City Gas rather than FGT nor the fact that one of City Gas' customers might have been Consolidated is of any significance on the issue of vertical integration.

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[28] I have discussed in detail above the irrelevance of City Gas' abandoned contract with Florida Gas. *See supra* slip op. at 5158-5160, .

Because these two companies would be engaged in identical operations, integrated to the same degree and operating at the same levels of the market, this case is fundamentally different from the monopoly-leveraging cases to which the district court analogized the present case. City Gas is simply not using its power as a monopolist on one level of a market to expand its operation into, maintain its monopoly in, or force out competition from another level of the market. City Gas is doing nothing more than competing -- legitimately and successfully -- with Consolidated for more business in the retail natural gas market. City Gas was successful for a variety of reasons: it is bigger, it has been in business longer, it has better resources (i.e., a hook up to FGT's pipeline), it implemented an aggressive marketing strategy, and its prices were lower. **[**99]** In short, City Gas could provide customers with better service than Consolidated. We might say, with the benefit of hindsight, that as a result of a series of historical accidents, Consolidated missed the boat years back when it failed to get into the natural gas supply business. None of this, however, means that the antitrust laws impose a duty on City Gas to deal with Consolidated. I discuss why in the following sections.

C. *The Monopoly-Leveraging Theory*.

I first consider the line of cases stemming from *Eastman Kodak, 273 U.S. at 359, 47 S. Ct. at 400*, which holds that monopoly leveraging -- a monopolist's attempt to use its monopoly power on one level of the market to gain a competitive advantage on another level of the market -- is evidence of anticompetitive intent and constitutes a violation of *section 2*. The present case, however, as I discuss in the above section, does not involve monopoly leveraging: City Gas' conduct implicated only the retail level of the natural gas market. This line of cases therefore provides no basis here for imposing liability under *section 2*.

[*1290] In *Eastman Kodak*, the plaintiff operated a stock house for photographic **[**100]** supplies in Atlanta, Georgia. Kodak supplied the plaintiff, and other stock houses in the area, with wholesale photographic supplies. Kodak, however, itself began to purchase stock houses, expanding its operation from the wholesale level into the retail level as well. By 1910, Kodak had acquired control of all stock houses in Atlanta but the plaintiff's, and, at that point, Kodak refused to sell the plaintiff supplies at wholesale prices. In evaluating the situation, the Court stated:

> Although there was no direct evidence -- as there could not well be -- that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference, to warrant the submission of this question to the jury.

273 U.S. at 375, 47 S. Ct. at 404.

Similarly, in *Poster Exchange, 431 F.2d at 334*, [29] a frequently cited case decided by our predecessor court, a vertically integrated producer/distributor of motion-picture advertising accessories refused to supply a local distributor. The district **[**101]** court held that the defendant "intentionally used the monopoly power it had at the manufacturing level to eliminate [the plaintiff] as a competitor at the distributor-jobber level." *Id. at 339*. Applying *Eastman Kodak*, the district court held that this use of monopoly "power at one level to drive out competition at another" constituted a violation of *section 2*. *Id.*

The present case simply does not fit this factual pattern. City Gas possesses monopoly power as a natural gas supplier at the retail level. It does not possess monopoly power on the wholesale level; nor does it operate on that level. City Gas, moreover, has never used its monopoly power on the retail level in order to leverage its way into another level of the market. Rather, if City Gas has used its **[**102]** monopoly power at all in this case, then it has used that power only with respect to the retail distribution market for natural gas. Given these circumstances, *Eastman Kodak* and its progeny do not control here: those monopoly-leveraging cases justify no inference under

[29] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

the present circumstances of a "purpose to monopolize," *Eastman Kodak, 273 U.S. at 375, 47 S. Ct. at 404*. [30] Nor do the so-called "essential facilities" cases, which I discuss in the next section, justify such an inference here.

[103]** D. *Essential Facilities Doctrine*.

As the district court stated, "the essential facilities doctrine teaches that, when a business controls a scarce facility, it assumes an obligation to provide its competitors reasonable access to that facility." *665 F. Supp. at 1532* (citing *Byars, 609 F.2d at 856*). The rationale behind this doctrine, as the district court noted, is that "[a] refusal to deal in this context may be unlawful because it could result in the monopolist extending its power vertically from one level of production to another." *Id. at 1532-33*. With this qualification in mind, the district court then articulated the four-part standard for applying the doctrine:

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; **[*1291]** (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Id. at 1533 (quoting *MCI, 708 F.2d at 1132-33*).

This test **[**104]** must be understood for what it is: merely a mechanism for evaluating the circumstantial evidence in a given case to determine whether that evidence yields an inference of the defendant's anticompetitive intent. Before considering in subsection 2 the limits of this doctrine as a means of evaluating circumstantial evidence, I first examine in subsection 1 the district court's application of the test to the present case. In my view, that application is erroneous in and of itself.

1. The District Court's Analysis.

Applying this test to the present case, the district court concluded that all four elements were satisfied and thus held that City Gas was liable under *section 2* for refusing to deal with Consolidated. *See* *id. at 1534-35*. The district court first held that "City Gas, a monopolist, controlled an essential facility -- a pipeline that transported wholesale gas." *Id. at 1534*. Under the second element of the test, the district court held that duplication by Consolidated of City Gas' facility -- the lateral pipe connecting City Gas' pipesystem to FGT's pipeline -- would be "unreasonable 'due to regulatory restriction, and delays, and the expense and time required.'" **[**105]** *Id.* (quoting *Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1521 (10th Cir. 1984)*, *aff'd*, *472 U.S. at 585, 105 S. Ct. at 2847*). Applying the third part of the test, the district court noted that City Gas had offered to sell gas to Consolidated for ten cents per therm over cost (City Gas' cost of purchasing gas at wholesale from FGT), which the district court held "essentially amounted to a refusal to deal at all." *Id.* Finally, under the fourth part of the test, the district court held that City Gas could feasibly have sold wholesale gas to Consolidated.

In my view, the district court misapplied the doctrine. First, as I discuss above, *see supra* slip op. at 5150-5160, , City Gas is not a monopolist in the wholesale market. Second, the facility under City Gas' control is not properly labeled "essential" under the doctrine. Third, Consolidated could practically and reasonably have duplicated City Gas' lateral connection to FGT's pipeline. Fourth, the district court improperly held that City Gas' offered price constituted a refusal to deal. I address these points in turn.

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[30] As I discuss below, *see infra* part VI, the present case also involves difficulties in fashioning a remedy that do not arise in these monopoly-leveraging cases. In these cases, the defendants were already engaged in providing the service at issue: Kodak sold photographic supplies at wholesale; National Screen sold movie advertising accessories at wholesale. Here, City Gas never sold gas at wholesale to anyone. In fashioning a remedy, therefore, the district court could look to no price established by City Gas for the transaction at issue. The district court instead had to set its own price (a task it delegated to the FPSC). That task presents a set of complications that I explore below. Regarding these problems, however, the monopoly-leveraging cases provide no guidance.

The district court based its application **[**106]** of the essential facilities doctrine on the following factual findings. Before Consolidated received its FERC allocation in 1984, Consolidated could have purchased gas for resale only from City Gas. After 1984, although Consolidated would have been authorized to purchase from FGT, it "would have encountered a prohibitive transportation problem." *665 F. Supp. at 1534*. That is, construction of "[a] lateral pipeline connecting Consolidated's facilities to the FGT main would have cost $ 250,000.00." *Id.* The district court concluded that "there is grave doubt as to whether Consolidated could have effectively competed with City Gas based on these additional expenses." *Id.*

The test's first element requires "control of the essential facility by a monopolist." *MCI, 708 F.2d at 1132-33*. Based on its earlier holding that City Gas possessed monopoly power in the wholesale market, the district court assumed that City Gas was a monopolist with control over the "essential" facility -- presumably, "a pipeline that transported wholesale gas." *665 F. Supp. at 1534*. As I discuss above, *see supra* slip op. at 5150-5160, , City Gas did **[**107]** not possess monopoly power in the wholesale market; indeed, City Gas did not even operate in that market. The district court thus improperly concluded that City Gas was a monopolist for purposes of the first element of the essential facilities doctrine.

In addition, the district court improperly characterized the facility at issue here as "essential" under the first part of the test. The district court initially identified the "essential facility" as "a pipeline that transported wholesale gas." In so doing, the district court mischaracterized a very **[*1292]** important feature of this facility: that is, City Gas' pipesystem transports only *retail* -- and not *wholesale* -- natural gas. [31] As such, this facility could not be essential to Consolidated's operation. Consolidated needed a facility that supplied wholesale gas. Because this facility supplied only retail gas, it did not do what Consolidated needed it to do. For this reason, the facility cannot properly be labeled "essential" under the doctrine's first element.

[108]** I also attack for one other reason the district court's conclusion that this facility is essential. As I note above, *see supra* slip op. at 5168, , the essential facilities doctrine is designed to deal with the danger that a monopolist in control of a scarce resource will "extend[] its power vertically from one level of production to another." *665 F. Supp. at 1532-33*. This concern, in my view, also defines the term "essential." That is, a facility becomes essential if, in restricting competitors' access to that facility, a monopolist gains a competitive advantage in another level of the market -- that is, a market downstream or upstream from the market containing the facility itself. As courts have reiterated again and again, the antitrust laws do not protect competitors; rather, the laws protect

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[31] As a more general problem, the district court improperly identified the facility at issue here. According to the district court's description, the facility appears to be a facility (the pipesystem) and the resource contained in that facility (the natural gas for resale). The district court, however, also referred to "City Gas' lateral pipe" as the essential facility. This lateral pipe connected City Gas' pipesystem to FGT's pipeline and enabled City Gas to pump a supply of natural gas into its pipesystem. Which of these three elements -- the gas, the lateral pipe, or the pipesystem itself -- constituted the essential facility? Clearly, all three components, together, formed the essential facility here. Consolidated did not want access just to City Gas' lateral pipe. That pipe was located a long distance from Consolidated's pipesystem. Consolidated, however, needed more than just gas: it needed access to City Gas' entire pipesystem in order to obtain the gas. Of course, Consolidated wanted access to that pipesystem only insofar as it contained gas, thus making the lateral pipe (through which City Gas acquired its gas) an indispensable component of the facility. In short, Consolidated wanted to hook into City Gas' pipesystem, at a point near Consolidated's own pipesystem, in order to take gas from City Gas' pipesystem (gas from FGT's pipeline that entered City Gas' pipesystem through City Gas' lateral pipe) in order to supply its own pipesystem. In effect, therefore, Consolidated wanted access to City Gas' entire distribution operation.

This case is not about a piece of City Gas' system, but rather about that system as a whole. Consolidated claimed that in order to compete with City Gas, it had to have access to City Gas' system. Consolidated needed gas from FGT, and, according to Consolidated, City Gas -- with its lateral pipe and pipesystem -- stood between Consolidated and FGT. Thus, Consolidated either had to go around City Gas' system or through it. Consolidated argued that going around that system would be too expensive to allow Consolidated to compete (in effect, what the second element of the essential facilities doctrine requires). It therefore claimed that access to the facility -- i.e., City Gas' system as a whole -- was "essential." Consolidated, therefore, wanted to be a customer of City Gas', but with an important difference from the rest of City Gas' customers: Consolidated wanted City Gas to sell this gas at a lower price than City Gas charged its other customers so that Consolidated itself could turn around and sell the gas.

competition. *See, e.g., Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 394 (7th Cir. 1984)*, *United States v. Syufy Enters., 903 F.2d 659, 663 (9th Cir. 1990)*. This principle, of course, applies to the essential facilities doctrine as well: the doctrine addresses the danger of monopoly leveraging and the anticompetitive effects **[**109]** that it has on *competition in general*. Applying this principle to the present case, City Gas' system is not essential in this sense. City Gas is not attempting to extend its power from one level of the market into another. City Gas, a monopolist at the retail distribution level, operates only at the retail level of the natural gas business. Its facility obviously relates to competition on that level, but the facility is not a mechanism for extending City Gas' power to another level of the market -- or for that matter, from another level of the market onto the retail level. City Gas operates solely on a single level of the market. The facility here, therefore, cannot properly be labeled "essential."

Even assuming this facility could be labeled "essential," I question the district court's determination that Consolidated could not practically or reasonably have duplicated it for purposes of the second element of the test. Consider what Consolidated **[*1293]** would have had to do in order to duplicate this facility. Consolidated already had a pipesystem in place from the days of its LP distribution. In order to change to natural gas distribution, therefore, Consolidated merely **[**110]** had to find a source of wholesale gas. Buying gas from FGT, the regional wholesale supplier, required two things: (1) an allocation from FERC, and (2) a lateral pipe connecting Consolidated's pipesystem to FGT's pipeline. Consolidated applied to FERC for the allocation on May 21, 1982. FERC issued its final decision granting the allocation on September 19, 1984. The process thus took two years and four months. The lateral pipe would have cost Consolidated $ 250,000. These factors of time and expense are not sufficient to support the conclusion that Consolidated could not reasonably or practically have connected directly to FGT's pipeline.

As I discuss above, *see supra* slip op. at 5157-5158, , given Consolidated's projected future profits as a company with a natural gas supply, Consolidated could feasibly have obtained underwriting for a $ 250,000 bond to finance the lateral pipe. Based on the figures presented by Consolidated's expert witness, the company's annual profits, with a supply of gas, would have been approximately $ 267,000, and the company would have generated those profits for twenty years. The annual interest rate on a $ 250,000 bond, figured at a rate of fifteen **[**111]** percent, would be $ 37,500. Taking into account Consolidated's tax deduction for those interest payments, the real interest would be $ 24,750 annually -- a figure representing 9.3% of Consolidated's annual profits. After paying that interest, Consolidated would be left with $ 242,250 in annual profits. Given those profits, Consolidated would have little trouble paying off the $ 250,000 principal on its bond offering at the end of twenty years. As these figures demonstrate, given the profits that Consolidated claims it could have generated for twenty years, it was clearly feasible for the company to undertake a $ 250,000 expenditure on a lateral pipe that would give it a supply of natural gas from FGT, an established wholesale supplier of natural gas.

This conclusion is also consistent with existing caselaw, which suggests that duplication of the facility must involve a high degree of impracticality and infeasibility before it will satisfy the essential facility doctrine's second element. *MCI, 708 F.2d at 1081*, a case on which the district court itself relied, illustrates this limit. In that case, MCI brought suit against AT & T, claiming that AT & T's refusal to **[**112]** allow MCI to interconnect with various AT & T facilities constituted monopolization in violation of *section 2* of the Sherman Act. A jury awarded MCI $ 1.8 billion; the Seventh Circuit affirmed in part, and reversed in part. I briefly state the facts.

Before 1969, the telecommunications industry existed as a lawful monopoly. The Bell System companies provided local exchange service, and AT & T provided long-distance service, which used the Bell System's exchange facilities to connect with customers on the local level. AT & T also used its long-distance lines to provide special services such as point-to-point lines (private lines connecting two locations) that do not require switching through the local exchange system and to provide other services such as foreign exchange (FX) lines and common control switching arrangements (CCSA) that do require switching through the local system.

In 1963, MCI began its attempt to enter the long-distance telephone market. It applied to the FCC for permission to construct and operate a long-distance system providing private-line service between Chicago and St. Louis. That service would require interconnections to ordinary local telephone lines in **[**113]** the two cities. Bell's local exchange system was all that was available. Six years later, in 1969, after a long administrative process, in which AT & T opposed MCI's application, the FCC finally approved MCI's request. As a result of that decision, applications similar to MCI's poured into the FCC. The FCC instituted a rulemaking procedure to deal with the applications. In June 1971, the FCC issued a decision, *see Establishment of Policies & Procedures for Consideration of Applications to Provide Specialized* **[*1294]** *Common Carrier Servs.* (*Common Carrier* decision), *24 F.C.C.2d 318 (1970)*, and as a result, AT & T agreed to enter into negotiations with MCI concerning the local interconnections. They reached an interim agreement in September 1971, but because AT & T disputed the reach of the *Common Carrier* decision, that agreement did not allow MCI interconnections for its FX or CCSA services. Finally, in April 1974, the FCC clarified the reach of its earlier decision and ordered AT & T to provide the disputed interconnections. Shortly before that decision, MCI filed its antitrust suit.

MCI's attempt to enter the telephone market thus involved substantial **[**114]** investments in time and capital. MCI spent *six* years engaged in administrative proceedings, with AT & T as an adversary, in order to gain initial FCC approval in 1969 for construction and operation of its St. Louis to Chicago line. *Two* more years passed before the FCC handed down its *Common Carrier* decision in 1971, and then another *three* years until the FCC finally clarified the effect of that decision in 1974 by issuing an order requiring AT & T to provide the disputed interconnections. From start to finish, the entire approval process took *eleven* years. In addition, MCI made a substantial expenditure in constructing its own long-distance lines. The original Chicago-to-St. Louis line required a terminal in each city and microwave relay towers along the whole length of the line to connect the terminals. MCI then extended the line from these original points as the company began to construct a nationwide long-distance system. This venture, moreover, to develop a nationwide long-distance system that would compete with AT & T, involved a tremendous capital investment, and even more initiative and risk. In order to finance its venture, MCI raised $ 110 million in loans **[**115]** and underwriting by leading lenders and equipment suppliers. As the *MCI* court stated, this made MCI "one of the largest start-up ventures in the history of Wall Street." *708 F.2d at 1095*.

In contrast, Consolidated completed its allocation proceedings before FERC in twenty-eight months, but was then unwilling to spend $ 250,000 on a lateral pipe. Compare that process in terms of time and money to the eleven-year administrative proceeding that MCI went through and to the $ 110 million that MCI raised and *actually invested*. Moreover, given Consolidated's net worth without a natural gas supply -- approximately $ 775,000 according to its own experts -- it could easily have financed the $ 250,000 required to construct the lateral pipe. *See supra* slip op. at 5157-5158, 5171 , . If we take into account what Consolidated claims it would have been worth with a natural gas supply -- *over $ 2.25 million* according to its expert witness -- its claim that it could not feasibly spend $ 250,000 on a lateral pipe becomes truly preposterous. As the facts in *MCI* suggest, a high degree of impracticality and infeasibility must be demonstrated in order to satisfy **[**116]** the second element of the essential facilities doctrine. [32] Given the nature of MCI's investment in terms of time, money, and initiative, as compared to the significantly smaller investment that Consolidated was unwilling to make here, Consolidated has not satisfied the second element of the essential facilities doctrine. *MCI* surely does not stand for the proposition that a firm has a duty to provide a free ride to potential market entrants, and that is exactly what Consolidated is after by claiming that access to City Gas' pipesystem is essential to Consolidated's ability to enter the market.

[117]** In addition, I also question whether City Gas has actually refused to deal in this case. The district court found that City Gas made a series of offers to sell to Consolidated, the lowest of which was at a price of cost (i.e., the cost of City Gas' wholesale gas from FGT) plus five cents per therm and held that those prices were **[*1295]** so unreasonable that they constituted a refusal to deal under *section 2*. The district court, however, never determined what a reasonable price would have been. Indeed, the district court never set any price whatsoever: in granting Consolidated's request for an injunction ordering City Gas to supply wholesale gas, the district court never set a price for that mandated sale, but rather delegated the price-setting task to the FPSC. *See 665 F. Supp. at 1512, 1534, 1545*. If the district court never determined what a reasonable, or "fair" [33] price would have been, then I

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[32] The nature of the facilities that courts have held are not practically or feasibly able to be duplicated in other essential facilities cases also supports my conclusion here. *See, e.g., Terminal R.R., 224 U.S. at 383, 32 S. Ct. at 507* (major railroad terminal); *Fishman, 807 F.2d at 520* (Chicago stadium); *Aspen, 738 F.2d at 1509* (ski mountain); *Hecht, 570 F.2d at 982* (Robert F. Kennedy Stadium).

question on what basis it could legitimately have determined that City Gas' offered price was so unreasonable that it constituted a refusal to deal under *section 2*. As I discuss in more detail in part VI, the district court could have made that determination only **[**118]** in light of its determination of what the "fair" price would have been -- that is, by comparing the offered price to the fair price and deciding that the offered price was so much higher than the fair price that it was unreasonable and constituted a refusal to deal. Without determining the fair price, therefore, the district court had no basis for concluding that City Gas' offered price constituted a refusal to deal. The third prong of the essential facilities doctrine is thus not satisfied here either.

For these reasons, the district court in my view improperly applied the essential facilities doctrine to the present case. As this discussion also suggests, this case is radically different from the typical essential facilities case. That the district court would nevertheless so readily apply the doctrine and also find it to be controlling **[**119]** -- and that the court today would affirm that result -- are therefore matters of considerable concern to me. I think it is necessary to take this opportunity to analyze thoroughly the character and the limits of the essential facilities doctrine, and the implications of forcing its application to a case such as this one. I undertake to do so in the following subsection.

2. The Doctrine's Limits.

The essential facilities doctrine, as I explain above, *see supra* slip op. at 5161-5164, 5168-5169, , , is nothing more than a mechanism that aids courts in evaluating circumstantial evidence to determine whether the evidence supports an inference of anticompetitive intent. Given a certain type of fact pattern, the doctrine's four-part test will generally give rise to such an inference. Absent that type of fact pattern, however, even if the facts of the case could be found to satisfy the test, they would not support an inference of anticompetitive intent. Such an inference depends on more than the four elements of the test; it arises from the larger factual context -- the circumstantial evidence -- of the case as a whole. The four elements of the doctrine therefore may indicate, **[**120]** but by no means define, the kind of refusal-to-deal cases in which an inference of anticompetitive intent is justified. In this subsection, I undertake to describe more fully the factual features and the kinds of circumstantial evidence that are necessary to give rise to an inference of anticompetitive intent in addition to satisfying the essential facilities doctrine and its four-part test.

I begin with a discussion of the doctrine's origin and application in two Supreme Court cases -- *United States v. Terminal R.R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912)*, and *Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*. Based on these cases, I describe the factual context necessary for a proper application of the essential facilities doctrine. I then consider the present case in light of that discussion in order to demonstrate that this case lacks certain key features that must be present if the essential facilities doctrine is justifiably to give rise to an inference of anticompetitive intent and require the imposition of liability under *section 2*.

In *Terminal R.R.*, frequently cited as the original **[**121]** essential facilities case, a group of railroads that serviced St. Louis acquired ownership of a railroad terminal **[*1296]** that provided the sole means of access to St. Louis. The terminal owners allowed competing railroads to use the terminal only on payment of an extremely high fee, an arrangement that secured a competitive advantage to the terminal owners' railroads. The terminal owners, however, allowed railroads from East St. Louis to use the terminal without payment, apparently because a toll bridge in Memphis, Tennessee provided the East St. Louis railroads an alternate means of access to the city. As a result of this situation, the federal government (and not a private plaintiff) brought an antitrust enforcement action against the terminal owners. [34]

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[33] As I explain in detail below, *see infra* slip op. at 5196-5203, , by "fair" price, I mean the price required by the *just compensation clause of the fifth amendment*.

[34] The government brought suit under *section 4* of the Sherman Act, *15 U.S.C. § 4*, contending that the arrangement was a combination in restraint of trade in violation of *section 1* of the Sherman Act, *id. § 1*.

The Supreme **[**122]** Court held in favor of the government and remanded the case to the district court with instructions to enter a decree requiring the terminal owners to provide all competing railroads with access to the facility "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane . . . as that occupied by the proprietary companies." *224 U.S. at 411, 32 S. Ct. at 516*. Two principal considerations supported the Court's decision. First, the Court noted that the terminal owners were not merely terminal owners. Their activities were not limited to operating the terminal, but also included the provision of railroad services in St. Louis. *See id. at 406-07, 32 S. Ct. at 514*. The terminal owners' railroads thus gained a competitive advantage in providing railroad service by virtue of their terminal ownership. The case thus involved a classic monopoly-leveraging situation: the terminal owners were using their monopoly power on one level of the market to gain a competitive advantage on another level of the market. Second, the terminal owners discriminated between **[**123]** other railroads in imposing the usage fee. The terminal owners did not, for example, assess a higher fee on railroads operating in East St. Louis. Based on these considerations, the Court issued its instructions concerning the decree. [35]

The next seminal Supreme Court case to which lower courts have pointed in discussing the essential facilities doctrine is **[**124]** *Associated Press*. In that case, the government brought an action seeking to enjoin enforcement of a newspaper association's bylaws. That association consisted of more than 1200 newspapers involved in the collection and distribution of news; the bylaws prohibited distribution or sale of news to nonmembers by any of the association's members. The government claimed that the arrangement constituted a conspiracy in restraint of trade -- a violation, as in *Terminal R.R.*, of *section 1* of the Sherman Act -- as well as an attempt to monopolize in violation of *section 2* of the Act.

The Court held that, in restraining the sale of news to nonmembers that competed with the association's members, the bylaws were designed to give members a competitive advantage over nonmembers and thus constituted a violation of the antitrust laws. The Court therefore approved an injunction ordering the association also to provide news to nonmembers on nondiscriminatory terms. *326 U.S. at 21, 65 S. Ct. at 1425*. In *Associated Press*, as in *Terminal R.R.*, the Court emphasized that the defendant attempted to use its power as a newspaper association to gain a competitive advantage over **[**125]** nonmember newspapers -- i.e., monopoly leveraging. In addition, as in *Terminal R.R.*, the association discriminated between newspapers in allowing access to its services: members, of course, enjoyed the benefits of the association's news, whereas nonmembers enjoyed **[*1297]** no benefits, and the bylaws prevented certain newspapers from becoming members. Finally, as in *Terminal R.R.*, the element of conspiracy underlying formation of the association (or the group of railroads owning the terminal) influenced the Court's decision.

If we are to understand the essential facilities doctrine as an outgrowth of these cases, as the lower courts applying the doctrine suggest we should, then we must understand the limits of the doctrine as articulated in these cases. To that end, I offer some observations on the teachings of *Terminal R.R.* and *Associated Press*.

These cases demonstrate three distinct factual features. First, the defendants were already engaged in the business of providing access to the essential facility or resource at issue. The terminal owners in *Terminal R.R.* were in the business of providing terminal access to railroads. The newspaper association in **[**126]** *Associated Press* was in the business of gathering and distributing news to newspapers. In short, the defendants in both cases were already in the business of selling the essential resource, or service, to other entities. Second, the defendants were vertically integrated: they also operated on another level of the market, and the facility or resource at issue was essential to their operations on that level as well. The terminal owners in *Terminal R.R.* ran their own trains into St. Louis, and that operation required access to the terminal. The member newspapers in *Associated Press* ran their own newspapers and depended on the association for their news. Third, the defendants in these cases, in

[35] The Court rejected the government's request for a dissolution of the ownership group. Relying on a proposition that "'injury to the public by the prevention of an undue restraint on or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest,'" *id. 224 U.S. at 409, 32 S. Ct. at 515* (quoting *Standard Oil, 221 U.S. at 78, 31 S. Ct. at 523*), the Court held that mandating equal access to the facility on the part of all railroads would accomplish the requirements of the antitrust laws most consistently with the public's interest in a well-operated railroad terminal.

control of essential facilities at one level of their operations, competed on the second level of operation with other entities that also required access to the essential facility in order to operate at this second level. The terminal owners in *Terminal R.R.* competed with other railroads servicing St. Louis, and those other railroads required access to the terminal in order to reach the city. Likewise, the member newspapers in *Associated Press* competed with nonmember newspapers **[**127]** that needed the association's news. Given these three factors, the defendants' attempts to restrain their competitors' access to the essential facilities at issue became significant for antitrust purposes: under the circumstances, that conduct gave rise to an inference of anticompetitive intent.

The essential facilities doctrine merely provides a means to evaluate this type of fact pattern in order to determine whether the facts give rise to such an inference of intent. I question how far courts can legitimately extend the doctrine when the circumstances of a case fail to approximate the fact pattern of these two cases. The cases themselves provide some guidance on this point. As the Supreme Court indicated in *Terminal R.R.*, it would have been a different case if the terminal owners had been solely in the terminal business and not in the railroad business as well. *See* *224 U.S. at 406-07, 32 S. Ct. at 514*. If that were the case, the terminal owners' conduct in charging high prices would not have had the anticompetitive overtones that the conduct had in the actual case. The case would not have been a monopoly-leveraging case: the terminal owners would not have **[**128]** been using their monopoly power over the terminal to gain a competitive advantage in supplying railroad services; they would simply have been charging some railroads a higher fee for use of the terminal. The inference of anticompetitive intent in the case did not arise from the conduct -- the high fee charged for access to the terminal -- in and of itself; rather, the inference arose from the *effect* of the high fee on the terminal owners' competitive position in the downstream railroad market. By charging downstream competitors a higher fee, the terminal owners obtained a competitive advantage in providing railroad service to St. Louis. *See* *id. at 408, 32 S. Ct. at 515*. If the terminal owners had not also been in the business of providing railroad services, then their high fee charges would have produced no such competitive advantage and would not, therefore, have given rise to an inference of anticompetitive intent.

The circumstances of the *Associated Press* case also support this analysis. The association's refusal to supply news to nonmember **[*1298]** newspapers gave the member newspapers a competitive advantage in the newspaper market. The refusal **[**129]** to deal thus gave rise to an inference of anticompetitive intent. If the association were differently constituted -- for example, as an independent news-reporting service, not composed of newspapers, and not engaged in the newspaper business -- its refusal to deal with nonmember newspapers would not have given the association a competitive advantage on another level of operation. The association, in that case, would not have engaged in monopoly leveraging, and its refusal to deal would not have signaled an anticompetitive intent.

These two cases would also have been different if the defendants had not already been in the business of providing access to the essential facility at issue, which is exactly the situation in the present case. This type of situation, however, is so fundamentally different from the fact pattern of *Terminal R.R.* and *Associated Press* that the Court in those cases did not touch on how to approach it. I therefore discuss a hypothetical case in order to demonstrate that the essential facilities doctrine does not properly extend to this type of situation: that is, absent the first factual feature of these two cases, satisfying the four elements of the essential **[**130]** facilities doctrine will not give rise to an inference of anticompetitive intent. As I also demonstrate, the imposition of liability under *section 2* in this hypothetical case would have practical implications that do not arise in the typical essential facilities case. The typical cases, moreover, fail to foresee these practical implications, let alone to address them. For this reason as well, the essential facilities cases do not control the result in this hypothetical case.

Assume that a newspaper called the *Times* possesses a one hundred percent share of the daily newspaper market in a given city. The *Times* has achieved this position by providing first-rate news and reporting services for years. The *Times* has a large reporting staff and, because it has been in business for a long time, its reporters have a vast web of information sources throughout the city. Assume, further, that the *Post* undertakes to publish a daily newspaper in the same city, thus entering into competition with the *Times*. The *Post*, however, has only enough resources for a small reporting staff, and even if it could afford a larger staff, it would take several years to build up the information **[**131]** network that the *Times*' reporters have developed. The *Post*, therefore, wants to buy news from the *Times*. The *Times*, however, refuses to sell to the *Post*. The *Times* has never sold its news to anyone (newspapers or otherwise) and has no intention of starting to do so now. As the *Times* also admits, it has no interest in supplying news to a rival newspaper so that the rival can compete. Indeed, in the *Times'* view, if the *Post* cannot survive in the daily newspaper market unless it can obtain news from the *Times*, that is all for the better. As would be expected, the *Post* has a difficult time making ends meet. The *Post*, therefore, hires some lawyers of its own and brings an antitrust suit against the *Times*, seeking an injunction ordering the *Times* to sell news to the *Post*.

I suggest that the court must deny this request for an injunction: the essential facilities doctrine provides no basis for imposing a duty to deal on the *Times* under these circumstances. As a preliminary point, this is not a monopoly-leveraging case such as *Terminal R.R.* or *Associated Press*. The *Times* is not a vertically integrated entity: the **[**132]** paper assembled its large reporting staff and developed its information networks entirely for purposes of, indeed as an integral part of, its own newspaper operation and not, as in *Associated Press*, to produce news for resale. The *Times* has never sold news to any other entity whatsoever. Its refusal to sell news to the *Post*, therefore, could not be classified as an attempt to use its "monopoly" power as a newsgatherer to maintain its distribution monopoly: its newsgathering operation is an integral part of its newspaper operation as a whole. [36] Given the constantly reiterated **[*1299]** rationale of the essential facilities doctrine -- to guard against the evils of monopoly-leveraging -- this hypothetical case would thus appear to fall beyond the doctrine's scope. For the sake of discussion, I assume that the essential facilities doctrine could theoretically apply to this non-monopoly-leveraging case. In practice, however, it could not.

[133]** Even assuming the elements of the essential facilities doctrine were satisfied here -- i.e., the court finds that the *Times* is a monopolist in control of an essential resource that the *Post* cannot reasonably or practicably duplicate, and the *Times* has refused to supply that resource to the *Post* although it could feasibly do so -- under the circumstances of this case, the *Times*' conduct in refusing to deal with the *Post* does not give rise to an inference of anticompetitive intent. Because the *Times* has never sold news, it has not acted inconsistently in refusing to deal with the *Post*. In the typical essential facilities case, in contrast, the defendant does act inconsistently, refusing to deal with some entities but not with others. In *Terminal R.R.*, for example, the terminal owners charged some railroads an exorbitant fee for access to the terminal and charged others a reasonable fee for the same access. In these typical cases, moreover, the inconsistent treatment relates to potential customers' status as competitors: the terminal owners in *Terminal R.R.*, for example, refused to deal only with railroads that also competed with the terminal **[**134]** owners' railroads. The inconsistent treatment there, coupled with the refused railroads' status as competitors, signaled the defendant's anticompetitive intent.

If the defendant treats all potential customers the same, however, even if it uniformly refuses to deal with any at all, that conduct would not give rise to an inference of anticompetitive intent. Thus, the *Times*, unlike the terminal owners, has not acted inconsistently in refusing to deal with the *Post*. For whatever reasons, the *Times* has chosen not to sell its news at all, and its decision not to deal with the *Post* merely follows from that blanket policy. Its decision is not inconsistent. Nor does the decision relate to the *Post's* specific status as competitor. Unlike the fact pattern in *Terminal R.R.* and other typical essential facilities cases, therefore, the circumstances of this hypothetical case give rise to no inference of anticompetitive intent.

The practical implications of imposing a duty to deal on the *Times* also suggest the inapplicability of section 2 under these hypothetical circumstances. In *Terminal R.R., Associated Press*, and other typical essential facilities cases, the **[**135]** defendants, when ordered to deal with the excluded entities, did not have to undertake a new business or provide a new service. They merely had to give the excluded entities the *same service that was already being provided* to other entities. Thus, in response to the Court's decision, the defendants in both cases had to stop *not doing what they usually did*. The Court's decision enjoined them to operate normally with respect to all customers. In this hypothetical case, however, if the *Times* were ordered to deal with the *Post*, the court's decree would be fundamentally different from the decrees in typical essential facilities cases. This decree would not order the *Times*

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[36] The monopoly-leveraging cases that I discuss above, *see supra* slip op. at 5167-5168, , would therefore not control here either.

to resume its ordinary course of operation; rather, it would order the *Times* to undertake a *new* course of operation, *to begin providing a service that it had never before provided*. In my view, this kind of a case is fundamentally different from the typical essential facilities case. [37] Not only is this kind of case factually and legally inconsistent with typical essential facilities cases, but the practical implications of imposing a duty to deal under these circumstances are radically **[**136]** different than such implications in the typical essential facilities cases. Consequently, those cases simply do not control here.

As a general matter, the antitrust laws do not impose a positive duty on companies to help competitors. The antitrust laws **[*1300]** focus on various types of conduct that inhibit competition. The laws, however, do not purport to facilitate competition by imposing a duty on a company to help another company into competition. As the Seventh Circuit stated in *Olympia Equip. Leasing Co. v. Western Union Tele. Co., 797 F.2d 370, 375-76 (7th Cir. 1986)*, *cert. denied*, *480 U.S. 934, 107 S. Ct. 1574, 94 L. Ed. 2d 765 (1987)*, a firm

> has no general duty to help its competitors. . . . "There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in **[**137]** tort, have generally been understood to impose only the latter." . . . A monopolist has no duty to reduce its prices in order to help consumers, . . . and no duty to extend a helping hand to new entrants. . . .

Id. (quoting *USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 512-13 (7th Cir. 1982)*, *cert. denied*, *462 U.S. 1107, 103 S. Ct. 2455, 77 L. Ed. 2d 1334 (1983))* (citations omitted). It is not surprising, therefore, that in every essential facilities case disclosed by my research in which a court imposed a duty to deal, the defendant was already engaged in the course of dealing at issue. *E.g., Otter Tail, 410 U.S. at 428, 93 S. Ct. at 1022* (defendant already in business of wheeling power); *Associated Press, 326 U.S. at 1, 65 S. Ct. at 1416* (defendant already in business of selling news); *Terminal R.R., 224 U.S. at 383, 32 S. Ct. at 507* (defendant already in business of operating railroad terminal); *Fishman, 807 F.2d at 520* (defendant already in business of leasing Chicago stadium); *Aspen, 738 F.2d at 1509* (defendant already engaged in practice **[**138]** of providing all-Aspen ski ticket), *aff'd*, *472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; *MCI, 708 F.2d at 1081* (defendant already in business of providing interconnections to local telephone exchange networks); *Hecht, 570 F.2d at 982* (defendant already in business of leasing Robert F. Kennedy Stadium). In these cases, moreover, the defendant had *in fact* been engaged in the course of dealing at issue: a duty to deal has never been imposed on a company under the rationale that the company could, in the court's view, feasibly engage in that course of conduct. Under this established law, therefore, the *Times* has no "positive duty" to sell news to the *Post*. But that is exactly the kind of duty that an injunction ordering it to deal with the *Post* would impose on the *Times*.

This legal principle -- that the antitrust laws impose no positive duty on a company to help its competitors -- is also supported by strong policy considerations. The imposition of a duty to deal in such circumstances would encourage economic inefficiencies and promote inequity. In order to achieve its level of success in the newspaper **[**139]** business, the *Times* invested significant amounts of capital over a period of time. That investment required initiative and involved significant risks. An attempt by any company to develop a product or service -- i.e., to compete in a market -- requires initiative, innovation, and risk-taking. Our antitrust laws are designed to ensure that every company has the opportunity to compete under these terms. Our antitrust laws, however, do not mandate that a company, having made this investment in capital and taken this initiative and risk, must then provide a free ride into the market for every potential new competitor that comes along. Such a policy would be unfair to those companies that have made investments and taken risks; moreover, it would discourage businesses from taking initiative, assuming risk, and making investments of capital in the first place. A policy that would lead to these results is not, in my view, a good one; nor is it the policy behind our antitrust laws.

In addition, courts must respect rational decisions of economic actors. If the *Times* has opted not to undertake a course of operation -- not to sell to others material that it develops for its own operation **[**140]** -- the court has no

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[37] Indeed, it differs from refusal-to-deal cases in general, under any formula of analysis. *See supra* slip op. at 5160-5165, .

business second-guessing that decision. The *Times* itself is in the best position to evaluate whether to enter into the course of dealing at issue, and it has decided not to do so. For the court to evaluate such a decision -- in effect upholding or overturning it by deciding whether or not to impose a duty to deal -- would push the court beyond the limits of its **[*1301]** administrative capabilities. If courts were to review such decisions, then the question whether an entity should have undertaken a course of dealing would become an element of every refusal-to-deal case. [38] The plaintiff would bear the burden of proving this element of the case, and the courts would have to develop a legal standard for judging the evidence. I suggest that this "element" of a refusal-to-deal case would be an impossible one to prove. What kind of a showing would the courts require a plaintiff to make? Assume a plaintiff has access to a defendant's books, to the defendant's research and development, and to the defendant's plans for expansion and growth -- or that the plaintiff could devise a reasonable approximation of this information. What if, based on this evidence, the **[**141]** plaintiff could show that the defendant could feasibly undertake the activity at issue, indeed would profit from that activity: would that provide a sufficient basis for a court to hold, as a matter of law, that the defendant *must* undertake that course of conduct? Would it be sufficient if the plaintiff could make an even stronger showing -- a showing that the defendant could not stay in business without undertaking that course of dealing, but that if the defendant did undertake it, he would become a millionaire, indeed a billionaire? What if the defendant argues in defense of its decision not to undertake the course of dealing that its board of directors and shareholders had a moral objection to doing so? Or that such an undertaking would place additional demands on the staff's time, which would conflict with the company's policy emphasizing the importance of spending quality time outside of the office? Or, that the undertaking would simply be inconsistent with the company's own plans for expansion? I suggest that the court has no legal basis for forcing a party to undertake an operation that the party has chosen not to undertake.

[142]** The courts would also face extreme administrative problems in imposing effective remedies in cases like this hypothetical one. If the court issued an injunction ordering the *Times* to sell news to the *Post*, the court would obviously have to set a transaction price in its injunction. In the typical essential facilities case, the court can simply look to the terms set by the defendant in its normal dealings with other customers. Unlike the association in *Associated Press* or the terminal owners in *Terminal R.R.*, however, the *Times* has no established terms for the sale of news to which the court could look in fixing a transaction price. Thus, the court must come up with a price on its own. As I discuss in detail in part VI, courts would confront severe difficulties in undertaking this price-setting task. The price must be fair to the *Times*; [39] the court cannot require it to sell news at a loss, or at the cost of its ability to compete. On the other hand, the price must also enable the *Post* to compete; if the *Post* cannot compete after purchasing news at that price, then the court will be unable to fashion a remedy that will provide relief to the *Post* **[**143]** . In that event, under established principles of equity, the case must be dismissed: courts cannot entertain claims that cannot be remedied. I discuss these issues in more detail below, *see infra* slip op. at 5194-5213, .

Because the essential facilities cases all involve defendants that are already engaged in providing the service at issue, those cases do not foresee, let alone address, any of the practical problems that would arise if the court were to impose a duty to deal in cases like this hypothetical case. Given these problems, and the failure of the essential facilities cases to provide any guidance, that doctrine provides no basis for liability under section 2 in this hypothetical case.

This hypothetical case, moreover, closely resembles the present case. For the same reasons that the hypothetical case is not **[*1302]** properly an essential facilities case, neither **[**144]** is the present case. City Gas has decided not to enter the business of supplying natural gas at wholesale. In so deciding, it has done nothing wrong, and its conduct in refusing to sell wholesale gas to Consolidated is not anticompetitive conduct under these essential facilities cases. Nor do the antitrust laws impose a duty on City Gas to enter the wholesale supply business and sell gas to Consolidated. The antitrust laws impose no positive duty on a company to help its competitors. Imposing

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[38] As such, this element would be very different from a legitimate business reason asserted by a company in its defense after a plaintiff has already submitted sufficient evidence to raise an inference of anticompetitive intent.

[39] That is, it must satisfy the *fifth amendment's* just compensation requirement. *See infra* slip op. at 5196-5203, .

such a duty in this case, as in the hypothetical case discussed above, would create serious problems of policy and of judicial administration. For these reasons, under the teachings of *Terminal R.R., Associated Press*, and their progeny, the essential facilities doctrine does not justify the imposition of liability under *section 2* in the present case.

E. *The "Intent Test."*

The district court also analyzed the case under the so-called "intent test," which considers whether, under the circumstances of a case, a monopolist's conduct demonstrates an illegal intent to destroy competition. If the conduct gives rise to an inference of anticompetitive intent, then the monopolist is subject **[**145]** to liability under *section 2*. *See* *Lorain Journal, 342 U.S. at 153, 72 S. Ct. at 186*; *Eastman Kodak, 273 U.S. at 375, 47 S. Ct. at 404*; *MCI, 708 F.2d at 1148*; *Poster Exchange, 431 F.2d at 338*. Applying these cases generally, the district court found, "based on a review of the record evidence, that [City Gas'] real purpose here was to maintain its monopoly unlawfully." *665 F. Supp. at 1540*. It held, therefore, that City Gas' conduct constituted a violation of *section 2*.

Courts have used this approach in both monopoly-leveraging and non-monopoly-leveraging cases. In the former, which I discuss above, *see supra* slip op. at 5167-5168, , the courts have held that the conduct of monopoly leveraging is sufficient evidence of illegal intent to justify the imposition of liability under *section 2*. *See, e.g., Eastman Kodak, 273 U.S. at 375, 47 S. Ct. at 404*; *Poster Exchange, 431 F.2d at 339*. Courts have also inferred intent in non-monopoly-leveraging cases, where a company with monopoly power on one level of the market refuses to deal in order to maintain its **[**146]** monopoly on that same level of the market. *See, e.g., Lorain Journal, 342 U.S. at 153-54, 72 S. Ct. at 186-87*. This so-called "intent test" is of course nothing more than a fancy label for what courts do in virtually every refusal-to-deal case under *section 2*: because direct evidence of anticompetitive intent rarely exists, courts evaluate the circumstantial evidence in a given case to determine whether it gives rise to an inference of anticompetitive intent. The intent-test cases, therefore, demonstrate factual contexts from which such an inference can arise.

As the preceding sections make clear, the present case does not involve monopoly leveraging. The district court, therefore, could not have inferred an illegal intent from an attempt by City Gas to extend its monopoly power from one level of the market to another. As I discuss above, the *Eastman Kodak-Poster Exchange* cases, which involve monopoly leveraging, do not control the present case. If the evidence in this case is to give rise to an inference of anticompetitive intent, therefore, it must do so on the basis of City Gas' conduct in using its power on the retail level in order to maintain its monopoly **[**147]** on that same level. Given this situation, *Lorain Journal* becomes the relevant case.

In that case, the only newspaper in Lorain, Ohio refused to accept paid advertisements from parties also advertising on a radio station that had begun to compete with the newspaper in the advertising market. The government brought an enforcement action under *section 4* of the Sherman Act, claiming that the newspaper had acted in violation of *section 2*. The Supreme Court agreed and approved an injunction requiring the newspaper to accept advertisements on its already established terms even if the parties also advertised on the competing radio station. The newspaper was not itself involved in the radio business, nor did it have any desire to become involved in that business. It was not, **[*1303]** therefore, attempting to use its monopoly power in the newspaper advertising business to gain a share of the radio broadcasting market. Rather, the newspaper's conduct was designed to protect its own monopoly in the newspaper advertising business. That conduct, though, demonstrated the newspaper's anticompetitive intent to foreclose competition in the relevant advertising market.

Lorain Journal **[**148]** , like other refusal-to-deal cases, has a crucial factual feature: the newspaper refused to provide a service that it was already in the business of providing. The newspaper sold advertising space on established terms (presumably a given dollar amount per column inch) to parties that wanted to advertise. The case arose when the newspaper refused to sell such space on the same terms to certain parties that also wanted to advertise. [40] The present case, of course, lacks this feature: City Gas has not refused to sell what it was already in the business of selling. Consolidated wanted to buy gas at wholesale. City Gas, however, sold only retail gas, which is an entirely different product. Because of this factual distinction, *Lorain Journal* does not control here for two reasons.

[149]** First, what gave rise to an inference of anticompetitive intent in *Lorain Journal* was the newspaper's diversion from its established course of conduct. The newspaper suddenly refused to sell advertising. Of course, it also refused only with respect to a specific class of advertisers -- those also advertising on the competing radio station. The sudden refusal, coupled with the identity of the refused customers, clearly signaled an anticompetitive intent. In the present case, City Gas did not change its established course of conduct. Rather, it did exactly the opposite: it refused to divert from its established course of conduct. City Gas has never sold gas at wholesale, and it continued not to do so in the present case. The fact that Consolidated, the would-be purchaser here, was a competitor of City Gas means nothing because City Gas never sold to any firm at all, regardless of the firm's competitive status. *Lorain Journal* is therefore distinguishable on the facts.

In addition, because this case does not involve a business in which City Gas was already engaged, it poses remedial problems not present in *Lorain Journal*. There, the trial court could simply mandate that **[**150]** the newspaper sell advertising space to the excluded parties on the same terms that the newspaper sold space to all other advertisers. Such a remedy would provide the excluded parties with relief -- advertising space in the newspaper -- and the court could easily impose that remedy within the limits of its administrative capabilities. That, however, is not the case here. Because City Gas does not, and has never, sold natural gas at wholesale, it obviously has established no terms for such a transaction. The district court, therefore, could not simply mandate that City Gas sell Consolidated wholesale gas on its already-established terms. Instead, the district court itself had to set a price for the forced sale. The district court did not do so, however; rather, it delegated the task to the FPSC. Had the district court undertaken to set the price, it would have found that task to be impossible, as I discuss in detail in part VI below. For this reason as well, *Lorain Journal* does not control the present case.

As this discussion demonstrates, therefore, the so-called "intent test" provided no basis for imposing liability here. Unlike the typical refusal-to-deal cases analyzed under **[**151]** this test, the circumstances in this case simply did not give rise to an inference of anticompetitive intent. I turn now to a discussion of two additional Supreme Court cases.

F. Aspen *and* Otter Tail.

The district court also relied heavily on two more recent Supreme Court cases -- *Aspen Skiing Co. v. Aspen Highlands Skiing* ***[*1304]*** *Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, and *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)* -- which also involve refusals to deal under *section 2*. Although lower courts frequently cite both cases as support for the essential-facilities doctrine and the intent test, as well as the monopoly-leveraging theory, neither case explicitly applies any of these formulas for determining liability in *section 2* cases. Both cases, nevertheless, follow from the general principles established in the early Supreme Court cases that I discuss in the preceding section. I consider *Aspen* and *Otter Tail* in turn, analyzing the theories of liability applied in the cases and demonstrating that neither case supports the imposition of a duty to deal on City **[**152]** Gas.

1. *Aspen*.

In *Aspen*, Aspen Highlands Skiing Corp. (Highlands), which owned one of four skiing areas in Aspen, brought a private antitrust suit against Aspen Skiing Company (Ski Co.), which owned the other three areas. From 1962 to 1977, Ski Co. and Highlands had offered an all-Aspen ticket that skiers could use interchangeably at all four skiing areas. In the 1977-78 season, however, Ski Co. offered to participate in the all-Aspen ticket only on terms that were

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[40] These advertisers, moreover, did not request advertising space on special terms, monetary or otherwise; the subject of their advertisements was unobjectionable; and the advertisements would not have had an adverse impact on the newspaper's ability to attract other clients. Thus, the newspaper presumably had no legitimate business reason for its refusal.

unacceptable to Highlands; Ski Co. would consider no counterproposal and, as the district court held, in effect refused to deal with Highlands. Highlands brought a treble damages action against Ski Co. under *section 4* of the Clayton Act, claiming that Ski Co. had monopolized the downhill skiing market in violation of *section 2* of the Sherman Act. As the Supreme Court described, the case raised the question whether "a firm with monopoly power has a duty to cooperate with its smaller rivals in a marketing arrangement in order to avoid violating *§ 2* of the Sherman Act." *472 U.S. at 587, 105 S. Ct. at 2849*.

In the district court, a jury found in favor of Highlands, and the Tenth Circuit affirmed, **[**153]** relying on the essential facilities doctrine as a basis for holding that Ski Co. had a duty to deal with Highlands. The Tenth Circuit also held that sufficient evidence existed to support the jury's finding that Ski Co. had an intent to create or maintain a monopoly. The Supreme Court approached the case in broader terms, analyzing whether Ski Co. had a duty to deal with Highlands under the circumstances. The Court first stated that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor." *Id. at 600, 105 S. Ct. at 2856*. The Court elaborated that this proposition is a counterpart to the "independent businessman's cherished right to select his customers and his associates." *Id. at 601, 105 S. Ct. at 2856*. Of course, as the Court quickly qualified, these rights -- both to select customers and not to deal with competitors -- are not absolute. The Court articulated the key to determining when such a decision constitutes an antitrust violation: when "the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" *Id. at 602, 105 S. Ct. at 2857*. The Court then **[**154]** examined Ski Co.'s conduct.

The Court identified a crucial feature of Ski Co.'s refusal to deal:

> In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.

Id. at 603, 105 S. Ct. at 2858. Ski Co.'s refusal to deal thus demonstrated one of the key features of the *Terminal R.R.* and *Associated Press* cases: its refusal to deal was not a refusal to undertake a new course of dealing; rather, it was a refusal to continue a course of dealing in which it was already engaged.

After identifying this feature, the Court suggested that even such a decision "to make an important change in the character of a market . . . is not necessarily anticompetitive." *Id., 105 S. Ct. at 2858*. As the Court explained, the question "cannot be answered by simply considering [the] effect of [Ski Co.'s conduct] on Highlands. In addition, it is relevant to consider its **[**155]** impact **[*1305]** on consumers and whether it had impaired competition in an unnecessarily restrictive way." *Id. at 605, 105 S. Ct. at 2859*. Based on its consideration of these additional factors, the Court agreed that the evidence was sufficient to support a finding that "consumers were adversely affected by the elimination of the 4-area ticket." *Id. at 606, 105 S. Ct. at 2859*. The Court also noted that Ski Co.'s conduct was not "justified by any normal business purpose." *Id.* at 608, 105 S. Ct. 2860. Because the evidence was sufficient to support the jury's verdict in favor of Highlands, the Court affirmed.

This case does not support the imposition of a duty to deal on City Gas. The decisive feature in *Aspen* -- Ski Co.'s decision "to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years," *id. at 603, 105 S. Ct. at 2858* -- is not present in this case. On the contrary, City Gas made no "important change in a pattern of distribution;" indeed, City Gas *refused* to make such a change, and that refusal is what Consolidated challenges **[**156]** in the present case. Given this crucial distinction between *Aspen* and the present case, *Aspen* does not control.

The remedy problem in the present case also did not arise in *Aspen*. Although the Supreme Court made no mention of the damages amount awarded in *Aspen*, the long history of the all-Aspen ticket produced an extensive body of evidence on the division of profits from the all-Aspen ticket between Ski Co. and Highlands. The trial court (or jury) in that case could easily have arrived at a damages figure that would accurately have reflected Ski Co.'s economic position while providing relief to Highlands. That is not true in the present case. Because City Gas has never sold gas for resale, either to Consolidated or anyone else, the district court had no point of reference for calculating a hypothetical transaction price. See *infra* slip op. at 5199-5203, , for a detailed elaboration of this point.

Aside from the problem of imposing a remedy in the present case, the district court below also failed to focus on any of the factors articulated by the Supreme Court in *Aspen* as support for the Court's determination that Ski Co.'s conduct was exclusionary: **[**157]** whether the conduct had an "impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id. at 605, 105 S. Ct. at 2859*. A consideration of these factors in the present case also suggests that City Gas' refusal to deal is not classifiable as exclusionary.

With respect to the conduct's impact on consumers, the record contains no evidence of a negative impact. In fact, the district court indicated that City Gas' service was more economical than the service that Consolidated could provide. *See 665 F. Supp. at 1505*. The district court did note that City Gas would have to pass on to its customers the costs of extending its pipesystem into Consolidated's service area. *Id. at 1513*. The district court, however, failed to account for the increased price that Consolidated would have to pay for wholesale gas compared to the price City Gas paid FGT: even if City Gas were forced to sell to Consolidated, it would be entitled to sell at a rate providing a reasonable rate of return on its investment, *see supra* part VI. Assuming that City Gas' distribution and hook-up operation was efficient, and no evidence **[**158]** to the contrary appears, Consolidated would have to make up for the difference in its wholesale price either by charging its retail customers more than City Gas would charge or by streamlining even further its distribution operation. Even assuming that Consolidated could streamline its operation, the record contains no evidence that this would actually benefit consumers. Unlike the negative impact on consumers from the abolition of the all-Aspen ticket in *Aspen*, the benefits to consumers from Consolidated's entry into the market would be minimal -- at best, slightly reduced natural gas rates for some consumers. Even that benefit would come only at the expense of higher natural gas rates for other consumers. I question, moreover, whether this type of competition really would benefit the consumer. Competition that forces a natural gas utility to streamline its operation might, in fact, harm the consumer. **[*1306]** Although such competition could conceivably result in slightly decreased gas rates for some customers, it might increase safety risks for all customers by pressuring gas suppliers to cut corners in order to lower their prices. That sort of pressure would not benefit **[**159]** consumers.

Moreover, the district court failed to consider that given the nature of the natural gas business, competition in that business is likely to benefit consumers only in the short term, if at all. As the district court stated, City Gas possessed a natural monopoly in its service area. That is not strange: because entering the natural gas supply business involves the expenses of building a pipesystem and arranging hookups to customers, virtually every supplier has a natural monopoly in its supply area. Two supply companies cannot continue to operate in the same service area. Companies compete only at the outset to gain control of a service area and to expand into new areas as they develop. Given the naturally monopolistic state of the natural gas supply business, the benefits of competition to the consumer are limited. Competition between companies for initial control of a service area may lower retail prices, but only in the short term. Once one supplier gains control of the service area (and thus develops a natural monopoly), the incentive for lower retail pricing also ends. (Of course, the FPSC monitors the rates set by all natural gas companies. *See infra* slip op. **[**160]** at 5218, .) Moreover, consumers would not benefit from continuing competition between gas companies within a single service area. Constant switching by customers between companies would generate transaction costs and force an increase in retail prices to all customers. In addition, constant competition between companies is likely to undermine safety concerns as the companies try to shave costs in order to increase their competitiveness. Competition in the natural gas supply market is, therefore, by no means the best state of affairs from the consumers' perspective.

As this discussion indicates, *Aspen* does not support the imposition of a duty to deal in the present case. The *Aspen* case is immediately distinguishable from the present case in that Ski Co.'s refusal to deal involved a significant alteration in its previous course of dealings with Highlands. That course of dealing provided a reference point for a meaningful damages award. No such course of dealing exists in the present case. Also, whereas the refusal to deal in *Aspen* adversely affected skiers, the refusal in this case had no such effect on gas consumers. In fact, the evidence suggests that the continued **[**161]** existence and expansion of City Gas' natural gas monopoly might actually benefit consumers, especially with respect to long-term safety concerns.

2. *Otter Tail*.

Nor does the Supreme Court's holding in *Otter Tail, 410 U.S. at 366, 93 S. Ct. at 1022*, support the imposition of a duty to deal in the present case. In *Otter Tail*, an electric power company produced electricity on the wholesale level and distributed its electricity as a retail franchisor in various municipalities. The company also engaged in "wheeling," or transmitting power generated by other companies over its transmission system. On the retail distribution level, municipalities granted Otter Tail ten- or twenty-year franchises, and during that time Otter Tail served as the sole distributor -- a natural monopolist -- in the given municipality. The case arose when certain municipalities attempted to establish municipal distribution systems on their own. Having built their own local distribution systems, the municipalities hoped that Otter Tail would sell or wheel them wholesale power. Otter Tail, however, refused to provide either service. Consequently, the government brought an antitrust enforcement **[**162]** action against Otter Tail, attempting to enjoin it from refusing to deal with the municipalities under the circumstances. The district court granted the government an injunction, and the Supreme Court upheld the decree.

Unfortunately, the *Otter Tail* opinion reveals no immediate rationale in support of the district court's action. As Judge Easterbrook observed in his dissent in *Fishman **[*1307]** v. Estate of Wirtz, 807 F.2d 520, 573-74 (7th Cir. 1986)*:

> A study of the majority opinion for four Justices in *Otter Tail* will not reveal the Court's reason; it gave only a result. . . . It did not offer any reason other than to say that Otter Tail had reduced competition. . . . To rely on *Otter Tail* my colleagues must be able to tease a reason out of a silent opinion.

In Judge Easterbrook's view, the key to the *Otter Tail* decision is the effect that Otter Tail's refusal to deal had on the electricity-generating level of the market. As Judge Easterbrook described, three markets existed in the electric power industry: the power generation market, the transmission market, and the retail distribution market. Otter Tail controlled the transmission **[**163]** market, and its refusal to deal occurred on that level. What made that refusal to deal an antitrust violation, in Judge Easterbrook's view, was that competition existed on the generating level. That is, the municipalities that wanted to enter into retail distribution of electricity could have taken advantage of the competition on the generating level, which would have resulted in lower prices for consumers at the retail level, if Otter Tail would have agreed to wheel. And according to Judge Easterbrook, consumer benefit is the primary consideration in determining antitrust liability. *See also* *Aspen, 472 U.S. at 605, 105 S. Ct. at 2859*; *supra* slip op. at 5185-5186, . Thus, Otter Tail's conduct was clearly anticompetitive.

Given this interpretation, *Otter Tail* does not control the present case. Judge Easterbrook's description of the three levels of the electric power industry applies also to the natural gas industry. As I describe above, *see supra* slip op. at 5165-5167, , the natural gas industry consists of three stages: (1) production; (2) interstate transportation and wholesale supply; and (3) intrastate distribution at retail. The present **[**164]** case, however, is factually distinguishable from *Otter Tail* in two respects: first, whereas Otter Tail participated on the transmission level as well as on the distribution level, City Gas participated only on the retail distribution level; second, whereas competition existed on the generating level in *Otter Tail*, no such competition existed in the present case -- FGT was the only source of wholesale gas in the region. Thus, the absence of competition on the generating (or wholesale) level in the present case means that consumers would not have benefitted had City Gas not refused to deal, in contrast to *Otter Tail* where consumers would have benefitted had Otter Tail not refused to deal. In addition, because City Gas never participated in the second level of the market, its conduct had no causal connection to any benefit consumers might have derived even if competition had existed on the production or wholesale levels. Applying Judge Easterbrook's interpretation of *Otter Tail*, then, that case does not control here.

Another possible rationale for the *Otter Tail* holding is that Otter Tail engaged in classic monopoly leveraging -- using its power on the transmission **[**165]** level to increase its business on the retail distribution level. Throughout the *Otter Tail* opinion, the Court indicated that Otter Tail had "'a strategic dominance in the transmission of power in most of its service areas'" and that Otter Tail used that dominance "to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." *Id. at 377, 93 S. Ct. at 1029*. This rationale, of course, does not apply in the present case: City Gas has not engaged in monopoly leveraging. Otter Tail was clearly a vertically integrated company; City Gas, as I discuss above, was just as clearly not vertically integrated.

As the district court in *Otter Tail* stated, Otter Tail's "operation consists of an integrated power system running the full gamut from initial production to final sale of electrical power combined with pool arrangements which supply emergency power reserves." *United States v. Otter Tail Power Co., 331 F. Supp. 54, 56 (D.Minn. 1971)*. Although Otter Tail did the majority of its business on the retail level, it also contracted with a number of other electric systems to obtain supplementary power, which it both **[**166]** used itself and "regularly" wheeled to other companies. *Id. at 56-57*. **[*1308]** For example, it wheeled power to approximately eighteen municipalities pursuant to an interconnection contract with the Bureau of Reclamation, the entity that had agreed to supply wholesale power to one of the municipalities with which Otter Tail refused to deal. *Id. at 57-58*. City Gas, on the other hand, was not involved in the initial production of gas; it was not a natural gas wholesaler; nor did it buy excess quantities of gas to distribute to other companies for resale. Rather, it was engaged solely in the retail distribution of gas. City Gas was not attempting to use its market power as a natural gas producer or wholesaler (it was neither) to maintain its monopoly as a retail distributor of gas. It was simply choosing to maintain its operation exclusively on the retail level as it then existed, refusing to extend that operation to another level of the market. Whereas Otter Tail's anticompetitive conduct followed from its vertical integration, the alleged violative conduct here followed from City Gas' decision *not to* integrate vertically. For this reason, **[**167]** *Otter Tail* does not control.

Another point of distinction between *Otter Tail* and the present case concerns the status of the municipalities attempting to enter the retail distribution market in *Otter Tail* and that of Consolidated in the present case. For example, Elbow Lake, one of the municipalities that Otter Tail refused to supply, had constructed its own generating plant. The town had also arranged for a supply of wholesale power from the Bureau of Reclamation, which had high voltage lines in the area but relied on Otter Tail and other companies to wheel power from its bulk lines to its wholesale customers. When Otter Tail refused, Elbow Lake applied to the Federal Power Commission (FPC) for an order requiring Otter Tail to interconnect to Elbow Lake and sell the wholesale power itself. [41] Elbow Lake had thus independently assumed the costs and faced the barriers of entering into the retail distribution market. Not only had Elbow Lake built its own generating facilities, it had also gained the Commission's approval to interconnect with Otter Tail, a process that involved litigation against Otter Tail in two forums, *see id. at 371* & nn. 4 & 5, *93 S. Ct. at 1027* **[**168]** & nn. 4 & 5.

Here, in contrast, Consolidated has attempted to limit its entry costs: it wanted to purchase its gas from City Gas in order to enter the market in the most competitive posture and at the least possible expense. Whereas Elbow Lake completed the administrative process necessary to gain Commission approval of an interconnection to Otter Tail's system, Consolidated not only attempted to avoid the delay of such proceedings but also pointed to that delay as a justification for requiring City Gas to provide it with wholesale gas. Moreover, whereas Elbow Lake built an entire generating plant at great expense, Consolidated refused to invest even $ 250,000 to build the lateral pipeline that would have connected its pipesystem to FGT's line. In short, Elbow Lake was not attempting to obtain a free ride into the retail distribution market by forcing Otter Tail **[**169]** involuntarily to undertake a new function so that Elbow Lake could avoid the market's entry barriers and enjoy an enhanced competitive position. That, I suggest, is exactly what Consolidated is attempting to do. To impose a duty to deal on City Gas in these circumstances, therefore, would be to say that any potential market entrant deserves a free ride into the market, on the best possible terms, and at the expense of those entities that have already entered the market on more difficult terms, with more risk, and at greater costs. The antitrust laws, in my view, do not support such a result.

Otter Tail provides no basis for imposing a duty to deal in the present case for one further reason: it fails to address the remedy problem that arises here. The *Otter Tail* decree, which the Supreme Court approved, mandates that Otter Tail supply power -- either by selling its own at wholesale or by wheeling from other companies -- to municipalities that have established their own retail distribution systems. The Supreme Court addressed the regulatory **[*1309]** issues implicated by the decree, [42] but the Court conveniently failed to address the question of

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[41] Although the FPC could not order a company to wheel involuntarily, the FPC did have authority to order interconnections and sales at wholesale.

[42] The Court faced the question of whether the federal regulatory scheme limited the district court's power to fashion a decree. The Court concluded that the requirement of FPC approval of interconnections posed a potential limit on the decree. Because the decree mandated wholesaling only subject to Commission approval, however, the facts of the case did not implicate that

price: if Otter Tail had **[**170]** to supply power, then how much should it get paid? As the Supreme Court concluded, "the District Court . . . in any event has retained jurisdiction to enable the parties to apply for 'necessary or appropriate' relief." *410 U.S. at 381-82, 93 S. Ct. at 1031-32*. Given the particular circumstances of the case, the district court on remand could presumably come up with a reasonable price term. Otter Tail already sold power at wholesale and wheeled power. Thus, the price terms in those existing transactions would provide a point of reference as the district court attempted to impose a price term for future transactions. In addition, Otter Tail did a substantial portion of its wheeling pursuant to a contract with the Bureau of Reclamation, a major supplier of wholesale power in the area. Many of the municipalities with which Otter Tail had refused to deal had themselves arranged to purchase wholesale power from the Bureau under the assumption that Otter Tail would wheel it. Thus, an even more specific reference point existed for imposing a price term with respect to many of the transactions that would arise pursuant to the district court's decree in *Otter Tail*.

[171]** The present case poses a different set of problems. *Otter Tail*, however, provides no solution. Given these circumstances, *Otter Tail* most certainly does not justify the imposition of liability in this case.

G. *MCI Revisited*.

I return finally to *MCI Communications Corp. v. AT & T, 708 F.2d 1081 (7th Cir. 1982)*, *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*, focusing on an aspect of the Seventh Circuit's holding that, in my view, does control in the present case and that demonstrates the absence of liability under *section 2* here. As I discuss above, *see supra* slip op. at 5171-5173, , the *MCI* case arose out of MCI's effort to enter the long-distance telephone market -- an effort that required access to the Bell network's local exchange facilities. As I also discuss above, *see id.*, the Seventh Circuit held that AT & T had a duty to allow MCI access to those local exchange facilities. [43] The court reached this conclusion by applying the essential facilities doctrine.

[172]** As the court stated:

> A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a "bottleneck") can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.

708 F.2d at 1132 (citing *Terminal R.R., 224 U.S. at 410-11, 32 S. Ct. at 515-16*). According to this statement, the concern motivating the essential facilities doctrine is that an entity with monopoly power on one level of a market can use that power to gain control on another level of a market -- i.e., **[*1310]** by monopoly leveraging. In order to prevent this from occurring, the essential facilities doctrine imposes a duty to deal on the monopolist.

Applying this rationale to AT & T's refusal to provide local interconnections for MCI's FX and CCSA services, *see supra* slip op. at 5173-5175, , the court characterized **[**173]** AT & T's refusal as an attempt to use its monopoly over local exchange systems to maintain its monopoly over long-distance services. *Id. at 1133*. The court pointed to *Otter Tail* as authority for holding that AT & T's conduct was anticompetitive. The court characterized the rationale

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limit. If, in light of future events, a problem were to arise, the Court indicated that the district court, which retained jurisdiction, could consider the problem then.

The Supreme Court noted, however, that the Federal Power Act gave the FPC no authority to order an electric company to wheel if the company had not voluntarily undertaken an obligation to do so, *see id. at 375-76, 93 S. Ct. at 1028-29*. Thus, the federal regulatory scheme had no impact on the district court's decree that Otter Tail wheel power. *Id. at 376, 93 S. Ct. at 1029*; *see Florida Power & Light Co. v. FERC, 660 F.2d 668, 674-76 (5th Cir. Unit B Nov. 1981)*, *cert. denied*, ***459 U.S. 1156, 103 S. Ct. 800, 74 L. Ed. 2d 1003 (1983)***.

[43] In fact, the court held only that the evidence was sufficient to support the jury's finding that AT & T's refusal to deal was unlawful. *708 F.2d at 1132-33*.

behind the *Otter Tail* decision as a concern "that market power in one market (transmission) was being used to further a monopoly in another market (retail distribution)." *Id.* (citing *Otter Tail, 410 U.S. at 377-79, 93 S. Ct. at 1029-30*). Based on this interpretation of *Otter Tail* and the facts in MCI, the court held that AT & T's conduct was anticompetitive. MCI wanted to compete with AT & T on the long-distance level, but to compete on that level, MCI required access to the exchange facilities at the local level. AT & T refused to provide MCI that access, and the court held that the refusal violated *section 2*. [44] That holding provides no support for the district court's decision in the present case. As I maintain throughout this part, the situation is entirely different here: City Gas has not engaged in monopoly leveraging.

[174]** A different aspect of the *MCI* opinion, however, is instructive here. The *MCI* court also held that AT & T had no duty to allow MCI to interconnect to AT & T's long-distance system (as opposed to the local exchange facilities) for multipoint service. Multipoint service consists of a private line for a customer between City A and City B, such as MCI's Chicago-to-St. Louis line. In requesting multipoint interconnections to AT & T's system, MCI wanted access to AT & T's multipoint line running from City B to City C, for example from St. Louis to Kansas City. This claim was entirely different from the claim concerning interconnections to Bell's local exchange system. In effect, multipoint interconnections required access to AT & T's own *long-distance* system rather than to the local exchange system, which was all that MCI required in order to operate its FX and CCSA services. The multipoint interconnections, therefore, involved only the long-distance market, the very market in which MCI was attempting to compete with AT & T. MCI claimed that it could not compete in that market -- by providing multipoint service to its customers -- unless AT & T provided access to its own lines. **[**175]** AT & T contended that MCI was simply trying to use AT & T's lines to provide service to customers in cities where MCI's current facilities could not reach, even though MCI was authorized to build facilities that could reach those cities.

The Seventh Circuit rejected MCI's claim, holding that the denial of interconnections for multipoint service could not form a basis of liability. *Id. at 1149*. The court reasoned that

> MCI's primary business was to build precisely the type of facilities to which it sought access from the Bell System. There was no sufficient explanation as to why MCI, on the one hand, was building its own network, and, on the other, was entitled to access in the interim to AT & T's facilities. Thus, the jury lacked sufficient evidence to conclude that these interconnections were essential.

Id. at 1148. The court continued:

> As a matter of antitrust liability, . . . can an entrant which actually builds its own facilities between Chicago and Milwaukee, for example, thereby gain entitlement to use all the far-flung facilities of the Bell System? Is its entitlement based on its expressed intention to duplicate major portions of the Bell **[**176]** System **[*1311]** a national basis? Could it claim entitlement before (or without) building any facilities of its own? We think the ramifications of the demand for multipoint service are troubling and complex, and that under the circumstances of this case . . ., the denial of interconnections for multipoint service cannot form a basis of liability.

Id. at 1149. [45]

I suggest that this holding controls in the present case. Like MCI, Consolidated had no basis for claiming an entitlement to buy wholesale **[**177]** gas from City Gas. As in *MCI*, Consolidated's primary business was to provide

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[44] MCI merely wanted access to the local exchange facilities on the same terms that AT & T had access to them. The Bell System, which consisted of twenty-three operating companies, provided the local exchange services. These companies were in the business of providing telephone service on the local level and of selling AT & T access to that service for its long-distance operation. Thus, the Bell System was obviously in the business of interconnecting long-distance lines to its local switching services.

[45] The court reached this conclusion based on its application of antitrust principles. It considered those principles independently of the effect that a regulatory determination regarding such interconnections might have. As the court admitted, its conclusion might have been different if the FCC had authorized or mandated that AT & T provide the interconnections. Without such an FCC order, however, the antitrust laws imposed no duty on AT & T to provide the interconnections. *See id. at 1149*.

the same service as City Gas provided. City Gas operated a retail distribution system; Consolidated wanted to do exactly the same. Like MCI, Consolidated claimed that it could not compete in the retail distribution market unless it had access to City Gas' system. As in *MCI*, Consolidated wanted access to City Gas' system so that it could provide the same service that City Gas provided and compete with City Gas on the same, and only, level of the market on which City Gas operated. Consolidated, like MCI, had every right to compete in the market at issue, and City Gas, like AT & T, could do nothing to prevent Consolidated from competing. As the *MCI* court indicated, however, City Gas had no duty to help Consolidated enter into competition against it. Like AT & T, which was not in the business of providing interconnections for other long-distance services (as compared to the local Bell companies, which were in the business of providing interconnections for long-distance systems), City Gas was not in the business of selling gas at wholesale. The refusal to deal in the present case, like AT & T's refusal **[**178]** to provide multipoint interconnections in *MCI*, related only to a single level of market operation and involved no attempt to leverage into another market level. Following the rule in *MCI*, if Consolidated wanted to provide the same service as provided by City Gas, which operated on a single market level as a non-vertically integrated entity, then Consolidated itself had to construct the facilities that such an operation required.

H. *Conclusion.*

As I discuss above, *see supra* slip op. at 5178-5180, , the antitrust laws do not impose a positive duty to help a competitor. The antitrust laws proscribe conduct that inhibits competition; the laws, however, do not purport to facilitate competition by imposing a duty on a company to help another company into competition. As the Seventh Circuit stated in *Olympia*, a firm

> has no general duty to help its competitors. . . . "There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter." . . . A monopolist has no duty to reduce its prices in order to help consumers, . . . and no duty to **[**179]** extend a helping hand to new entrants. . . .

797 F.2d at 375-76 (quoting *SPS Technologies, 694 F.2d at 512-13*) (citations omitted). This is especially true when such a duty would require the company to undertake a course of dealing in which it does not already engage -- such as providing interconnections or selling gas at wholesale where it normally does not. Courts must respect rational decisions of economic actors. If an entity has opted not to undertake a course of operation, courts have no business second-guessing that decision. In addition, the imposition of a duty to deal in such circumstances would encourage economic inefficiencies and promote inequity. An attempt by any company to develop a product or service -- i.e., to compete in a market -- requires initiative, innovation, and risk-taking. Our antitrust laws are designed to ensure that every company has **[*1312]** the opportunity to compete under these terms, but not to require that a company which has made this investment in capital and taken this initiative and risk provide a free ride into the market for every potential competitor that comes along. Such a policy would be unfair **[**180]** to those companies that have made investments and taken risks; moreover, it would discourage businesses from taking initiative, assuming risk, and making investments of capital in the first place. A policy with these results would not, in my view, be a good one. More importantly, it is not the policy that our antitrust laws were designed to promote.

As the above sections demonstrate, no legal basis exists for requiring City Gas to enter the wholesale business and supply Consolidated with gas. The factual circumstances of this case are fundamentally different from typical refusal-to-deal cases, and given the circumstances here, City Gas' refusal to deal gives rise to no inference of anticompetitive intent under any of the approaches used by courts to evaluate circumstantial evidence. Finally, as I discuss in more detail in the next part, the present case presents extreme administrative problems for the imposition of an effective remedy -- problems that Congress could not have intended the courts to solve. City Gas' conduct, therefore, does not constitute a violation of *section 2*.

VI. THE *FIFTH AMENDMENT*

As part V demonstrates, this case is not a typical refusal-to-deal case. **[**181]** In the typical refusal-to-deal case, a defendant participates in the market at issue, selling a product or service either directly to a plaintiff (in previous transactions) or to other customers. The defendant then attempts to charge the plaintiff a higher price than it charges other customers or simply refuses outright to deal with the plaintiff. As a result, the plaintiff [46] **[**182]** brings suit under the Clayton Act, *15 U.S.C. §§ 15*, *26*, contending that the defendant has violated *section 2* of the Sherman Act by refusing to supply the product at issue to the plaintiff and seeking an injunction ordering the defendant to supply the product on the same terms as those given to the defendant's other customers and also seeking damages. [47] If the court concludes that the defendant has violated *section 2* of the Sherman Act by charging the plaintiff higher prices or refusing outright to deal with the plaintiff, then the court orders the defendant to deal with the plaintiff and to do so at the same price that the defendant has set in its dealings with other customers.

In the present case, City Gas has never sold gas for resale to anyone. [48] In deciding **[*1313]** not to supply gas to Consolidated, City Gas did not discriminate against Consolidated by attempting to charge Consolidated a higher price than City Gas charged its other customers or by entirely denying Consolidated a service that City Gas provided to other customers. Under these circumstances, the district court could not conclude that City Gas violated *section 2* by treating Consolidated differently than City Gas treated its other customers. Nor could the district court require City Gas to sell wholesale gas to Consolidated at the same **[**183]** price that City Gas sold gas to its other customers. Such a decree would be meaningless since City Gas has never sold wholesale gas to any firm at any price.

[184]** Under the typical refusal-to-deal cases, therefore, City Gas did nothing wrong. It merely operated as a retail gas distributor in its established service area and decided not to deal at all on the wholesale level. The district court, however, developed a new rule of law: it held that *section 2* of the Sherman Act imposed a positive duty on City Gas to change the nature of its operation and sell wholesale gas to Consolidated so that Consolidated could enter the retail distribution market and compete with City Gas. [49] The district court applied this rule in the present

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[46] The government might also bring a civil enforcement action under *section 4* of the Sherman Act, *15 U.S.C. § 4*, to enjoin the defendant from refusing to deal in violation of *section 2*. *See infra* note 11.

[47] As I elaborate below, *see infra* slip op. at 5205-5210, , the private plaintiff may also seek, in addition to an injunction, damages for profits lost between the refusal to deal and the date of final judgment; or, if injunctive relief would not provide a remedy because the refusal to deal forced the plaintiff to go out of business, then the plaintiff may seek damages for loss of its going concern value and damages for profits lost in the interim.

[48] The district court and panel made much of the fact that City Gas "had, in fact, entered into a contract with a third party [Florida Gas] to sell its gas for resale." *880 F.2d at 300*, *see* *665 F. Supp. at 1510*. This contract, however, was merely executory: City Gas never performed. As the panel claimed, this contract no doubt provides evidence that City Gas had "*power*" to sell gas at wholesale, *880 F.2d at 301* (emphasis in original), but the contract is not evidence that City Gas ever actually did sell at wholesale. As I discuss in part IV, that City Gas might have possessed the *power* to sell at wholesale is neither here nor there; rather, what is significant is that City Gas *legitimately chose not to exercise* that power -- not selling to Consolidated, to Florida Gas, or to any other firm. And in making this choice, City Gas did nothing wrong.

As I also discuss in part IV, the contract would not be relevant even if the parties had not abandoned it: the contract would have involved a different geographic market than the market involved in the present case. Perhaps the best evidence of this contract's irrelevance, though, is the fact that the district court never looked to it as a basis for establishing a selling price in its injunctive order requiring City Gas to supply wholesale gas to Consolidated. The district court delegated the task of establishing a selling price to the FPSC. *See* *665 F. Supp. at 1512, 1534, 1545*. In so doing, the district court implicitly found the Florida Gas contract to be unreliable as evidence of City Gas' wholesale gas price.

[49] In articulating this new rule of law, the district court should have distinguished the body of antitrust cases in which courts have held that the antitrust laws impose no positive duties, but only negative duties. *See, e.g.,* *Aspen, 472 U.S. at 600-01, 105 S. Ct. at 2856-57*; *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919)*; *Olympia, 797 F.2d at 376 (7th Cir. 1986)*; *Florida Fuels, Inc. v. Belcher Oil Co., 717 F. Supp. 1528, 1532 (S.D.Fla. 1989)*. These cases teach that a

case to take a portion of City Gas' gas supply and give it to Consolidated. This new rule thus requires City Gas -- a company that has done nothing wrong -- to undertake a new level of operation and engage in a forced sale of wholesale gas to Consolidated.

[185]** In my view, Congress could not have intended *section 2* of the Sherman Act to mandate such a result. This becomes apparent when one considers the practical implications of the rule's enforcement, which the district court, as well as this court today, has entirely failed to do. As those implications suggest, the rule will be impossible to apply. The district courts of this circuit will confront severe difficulties in fashioning remedies under the rule. In addition, the rule's application will frustrate the very purposes behind the antitrust laws. I develop these points in the following section by analyzing how a court would apply this new rule to the facts of the present case.

I first introduce the idea that this rule implicates the *fifth amendment takings clause*. As I note above, because City Gas has never sold gas at wholesale and has therefore established no price for such sales, the court under these circumstances must set a selling price if it is to require City Gas to sell to Consolidated. That price must satisfy the *fifth amendment's* just compensation requirement. [50] I then consider what finding the *just compensation clause* requires under the present facts. Next, I discuss **[**186]** some further implications of the *fifth amendment*, which suggest that the rule is impossible to apply and leads to results that are inconsistent with the purposes behind the antitrust laws. Based on this discussion, I conclude that Congress could not have intended *section 2* to support such a rule. The rule, therefore, should be struck down.

[*1314] Because our court today nevertheless upholds this impossible rule, I analyze in section B the district court's errors in attempting to apply it and conclude that the judgment should be vacated and the case remanded for further proceedings as I describe.

A. *Implications of Enforcing the Rule*.

1. The *Fifth Amendment*.

The *fifth amendment* provides in pertinent part: "nor **[**187]** shall private property be taken for public use, without just compensation." *U.S. Const. Amend. 5*. Courts have long held that the *fifth amendment* applies to utility rates set by federal and state regulatory agencies: in order to satisfy the *just compensation clause*, rates must not be "so 'unjust' as to be confiscatory," *Duquesne Light Co. v. Barasch, 488 U.S. 299, __, 109 S. Ct. 609, 615, 102 L. Ed. 2d 646 (1989)*. *See, e.g., In re Permian Basin Area Rate Cases, 390 U.S. 747, 770, 88 S. Ct. 1344, 1361, 20 L. Ed. 2d 312 (1968)*; *FPC v. Natural Gas Pipeline Co. of Am., 315 U.S. 575, 585-86, 62 S. Ct. 736, 742-43, 86 L. Ed. 1037 (1942)*; *Tenoco Oil Co. v. Department of Consumer Affairs, 876 F.2d 1013, 1020 (1st Cir.1989)*; *Jersey Cent. Power & Light Co. v. FERC, 258 U.S. App. D.C. 189, 810 F.2d 1168, 1175 (D.C.Cir.1987)*. This line of cases indicates that the *fifth amendment* does not proscribe rate regulation in and of itself; rather, it proscribes rate regulation *at a price that denies just compensation*. The Supreme Court has therefore articulated a standard -- the "historical cost basis" -- for **[**188]** reviewing rate regulations to determine whether they satisfy this constitutional mandate. *See Barasch*,

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company has no duty to foster competition or to aid a competitor but that a company may not do anything to prohibit competition or to prevent a company from competing. Under the district court's new rule, which the court today upholds, *section 2* would seem to impose a positive duty on City Gas, requiring it to sell at wholesale to Consolidated so that Consolidated can compete, even though City Gas has never voluntarily sold wholesale gas to any firm. Although I see no grounds for distinguishing these cases from the present case, I assume for purposes of discussion that their inapplicability to the present case could be explained.

[50] In the typical refusal-to-deal case, the *fifth amendment* poses no problem: the court requires the defendant to sell at its already-established selling price, applying a presumption that the defendant has set the price that it must receive in order to obtain just compensation.

489 U.S. at , 109 S. Ct. at 616-17; *FPC v. Hope Natural Gas Co., 320 U.S. 591, 603-05, 64 S. Ct. 281, 288-89, 88 L. Ed. 333 (1944)*. [51]

[189]** Assuming the facts of the present case, a different category of regulation is involved. The regulation here goes beyond ratemaking to require City Gas to provide a service that it did not normally provide. If administrative price regulation implicates the *fifth amendment*, then this more intrusive category of regulation obviously implicates the *fifth amendment* as well. [52] **[**190]** Thus, if **[*1316]** this "taking" is to pass constitutional muster, then a court confronting these facts must set a price in its injuction that provides City Gas with just compensation for its gas. [53]

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[51] The *Hope* Court approved historical cost as a basis for calculating rates. Under this rule, just compensation is provided by "rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." *Hope, 320 U.S. at 605, 64 S. Ct. at 289*.

The rationale behind this rule, as one judge has stated, is that regulation

> was part of the original compact between investors and the state. Rate regulation is, in theory, the substitute for competition. The state stands in the shoes, as it were, of competitors, keeping the utility within bounds that would be drawn by market forces in a non-monopolistic market. Whether economically sound or not, utility rate regulation in itself raises no constitutional concerns.

Jersey Central, 810 F.2d at 1190 (Starr, J., concurring). A crucial principle behind this rule, therefore, is the idea that the utility companies have *voluntarily* undertaken to operate in a regulated industry, enjoying the benefits of a natural monopoly in return for submitting to reasonable regulation of their rates. As a corollary to this principle, the utility company may, of course, choose not to participate in the industry any longer: although the regulations limit the companies' rates, those regulations, as this court has itself observed, do not require "the regulated group . . . to participate in the regulated industry." *Whitney v. Heckler, 780 F.2d 963, 972* (11th Cir.), *cert. denied*, ***479 U.S. 813, 107 S. Ct. 65, 93 L. Ed. 2d 23 (1986)***.

[52] Application of established takings cases also supports this conclusion. In this case, the "compact" rationale, *see supra* note 51, under which utilities voluntarily subject themselves to regulation in return for certain benefits, does not apply. Rather, "the regulated group is . . . required [by a federal court implementing the Sherman Act] to participate in the regulated industry," *Whitney, 780 F.2d at 972*, and courts have considered such compulsion to be an important indication of a *fifth amendment* taking. Such a regulation could still be enforced if the company was provided just compensation. Because the company acts under compulsion, however, rather than voluntarily submitting to regulation as in the ratemaking cases, the court should apply a more rigorous standard for just compensation than the relatively broad "zone of reasonableness" standard developed under *Hope*. Before turning to the question of just compensation, I first analyze this case under established takings principles.

As the Supreme Court has emphasized, "the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 102 S. Ct. 3164, 3176, 73 L. Ed. 2d 868 (1982)*; *see* *Nollan v. California Coastal Comm'n, 483 U.S. 825, 830-32, 107 S. Ct. 3141, 3145, 97 L. Ed. 2d 677 (1987)*; ***Kaiser Aetna v. United States, 444 U.S. 164, 179-80, 100 S. Ct. 383, 393, 62 L. Ed. 2d 332 (1979)***; *see also* *FCC v. Florida Power Corp., 480 U.S. 245, 251-53, 107 S. Ct. 1107, 1112, 94 L. Ed. 2d 282 (1987)*. In fact, the Court has held that a permanent physical occupation of property by the government constitutes a *per se* taking. *See, e.g., Loretto, 458 U.S. at 434-36, 102 S. Ct. at 3175-76*; *see also* *Florida Power Corp., 480 U.S. at 251-53, 107 S. Ct. at 1112*. The severity of such an invasion warrants this conclusion without requiring analysis under the "multifactor inquiry generally applicable to nonpossessory governmental activity." *Loretto, 458 U.S. at 440, 102 S. Ct. at 3178-79*; *see* *Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978)* (describing multifactor inquiry); *see also infra* (applying inquiry in present case). The Supreme Court has emphasized, however, that this permanent-physical-occupation rule is "very narrow." *See, e.g., Florida Power, 480 U.S. at 251-53, 107 S. Ct. at 1112*; *Loretto, 458 U.S. at 441, 102 S. Ct. at 3179*.

In my view, this case presents a close question concerning the *Loretto* rule's applicability. *Loretto* involved a state regulation that required landlords to allow cable television companies to install cable facilities on their property. The Court found that the installation involved a permanent, physical attachment and thus held that it constituted a *per se* taking. *Loretto, 458 U.S. at 441, 102 S. Ct. at 3179*. As the Court has subsequently indicated, a key rationale behind that holding was the fact that the statute *required* landlords to allow cable installation. On this basis, the Court in *Florida Power* distinguished a federal statute, the Pole Attachments Act, *47 U.S.C. § 224 (1982)*, which authorized the FCC to regulate the terms of contracts between utility companies

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and cable operators for the attachment of cable to utility poles, from the regulation in *Loretto*. As the *Florida Power* court discussed,

> while the statute we considered in *Loretto* specifically *required* landlords to permit permanent occupation of their property by cable companies, nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.

480 U.S. at 251, 107 S. Ct. at 1112. The Court in *Florida Power* expressly stated, however, that it did "not decide . . . what the application of *Loretto* . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *Id. at 251 n. 6, 107 S. Ct. at 1112 n. 6*. The present case seems to present exactly this question, and to the extent that the element of compulsion explains the rule in *Loretto*, that rule should apply here.

Another key factor in the *Loretto* decision was the nature of the invasion: the permanence of the facilities and the landlord's lack of control over them and their installation. In my view, the invasion in the present case is factually similar. As in *Loretto*, the district court's mandate requires a permanent, physical intrusion onto City Gas' property. The intrusion is permanent in two ways: first, a pipe must be constructed *permanently* to attach City Gas' pipesystem to Consolidated's pipesystem; and second, this interconnecting pipe will permanently drain natural gas from City Gas' pipesystem and into Consolidated's pipesystem. As the Court has previously held, such a continuous arrangement constitutes a "permanent physical occupation" for purposes of the *Loretto* rule. *See* Nollan, 483 U.S. at 832, 107 S. Ct. at 3145 (easement giving individuals "permanent and continuous right to pass to and fro, so that the real property may continuously be traversed").

I also think that City Gas, like the landlord in *Loretto*, lacks control over this invasion. City Gas has no control over the invasion in that City Gas cannot refuse to provide gas. But City Gas also lacks control over the invasion in a secondary sense that the *Loretto* Court also held to be important. The Court there referred to the landlord's lack of control over the "placement, manner, use, and possibly the disposition of the installation" and suggested that the outcome might have been different if the landlord had such control. *458 U.S. at 440 n. 19, 102 S. Ct. at 3179 n. 19*. Similarly, in *Nollan*, the Court noted the property owner's inability to regulate the continuous flow of traffic across his property. *See* *483 U.S. at 830-32, 107 S. Ct. at 3145*. Here, City Gas will have to supply gas according to the terms mandated by the district court: in set amounts, at set times, and at set prices. The fact that City Gas owns its own pipesystem is of no significance. The district court, and not City Gas, decrees the terms of the arrangement. I would think, therefore, that *Loretto* controls: if *section 2* of the Sherman Act requires City Gas to deal under these circumstances, that constitutes a *per se* taking.

Even if *Loretto* does not control, this forced supply constitutes a taking under the *Penn Central* multifactor inquiry. That inquiry looks to (1) the economic impact of the regulation, (2) the extent to which it interferes with investment-backed expectations, and (3) the character of the governmental action. *See* Penn Central, 438 U.S. at 124, 98 S. Ct. at 2659. Imposing a duty to deal will have a significant economic impact on City Gas. With an investment of time and money, City Gas will have to divert some of its own gas supply to Consolidated and also administer the actual process of supplying gas to Consolidated. In addition, by enabling Consolidated to compete without having to undertake the costs associated with entry into the natural gas supply business, the duty to deal might force City Gas to change its retail distribution business: in order to avoid losing customers to Consolidated, City Gas might (subject to the FPSC's approval) have to lower its retail prices, if it can do so without loosening the safety controls of its operation; it might have to undertake a more aggressive marketing strategy, which would in turn increase its operating costs; it might also lose potential business opportunities -- e.g., the ability to extend its services to customers in territory occupied by Consolidated. In the event of a gas shortage, moreover, City Gas might have to curtail delivery to its own customers in order to continue supplying Consolidated.

As these considerations suggest, the duty to deal will also interfere with City Gas' investment-backed expectations. By changing the market's regulatory structure and altering the nature of competition in that market, the duty to deal will significantly affect these expectations.

Finally, the character of the district court's invasive action suggests a taking. This is not a case where a government regulation merely restricts the use of property. Rather, the case involves an actual physical invasion of City Gas' property: gas is removed from its pipesystem and transferred to Consolidated's pipesystem. Even under the multifactor inquiry, therefore, this case involves a taking.

The *fifth amendment* requirement means more though: it also controls the court's determination of whether City Gas violated the duty to deal imposed under this new rule. The *fifth amendment* protects City Gas from having to sell its gas at a price lower than the just compensation price. Thus, City Gas violated its duty to deal under *section 2* only if it refused to deal *at the fifth amendment price*. [54] The court must make this determination by comparing the *fifth amendment* price to the selling price actually offered by City Gas and evaluating whether that offered price was unreasonably high, thus constituting a refusal to deal in violation of *section 2*. The court must therefore set the *fifth amendment* price in order not only to fashion its injunction, but also to evaluate whether City Gas violated its duty to deal in the first place.

[192]** In addition, the *fifth amendment* price controls the court's determination of whether Consolidated can satisfy the injury-in-fact requirements of *sections 4* and *16* of the Clayton Act. As I discuss below, *see infra* slip op. at 5206-5207, , in order to prove injury, or the likelihood of injury, for purposes of *sections 4* and *16*, Consolidated must show that it could have turned a profit by purchasing wholesale gas from City Gas *at the fifth amendment price*. If Consolidated could not have turned a profit after purchasing gas at that price, then City Gas' refusal to deal did not injure Consolidated, and Consolidated has no standing under the Clayton Act to point to that conduct as a basis for liability under *section 2*. In order properly to decide this issue, however, the court must first find the *fifth amendment* price. I now consider the application of **[*1317]** these *fifth amendment* requirements to the present facts.

2. Finding a *Fifth Amendment* Price.

Assuming the facts of the present case, the court finds as follows: City Gas initially offered to sell the gas at cost [55] plus ten cents per therm. Consolidated eventually made a counter offer to buy the gas at cost **[**193]** plus two and one-half cents per therm. City Gas rejected the offer as too low, but then lowered its initial price to cost plus seven cents per therm. Consolidated later proposed a price of cost plus five cents per therm. The parties reached no agreement and the negotiations ceased. *See* *665 F.Supp. at 1510*. [56]

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[53] In deciding this case, of course, the court faces the question of just compensation in a different procedural context than it would in the standard ratemaking cases that I cite above. Rather than *reviewing* a state or federal agency's rate determination to decide whether it passes constitutional muster, the court, as I explain in the text below, must itself *set* the just compensation price in order to determine the issue of liability in the case.

In addition, this "taking" must satisfy the *fifth amendment's* "public use" requirement. That requirement, however, has been interpreted broadly. As the Supreme Court stated in *Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240, 104 S. Ct. 2321, 2329, 81 L. Ed. 2d 186 (1984)*, "the 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." *See also* *Berman v. Parker, 348 U.S. 26, 32-33, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954)*. Thus, the courts conduct "'an extremely narrow'" review of "a legislature's judgment as to what constitutes a public use," *Midkiff, 467 U.S. at 240, 104 S. Ct. at 2328* (quoting *Berman*): "the Court . . . will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation,'" *id. at 241, 104 S. Ct. at 2329* (quoting *United States v. Gettysburg Elec. R. Co., 160 U.S. 668, 680, 16 S. Ct. 427, 429, 40 L. Ed. 576 (1896))*. I assume, for the sake of discussion, that the taking in the present case would satisfy this requirement.

[54] In effect, antitrust doctrine already reflects this idea by holding that a party is not liable under *section 2* for a refusal to deal if a valid business justification supports that party's decision. *See, e.g.,* *Mid-Texas Communications Sys., Inc. v. AT & T, 615 F.2d 1372, 1388-89* (5th Cir.), *cert. denied*, ***449 U.S. 912, 101 S. Ct. 286, 66 L. Ed. 2d 140 (1980)***; *Poster Exchange, 431 F.2d at 339*; *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484, 488* (1st Cir.), *cert. denied*, ***344 U.S. 817, 73 S. Ct. 11, 97 L. Ed. 636 (1952)***.

[55] In its "cost" figure, the district court below included only the price that City Gas paid for its wholesale gas and not the overall costs that City Gas incurred in its retail gas operation. *See* *665 F. Supp. at 1511*.

[56] As I discuss above, *see supra* notes 5 & 7, the district court below put a spin on these facts, characterizing City Gas as the bad guys and Consolidated as the good guys. The district court suggested that City Gas knew its initial offer of cost plus ten cents per therm was too high and that the FPSC would never approve it. In addition, the district court pointed to testimony by

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Now, in order to prove its case under the new rule, Consolidated must make two showings: it must (1) establish a selling price that will justly compensate City Gas; and (2) prove that City Gas' price of cost plus seven cents per therm was substantially higher than the just compensation price [57] and therefore constituted a refusal to deal under *section 2*. [58] I next consider how Consolidated can establish the just compensation price.

[195]**

A just compensation price provides a property owner with a reasonable rate of return on its investment. In a typical takings case, for example where the government institutes a condemnation procedure and takes Blackacre so that the interstate highway can become two lanes wider, the government compensates the owner for Blackacre's fair market value, or "what a willing buyer would pay in cash to a willing seller." *United States v. Miller, 317 U.S. 369, 374, 63 S. Ct. 276, 280, 87 L. Ed. 336 (1943)*. [59] The present facts, however, do not describe a typical takings case. Rather than the one-shot taking of Blackacre to widen the interstate highway, the present facts involve a *continuous* taking of a portion of City Gas' assets. The fair-market-value standard obviously does not provide **[*1318]** an acceptable formula for calculating a reasonable rate of return in a case involving this type of continuous taking. *See* *Hope, 320 U.S. at 601, 64 S. Ct. at 287* ("The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated.") Consolidated **[**196]** must therefore find an alternative basis for establishing a *fifth amendment* price.

As one possibility, Consolidated might point to a wholesale gas price set by a company similarly situated to City Gas, claiming that that price will provide City Gas just compensation. That company has to be virtually identical to City Gas in terms of the factors that a gas company takes into account in setting its wholesale price, *see infra*. For example, the company must deal in both the retail and wholesale markets. No such company exists under the facts of the present case. [60] **[**198]** Nor can Consolidated point to any other existing operation, under the facts here, as

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City Gas' Vice President that "he made no attempt to ascertain a reasonable price for direct gas sales to Consolidated, and that he came up with the cost plus ten cents terms 'out of the air.'" *665 F. Supp. at 1510*.

This characterization assumes that City Gas had a duty to enable Consolidated to enter the natural gas business at as little cost as possible so that it could most effectively compete with City Gas. Because City Gas did not want, and did not seriously attempt, to do this, the court characterized its behavior as bad. This characterization is counterintuitive. City Gas did exactly what one would expect any rational business firm to do: it continued operating as it normally did, doing nothing illegal to obstruct a potential competitor's entrance into the market but also doing nothing to facilitate its entrance into the market. To characterize this type of conduct as bad is to adopt a position totally at odds with normal business practices in this country.

[57] Consolidated must show that City Gas' price exceeded the *fifth amendment* price by a *substantial* amount. If that point is fairly debatable, then City Gas will not be subject to liability.

I suggest that Consolidated might also have to show that its counter offer was reasonable in light of the *fifth amendment* price. If Consolidated offered a price, indicating that it would *pay no more* for the gas, and the *fifth amendment* price substantially exceeded Consolidated's offered price, then Consolidated has no claim under *section 2*.

[58] Consolidated bears the burden of proof on this point. In arranging the order of proof, however, the court might apply a presumption requiring City Gas to come forward with all of the evidence, on the ground that the evidence is exclusively in its possession and that fairness requires City Gas to proceed first. City Gas will then have to present evidence demonstrating that the price it quoted to Consolidated was necessary to provide just compensation. See *infra* slip op. at 5199-5203, , for a discussion of the factors relevant to such a showing. The burden, however, will then shift to Consolidated to rebut City Gas' just compensation price.

[59] Blackacre's fair market value can be determined based on the selling price of comparable pieces of property. Even if no comparable sales have occurred in the market, the value can be determined by constructing a hypothetical market and taking expert testimony regarding Blackacre's best-use price.

a basis for calculating the just compensation price. [61] Instead, **[**197]** Consolidated has to establish the *fifth amendment* price based on City Gas' actual costs, which is in effect the historical-cost basis of the *Hope-Barasch* cases. *See supra* note 51 & accompanying text.

Under this inquiry, Consolidated must establish a variety of factors, for example: (1) the price at which City Gas itself purchases the gas; (2) City Gas' operating costs in purchasing and delivering the gas; (3) City Gas' fixed costs in purchasing and delivering the gas; and (4) any business opportunities that City Gas might lose as a result of selling gas to Consolidated. [62] In addition, a court faced with the present facts must take into account the risks assumed by City Gas' investors. The court **[**199]** must determine the return needed to compensate those investors for that risk, and the greater the risk, the higher the rate of return has to be. [63] **[**200]** The court must evaluate all of the evidence and, adopting the role of a ratemaker, set a price that enables City Gas to sell at a reasonable profit. Consolidated must then prove that City Gas' offered price was unreasonable. [64] In **[*1319]** addition, the court must determine, for purposes of the injury-in-fact requirement of *sections 4* and *16* of the Clayton Act, whether Consolidated can turn a profit at the *fifth amendment* price.

Courts have a difficult enough time interpreting and applying the historical-cost test in a reviewing capacity. *See, e.g., Jersey Central, 810 F.2d at 1175*. [65] **[**201]** I suppose, however, that if an administrative agency can

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[60] If such a company had existed in the present case, then the district court below, in fashioning its injunction requiring that City Gas sell to Consolidated, would not have had to delegate to the FPSC the task of setting a selling price. *See 665 F. Supp. at 1512, 1534, 1545*. Instead, it could have looked to that other company's wholesale gas price as evidence of City Gas' just compensation price.

Even if such a company could be found, its selling price would probably not be controlling. That company would be a regulated company, selling its wholesale gas at rates approved by the FPSC. As such, that company would have voluntarily undertaken to sell at wholesale in a regulated market, subjecting itself to the FPSC's rates in return for the benefits of operating in a regulated industry. *See supra* note 51. That price would not be presumptively fair to City Gas, a company that has not voluntarily undertaken to deal at those FPSC-approved rates.

[61] Consolidated obviously could not point to the price charged by wholesalers like FGT, as a basis for the just compensation price. City Gas has opted not to sell in the wholesale market, applying its resources to the retail market instead. As a retail distributor, City Gas' fixed and operating costs are entirely different from those of a wholesaler like FGT: City Gas' investments are committed to a variety of expenditures that are unnecessary for a wholesale operation. In order to receive a reasonable return on its investment, therefore, City Gas must charge a different price than FGT charges.

[62] In order to evaluate this last factor, the court considers, in part, probable changes in the market value of Consolidated's stock.

[63] As the *Hope* Court stated:

The investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

320 U.S. at 603, 64 S. Ct. at 288.

[64] That is, Consolidated must prove that the price City Gas offered Consolidated was *substantially* higher than the *fifth amendment* price. *See supra* note 57.

[65] In that context, moreover, the courts' task is eased by a high initial burden of proof on the utility company to show that the rate is unreasonable before the test even applies. In addition, the courts apply a broad standard of reasonableness in reviewing rates set by regulators. In part, that standard reflects institutional concerns and ensures the courts' deference to agencies' determinations. That standard also reflects the nature of the compact between utility companies that have voluntarily entered a regulated market and the state, which regulates the market. *See supra* note 51. In the present case, however, City Gas has not

establish a rate by taking evidence concerning these factors, then the court can adopt the role of a regulator and do so too. Of course, the just compensation price established by the court under the present facts must satisfy a more stringent standard than the standard that applies to rates set by a regulatory agency. *Cf. id.; supra* note 51. [66]

In order to demonstrate that Congress could not have intended *section 2* to support such a rule in the first place, I continue with this analysis and assume, for the sake of discussion, that Consolidated manages to establish (1) the *fifth amendment* price in this case, (2) that City Gas breached its **[**202]** duty under *section 2* by offering a price that was unreasonably high in light of the *fifth amendment* price, and (3) that Consolidated actually suffered damages as a result of City Gas' refusal to deal. I assume further that the court orders City Gas to supply wholesale gas to Consolidated at the *fifth amendment* price. As I describe in the next section, however, the matter would not end there.

3. Changed Circumstances.

Assume that City Gas abides by the court's decree and begins supplying gas for resale to Consolidated. A few months later, the cost of supplying gas to Consolidated increases. As a result, the price set by the court in its decree no longer justly compensates City Gas, and City Gas moves for a modification of the decree to increase the selling price. Consolidated opposes the increase. At that point, the court, which has retained jurisdiction, again has to assume the role of regulator and undertake an extensive inquiry into the facts to determine whether a price increase is justified.

The increase in City Gas' costs can result from any of several factors: City Gas' purchase price from FGT might increase; City Gas' own delivery costs might increase; or, City Gas might **[**203]** make some business decisions that increase its operating costs. Assume here that City Gas decides that it must spend more money on advertising in order to compete with Consolidated: after all, Consolidated entered the market in order to compete with City Gas, which is exactly what the district court's injunction was designed to achieve.

At the hearing, therefore, City Gas argues that the just compensation price must include the legitimate expenses of competing with Consolidated. If the *fifth amendment* price does not reflect these expenses, City Gas contends, then the company will eventually have to pass them off to its customers by increasing its retail price (assuming the FPSC will approve such a rate **[*1320]** increase). [67] If the court denies the rate increase, according to City Gas, that will give Consolidated a decisive competitive advantage and will therefore defeat the purpose behind the court's injunction -- i.e., enabling both companies to compete on equal terms. City Gas argues that denial of the increase will give Consolidated a free ride at City Gas' expense and that the *fifth amendment* surely protects it from that result.

[204]** Consolidated, on the other hand, argues that if the court increases the selling price, then City Gas will gain a competitive advantage in the marketplace. Consolidated's costs will increase; it will, in turn, have to pass those costs off to its customers, *see supra* note 67; and as a result, it will be unable to compete with City Gas' lower retail prices. That result, says Consolidated, is inconsistent with the policies behind the antitrust laws.

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voluntarily entered such a compact. A price that might be satisfactory in the regulatory context, therefore, will not necessarily provide City Gas with a reasonable rate of return on its investment here.

[66] As I develop below, *see infra* slip op. at 5210-5213, , the district court in this case did not find a *fifth amendment* price, let alone evaluate City Gas' offered price in light of that *fifth amendment* price. The district court, therefore, never properly decided whether, in light of the *fifth amendment* price, City Gas actually refused to deal under *section 2*. In addition, having failed to find a *fifth amendment* price, the district court did not properly determine whether Consolidated actually suffered injury as a result of City Gas' refusal to deal. Finally, because of this failure to find a *fifth amendment* price, the remedies fashioned by the district court were also erroneous: as I discuss below, *see id.*, proper remedies in this case must be based on the *fifth amendment* price.

[67] City Gas' shareholders will initially absorb these expenses through a depletion of City Gas' resources but will then pass them off to the customers through rate increases. If the FPSC does not approve rate increases, however, the shareholders will assume the burden themselves. In that case, City Gas will eventually go out of business (when its resources are exhausted).

What is the court to do in such a situation? I suggest that whatever it does, it cannot serve the purposes of the antitrust laws while at the same time satisfying the *fifth amendment's* requirements. Whether the court grants or denies City Gas' request for an increase in the selling price, its decision will harm one segment or another of natural gas consumers. If the court grants the increase, then Consolidated's consumers will eventually bear the burden of Consolidated's increased costs. If the court denies the increase, then City Gas' consumers will bear the burden of City Gas' increased costs. Surely Congress could not have intended to create a rule that inevitably harms consumers: harm to consumers is exactly what Congress designed **[**205]** the antitrust laws to prevent.

The court might attempt to avoid this dilemma by placing controls on the competition between City Gas and Consolidated. For example, the court could allocate parts of the territory within the area of competition to each of the companies and prohibit them from competing for control of the other company's territory. Such a forced allocation, however, would run afoul of the *fifth amendment* by restricting City Gas' ability to compete and expand, if not by actually limiting City Gas' present distribution area.

Finally, if the court denies the rate increase, what will it do when City Gas' customers, who will have to pay more for their gas, seek to intervene in the case on the ground that the court's decision infringes upon rights accorded them (by implication) under the antitrust laws? If the court instead grants the increase, then Consolidated's customers rather than City Gas' customers will seek to intervene. In short, whichever way the court decides the question, consumers will be harmed.

Congress clearly could not have intended *section 2* to support this new rule of liability. That rule, as my discussion demonstrates, forces the courts to adopt the **[**206]** role of a regulatory agency, an agency charged, moreover, with an impossible task and facing a set of never-ending problems. In addition, the rule frustrates the purposes behind the antitrust laws: it creates situations in which, however a court rules, consumers will be harmed. A rule that leads to such results is not consistent with Congress' intent in passing *section 2*.

B. *The District Court's Application of the Rule Below.*

This court today, nevertheless, upholds this impossible rule. Even under this rule, however, I would vacate the district court's judgment and remand the case for further proceedings. The district court failed to find a *fifth amendment* price in the present case, and that failure created reversible error on three grounds: (1) the district court never properly decided whether, given the *fifth amendment* price, City Gas actually refused to deal under *section 2*; (2) the district court failed to determine whether, for purposes of *sections 4* and *16* of the **[*1321]** Clayton Act, Consolidated suffered any injury in fact as a result of City Gas' refusal; and (3) the absence of the *fifth amendment* price also infected the remedies fashioned by the district court.

[207]** I would thus instruct the district court on remand first to find the *fifth amendment* price, in the manner I describe above, second to decide whether City Gas breached its duty to deal under the district court's new rule, third to determine whether Consolidated suffered injury as a result of City Gas' refusal to deal, and fourth, to revisit the remedies issues. I now provide more particular instruction on these last two points.

1. Injury in Fact.

It is an established principle of law that *injuria absque damno*, or an injury without damage, creates no right to a remedy. *See* *Shumate & Co. v. National Ass'n of Secs. Dealers, Inc., 509 F.2d 147, 152 (5th Cir.1975)* ("injury is the *sine qua non* for stating a cause of action"). *Section 4* of the Clayton Act expressly incorporates this principle by creating a private suit for treble damages only for "any person who shall be *injured* in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15 (1988)* (emphasis added); *see* *Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; **[**208]** *Blue Shield v. McCready, 457 U.S. 465, 476-78, 102 S. Ct. 2540, 2546-48, 73 L. Ed. 2d 149 (1982)*; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*; *Cable Holdings, Inc. v. Home Video, Inc., 825 F.2d 1559, 1561-62 (11th Cir. 1987)*; *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 607 (11th Cir.1984)*, *cert. denied*, *471 U.S. 1056, 105 S. Ct. 2120, 85 L. Ed. 2d 484 (1985)*; *McClure v. Undersea Indus., 671 F.2d 1287, 1289 (11th Cir. 1982)*. Similarly, *section 16* of the Clayton Act, which authorizes private suits for injunctive relief, requires the private plaintiff to show a likelihood of injury. *See 15 U.S.C. § 26*; *Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 111-15, 107 S. Ct. 484, 490-91, 93 L. Ed. 2d 427 (1986)*.

Because the district court failed to find the *fifth amendment* price, it did not properly decide whether Consolidated suffered injury. On remand, in order to prove injury in fact, Consolidated would have to show that it could have **[**209]** turned a profit after purchasing gas from City Gas at the *fifth amendment* price. If Consolidated can show that it could have turned a profit, that showing would prove that it suffered injury as a result of City Gas' refusal to deal. The showing would satisfy *section 4*'s injury-in-fact requirement and would probably also demonstrate a likelihood of future injury for purposes of *section 26* of the Clayton Act as well. If, on the other hand, Consolidated cannot show that it could have turned a profit, then City Gas' refusal to deal caused no injury: Consolidated would have gone out of business regardless of the refusal. [68] In that event, Consolidated would be unable to show that it suffered, or was likely to suffer, injury in fact and thus would be unable to make out a case under *sections 4* or *26* of the Clayton Act. I next discuss the remedies issues.

[210]** 2. Available Remedies.

The availability of remedies in this case -- assuming City Gas violated *section 2* -- depends upon the assumption that Consolidated could have turned a profit with a supply of natural gas at the *fifth amendment* price. As I discuss above, injury is an element of liability under *sections 4* and *16* of the Clayton Act. The principle of *injuria absque damno*, though, also implicates the availability of remedies. In the **[*1322]** present case, therefore, if Consolidated could not have turned a profit with gas, then it is entitled to no remedy. As I also discuss above, the *fifth amendment* price controls this injury question as well. Consolidated's ability to turn a profit, and thus prove injury, depends upon the *fifth amendment* price. To the extent that the *fifth amendment* price changes, therefore, Consolidated's profitability, and the question of injury, will also change. With these principles in mind, I now turn to the specific remedies issues raised here. Depending upon whether or not Consolidated can operate in the future as a natural gas distributor, one of two remedial schemes, which I discuss in turn in subsections a and b, will provide relief. As I **[**211]** demonstrate in subsection c, however, the two schemes are inconsistent with one another. In subsection d, I then consider the district court's errors in granting Consolidated relief under both schemes and instruct it on how to proceed on remand.

a. The first remedial scheme.

In its amended complaint, Consolidated sought both permanent injunctive relief and damages for lost profits under the first remedial scheme. Consolidated's request for permanent injunctive relief implied that at the time of City Gas' refusal to deal, and at least until the date of the amended complaint, Consolidated could have turned a profit after purchasing wholesale gas at the *fifth amendment* price. The request for an injunction further implied that, based on Consolidated's ability to turn a profit in the past, Consolidated could have turned a profit in the future if the district court granted the injunction and provided Consolidated with a supply of wholesale gas. [69] Consolidated thus

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[68] Congress surely did not design the antitrust laws merely to prevent companies from going out of business where the defendant has done nothing to undercut that company's ability to compete. Nor did Congress provide for liquidated damages in the antitrust laws, and I sincerely doubt that Congress intended the antitrust laws to tie up a courtroom for months for the purpose of awarding nominal damages merely to punish a company such as City Gas for not selling gas at the *fifth amendment* price.

[69] Curiously, Consolidated did not request a preliminary injunction. If Consolidated's ability to operate as a natural gas supplier -- and to do so at a profit -- depended upon a hook-up to City Gas, then presumably Consolidated would have wanted a hook-up as soon as it could obtain one. Nevertheless, for reasons not apparent in the record, Consolidated decided not to request a preliminary injunction. Instead, it waited until trial to specify the remedy it was seeking. There, Consolidated claimed that City Gas, by refusing to supply wholesale gas, had in effect taken Consolidated's business. Consolidated therefore sought damages in the form of the going concern value of its business. Through its expert witness, Ben Ball, Consolidated asserted that City Gas had deprived it of twenty years of future profits. As it turned out, the district court awarded Consolidated its lost future profits (reduced to their present value) as well as a permanent injunction requiring City Gas to supply Consolidated with gas at a price

requested damages for its lost profits from the date of City Gas' refusal to deal to the date of final judgment and a permanent injunction enabling Consolidated to operate in the future as retail natural gas distributor **[**212]** *with a supply of gas*. This combination of remedies would make Consolidated whole, with the damages compensating for any losses incurred before the injunction and the injunction enabling it to operate in the future as a company with a supply of natural gas.

[213]** In calculating Consolidated's damages for lost profits under this remedial scheme, a court must undertake the following inquiry: based on the *fifth amendment* price, the court must determine what Consolidated's profits would have been if it had a natural gas supply. Of course, if Consolidated could not have turned a profit, then it is not entitled to damages. [70] In addition, because the *fifth amendment* price is always subject to change, the court must determine whether the *fifth amendment* price remained fixed from the time of the refusal to deal until the time of final judgment. If the *fifth amendment* price changed, then the court must reassess whether Consolidated could have turned a profit at each interval of changing prices.

[214]** If the court decides to grant the injunction, and requires City Gas to supply gas at the *fifth amendment* price, the court must then retain jurisdiction over the case and **[*1323]** entertain City Gas' motions to modify the injunction in light of any subsequent changed circumstances or to dismiss the case in the event that Consolidated can no longer turn a profit. As I discuss above, the *fifth amendment* price is subject to constant change, as are Consolidated's own costs. Thus, the court must retain jurisdiction over the case, not only to redetermine the *fifth amendment* price in light of successively changing circumstances, but also to redetermine whether Consolidated can still turn a profit at the modified *fifth amendment* price. If at any subsequent time Consolidated can no longer turn a profit at the *fifth amendment* price, then the court must vacate the injunction and dismiss the case.

This combination of damages for lost profits and injunctive relief would make Consolidated whole. The damages would compensate it for whatever loss it suffered as a result of the refusal to deal prior to the date of final judgment, and the injunction would enable it to operate in the future as **[**215]** a company with a natural gas supply.

b. The second remedial scheme.

As I suggest above, the implication of Consolidated's request for injunctive relief was that Consolidated, which had been shut down for want of a natural gas supply, could resume operation if it acquired a natural gas supply. This outlook could change, of course, if, prior to trial, the effects of the refusal to deal put Consolidated permanently out of business, thus rendering injunctive relief useless. In that event, at trial, Consolidated would seek (1) damages for the net going concern value of the company, with gas, just prior to its demise and (2) damages in the amount of lost profits from the date of the refusal to deal to the date of its demise. [71]

[216]** The principle behind the damages for loss of Consolidated's going concern value is that City Gas' refusal to deal eventually resulted in Consolidated's demise, in effect a taking of its business (less the assets that

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to be set by the FPSC. The granting of injunctive relief was patently inconsistent with the damages award, an issue that I discuss below, *see infra* slip op. at 5209-5210, 5212, , .

[70] If Consolidated cannot show past injury for purposes of the damages award, then Consolidated will probably also be unable to show a likelihood of future injury for purposes of injunctive relief. In a case such as this one, a plaintiff generally proves a likelihood of future injury based on a showing of past injury.

[71] Conceivably, Consolidated could have lost a part of its going concern value prior to its total demise. Assume, for example, that Consolidated (as an LP gas distributor) serviced Whiteacre and Blackacre and that, soon after the refusal to deal, City Gas took control of Blackacre. At that point, which preceded its general demise, Consolidated lost the ability to go back into operation in Blackacre even if it could have acquired a supply of gas before its general demise. In that case, Consolidated would still seek damages for the company's going concern value just prior to the demise, as well as damages for profits lost prior to its demise; it would also seek damages for the going concern value of its operation in Blackacre -- the portion of its operation that was lost before the demise. Of course, when the court determined the going concern value of Consolidated's *entire* operation just prior to the demise, that operation would no longer include Consolidated's operation in Blackacre. *Cf. infra* note 76 (discussing loss of partial going concern value in relation to injunctive relief).

Consolidated kept). That is, as a result of City Gas' continued refusal to deal, Consolidated could no longer operate as a natural gas distributor even if it had a supply of natural gas. The damages for loss of going concern value would therefore compensate Consolidated for the difference between what Consolidated would have been worth had City Gas supplied gas and what it was worth without a supply of gas just prior to its demise. [72]

In calculating these damages, a court must undertake the following analysis: the court must first determine Consolidated's fair market value -- or, what a hypothetical willing buyer, fully informed of all relevant **[**217]** facts, would pay a hypothetical willing seller, also fully informed of all relevant facts, for Consolidated -- with gas as compared to without gas. Without a supply of gas, Consolidated would be worth the salvage value of its plant and equipment (its pipesystem), that is, what a hypothetical buyer would pay for the company without gas just prior to its demise -- say, for the sake of discussion, $ 750,000. With a supply of gas, Consolidated would still not be worth any more than its salvage value *unless* it could have turned a profit with a supply of gas at the *fifth amendment* price. If Consolidated **[*1324]** could have turned a profit with gas, then the court must determine the damages caused by the refusal to deal through the eyes of the hypothetical willing buyer and seller.

Assume that the court finds that the buyer and seller strike the following deal: after dickering about how long Consolidated can count on a supply of gas from City Gas and about how long Consolidated can turn a profit at City Gas' *fifth amendment* price, the buyer and seller reach a compromise on these points. The buyer then decides how much it is willing to invest in order to obtain Consolidated's profits **[**218]** over the established period of time. [73] **[**219]** The seller decides what amount it will accept, and the two reach another compromise. They conclude that Consolidated with a supply of gas will probably generate $ 250,000 in profits per year for twenty years. [74] Given the nature of the investment risks, the buyer expects a ten percent annual return on its investment and is thus willing to pay approximately $ 2,128,500, or the present value of annual profits of $ 250,000 over a period of twenty years. The buyer will in effect purchase a twenty-year annuity that pays $ 250,000 a year. The court thus finds that Consolidated's loss of going concern value is $ 1,353,500 -- the difference between $ 2,128,500 (Consolidated's fair market value with gas) and $ 775,000 (Consolidated's fair market value without gas).

Consolidated also seeks damages for the profits it lost while in operation after City Gas' refusal to deal until the time of its demise. [75] The court must determine those damages based on the profits that Consolidated would have made if it had purchased gas at City Gas' *fifth amendment* price. *See supra* slip op. at 5206, . The district court must also take into account any changes in the *fifth amendment* price during that period of operation.

[220]** *c. The two schemes' inconsistency*.

As this discussion indicates, these two remedial schemes are theoretically inconsistent. As I explain above, Consolidated can recover damages for loss of its going concern value if, by the time of trial, it can no longer operate as a natural gas distributor. Under that measure of damages, City Gas in effect pays Consolidated the present value of the profits that Consolidated would have made in the future ($ 250,000 for twenty years in my hypothetical example) had City Gas sold it gas. In contrast, if, having acquired a supply of gas, Consolidated can operate in the

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[72] I assume that City Gas was Consolidated's only feasible gas supplier, i.e., that hooking up to FGT's pipeline was too expensive for Consolidated.

[73] In the dickering process, the buyer and seller assess the risk of the investment. The buyer emphasizes the possibility that Consolidated will generate profits only for a short term, taking into account the likelihood of changes in the *fifth amendment* price. Obviously, the more uncertain Consolidated's profit picture might be, the less the buyer is willing to pay.

[74] For the sake of discussion, I assume that $ 250,000 in annual profits represents Consolidated's net operating profits: gross revenues less gas delivery costs with no reserve for depreciation. I also assume that Consolidated's fixed assets -- its plant and equipment -- are self-consuming and will be worthless at the end of twenty years.

[75] In the unlikely event that the demise occurred the moment of City Gas' refusal, and Consolidated could still show that it could have turned a profit had City Gas not refused to deal, then Consolidated obviously cannot seek damages for lost profits in the past: the damages for loss of future profits will be calculated as of the moment of the refusal and will thus include all profits that Consolidated could have generated had the refusal not occurred.

future as a natural gas distributor, then it will seek an injunction. Thus, the permanent injunction means that Consolidated *can* operate as a natural gas distributor, whereas the award of damages for loss of going concern value means that Consolidated *cannot* operate as a natural gas distributor. If Consolidated can continue to operate, the court orders City Gas to supply wholesale gas to Consolidated. If Consolidated cannot continue to operate, however, the court does not order City Gas to supply the gas but instead awards Consolidated damages equivalent to the present **[**221]** value of the profits that it would have made had City Gas supplied it with gas.

Now, if the court awards Consolidated *both* an injunction *and* damages for loss of its going concern value (i.e., the present value of the profits that Consolidated would have made had City Gas supplied it **[*1325]** with gas), not only are the remedies theoretically inconsistent -- the injunction implying that Consolidated can continue to operate as a natural gas distributor, and the damages implying that Consolidated cannot continue to operate as a distributor -- but the award also provides Consolidated with a double recovery. That is, Consolidated recovers its future profits twice: once in the form of the damages equivalent to the present value of twenty-years worth of profits, and again in the form of the profits that it generates over the same twenty years by operating its business. [76]

[222]** With these remedial models, and the inconsistencies between them, in mind, I now consider what the district court actually did in the present case and provide instruction on how it would proceed assuming the case were remanded.

d. Remedies granted below and instructions for remand.

The district court below improperly applied the first remedial model. The district court awarded damages for lost profits in the amount of $ 83,090.15, which covered the period of time from the refusal to deal [77] until the date of trial. The district court, however, did not arrive at this figure by calculating what Consolidated's profits during that time would have been, based on the *fifth amendment* price, with a natural gas supply. Rather, the district court reached this figure based on the profits that *City Gas* made in servicing Consolidated's former customers. The district court determined City Gas' net profits by subtracting City Gas' wholesale gas costs from City Gas' gross revenues. *665 F. Supp. at 1515*. As I show above, however, *City Gas'* profit picture has no relevance to what Consolidated's profit picture would have been. *See supra* slip op. at 5201-5205, **[**223]** . City Gas' wholesale cost -- the cost of gas from FGT -- has no relation to the *fifth amendment* price that Consolidated would have paid for wholesale gas from City Gas. The district court, therefore, improperly calculated this damages figure. On remand, I would instruct the district court instead to award damages based on a showing by Consolidated of what its profits would have been had it purchased gas from City Gas at the *fifth amendment* price.

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[76] These two remedial schemes would be consistent and would not involve a double recovery in a case where a company permanently loses part of its assets as a result of a refusal to deal but retains enough of its assets to continue operating once it gains access to the needed resource. Assume, for example, that Company A operated in Whiteacre and Blackacre and had an opportunity to expand into Beyondacre. As a result of Company B's refusal to sell resource X to Company A (which would constitute a violation of *section 2* under the district court's new rule, even though Company B has never sold resource X to other companies), Company A can no longer operate in Blackacre and has lost forever the opportunity to expand into Beyondacre; Company A's operation, although still profitable, is now limited to Whiteacre. Thus, the court grants an injunction ordering Company B to deal, which allows Company A to continue its operation in Whiteacre, and the court also awards damages for lost profits between the time of Company B's refusal to deal and the final judgment in the case. In addition, the court awards Company A the fair market value of its operation in Blackacre and its opportunity to expand into Beyondacre (these business opportunities having been lost forever). If the court, in doing so, made the necessary factual findings -- such as what the *fifth amendment* price was for resource X, whether Company A could turn a profit given that *fifth amendment* price, and what the degree of uncertainty concerning Company A's profitability was -- these remedies would be proper.

[77] The district court below found that City Gas refused to deal as of February 20, 1982 -- the date when City Gas' Board of Directors met and first considered acquiring Consolidated. In my view, that finding is clearly erroneous. The refusal could not have occurred until City Gas and Consolidated entered into negotiations and City Gas refused to deal at the *fifth amendment* price.

The district court similarly erred in fashioning the injunction in this case. Assuming that on remand Consolidated could show the likelihood of future injury, *see supra* slip op. at **[**224]** 5204-5205, , the district court, under its new rule of liability, should grant an injunction ordering City Gas to supply wholesale gas to Consolidated. The injunction, though, may require City Gas to supply gas only *at the fifth amendment price*. Because, in the proceedings below, the district court never set the *fifth amendment* price, it could include no price term in its **[*1326]** injunction and, as a result, delegated the price-setting task to the FPSC, *see 665 F. Supp. at 1512, 1534, 1545*. [78] On remand, the district court would have to include the *fifth amendment* price term in the injunction. In addition, the district court would have to retain jurisdiction over the case (which it did not do below), entertaining any motions made by City Gas to modify the injunction in light of changed circumstances or to dismiss the case if Consolidated can no longer turn a profit.

[225]** The district court also awarded damages for the loss of Consolidated's going concern value in the amount of $ 1,503,975. I first consider the district court's error in calculating this figure without having found a *fifth amendment* price. I then discuss the inconsistency of its decision to award these damages as well as to grant an injunction.

The court awarded damages for loss of going concern value in the amount of $ 1,503,975 based on testimony by Consolidated's expert witness, Ben Ball. Consolidated called Ball to the stand to render an opinion concerning Consolidated's present value as a company with a natural gas supply -- in effect, what a hypothetical willing buyer, fully informed of all relevant facts, would pay a hypothetical willing seller, also fully informed of all relevant facts. In formulating his opinion, Ball assumed that Consolidated could indefinitely obtain a "competitively priced source of natural gas," *665 F. Supp. at 1514*, and then forecast that, with this supply of gas, Consolidated could continue to operate profitably for twenty years. He estimated the company's annual profits for that period, including the profits that Consolidated would have **[**226]** made by servicing former customers that were now lost to City Gas. From those combined profits, he deducted the expenses that Consolidated would have incurred in changing from LP gas distribution to natural gas distribution and in hooking up to City Gas' pipesystem. Ball then opined that the hypothetical buyer would expect a ten-percent return on his investment, and, using that rate, he reduced the annual net profits during the twenty years to their present value. He concluded that Consolidated's "value today as a natural gas firm," *665 F. Supp. at 1515*, was $ 2,275,130.

From that figure, Ball subtracted $ 771,155 -- the salvage value of Consolidated's assets without gas. Ball arrived at that figure based on the price that City Gas offered to pay Consolidated for all its assets, in the course of their negotiations regarding the wholesale gas supply. As Ball suggested, that figure represented the salvage value of Consolidated's assets as a company without a natural gas supply -- the assets that Consolidated still possessed. After subtracting this figure, Ball was left with a figure of $ 1,503,975, which represented "the diminution of Consolidated's value as a natural **[**227]** gas company as a result of City Gas' actions," *id. at 1515*, that is, the present value of the profits that Consolidated would have made over the next twenty years if City Gas had not refused to deal, less Consolidated's present salvage value.

The district court erred, however, in relying on Ball's profit figures to the extent that those figures were not based on the *fifth amendment* price. Although this error did not infect Ball's calculation of Consolidated's without-gas value (i.e., its salvage value), the error did infect his calculation of Consolidated's with-gas value (i.e., the present value of a twenty-year stream of profits). Rather than basing his figures on the *fifth amendment* price, Ball considered a "competitively priced source of natural gas." As I discuss in detail above, however, no "competitively priced source of gas" existed. *See supra* notes 60, 61, & accompanying text. Presumably, Ball **[*1327]** based his figure on FGT's price to City Gas, which has no relevance to the *fifth amendment* price here. *See id.* In addition, rather than

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[78] In improperly directing the parties to repair to the FPSC for a determination of the wholesale price, the district court in the present case implied that the FPSC's price would, without further consideration by the district court, operate as a provision (the price term) of the injunction. The district court apparently gave no thought to what should happen if the FPSC's price did not satisfy the *fifth amendment*. That is, the district court did not retain jurisdiction to review the FPSC's price in the event that the price failed to provide City Gas with just compensation.

determining what Consolidated's rates would have been if Consolidated bought gas at City Gas' *fifth amendment* **[**228]** price, Ball looked to "City Gas' rates" to its customers. As I also discuss above, City Gas' rates were irrelevant to Consolidated's rate structure. *See id.* For these reasons, Ball's figures provided no support for the damages award; the district court, therefore, improperly relied on those figures in calculating the damages award. On remand, the district court would have to recalculate the award in a manner consistent with the *fifth amendment*.

As a more serious problem, this award of damages for loss of Consolidated's going concern value is inconsistent with permanent injunctive relief and gives Consolidated a double recovery. [79] As I discuss above, *see supra* slip op. at 5209-5210, , the remedies are theoretically inconsistent: the permanent injunction implies that Consolidated can operate (for twenty years) as a profitable natural gas company whereas the damages award (in the form of the present value of a twenty-year stream of profits) implies that Consolidated can no longer operate as a natural gas company. Consolidated either can operate as a gas company or it cannot operate as such; it cannot, however, do both. Depending on which course Consolidated elects, it **[**229]** will be entitled either to an injunction or to damages for loss of going concern value; it cannot, however, receive both.

To award Consolidated both remedies, moreover, constitutes a double recovery. After compensating Consolidated for the loss of its going concern value by awarding it the present value of the profits that it would have made over the next twenty years as a gas company, a permanent injunction then in effect duplicates the award. The injunction gives Consolidated gas for the next twenty years and thus the profits that the damages award assumed Consolidated would have made during that time had City Gas not refused to deal. [80] Armed with the injunction, Consolidated can sell its "going concern" **[**230]** for the same present-value price reflected in the going concern damages award. Consolidated thus earns twenty-years worth of profits *twice*. Under the district court's decision, therefore, Consolidated has obviously received a double recovery. On remand, Consolidated would have to elect between remedies.

In addition, if, on remand, **[**231]** Consolidated were to elect damages for loss of going concern value, then the district court would have to find the date of Consolidated's demise and begin its damages calculation as of that date. Based on that date as well, the district court would have to determine whether Consolidated should recover any damages for lost profits prior to the date of its demise. The expert on whose figures the district court relied indicated that he had calculated "Consolidated's value *today* as a natural gas firm." *Id. at 1515* (emphasis added). The district court, however, did not specify which date "today" was -- whether it was the date of the refusal, the date of Consolidated's amended complaint, the date of trial, or some other interim date. That date, of course, must be the date of Consolidated's demise -- the point in time at which Consolidated's continued operation as a natural gas company became impracticable. The district court would have to calculate the damages for loss of **[*1328]** going concern value (in the form of the present-day value of twenty-years' worth of future profits) as of that point forward and would have to calculate the damages for lost profits from **[**232]** that point backward to the date of the refusal to deal.

The district court, however, never explicitly decided whether or not Consolidated's business was ruined -- let alone when its demise might have occurred. Instead, the district court implied that Consolidated both died and stayed alive. On remand, the district court would have to address this problem. First, it would have to require Consolidated to elect between these two remedial schemes. Depending on its ability to operate in the future, Consolidated could elect *either* injunctive relief, with damages for profits lost in the past, *or* it may elect damages for loss of going

[79] Ball's testimony assumed an entire taking of Consolidated's business as a company with gas. Thus, the record provided no basis for treating this case as a partial-taking situation, *see supra* notes 71 & 76, in which damages for loss of going concern value might be consistent with injunctive relief.

[80] In awarding Consolidated damages in the form of the present-day value of the profits that it would have made over the next twenty years, the district court found -- albeit implicitly (by accepting Ben Ball's testimony) -- that City Gas would have supplied gas for that period at a "competitive price." If Ball's testimony supported the finding that, with a supply of gas from City Gas, Consolidated could have operated profitably for twenty years, then that testimony certainly supported, with equal force, the district court's conclusion (implicit in its award of permanent injunctive relief) that an injunction would enable Consolidated to operate profitably for twenty years.

concern value, with damages for profits lost in the past. In either case, however, the district court's award of damages for lost profits in the amount of $ 83,090.15, which covered the period of time from the refusal until the date of trial, would not be a proper award: the district court did not base the award on the fifth amendment price and never properly determined the dates of the refusal, *see supra* note 77, or of Consolidated's demise.

Thus, even if today's court upholds the impossible rule fashioned by the district court, the district **[**233]** court has still failed to apply it properly in the present case. For that reason, I would vacate the district court's decision and remand for further proceedings as I describe.

VII. STATE-ACTION IMMUNITY

Even if City Gas could be held to have violated section 2, which in my view it has not violated, City Gas would still be immune from federal antitrust liability under the state-action immunity doctrine of Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). I first discuss the *Parker* doctrine's application to private parties. I then analyze City Gas' conduct -- both its territorial agreement with Peoples Gas and its refusal to deal with Consolidated (neither of which, as I have shown, would provide grounds for liability anyway) -- under this doctrine.

A. *The* Midcal *Test*.

The district court correctly stated that in a case such as the present one, when a private party claims immunity under the state-action immunity doctrine, the party must satisfy both parts of the test articulated by the Supreme Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: [81] "First, the challenged restraint must be 'one clearly **[**234]** articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. 97, 105, 100 S. Ct. 937, 943, 63 L. Ed. 2d 233 (1980) (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S. Ct. 1123, 1135, 55 L. Ed. 2d 364 (1978) (opinion of Brennan, J.)). I discuss what these two prongs require in turn.

1. The Clearly Articulated Prong.

In Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985), the Supreme Court considered the first prong of this test. In that case, the United States brought an antitrust challenge against the collective ratemaking practices **[**235]** of rate bureaus composed of motor common carriers in the southeast. Under procedures authorized, but not compelled, by the states in which the carriers operated, the rate bureaus submitted joint rate proposals to the public service commission in each state. Id. at 50, 105 S. Ct. at 1723. The Supreme Court held that Midcal's first prong did not require the state to compel the challenged conduct: "The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties." Id. at 60, 105 S. Ct. at 1728 (emphasis original).

[*1329] The Court then considered whether the first prong would be satisfied "in the absence of a statute expressly permitting the challenged conduct." Id. at 63, 105 S. Ct. at 1730. In *Southern Motor Carriers*, statutes in North Carolina, Georgia, and Tennessee explicitly permitted collective ratemaking; the Mississippi motor carrier statute, however, did not expressly permit such ratemaking, *see* Miss.Code Ann. § 77-7-1 et seq. (1972 & Supp. 1984). Rather, that statute authorized the public service commission **[**236]** to prescribe "just and reasonable" rates for intrastate transportation but left the details of the rate-setting process to the commission itself. The Supreme Court held that the statute satisfied *Midcal's* clearly articulated requirement. The Court reasoned that the statute clearly indicated the legislature's intent that the commission, rather than the market, would set intrastate rates. The legislature left the details of that process to the commission, and the commission exercised its authority by encouraging collective ratemaking. The Court concluded,

> A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. [389]

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[81] Municipalities, unlike private parties, must satisfy only the first *Midcal* requirement in order to have *Parker* immunity. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 1720, 85 L. Ed. 2d 24 (1985).

> at 415, 98 S. Ct. [1123] at 1138 (opinion of BRENNAN, J.). As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.

471 U.S. at 64, 105 S. Ct. at 1730.

The application of the first *Midcal* requirement to conduct by private parties **[**237]** under *Southern Motor Carriers* thus parallels the requirement's application to conduct by municipalities under Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42-44, 105 S. Ct. 1713, 1718-19, 85 L. Ed. 2d 24 (1985), a case handed down the same day as *Southern Motor Carriers*. In *Town of Hallie*, a township challenged a city's conduct in gaining a monopoly over sewage treatment and tying its provision of sewage collection services to its treatment services. The city claimed immunity under *Parker* based on a state statute, which granted the city authority to develop sewage systems and to "'describe with reasonable particularity the district to be [served].'" Id. at 41, 105 S. Ct. at 1717 (quoting Wis.Stat. § 62.18(1) (1981-1982)). The Court considered whether that statute satisfied the requirement of a clearly articulated state policy. The Court applied a foreseeability test: it observed that "the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas." Id. at 42, 105 S. Ct. at 1718. The Court then **[**238]** stated that "it is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." Id., 105 S. Ct. at 1718. Citing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415, 98 S. Ct. 1123, 1138, 55 L. Ed. 2d 364 (1978) (opinion of Brennan, J.), the Court held that "it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served." 471 U.S. at 42, 105 S. Ct. at 1718 (same passage cited in *Southern Motor Carriers* holding, *see supra* slip op. at 5214,). In the Court's view, the statutes plainly showed that "'the legislature contemplated the kind of action complained of'" -- a showing that was "sufficient to satisfy the 'clear articulation' . . . test." Id. at 44, 105 S. Ct. at 1719 (quoting Lafayette, 435 U.S. at 415, 98 S. Ct. at 1138).

Both *Southern Motor Carriers* and *Hallie* thus derive from the Court's earlier pronouncements in *Lafayette* and stand for the proposition that, under the first *Midcal* requirement, **[**239]** a state legislature need not *expressly* permit (and clearly need not compel) the conduct at issue; rather, if the legislature, by displacing competition in a given field with a broad regulatory structure, has contemplated that such conduct might occur, that will satisfy the "clearly articulated" requirement. *See also* Executive Town & Country Servs. v. City of Atlanta, 789 F.2d 1523, 1529 (11th Cir. 1986). Of course, as the Supreme Court **[*1330]** stated in Community Communications Co. v. City of Boulder, 455 U.S. 40, 55, 102 S. Ct. 835, 843, 70 L. Ed. 2d 810 (1982), the requirement "is not satisfied when the State's position is one of mere *neutrality* respecting the . . . actions challenged as anticompetitive." Thus, when the Constitution of Colorado granted cities "the full right of self-government in both local and municipal matters," id. at 43 n. 1, 102 S. Ct. at 837 n. 1, the Court held that the provision did not clearly articulate a state policy to displace competition with regulation in the cable television industry: the constitutional provision had nothing at all to do with cable television regulation. Id. at 55, 102 S. Ct. at 843; **[**240]** *see also* Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 825 (11th Cir.) (legislature must have foreseen specific *type* of anticompetitive conduct alleged in case), *cert. denied*, *495 U.S. 924, 110 S. Ct. 1960, 109 L. Ed. 2d 322 (1990)*.

2. The Active Supervision Prong.

Midcal's second requirement of active supervision, as the Court explained in *Hallie*, reflects the concern that "where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." Hallie, 471 U.S. at 47, 105 S. Ct. at 1720. The active supervision requirement is thus "designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." Patrick v. Burget, 486 U.S. 94, 100-01, 108 S. Ct. 1658, 1663, 100 L. Ed. 2d 83 (1988). The crux of active supervision, as the Court stated in *Patrick*, is "that the State exercise ultimate control over the challenged anticompetitive conduct. **[**241]** " Id., 108 S. Ct. at 1663. The state must therefore "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id., 108 S. Ct. at 1663*.

Applying this formula in *Patrick*, the Court held that a state did not actively supervise a physician peer-review process. Although the state had mandated the peer-review process in the first place, that state lacked ultimate authority over the peer-review committee's actual decisions: neither the state nor any of its administrative bodies reviewed specific decisions or had authority to overturn decisions not in accordance with state policy. *See id. at 102-04, 108 S. Ct. at 1664*. [82] The Court, therefore, held that no state actor actively supervised the peer-review process and that the federal antitrust laws applied. *Id. at 104-05, 108 S. Ct. at 1665*; *see also Shahawy v. Harrison, 875 F.2d 1529, 1535-36 (11th Cir. 1989)* (applying *Patrick* to public hospital peer-review procedure).

[242]** Similarly, in *324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987)*, the Supreme Court held that New York State's liquor-pricing scheme did not satisfy *Midcal's* active supervision prong. That scheme, which did satisfy *Midcal's* clear articulation prong, required liquor wholesalers to post a wholesale bottle price and then prohibited retailers from selling at less than 112% of that posted price. In effect, though, the scheme allowed wholesalers to set retail prices. Although the retail price was based on the posted *bottle* price, wholesalers generally sold liquor to retailers at a lower, posted *case* price. In addition, the retail price was based on the *current* posted bottle price; the wholesalers could thus sell at a low posted price and then increase the posted price in order to allow retailers to sell at a higher price. *See id. at 342-46* & n. 6, *107 S. Ct. at 725-26* & n. 6. As a result, the Court found that the state did not actually set prices, did not review the reasonableness of established prices, and did not generally monitor the **[*1331]** market or reexamine the pricing program. *See id. at 345-46, 107 S. Ct. at 726*. **[**243]** The Court therefore held that the state did not actively supervise the pricing system. [83]

As these two cases hold, then, the state must possess ultimate authority over the regulatory scheme at issue. The state must also exercise this authority to ensure that the scheme works as the state intended it to work. If the scheme breaks down and allows private parties to act however they want, then under *324 Liquor*, Midcal's active supervision requirement would not be satisfied: the state must exercise its authority by disapproving "particular anticompetitive acts . . . that fail to accord with state policy." *Patrick, 486 U.S. at 101, 108 S. Ct. at 1663*. Of course, if the scheme operates effectively, automatically requiring private actors to act in **[**244]** accord with state policy, the state would have nothing to disapprove, and the active supervision prong would be satisfied. *See 324 Liquor*, 479 U.S. at 344 n. 6, 107 S. Ct. at 725 n. 6.

I now apply the *Midcal* test to the present case, considering in turn City Gas' territorial agreement and its refusal to deal.

B. *Applying* Midcal.

1. The Territorial Agreement.

As I discuss above, City Gas' territorial agreement with Peoples Gas provided no basis for antitrust liability in the present case. Nevertheless, assuming for the sake of discussion that the agreement might provide a basis for liability, City Gas is still immune under the state action doctrine.

a. Clearly articulated state policy.

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[82] Because the state courts conducted no review of specific committee decisions, the *Patrick* court found it unnecessary to decide "the broad question whether judicial review of private conduct ever can constitute active supervision." *486 U.S. at 104, 108 S. Ct. at 1664-65*; *see also Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1030 (9th Cir. 1989)* (also avoiding that question), *cert. granted*, ***496 U.S. 935, 110 S. Ct. 3212, 110 L. Ed. 2d 660 (1990)***. I consider this question below, as it applies to this case. *See infra* slip op. at 5223, .

[83] The Court did suggest that a simple "minimum markup" statute, which required retailers to charge 112% of their *actual* wholesale cost, might satisfy Midcal's second prong. *See 479 U.S. at 344 n. 6, 107 S. Ct. at 725 n. 6*.

City Gas' territorial agreement is protected pursuant to a clearly articulated state policy. That policy is expressed in Chapter 366 of the Florida Statutes, Fla.Stat. ch. 366 (1987), [84] which prescribes the duties of the utility companies in Florida and charges the FPSC with administrative responsibility. Chapter 25-7 of the Florida Administrative Code contains regulations promulgated by the FPSC for gas utilities. *See* 1986 Fla.Admin.Code Ann. ch. 25-7 (FPSC **[**245]** regulations promulgated under chapter 366).

The court today adopts the district court's conclusion that these provisions did not satisfy *Midcal's* clearly articulated requirement. The district court based its conclusion on the fact that chapter 366 expressly grants the FPSC power to approve territorial agreements involving electric utilities, and that other chapters do the same with respect to telephone, water, and sewage utilities, but that the legislature failed expressly to grant this power to the FPSC with respect to natural gas utilities. In the district court's view, that omission clearly indicates that the legislature did not intend to authorize the FPSC to approve territorial agreements between natural gas utilities. Given **[**246]** this clear indication, the district court was not persuaded otherwise by the Florida Supreme Court's opinion in *City Gas Co. v. Peoples Gas Sys., 182 So.2d 429, 436 (Fla. 1965)*, which addressed the very territorial agreement at issue here and held that chapter 366 implicitly grants the FPSC authority to approve such agreements.

I disagree with the district court's interpretation of the legislative intent behind chapter 366. That interpretation overemphasized the absence of an express grant of power to approve territorial agreements between natural gas utilities and, as a result, reached a conclusion that was inconsistent with the general structure of the regulatory scheme created by chapter 366 for the natural gas industry and with the role of the FPSC within that scheme. The scheme that the legislature has created in effect requires the FPSC to approve territorial agreements in exercising its prescribed **[*1332]** ratemaking functions. Given the nature of this scheme, therefore, if the legislature had intended that the FPSC not approve such agreements, then it would have had to include a provision expressly prohibiting the FPSC from doing so and also explaining **[**247]** how the FPSC could accomplish its statutorily mandated ratemaking responsibility without that power. [85] In my view, chapter 366 and the regulatory scheme that it creates clearly demonstrate the legislature's intent "to displace competition in [the natural gas] field with a regulatory structure," *Southern Motor Carriers, 471 U.S. at 64, 105 S. Ct. at 1730*. Under the Supreme Court's decision in *Southern Motor Carriers*, that intent satisfies the first prong of the *Midcal* test. *See id.*, *105 S. Ct. at 1730*. I first review chapter 366 to determine the kind of regulatory scheme that it creates and the FPSC's role within that scheme. I then consider the inconsistency of the district court's interpretation with this scheme.

[248]** In chapter 366, the state empowers, as "an exercise of the police power of the state," the FPSC to regulate public utilities. *Fla.Stat. § 366.01*. Section 366.03 addresses the general duties of public utilities: "Each public utility shall furnish to each person applying therefore reasonably sufficient, adequate, and efficient service upon terms as required by the commission." Section 366.04 then describes the duties of the FPSC: "the commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service and the issuance and sale of its securities." Thus, *section 366.05* provides that the FPSC "shall have power to prescribe fair and reasonable rates and charges . . . to be observed by each public utility." The FPSC fixes these rates based on the factors described in section 366.041:

> In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and **[**249]** the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and

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[84] This chapter has been amended by 1989 Fla. Laws ch. 89-292, to authorize expressly the FPSC to approve territorial agreements and resolve territorial disputes between natural gas utilities. I consider below the amendment's effect on the present case, *see infra* note 86.

[85] Indeed, once the panel's decision in this case adopted this inconsistent position, the Florida legislature in effect overruled it by adding language that expressly authorizes the FPSC to approve territorial agreements and resolve territorial disputes between natural gas utilities. The legislature thus made explicit what, as I have observed, was already implicit in the old provision.

> the efficient use of alternative energy resources; provided that no public utility shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings.

The FPSC further addresses the rate-fixing process in its regulations under chapter 366. Section 25-7.033(2) of the regulations requires each utility to "file with the Commission tariffs containing schedules for all rates and charges." Section 25-7.033(3) then states that no "schedules of rates or charges, or modifications or revisions of the same, shall be effective until filed with and approved by the Commission as provided by law." In addition, the FPSC has established procedures to monitor existing rates to ensure that they are fair and just and provide a reasonable rate of return as specified in section 366.041 of the Florida Public Utilities statute. Sections 366.07 through 366.072 also provide procedures for rate adjustments.

In addition to its rate-setting function, the FPSC's **[**250]** powers reach the utilities' general assets. As *section 366.05* provides: "the commission shall have power to . . . require repairs, improvements, *additions, and extensions* to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto." (Emphasis added.) Under section 366.04, the FPSC also has jurisdiction "to regulate and supervise each public utility with respect to . . . the issuance and sale of its securities."

[*1333] Chapter 366 thus establishes a full-scale regulatory structure and grants the FPSC broad regulatory and supervisory powers within that structure. Not only does the FPSC fix utilities' rates -- a process that engages the FPSC in an in-depth and continuous review of virtually every aspect of the utilities' operation -- but the FPSC also has direct supervisory power with respect to the utilities' use of their own assets. The FPSC has jurisdiction to regulate utilities' stock issuances, to require repairs to the utilities' facilities, and also to mandate additions and extensions of those facilities -- undertakings **[**251]** that would substantially affect utilities' assets.

True, the statute does not explicitly grant the FPSC power to approve territorial agreements and resolve territorial disputes between natural gas companies, whereas the statute does grant such powers with respect to electric utilities. In light of the powers the statute does expressly grant to the FPSC, however, and the general regulatory structure that the statute creates, I find this omission to be insignificant. The Florida legislature clearly intended to displace competition in the natural gas industry with a system of regulation. As my review of this regulatory structure shows, moreover, the nature of a utility's operating territory -- its size, the density of consumers, the degree of competition with other companies -- is a crucial factor in the rate-fixing process. In order to provide the utility with a "reasonable rate of return" -- the standard applied under the statute -- the FPSC will obviously consider the utility's distribution area and the degree of competition in that area. The size of a utility's operating area will affect its cost structure: a larger area might increase the utility's fixed and operating costs; it **[**252]** might also require a greater investment in equipment and in a gas supply; in turn, however, the larger area might enable the utility to sell a larger volume of gas, thus generating higher gross revenues and perhaps more operating capital. As I discuss in detail in part VI, the degree of competition with other gas companies will also significantly affect the utility's cost structure: a company must invest resources in order to compete, an investment that increases the utility's costs. That investment in competition, moreover, might affect the general structure of the utility's assets. If the FPSC does not allow the utility to recover those costs through a rate increase, then the utility must cover them from its own assets, which might in turn force the utility to cut corners on safety or on research and development of alternative energy sources or which might simply force the utility out of business -- concerns that obviously fall directly within the FPSC's jurisdiction.

As this discussion indicates, the utility's operating territory is of central concern to the FPSC's regulatory function and undeniably falls within the FPSC's purview: the nature of the utility's territory directly **[**253]** influences the rates set for consumers. To think, therefore, that the Florida legislature did not intend the FPSC to approve territorial agreements -- whether or not the legislature explicitly authorized such approval -- is utterly inconsistent with the overall structure of the regulatory scheme that the Florida legislature did impose and the powers that it expressly granted to the FPSC. Given the nature of this scheme as actually created, had the legislature intended the FPSC not to approve such agreements, the legislature would have had to add a provision expressly prohibiting the FPSC from doing so and also explaining how the FPSC could accomplish its statutorily mandated ratemaking functions without that power. Under *Southern Motor Carriers*, this comprehensive regulatory scheme satisfies the first prong of the *Midcal* test. [86]

[254]** *b. Active supervision prong*.

As my review of chapter 366's regulatory scheme also demonstrates, the FPSC **[*1334]** exercises "ultimate control" over the territorial agreement. The FPSC "ha[s] and exercise[s] power to review [territorial agreements between natural gas utilities] and disapprove those that fail to accord with state policy." *Patrick, 486 U.S. at 101, 108 S. Ct. at 1663*. Under *Patrick*, therefore, *Midcal's* second prong is satisfied as well.

The panel, in holding that the active supervision requirement was not satisfied, pointed to language in a decision by the FPSC and characterized it as an "expression of doubt . . . as to its authority to establish exclusive territories or to resolve territorial disputes between natural gas utilities." *880 F.2d at 303* (citing *In re: Tariff filed by Miller Gas*, 85 FPSC 10:205, at 5-6 (Oct. 18, 1985)). [87] The panel then noted that the FPSC approved the specific territorial agreement at issue here, but, in a confusing passage, the panel seemed to conclude that, "simply because the Commission has on occasion, some 15 to 25 years ago, looked at this agreement does not automatically **[**255]** immunize it from federal antitrust scrutiny." *Id. at 303*. That isolated review, in the panel's opinion, was not sufficient. The panel also summarily rejected the argument that the Florida Supreme Court's review of the agreement in *Peoples Gas* satisfied the active supervision prong.

[256]** The panel's approach, in my view, is improper in that it failed to consider the regulatory and supervisory functions that the FPSC exercises in its continuous rate-fixing process. That process, I suggest, satisfies the active supervision requirement. As I describe above, the FPSC continually takes account of existing territorial allocations in the course of setting rates. The FPSC sets rates that will provide the utility with a reasonable rate of return *given existing territorial allocations*. To the extent that the FPSC sets rates that allow the utility to continue to operate (that is, operate at a profit), the FPSC necessarily approves the existing territorial allocation. The FPSC, moreover, continually reviews the utility's rates: under § 25-7.024 of the FPSC's regulations, the gas utility must file a rate of return report for every month, based on which the FPSC continually monitors the utility's rates and, necessarily, its territorial allocation. In addition, if the FPSC disapproves of such an allocation, it has ultimate authority to mandate the utility to alter its distribution area "when reasonably necessary to promote the convenience and welfare of the public and secure **[**257]** adequate service or facilities for those reasonably entitled thereto." *Fla. Stat. § 366.05(1)*. In choosing not to exercise that authority -- and it has chosen not to do so in the present case -- the FPSC thus implicitly approves the existing territorial allocation.

This is not a case, moreover, like *324 Liquor* where the state establishes a regulatory scheme that merely enforces private arrangements. Rather, the FPSC assumes a very active role under this regulatory scheme, initially

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[86] This conclusion finds support in the Florida Supreme Court's holding in the *Peoples Gas* case that chapter 366 implicitly grants the FPSC power to approve territorial agreements. As the panel noted, *880 F.2d at 302-03*, although that decision is not dispositive of this inquiry, it is relevant.

[87] The district court quoted the relevant passage from the FPSC's decision:

> It is not clear that this Commission has the statutory authority to either establish exclusive service territories for natural gas utilities (as it does for telephone, water and sewer utilities) or resolve territorial disputes between natural gas utilities (as specifically authorized for electric utilities). However, our resolution of this question is not necessary in view of our [other] finding. . . .

665 F. Supp. at 1530. This "expression of doubt" is clearly dictum. Whatever doubt the FPSC might have *expressed*, moreover, has not effected the FPSC's *actions* in approving territorial agreements, as I discuss. Also, that expression of doubt has nothing to do with the active supervision issue; rather, the expression merely comments on whether the state has clearly articulated a policy in favor of territorial agreements. As I show above, the state has indeed done so -- regardless of whatever doubt the FPSC (an agency without judicial authority to interpret legislative intent) may have expressed.

approving the utility's proposed rates, and, in doing so, undertaking an investigation and consideration of a variety of factors as mandated in chapter 366. *See id.* §§ 366.041,.06. Nor is this a case like *Patrick*, where the state supervises a peer-review committee's general procedures but does not review the committee's specific, substantive decisions. Here, the FPSC does more than prescribe general procedures for filing rates; it actually conducts **[*1335]** the rate-fixing process itself, setting initial rates and continually monitoring them.

In this case, furthermore, the Florida Supreme Court has directly reviewed the territorial agreement at issue. Although the Supreme Court has not **[**258]** yet had occasion to decide the question whether such review satisfies the active supervision requirement, *see* *Patrick, 486 U.S. at 102-05, 108 S. Ct. at 1664-65* (state courts conducted insufficient review of specific committee decisions, thus not necessary to decide broad question whether such review could ever satisfy active supervision requirement); *see also* *Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1030 (9th Cir. 1989)* (same), *cert. granted*, *496 U.S. 935, 110 S. Ct. 3212, 110 L. Ed. 2d 660 (1990)*, the Florida courts' review of the agreement here is, in my view, sufficient to satisfy the active supervision requirement. In *Peoples Gas*, the Florida Supreme Court carefully considered City Gas' territorial agreement with Peoples Gas and approved that agreement under chapter 366. *See* *182 So.2d at 436*. Unlike the judicial review conducted by the courts in *Patrick, see supra* note 82, which merely considered the procedures through which the peer-review committee's decision was reached but not the decision's merits, the Florida Supreme Court specifically reviewed the territorial agreement itself and approved **[**259]** it as consistent with state policy. That review, in my view, constituted active supervision. [88]

Thus, based on both the Florida Supreme Court's decision in *Peoples Gas* and on the FPSC's supervisory powers in the rate-fixing process, the active supervision prong is satisfied. Under *Midcal*, therefore, City Gas is immune from antitrust liability on the basis of its territorial agreement with Peoples Gas.

2. **[**260]** The Refusal to Deal.

I reach the same conclusion with respect to City Gas' refusal to sell wholesale gas to Consolidated. [89] I apply the two prongs of the *Midcal* test in turn.

a. Clearly articulated state policy.

Section 366.03 states: "No public utility shall be required to furnish electricity or gas for resale. . . ." This provision explicitly and affirmatively expresses a state policy not to require utilities to sell at wholesale. Indeed, I could think of no more explicit an expression of this policy. The policy, of course, does not *compel* gas utilities not to sell at wholesale; it merely *permits* them to refrain from selling at wholesale. Under *Southern Motor Carriers*, though, *Midcal's* clearly articulated prong does not require the state to compel **[**261]** the anticompetitive conduct; the state need only permit such conduct, as it does in section 366.03. It is beyond dispute, in my view, that this statutory provision satisfies the first prong of the *Midcal* test. [90]

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[88] As the Supreme Court has made clear, a state court's determination that conduct is consistent with some state law does not necessarily insulate that conduct from federal ***antitrust law***. *See* *Parker, 317 U.S. at 351, 63 S. Ct. at 314* (citing *Northern Sec. Co. v. United States, 193 U.S. 197, 344-47, 24 S. Ct. 436, 459-61, 48 L. Ed. 679 (1904))*. Here, however, the Florida Supreme Court has approved that conduct as consistent with the state's policy to displace competition in the natural gas industry. Such a decision is exactly what invokes *Parker* immunity.

[89] Curiously, the panel noted that City Gas challenged the district court's holding that *Parker* immunity did not apply to its refusal to deal, *see* *880 F.2d at 301*, but nevertheless failed to address the issue.

[90] The district court claimed that the legislature, in drafting this provision, had in mind sales of gas for resale to landlords who would re-meter the gas for further distribution to their tenants and that the legislature, therefore, did not specifically contemplate wholesale sales to other natural gas utilities. Although the legislature no doubt had in mind sales to landlords, that fact provides no basis for the district court's conclusion that this provision does not apply to wholesale sales to other natural gas utilities. Not only is that reading inconsistent with the provision's plain language, which refers in broad terms to sales of gas for resale generally, but the district court's construction of the legislature's intent is extremely crabbed. Wholesale sales to other natural

[262]** **[*1336]** *b. Active supervision*.

The active supervision prong of the *Midcal* test is also satisfied here. Two reasons support this conclusion. First, by virtue of its rate-setting function, the FPSC regulates a utility's decision to sell at wholesale. If a utility were to decide to sell at wholesale, the FPSC would exercise its ratemaking function with respect to the wholesale price. The utility would therefore base its decision whether or not to sell at wholesale, at least in part, on the likelihood that the FPSC would approve wholesale rates that were sufficiently high to allow the utility to recover a reasonable return on its investment. As I describe above, the economic implications of selling at wholesale may be quite broad -- affecting the structure of competition in the marketplace and thus forcing the utility to reconsider the deployment of its own resources. *See supra* slip op. at 5219, . The FPSC's rate-fixing process, in the utility's view, might not adequately take into account all of these implications. Or, at least, the utility might be uncertain whether or not the FPSC's rate-fixing calculation would adequately consider these implications. Unless **[**263]** the FPSC were to promulgate regulations expressly dealing with rate calculations for wholesale sales, which it has not, the FPSC would continue to discourage wholesale sales through its rate-fixing process. The FPSC's ratemaking function, therefore, by virtue of its effects on a utility's decision whether or not to sell gas at wholesale, satisfies the active supervision requirement.

Even if the FPSC's ratemaking function did not so affect the utility's decision whether or not to sell gas at wholesale, the active supervision prong would still be satisfied here. As the Court explained in *Patrick*, the purpose of the active supervision requirement is "to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the state, actually further state regulatory policies." *486 U.S. at 100-01, 108 S. Ct. at 1663*. Because the state policy concerning sales of gas at wholesale is to leave such decisions entirely to the utility's discretion, the utility would necessarily be acting in accordance with the state policy whether or not it decided to sell at wholesale. Either decision would be consistent with **[**264]** state policy, and neither decision could be inconsistent with that policy. The state, therefore, would never have to exercise its power to disapprove a decision that failed to accord with state policy: no decision could so fail. In this situation, the concerns behind the active supervision requirement are automatically satisfied regardless of how the state supervises the decisionmaking process. *See* P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 212.7, at 168-69 (Supp. 1989). For this reason as well, the second prong of the *Midcal* test is satisfied in this case.

C. Conclusion.

As the foregoing discussion shows, even if City Gas' conduct could justify the imposition of liability under *section 2* of the Sherman Act, City Gas is immune from liability under the state-action immunity doctrine of *Parker*.

VIII. CONCLUSION

This case's history has been complicated and long. The case is extremely important, however, in that it involves issues of first impression and tests the limits of the antitrust laws. In my view, the district court decided the case improperly, imposing liability on City Gas under *section 2* of the Sherman Act. Because this court today upholds the district **[**265]** court's decision, I am compelled to dissent.

As a preliminary issue, City Gas' territorial agreement with Peoples Gas provided no basis for liability here. That agreement had no causal relationship to Consolidated's injury. Consolidated, therefore, has no standing under the Clayton Act, which authorizes private actions under the antitrust laws, to challenge the territorial agreement.

Nor did City Gas' decision not to sell wholesale natural gas to Consolidated constitute a refusal to deal in violation of **[*1337]** *section 2*. As an initial problem, City Gas did not possess monopoly power in the relevant market. First, the relevant market defined by the district court did not exist. Second, even if that market did exist, City Gas never operated on the wholesale level of the natural gas market; it operated only as a retail distributor of natural gas.

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gas companies also place an administrative burden on the FPSC by altering the structure of competition in the industry or of the utility's assets, thus increasing the complexity of the ratemaking process. *See supra* slip op. at 5218-5219, . The district court's too narrow construction of the legislature's intent is thus inconsistent with the nature of the regulatory scheme created by chapter 366.

Moreover, City Gas' abandoned and unperformed contract with Florida Gas does not suggest otherwise. Third, even if City Gas had operated as a natural gas wholesaler, it would not have possessed monopoly power in that market. FGT had a tremendous share of that market, and Consolidated, given its projections of the profits it could make **[**266]** as a natural gas company, could practicably have turned to FGT for a wholesale supply of natural gas.

Given the fact that City Gas has never operated as a natural gas wholesaler, no basis existed to require City Gas to deal with Consolidated. Under established law, a defendant is liable under *section 2* when the circumstances surrounding its refusal to deal give rise to an inference of anticompetitive intent. Courts have developed various formulas -- such as the essential facilities doctrine, the monopoly-leveraging theory, and the intent test -- for evaluating the circumstantial evidence in a given case in order to determine whether the evidence justifies an inference of intent. The circumstances here, however, give rise to no inference of anticompetitive intent under any of these formulas. Nor does the existing caselaw under *section 2* justify the imposition of liability on City Gas. The practical implications of imposing a duty to deal in the present category of case also support the conclusion that *section 2* does not apply. In short, the present case simply did not involve the type of refusal to deal that violates *section 2*.

In nevertheless imposing a duty to deal under *section **[**267]** 2* in the present case, the district court thus created a new rule of antitrust liability, which this court today upholds. Under this new rule, City Gas -- a company that has done nothing wrong under established law -- must undertake an entirely new level of operation and submit to a forced sale of gas to Consolidated. City Gas must do so, moreover, not because that undertaking will benefit consumers or enhance competition in general -- it will do neither -- but because the undertaking will enable *Consolidated* to enter the natural gas market as a retail distributor on the most favorable terms possible. That is, this new rule requires City Gas to give its potential competitors a free ride into the natural gas market.

This new rule is, in my view, extraordinarily bad law. It promotes inefficiencies, undermines business firms' rational decisions, and leads to results that are flatly inconsistent with the purposes behind the antitrust laws. In addition, this new rule will be impossible to apply. The district courts of this circuit will face an administrative nightmare in attempting to fashion remedies under this rule. Given these practical implications, Congress surely could not have **[**268]** intended *section 2* to support such a rule. This new rule should therefore be struck down.

Even under this impossible rule, however, which this court today upholds, the district court's decision was erroneous. The district court failed properly to apply its own new rule. For that reason, I would vacate the decision and remand the case for further proceedings. Because the rule implicates the *fifth amendment*, a proper application of the rule depends on a determination of the *fifth amendment* price for the forced sale of gas here. The district court, however, did not find the *fifth amendment* price in the present case. As a result, it did not properly determine (1) whether, given the *fifth amendment* price, City Gas refused to deal in violation of *section 2*; and (2) whether, for purposes of the Clayton Act, Consolidated suffered any injury in fact as a result of City Gas' conduct.

In addition, the district court's failure to set a *fifth amendment* price infected the remedies it awarded Consolidated. First, the district court did not properly calculate its damages awards: those damages must be based on the *fifth amendment* price. Second, the district court was unable to set a price in its **[**269]** injunction requiring City Gas to sell gas to Consolidated; instead, it delegated **[*1338]** the price-setting task to the FPSC. Third, the district court erred in awarding Consolidated both an injunction as well as damages for the loss of its going concern value. Not only are those two remedies theoretically inconsistent, but by awarding Consolidated both remedies, the district court gave Consolidated a double recovery.

For these reasons, even under this impossible new rule, the district court's decision must be vacated, and the case must be remanded so that the district court can properly address these issues.

Finally, even if the district court could properly determine under its new rule that City Gas' conduct violated *section 2*, in my view, City Gas is still immune from liability under the state-action doctrine of *Parker*. City Gas' conduct -- both in entering into a territorial agreement with Peoples Gas and in refusing to sell gas to Consolidated -- was consistent with a clearly articulated and affirmatively expressed state policy that was actively supervised by the state.

Based on the foregoing discussion, I respectfully, but strongly, dissent from this court's decision **[**270]** today.

ANDERSON, Circuit Judge, dissenting:

I join Parts IV and V of Chief Judge Tjoflat's opinion, in which he concludes that City Gas was not a monopolist in the wholesale market and that its refusal to deal did not trigger liability under the essential facilities doctrine or the intent test.

I also join subparts A. and B.1. of Part VII of Chief Judge Tjoflat's opinion, in which he concludes that state action immunity would shield City Gas with respect to the territorial agreement. I also join Judge Johnson's dissent on the issue of state action immunity with respect to the territorial agreement.

EDMONDSON, Circuit Judge, dissenting:

For the reasons stated by Judge Tjoflat, I think that City Gas -- whether or not it would otherwise be liable -- is immune from liability under the state-action immunity doctrine of *Parker v. Brown, 317 U.S. 341, 351, 63 S. Ct. 307, 313-14, 87 L. Ed. 315 (1943)*.

Gaines v. National Collegiate Athletic Ass'n

United States District Court for the Middle District of Tennessee, Nashville Division

September 20, 1990, Entered

No. 3:90-0773

Reporter

746 F. Supp. 738 *; 1990 U.S. Dist. LEXIS 12460 **; 1990-2 Trade Cas. (CCH) P69,238

BRADFORD L. GAINES v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, SOUTHEASTERN CONFERENCE, and VANDERBILT UNIVERSITY

Disposition: **[**1]** For the foregoing reasons Gaines' Application For a Preliminary Injunction is denied.

Core Terms

college football, player, football, eligibility rules, athletics, monopoly power, eligibility, amateur, preliminary injunction, team, anticompetitive, injunction, merits, anti trust law, intercollegiate, League, reasons, sport, Sherman Act, antitrust, mandatory, application for preliminary injunction, relevant market, status quo, procompetitive, exclusionary, regulation, agrees, argues, substantial likelihood

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN1[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

A court must consider in deciding whether to issue a preliminary injunction (1) whether a substantial likelihood exists that the party seeking the preliminary relief ultimately will succeed on the merits; (2) whether it is likely that the party seeking preliminary relief will suffer immediate and irreparable harm if the relief is not granted; (3) whether granting the relief would cause substantial harm to the other parties; and (4) whether granting the preliminary relief would protect the public interest. The plaintiff bears the burden of proving each of these elements. Although the case law is clear that a court should apply each of the four factors in a flexible manner, the likelihood of success on the merits factor is one of the most significant factors The plaintiff need only raise questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation to satisfy the likelihood of success on the merits element.

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Injunctions, Mandatory Injunctions**

The United States Court of Appeals for the Sixth Circuit has ruled that where the relief prayed for is much broader than a mere restraining order preserving the status quo and there is sufficient doubt about whether appellant will ultimately prevail, granting a mandatory injunction is inadvisable. It is inappropriate to give a party relief on the "front end" where sufficient doubt exists as to the party's ultimate chance of prevailing, especially where the relief sought preliminarily is the ultimate relief requested and where that relief is mandatory in nature.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN4[] **Monopolies & Monopolization, Attempts to Monopolize**

An unlawful monopoly under *§ 2* of the Sherman Act consists of (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] **Higher Education & Professional Associations, Colleges & Universities**

The federal antitrust laws seek to prevent restraints on free competition in businesses and commercial transactions.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Education Law > Intercollegiate & Interscholastic Athletics > Athletic Associations

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

HN6[] **Higher Education & Professional Associations, Colleges & Universities**

The eligibility Rules of the National Collegiate Athletic Association are not subject to scrutiny under *§ 2* of the Sherman Act.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN7[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Monopoly power consists of the power to control prices or exclude competition.

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN8[] **Sherman Act, Defenses**

An entity with monopoly power does not violate *§ 2* of the Sherman Act by refusing to deal with a competitor if there are valid business reasons for the refusal.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Education Law > Intercollegiate & Interscholastic Athletics > General Overview

HN9[] **Regulated Industries, Sports**

The National Collegiate Athletic Association ("NCAA") seeks to market a particular brand of football, college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed that might otherwise be unavailable. In performing this role, its actions widen consumer choice, not only the choices available to sports fans but also those available to athletes, and hence can be viewed as procompetitive.

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Judges: Thomas A. Wiseman, Jr., Chief United States District Judge.

Opinion by: WISEMAN

Opinion

[*739] MEMORANDUM

THOMAS A. WISEMAN, JR., CHIEF UNITED STATES DISTRICT JUDGE

This cause of action came before the Court on August 31, 1990, on Gaines' Application for Temporary Restraining Order **[*740]** and Preliminary Injunction. This Court denied the Motion for a Temporary Restraining Order on that date. In the September 13 hearing on Gaines' Motion for a Preliminary Injunction, Gaines urged this Court to enjoin the Defendants from enforcing certain rules ("Rules") promulgated by the National Collegiate Athletic Association ("NCAA") which deem Gaines ineligible to compete in the 1990-91 college football season for Vanderbilt University ("Vanderbilt"). This Court denied the preliminary injunction from the bench and now issues this Opinion setting forth the reasons **[**2]** for the denial.

I.

The facts leading to this lawsuit are not in dispute. Bradford L. Gaines was a football player for Vanderbilt during the 1986-89 football seasons. He is currently enrolled at Vanderbilt to complete the thirteen additional semester hours he needs to graduate. Gaines has attended Vanderbilt on a full athletic scholarship.

In late March of 1990, Gaines submitted a Petition For Special Eligibility and Renunciation of College Eligibility to the National Football League ("NFL") declaring himself eligible for the NFL draft to be conducted on April 22-23, 1990. The paragraph immediately preceding his signature on the Petition contained the following language: "I HEREBY IRREVOCABLY RENOUNCE ANY AND ALL REMAINING COLLEGE FOOTBALL ELIGIBILITY I MAY HAVE. I WISH TO BE ELIGIBLE FOR THE NFL DRAFT SCHEDULED FOR APRIL 22-23, 1990."

On April 7-8, 1990, Gaines attended a scouting combine in Indianapolis, Indiana. The combine gave Gaines and other college football players a chance to try out before the scouts for various pro football teams. Gaines had no other contact with any NFL team prior to the draft, and he was not selected by any team during any round of the draft.

Shortly after **[**3]** the draft, Gaines was contacted by a representative of one NFL team regarding a possible free agency contract with that team. Mr. Tim Greer, who serves as the agent for Gaines' older brother, a football player in the Canadian Football League ("CFL"), briefly discussed this possible free agency contract with the NFL team. However, the next day the team let Gaines know that they were no longer interested in signing him to a free agency contract. Subsequently, Mr. Greer phoned numerous teams in the NFL and the CFL on Gaines' behalf, but Gaines has never entered into any contract with any professional team. Nor has Greer received any compensation of any kind from Gaines. Additionally, Greer has never compensated Gaines in any way.

As a result of NCAA Rules 12.1.1(f), 12.2.4.2, and 12.3.1, Gaines is now ineligible to complete his fourth year of eligibility as a football player at Vanderbilt. Rule 12.1.1(f) [1] provides that an athlete loses his amateur status when he enters a professional draft or enters into an agreement with an agent to negotiate a professional contract. Rule 12.2.4.2, [2] **[**5]** commonly known as the "no-draft" rule, makes a player ineligible for participation in a particular **[**4]** intercollegiate sport when he or she asks to be placed on the draft list or supplemental draft list of a professional league in that sport. **[*741]** Rule 12.3.1, [3] commonly known as the "no-agent" rule, makes any player ineligible for participation in any future intercollegiate sport in which the player agrees, orally or in writing, to be represented by an agent for the purposes of marketing the player's abilities in the sport. This Rule applies even if the player receives no money or financial benefit of any kind from the agent, even if the agent is a family member or a close family friend, and even if the agent has not charged and agrees not to charge the player any fee.

II.

In his Memorandum of Law in support of his application for a preliminary injunction, Gaines argues that the Defendants, by preventing college football players like himself from returning to college play for which they are otherwise eligible after an unsuccessful bid in the NFL draft, have engaged in an unlawful exercise of monopoly power in violation of *15 U.S.C. § 2*. [4] Gaines cites *15 U.S.C. § 26*, which provides that any party threatened with loss or damage by a violation of the antitrust laws may seek injunctive relief against the threatened conduct, as the basis for his injunction suit **[**6]** against the Defendants.

The parties agree on the four relevant factors ***HN2***[] this Court must consider in deciding whether to issue a preliminary injunction:

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[1] Rule 12.1.1(f) provides as follows:

12.1.1 Amateur Status. An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

* * * *

(f) Enters into a professional draft or an agreement with an agent or other entity to negotiate a professional contract.

[2] Rule 12.2.4.2 provides as follows:

12.2.4.2 Draft List. An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport, even though:

(a) The individual asks that his or her name be withdrawn from the draft list prior to the actual draft,

(b) The individual's name remains on the list but he or she is not drafted, or

(c) The individual is drafted but does not sign an agreement with any professional athletics team.

[3] Rule 12.3.1 provides as follows:

12.3.1 General Rule. An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports and the individual shall be ineligible to participate in any sport.

[4] *15 U.S.C. § 2* provides the following:

HN1[] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

(1) whether a substantial likelihood exists that the party seeking the preliminary relief ultimately will succeed on the merits;

(2) whether it is likely that the party seeking preliminary relief will suffer immediate and irreparable harm if the relief is not granted;

(3) whether granting the relief would cause substantial harm to the other parties; and

(4) whether granting the preliminary relief would protect the public interest.

American Motors Sales Corp. v. Runke, 708 F.2d 202, 205 (6th Cir. 1983). The parties also agree that the plaintiff bears the burden **[**7]** of proving each of these elements. Although the case law is clear that this Court should apply each of the four factors in a flexible manner, the likelihood of success on the merits factor is one of the most significant factors. *Gibson v. Sallee, 648 F. Supp. 54, 56 (M.D.Tenn. 1986)* (citing *Roth v. Bank of the Commonwealth, 583 F.2d 527, 537 (6th Cir. 1978))*.

This Court recognizes that the plaintiff need only raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation" to satisfy the likelihood of success on the merits element. *Roth v. Bank of the Commonwealth, 583 F.2d 527, 537 (6th Cir. 1978)*; *Brandeis Machinery & Supply Corp. v. Barber-Greene Co., 503 F.2d 503, 505 (6th Cir. 1974)*. However, as elaborated below, this Court has concluded that Gaines has not raised any question on the merits of his *§ 2* claim which presents a "fair ground for litigation." Consequently, because Gaines has failed to show a substantial likelihood that he ultimately will succeed on the merits, this Court must deny his application for a preliminary injunction.

Before analyzing **[**8]** the likelihood of success on the merits factor, however, it is important to point out the nature of the injunctive relief sought by Mr. Gaines and to emphasize the effect of this relief on the standards this Court must apply in determining whether to issue the injunction. **[*742]** Despite the fact that Gaines requested relief in language suggesting the injunction would be merely prohibitory, [5] it is clear to this Court that Gaines really is seeking a mandatory injunction. As Defendant NCAA correctly argued (*see* NCAA's Memorandum In Opposition To Plaintiff's Request For Preliminary Injunction, p. 6 n. 4), Gaines seeks a preliminary injunction to force the NCAA and Vanderbilt to do an affirmative act -- the NCAA to restore his eligibility and Vanderbilt to allow him to participate in its football program this season -- not to preserve the status quo.

[9]** Because Gaines is requesting mandatory relief which would change the status quo, he bears an especially heavy burden in convincing the Court that an injunction is appropriate. ***HN3***[] The United States Court of Appeals for the Sixth Circuit has explained that where "the relief prayed for . . . is much broader than a mere restraining order preserving the status quo" and there is "sufficient doubt about whether appellant will ultimately prevail", granting a mandatory injunction is inadvisable. *See* *Dunn v. Retail Clerks International Ass'n, Local 1529, 299 F.2d 873 (6th Cir. 1962)*. This Court agrees that it is inappropriate to give a party relief on the "front end" where sufficient doubt exists as to the party's ultimate chance of prevailing, especially where the relief sought preliminarily is the ultimate relief requested and where that relief is mandatory in nature.

Several courts in other circuits have ruled in accord more recently. *See* *United Steelworkers of America v. Textron, Inc., 836 F.2d 6, 10 (1st Cir. 1987)* (courts disfavor injunctions that disturb, rather than preserve, the status quo; however, it is appropriate to issue an injunction which changes the "just previous" status **[**10]** quo when the injury to the seeking party is "serious enough," the absence of harm to the opposing party is "clear enough," and the seeking party's likelihood of success is "great enough."); *Committee of Cent. American Refugees v. I.N.S., 795 F.2d*

[5] Gaines' Complaint prays for the following relief:

B. That the Court issue an injunction restraining the Defendants from enforcing NCAA Rules 12.1.1(f), 12.2.4.2, and 12.3.1 in a manner which declare the Plaintiff ineligible from competition as a member of the Vanderbilt University football team during the coming season.

Plaintiff's Complaint at p. 7.

1434, 1441 (9th Cir. 1986) (where a plaintiff seeks a mandatory preliminary injunction "that goes beyond maintaining the status quo *pendente lite*, 'courts should be extremely cautious' about issuing a preliminary injunction and should not grant such relief unless the facts and law clearly favor the plaintiff." (quoting Martin v. International Olympic Committee, 740 F.2d 670, 675 (9th Cir. 1984))); Diaz v. I.N.S., 648 F. Supp. 638, 656 (E.D.Cal. 1986) (the burden of the plaintiff "increases sharply" in seeking mandatory relief; standards for such relief are "stringent").

As detailed below, this Court has concluded that Gaines has not met his burden of proving the likelihood of success on his § 2 claim.

III.

In evaluating Gaines' proof of a § 2 violation, this Court must determine whether he has shown that enforcement of the NCAA Rules constitutes an unlawful exercise of monopoly power by the NCAA. The courts are clear on what **[**11]** ***HN4***[] an unlawful monopoly under § 2 consists of:

> (1) the possession of monopoly power in the relevant market and
>
> (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Beard v. Parkview, 912 F.2d 138 (6th Cir. 1990) (quoting United States v. Grinnell, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)).

However, before focusing on the two-prong test, the Court must determine whether the eligibility Rules implemented by Vanderbilt and other NCAA schools are subject to federal ***antitrust law***.

[*743] A.

HN5[] The federal antitrust laws seek to prevent restraints on "free competition in businesses and commercial transactions." Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 493, 60 S. Ct. 982, 992, 84 L. Ed. 1311 (1940)). The Defendants argue that the NCAA Rules are not subject to antitrust analysis because they are not designed to generate profits in a commercial activity but to preserve amateurism by assuring that the recruitment of student athletes does not become a commercial activity. *See* Vanderbilt University's Brief **[**12]** In Support Of Motion To Dismiss And Response In Opposition To Application For Preliminary Injunction, p. 4. This Court agrees with the Defendants on this point.

There is no dispute that "while organized as a non-profit organization, the NCAA -- and its member institutions -- are, when presenting amateur athletics to a ticket-paying, television-buying public, engaged in a business venture of far greater magnitude than the vast majority of 'profit-making' enterprises." Hennessey, 564 F.2d at 1149 n. 14. The United States Supreme Court has recognized that the NCAA's television restrictions are subject to antitrust scrutiny because those regulations are commercial in nature. *See* NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (holding NCAA's television restrictions violated § 1 of the Sherman Act).

However, there is a clear difference between the NCAA's efforts to restrict the televising of college football games and the NCAA's efforts to maintain a discernible line between amateurism and professionalism and protect the amateur objectives of NCAA college football by enforcing the eligibility Rules. The U.S. Supreme Court **[**13]** recognized as much in the *Board of Regents* case:

> The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, *the eligibility of participants*, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

Board of Regents, 468 U.S. at 117 (emphasis added). Although the U.S. Supreme Court did not state that eligibility rules were not subject to antitrust scrutiny, it cited a case with approval, *Jones v. NCAA, 392 F. Supp. 295 (D.Mass. 1975)*, which stated exactly that. *See* *Board of Regents, 468 U.S. at 102 n. 24*.

In *Jones* a college hockey player sought restoration of his eligibility for intercollegiate competition after it was discovered that he had received compensation for playing hockey before his college enrollment. The court upheld the eligibility Rules under §§ 1 and 2 of the Sherman Act, reasoning that the antitrust laws are aimed primarily at combinations with commercial objectives and have limited application to other types of organizations. The court concluded that the plaintiff **[**14]** ha[d] "not shown how the action of the N.C.A.A. in setting eligibility guidelines had any nexus to commercial or business activities in which the defendant might engage," *Id. at 303*, and that "the N.C.A.A. eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the N.C.A.A. basic principles of amateurism." *Id. at 304*.

This distinction between commercial NCAA rules and primarily noncommercial rules was clearly set forth in *Justice v. NCAA, 577 F. Supp. 356 (D.Ariz. 1983)*. The court pointed out that the NCAA now engages in two types of rule-making -- "one type, exemplified by the rules in *Hennessey* [rule limiting number of assistant coaches employable at any one time by certain member institutions] and *Jones* [eligibility rule] is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose [citing *Board of Regents*]." *Id. at 383*. The court upheld the rules at issue (NCAA sanctions rendering the University of Arizona football team ineligible to participate in post-season **[*744]** competition) as being of the former type. *Id*. **[**15]**

The United States Court of Appeals for the Fifth Circuit also has indicated that the NCAA has "some support in the caselaw" (citing to *Jones* and *Justice*) for its argument that the eligibility Rules are not subject to the antitrust laws because these Rules have "purely or primarily noncommercial objectives." *McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988)*. The Fifth Circuit decided the case by assuming that the antitrust laws apply to eligibility rules, and by then finding that the NCAA rules restricting benefits to be awarded to student athletes were reasonable and thus did not violate § 1 of the Sherman Act. [6]

[16]** This Court agrees with the Fifth Circuit in *Hennessey* that the NCAA, with its multimillion dollar annual budget, is engaged in a business venture and is not entitled to a *total* exemption from antitrust regulation on the ground that its activities and objectives are educational and are carried on for the benefit of amateurism. *See* *Hennessey, 564 F.2d at 1148-49*. However, by holding that the eligibility Rules challenged by Gaines are not subject to antitrust analysis, this Court is by no means creating a total exemption, but rather a very narrow one. Justice White's dissenting opinion in *Board of Regents* provides support for this position: "Although the NCAA does not enjoy blanket immunity from the antitrust laws, [citations omitted] it is important to remember that the Sherman Act 'is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives.'" *Board of Regents, 468 U.S. at 133* (White, J., dissenting) (quoting *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n. 7, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959))*.

The United States District Court for the Northern **[**17]** District of Indiana very recently ruled, in a case with facts strikingly similar to those presently before this Court, that it was "unwilling to rely on a single district court opinion [*Jones v. NCAA*] for the conclusion, sought by the NCAA, that the antitrust laws have no application to NCAA regulations concerning eligibility." *Banks v. NCAA, 746 F. Supp. 850, 857 (N.D.Ind. 1990)*. As detailed above, this Court has found more than a single opinion on which to base its conclusion.

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[6] The D.C. Circuit also has cited *Jones* with approval. In *Ass'n For Intercollegiate Ath. For Women v. NCAA, 236 U.S. App. D.C. 311, 735 F.2d 577 (D.C. Cir. 1984)*, the court, qualifying somewhat its position on the applicability of ***antitrust law*** to eligibility and similar rules, stated: "We do not assert that regulations governing noncommercial activity are exempt from the Sherman Act. Rather, we assert only that such regulations carry less potential of significantly restraining commerce than do regulations governing commercial activity." *Id. at 588 n. 19*.

According to the NCAA Constitution, the purposes of the NCAA eligibility Rules are to maintain amateur intercollegiate athletics "as an integral part of the educational program and the athlete as an integral part of the student body and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." Defendant NCAA's Memorandum In Opposition To Plaintiff's Request For Preliminary Injunction, p. 23 (quoting Purposes and Fundamental Policy of the NCAA, Article One of NCAA Constitution). The overriding purpose of the eligibility Rules, thus, is not to provide the NCAA with commercial advantage, but rather the opposite extreme -- to prevent commercializing **[**18]** influences from destroying the unique "product" of NCAA college football. Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body. The overriding purpose behind the NCAA Rules at issue in this case is to preserve the unique atmosphere of competition between "student-athletes." This Court, therefore, rejects the notion that such Rules may be judged or struck down by federal ***antitrust law***.

For the foregoing reasons this Court concludes that denial of Gaines' Application **[*745]** For a Preliminary Injunction is proper because ***HN6***[] the eligibility Rules at issue are not subject to scrutiny under *§ 2* of the Sherman Act.

B.

Notwithstanding the above conclusion, this Court, adopting an approach similar to the Fifth Circuit's in *McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988)*, will assume that the antitrust laws apply to the NCAA eligibility Rules and explain why Gaines has not shown a substantial likelihood of succeeding on the merits of his *§ 2* claim. As discussed above, Gaines must show both that the NCAA possesses monopoly power in the relevant market and **[**19]** that the NCAA has willfully acquired or maintained that power.

HN7[] Monopoly power consists of "the power to control prices or exclude competition." *United States v. Grinnell, 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Smith v. Northern Michigan Hospitals, 703 F.2d 942, 954 (6th Cir. 1983)*. The parties dispute the proper definition of the relevant market in which to measure the NCAA's alleged monopoly power. Gaines posits that the product market is one for "major college football player services," consisting of football players at schools in Division I-A of the NCAA. Plaintiff's Brief, p. 13. Assuming this is the relevant market, Gaines argues that the NCAA controls 100% of the market.

In contrast, the NCAA contends that the heart of Gaines' antitrust claim focuses on a different and broader market -- the professional football recruitment market -- by asserting that the Rules hamper competition between the NCAA and the NFL for the top college football players. Consequently, the NCAA argues that it does not have monopoly power over this broader market because it is not capable of controlling prices or excluding competition when the "buyers" in the market are not only **[**20]** the NFL and the NCAA, but also the Canadian Football League, the World League of American Football, and the Arena Football League. *See* NCAA's Memorandum, pp. 16-19.

This Court is hard-pressed to see any validity to the parties' interpretation of college football players like Brad Gaines as "sellers" and NCAA schools and professional football leagues or teams as "buyers" in an economic market. However, this Court sees no need to elaborate on the proper, if any, market definition because Gaines' proof is clearly insufficient as to the second element necessary to a *§ 2* claim.

After showing that a party possesses monopoly power in the relevant market, the plaintiff must show that the party has willfully acquired or maintained its monopoly power. *Grinnell, 384 U.S. at 570-71*. The United States Supreme Court has summarized what a plaintiff must show to establish "willfulness" under *§ 2*. Although in the case of an attempted monopolization the plaintiff must prove a specific intent to accomplish the "forbidden objective," in the case of an actual monopolization "evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as '*exclusionary'* ***[**21]*** *or 'anticompetitive' or 'predatory'. . . ." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S. Ct. 2847, 2857, 86 L. Ed. 2d 467 (1985)* (emphasis added).

Thus, the critical question becomes whether the NCAA eligibility Rules are "unreasonably exclusionary" or "anticompetitive." Gaines argues that the Rules are unreasonably exclusionary because they permanently exclude him and others similarly situated from competing in major college football, because the Rules effectively discourage all major college football players from even attempting to see whether they could make it in the NFL, and because enforcement of the Rules consequently results in the NCAA keeping to itself the most talented of major college football players and enhancing its power with the great economic benefits derived from having the top athletes.

Gaines analogizes the NCAA practices at issue to refusals to deal and argues that, because the U.S. Supreme Court has repeatedly struck down arrangements in **[*746]** which a firm with monopoly power refuses to deal with other firms in order to exclude them from business, this Court similarly should find that the NCAA is unlawfully excluding Gaines because **[**22]** he had contact with a "competitor," the NFL. Gaines also places emphasis on the fact that several NCAA committees and officials have recognized the Rules are restrictive and sometimes unfair and have proposed that college football players should be allowed to enter the professional draft without losing eligibility. *See* Supplemental Affidavit of Paul A. Alexis.

The Defendants, on the other hand, forcefully argue that they have a complete defense to any allegation of the exercise of monopoly power by the NCAA. The U.S. Supreme Court has stated that ***HN8***[] an entity with monopoly power does not violate *§ 2* by refusing to deal with a competitor if there are *valid business reasons* for the refusal. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467, 477, 482 (1985)*. The Supreme Court approved the district judge's jury instruction on this issue, which said, in pertinent part, the following:

> 'In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes **[**23]** or handicaps competitors. This is conduct which *does not benefit consumers by making a better product or service available* -- or in other ways -- and instead has the effect of impairing competition.'

Id. at 597, 86 L. Ed. 2d at 477 (emphasis added).

This Court is convinced that the NCAA Rules benefit both players and the public by regulating college football so as to preserve its amateur appeal. Moreover, this regulation by the NCAA in fact makes a better "product" available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs. Therefore, Gaines cannot succeed on the merits of his *§ 2* claim because the NCAA has shown legitimate business justifications for the Rules at issue.

It seems obvious to this Court that rules which are justified by legitimate business reasons necessarily cannot be deemed "unreasonably exclusionary" or "anticompetitive." Thus, the legitimate business reasons of the NCAA justifying enforcement of the eligibility Rules negate any attempt by Gaines to show the second element of a *§ 2* claim -- willful maintenance of monopoly power. Consequently, regardless of whether the **[**24]** NCAA justifications are viewed as a defense to a *§ 2* challenge or rather as proof contradicting an assertion of willful monopolization, they necessitate a ruling by this Court in favor of the Defendants at this preliminary injunction stage of the proceeding.

The NCAA eligibility Rules have recently been upheld under § 1 of the Sherman Act. *Banks v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1990)*. This Court realizes that the test for a § 1 violation is somewhat different than the two-prong test for a *§ 2* violation. In *Banks* the court upheld the Rules under the Rule of Reason, which requires the court to balance the procompetitive and anticompetitive effects of an alleged restraint and strike down the restraint if the anticompetitive effects predominate. *See Banks*, slip op. at 17. Although the Rule of Reason was developed specifically in *§ 2* case, its focus on the reasonableness of a restraint on competition overlaps with the *§ 2* test for "willfulness" because in a *§ 2* case the court must also decide whether the regulation at issue is unreasonably anticompetitive. Thus, this Court agrees with the findings of the *Banks* court that the "no-agent" and "no-draft" Rules have **[**25]** primarily procompetitive effects in that they promote the integrity and quality of college football and preserve the distinct "product" of major college football as an amateur sport. Gaines would have us hold that a finding of *any* anticompetitive effect requires finding a *§ 2* violation. Gaines argues that such an effect is evident from the proposition that **[*747]** the Rules deter many college players from even testing the professional waters. However, the proper inquiry is whether the Rules are unreasonably anticompetitive. This Court has concluded that the Rules are overwhelmingly procompetitive, are justified by legitimate business reasons, and consequently cannot be viewed as having any unreasonably exclusionary or anticompetitive effect.

The United States Supreme Court has expressly recognized the legitimate procompetitive effects of the eligibility Rules:

> ***HN9***[] The NCAA seeks to market a particular brand of football -- college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order **[**26]** to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice -- not only the choices available to sports fans but also those available to athletes -- and hence can be viewed as procompetitive.

NCAA v. Board of Regents of Univ. of Olka., 468 U.S. 85, 101-02, 104 S. Ct. 2948, 82 L. Ed. 2d 70, 84 (1984). The Supreme Court distinguished the NCAA television restrictions, which it invalidated under § 1, from "most of the regulatory controls of the NCAA [which] are justifiable means of fostering competition among amateur teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." *Id., 468 U.S. at 117, 82 L. Ed. 2d at 94*. The **[**27]** only conclusion which this Court can reach in light of the Supreme Court's language quoted above is that the Rules challenged by Gaines are not unreasonably anticompetitive.

C.

Because this Court has determined that Gaines has failed to show a substantial likelihood of success on the merits, it is not necessary to discuss fully the other three elements relevant to a preliminary injunction determination.

This Court recognizes that Gaines is harmed more by a denial of his preliminary injunction request than if the injunction was issued. However, Gaines has not made a strong showing that he will suffer immediate and irreparable injury upon denial of his request. It is true he will not be able to play football for Vanderbilt this season. However, it is not true that his chances of playing professional football are irreparably foreclosed. Although his chances may be narrowed by his lack of college play this year, he himself has admitted that he has a good chance to play in some professional league (CFL, Arena Football, etc.). *See* Alexis Affidavit. Ex. 4.

Secondly, this Court must consider the hardship which likely would result to the Defendants were Gaines' request granted. This Court **[**28]** does not consider lightly a request which puts it in the position of substituting its judgment for the authority of a regulatory body, in this case the NCAA. This Court also is reluctant to blur the line further between professional and college football, especially because of the likely increased confusion among players and schools like Vanderbilt concerning the possible consequences of a player unsuccessfully entering the pro draft or a school letting such a player back into its program.

Finally, although there indeed is a strong public interest in encouraging free and open competition in the marketplace, with respect to the unique "marketplace" for college football, there are other strong interests to consider. The public interest is promoted by preserving amateurism and protecting the educational objectives of intercollegiate athletics. As the United **[*748]** States Supreme Court has articulated, "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Board of Regents, 468 U.S. at 120, 82 L. Ed. 2d at 96*.

IV.

Despite the compelling situation which has befallen Mr. **[**29]** Gaines, he has failed to show a substantial likelihood of success on the merits of his *§ 2* claim. From the outset he shouldered a heavier burden because of the mandatory nature of the relief sought. However, this Court is convinced that Gaines has not carried even the lighter burden of establishing any fair ground for litigation of his claim. There is substantial support in the caselaw for this Court's conclusion that the NCAA eligibility Rules are not subject to antitrust scrutiny. Nonetheless, upon such scrutiny, it is clear to this Court that the NCAA has demonstrated strong business justifications for enforcing the current eligibility Rules, leading to the conclusion that the Rules cannot be deemed unreasonably anticompetitive or exclusionary.

For the foregoing reasons Gaines' Application For a Preliminary Injunction is denied.

ORDER - September 20, 1990, Entered

In accordance with the accompanying Memorandum, plaintiff's application for a preliminary injunction is denied.

Yamaha Store of Bend, Inc. v. Yamaha Motor Corp.

Supreme Court of Oregon

April 10, 1990, Argued and submitted ; September 20, 1990

SC No. S36613

Reporter

310 Ore. 333 *; 798 P.2d 656 **; 1990 Ore. LEXIS 328 ***; 1990-2 Trade Cas. (CCH) P69,231

The YAMAHA STORE OF BEND, OREGON, INC., dba "The Yamaha Store," Respondent on Review, v. YAMAHA MOTOR CORPORATION, U.S.A., Petitioner on Review, Benjamin H. JACQUES, Jr., and Phillippe D. Jacques, dba Bend Yamaha Snowmobile, Defendants. YAMAHA MOTOR CORPORATION, U.S.A., Counterclaim Plaintiff, v. Robert A. NOSLER and John A. Nosler, Counterclaim Defendants

Subsequent History: [*1]** Reconsideration Granted In Part February 7, 1991, Reported at *1991 Ore. LEXIS 15*.

Prior History: On review from the Court of Appeals. * TC No. 32901-TM; CA No. A44218.

Disposition: The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part. Remanded to the circuit court for further proceedings not inconsistent with this opinion.

Core Terms

damages, motorcycles, inventory, prices, price discrimination, dealer, trial court, advertising, measure of damages, noncurrent, customers, sales, models, presumed, devaluation, further damage, lower price, market area, residents, compete, costs

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN1[] **Monopolies & Monopolization, Attempts to Monopolize**

See *Or. Rev. Stat. § 646.040(1)*.

* Appeal from judgment of *Deschutes County Circuit Court, Thomas M. Mosgrove, Judge. 98 Or App 290, 779 P2d 1061 (1989)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Jurisdiction

Torts > Remedies > Damages > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN2[] **Price Fixing & Restraints of Trade, Vertical Restraints**

See *Or. Rev. Stat. § 646.150*.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Torts > Remedies > Damages > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN3[] **Jurisdiction, Subject Matter Jurisdiction**

See *Or. Rev. Stat. § 646.140(1)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Torts > Remedies > Damages > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN4[] **Price Fixing & Restraints of Trade, Vertical Restraints**

See *Or. Rev. Stat. § 646.160*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN5[] Monopolies & Monopolization, Attempts to Monopolize

Or. Rev. Stat. § 646.040(1), requires that a plaintiff prove that a defendant's price discrimination "probably" had the proscribed effect on competition.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Remedies > Damages > General Overview

HN6[] Private Actions, Remedies

The general rule in Oregon in assessing damages has been that a plaintiff should recover only such sums as will compensate a plaintiff for the injury suffered as a result of a defendant's wrong. Furthermore, when damages are susceptible to proof with approximate accuracy, the necessary evidence must be supplied.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Remedies > Damages > General Overview

HN7[] Private Actions, Remedies

A plaintiff must prove lost profits damages with reasonable certainty.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Remedies > Damages > General Overview

HN8[] Private Actions, Remedies

The presumed damages provision of Or. Rev. Stat. § 646.160, is a specific statutory exception to the general rule. The provision expressly overrides the general rule of compensatory damages by providing for statutory damages without regard to a plaintiff's actual losses; it also provides an express measure of such damages by conclusively presuming that a successful price discrimination plaintiff has "sustained damages equal to the monetary amount or equivalent of the unlawful discrimination.

Counsel: Peter C. Richter, Portland, argued the cause and submitted the petition for petitioner on review. With him on the petition were Jeffrey D. Austin and Miller, Nash, Weiner, Hager & Carlsen, Portland.

Ronald L. Marceau, Bend, argued the cause and filed the response for respondent on review. With him on the response were David F. Berger and Marceau, Karnopp, Petersen, Noteboom & Hubel, Bend.

Judges: Peterson, Chief Justice, and Carson, Jones, [**] Gillette, Van Hoomissen, Fadeley, and Unis, Justices.

[**] Jones, J., resigned April 30, 1990.

Opinion by: VAN HOOMISSEN

Opinion

[*336] **[**657]** Plaintiff, The Yamaha Store of Bend, Oregon, Inc., sued defendant **[***2]** Yamaha Motor Corporation, U.S.A., (Yamaha) for price discrimination, *ORS 646.040(1)*, [1] **[***3]** for breach of contract, and in tort for intentional interference with business and economic relationships. [2] The jury awarded plaintiff a verdict on its price discrimination and breach of contract claims. Judgment was entered trebling the price discrimination award and awarding plaintiff attorney fees and costs. [3] The Court of Appeals affirmed. *Yamaha Store of Bend, Inc. v. Yamaha Motor Corp., 98 Or App 290, 779 P2d 1061 (1989)*.

[*4]** We allowed review to consider two issues of first impression under Oregon's Anti-Price Discrimination Law: What kind of evidence is legally sufficient to present a factual **[*337]** issue of competition, and what is the proper measure of damages under the "such further damages" provision of *ORS **[**658]** 646.160*? [4] We conclude that plaintiff presented sufficient evidence to present a factual issue of competition and that the trial court, therefore, did not err in denying Yamaha's motion for a directed verdict on that issue. However, we also conclude that the trial

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[1] *ORS 646.040(1)* provides:

> ***HN1***[] "It is unlawful for any person engaged in commerce or food commerce, or both, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, or services or output of a service trade, of like grade and quality or to discriminate in price between different sections, communities or cities or portions thereof or between different locations in sections, communities, cities or portions thereof in this state, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

[2] Yamaha's cross-claims against defendants Jacques were settled before trial. Plaintiff's claim against defendants Jacques was dismissed by plaintiff. On Yamaha's counterclaim against plaintiff for unpaid parts, plaintiff and Yamaha stipulated before trial that $ 29,391 would be credited to Yamaha against any judgment in plaintiff's favor.

[3] *ORS 646.150* provides:

> ***HN2***[] "If no injunctive relief is sought or required, any person injured by any violation of *ORS 646.010 to 646.180* may maintain an action for damages alone in any court of general jurisdiction in this state. The measure of damages in such action shall be the same as that prescribed by *ORS 646.140*."

ORS 646.140(1) provides:

> ***HN3***[] "Any person injured by any violation, or who will suffer injury from any threatened violation, of *ORS 646.010 to 646.180* may maintain an action in any court of general equitable jurisdiction of this state, to prevent, restrain or enjoin the violation or threatened violation. If in such action, a violation or threatened violation of *ORS 646.010 to 646.180* is established, the court shall enjoin and restrain or otherwise prohibit such violation or threatened violation, and the plaintiff in the action is entitled to recover three-fold the damages sustained by the plaintiff, and the costs of suit and a reasonable attorney fee at trial and on appeal."

[4] *ORS 646.160* provides:

> ***HN4***[] "In any proceedings instituted or action brought in pursuance of the provisions of *ORS 646.140* or *646.150*, the plaintiff, upon proof that the plaintiff has been unlawfully discriminated against by the defendant, shall conclusively be presumed to have sustained damages equal to the monetary amount or equivalent of the unlawful discrimination; and, in addition thereto, may establish *such further damages,* if any, as the plaintiff may have sustained as a result of the discrimination." (Emphasis added.)

court erred in allowing the jury to consider an improper measure of damages and that the judgment as to those damages cannot stand.

[*5]** Given the jury's verdict for plaintiff, disputed questions of fact have been resolved in plaintiff's favor. *Katter v. Jack's Datsun Sales, Inc., 279 Or 161, 163, 566 P2d 509 (1977)*; *Scott v. Mercer Steel/Edwards Realty, 263 Or 464, 466-67, 503 P2d 1242 (1972)*.

Yamaha, the United States distributor for Yamaha motorcycles, published a list of the prices that it charged its dealers for motorcycles. Plaintiff, a retail Yamaha motorcycle dealer from 1978 to 1983, purchased motorcycles, parts, and accessories from Yamaha for resale in Bend, Oregon, and the surrounding area, including Deschutes, Jefferson, and Crook counties.

In June 1982, the largest Portland-area Yamaha dealer went out of business. That dealer had about 550 new 1980, 1981, and 1982 motorcycles in its inventory, which Yamaha repossessed. In July 1982, Yamaha sold those repossessed motorcycles to Beaverton Honda (Beaverton) at prices substantially below Yamaha's regular dealer list prices. Yamaha did not offer to sell any of the repossessed motorcycles at the lower price to plaintiff or to any of its other dealers. Yamaha also provided Beaverton with advantageous **[***6]** credit terms (free "flooring") and advertising support. [5] **[*338]** Beaverton then changed its name to Beaverton Honda-Yamaha and became metropolitan Portland's largest Yamaha dealer.

Beaverton then sold the repossessed motorcycles at retail prices close to other dealers' wholesale costs for the same models. Beaverton advertised its low prices extensively in Portland newspapers and on Portland television stations, all of which were readily available to readers and viewers in the Bend area. Plaintiff's customers were aware of Beaverton's lower prices; plaintiff reduced its own prices and, in some cases, sold motorcycles at or below plaintiff's actual cost. Beaverton sold at least two motorcycles to customers with Bend addresses and several **[***7]** others to customers residing in plaintiff's central Oregon market area.

I.

At trial, Yamaha moved for a directed verdict on plaintiff's price discrimination claim, arguing that as a matter of law plaintiff and Beaverton were not "competitors," a necessary element of an *ORS 646.040(1)* price discrimination claim. The trial court denied that motion, and the Court of Appeals affirmed that denial. On review, Yamaha contends that the Court of Appeals erred in holding that there was evidence of actual competition between plaintiff and Beaverton.

Yamaha argues that the question of whether Beaverton's competitive market included the Bend area may only be determined by how many actual sales Beaverton made to Bend area residents. Pointing to evidence showing that out of more than 800 sales, Beaverton sold only two motorcycles to Bend residents, Yamaha argues that that evidence establishes as a matter of law plaintiff and Beaverton were *not* competitors. Yamaha also argues that it was **[**659]** not sufficient for plaintiff to show the effects of Beaverton's advertising campaign on plaintiff's competitive position (*e.g.,* that Bend area residents would shop in the Portland area or that they knew **[***8]** about Beaverton's lower prices and expected plaintiff to meet them). Yamaha relies primarily upon *Eastern Auto Distrib. v. Peugeot Motors of America, 795 F2d 329, 335 (4th Cir 1986)* (a few "crossover" sales do not prove actual competition) and other federal cases. [6] We find the cited federal cases inapposite, **[*339]** however, because they are concerned with exclusive geographic market areas with defined boundaries. No such clearly defined market areas are involved here.

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[5] Yamaha also gave advertising support to its other dealers. Thus, advertising support apparently does not constitute part of plaintiff's price discrimination claim. *See 3 Advising Oregon Businesses* (Oregon CLE 1985) § 65.51 (advertising allowance as price discrimination).

[6] Federal cases interpreting the Robinson-Patman Act are persuasive authority in interpreting Oregon's Anti-Price Discrimination Law. *Top Service Body Shop v. Allstate Ins. Co., 283 Or 201, 217 n 21, 582 P2d 1365 (1978)*; *Redmond Ready-Mix, Inc. v. Coats, 283 Or 101, 110, 582 P2d 1340 (1978)*.

The rationale behind the requirement for actual competition in the same market area is that if the favored and disfavored buyers, here Beaverton and plaintiff, [7] **[***10]** do not in **[***9]** fact compete for the same customers, there cannot be a reasonable probability [8] of harm to competition. *Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F2d 1163, 1170-71 (7th Cir 1978)*, *cert den 440 U.S. 982, 99 S Ct 1791, 60 L Ed 2d 242 (1979)*; *M. C. Manufacturing Co. v. Texas Foundries, Inc., 517 F2d 1059, 1066 (5th Cir 1975)*, *cert den 424 U.S. 968, 965 S Ct 1466, 47 L Ed 2d 736 (1976)*; *see* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 179 (1962) (if buyers on different sides of a boundary line do not compete with each other, no adverse competitive effects at the buyer level follow from the supplier's price variations).

There is no dispute that Yamaha sold 1980, 1981, and 1982 motorcycles to Beaverton at prices significantly lower than the prices Yamaha charged plaintiff for the same models. Furthermore, Yamaha also gave Beaverton advantageous credit terms not given to plaintiff. Beaverton then advertised the sale of its lower priced motorcycles extensively in Portland newspapers and on Portland television stations, media which Yamaha acknowledges in its petition for review are "state-wide" media. [9]

[*11]** **[*340]** The Honda motorcycle dealer in Bend testified that 75 percent of his competition came from Portland area motorcycle dealers, that Bend area customers compared his prices with those of the Portland area dealers, and that his customers came into his store with *The Oregonian's* classified advertising in hand. He testified that Portland pricing directly affected his own prices because, in order to make a sale, he often had to match Portland dealers' prices.

A former Oregon Yamaha district manager, who had been the Oregon Kawasaki district manager at the time of Yamaha's sale to Beaverton, testified that the predictable effect of Yamaha's sale to Beaverton was to put all other dealers in Beaverton's market at a competitive disadvantage.

One of plaintiff's owners testified that Beaverton's advertising of its lower prices forced plaintiff to lower its own prices. **[**660]** Plaintiff's general manager testified that it was impossible for plaintiff to compete with Beaverton because of Beaverton's advertising and low prices and that although plaintiff's primary sales area was the Bend area, plaintiff nevertheless had to lower its prices to compete with Beaverton.

A Bend resident testified **[***12]** that he had become aware of Beaverton's lower prices from television advertising seen in Bend and that he had bought a motorcycle from Beaverton because of its advertised lower price.

A former Baker, Oregon, Yamaha dealer testified that he, too, had been damaged by Yamaha's 1982 sale to Beaverton. There also was evidence that of twelve Yamaha dealers in northwestern Oregon before the challenged

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[7] Price discrimination cases distinguish among the probable impact of the price discrimination on competitors of the seller (primary-line discrimination), on the favored and disfavored buyers (secondary-line discrimination), or on the customers of either of them (third-line discrimination). *See* *Redmond Ready-Mix, Inc. v. Coats, supra, 283 Or at 115 n 17*; 3 *Advising Oregon Businesses, supra,* § 65.44-65.45; 3 E. Kintner & J. Bauer, *Federal* ***Antitrust Law*** § 20.9 at 127 (1983). This is a secondary-line discrimination case.

[8] ***HN5***[] *ORS 646.040(1)* requires that a plaintiff prove that a defendant's price discrimination "probably" had the proscribed effect on competition. *Redmond Ready Mix, Inc. v. Coats, supra, 283 Or at 114*.

[9] In *Zoslaw v. MCA Distributing Corp., 594 F Supp 1022 (ND Cal 1984)*, the court denied the defendant's motion for a summary judgment, even though there was no evidence that the plaintiff had actually lost any sales. The court found that there remained an issue of fact as to the competition element, based in part on the fact that the defendant's advertisements reached the plaintiff's market area. The court also relied on statements that the plaintiff's customers would "buy the product at a much lower price at [the defendant's store]" to find that there was an issue concerning the defendant's competitive presence in the plaintiff's market area. *594 F Supp at 1035*.

sale to Beaverton, some started closing up within a few months after the sale, and all twelve were out of business by the time this case came to trial. [10]

Plaintiff's expert witness, an economist, testified that the relevant competitive market is wherever the impacts of a price differential are felt; that **[***13]** Beaverton's extensive advertising of its low prices would have an impact on plaintiff; that competition in the Bend area definitely would be **[*341]** lessened; and that the effect was a foreseeable, natural, and necessary consequence of Beaverton's extensive advertising of its low prices. He further testified that the foreseeable consequences to plaintiff would include diversion of sales, negative customer relations, and the depressed value of plaintiff's new and used motorcycle inventory. He testified, "The Bend area is reasonably in the Portland [market] area."

Yamaha's own records showed that Beaverton made sales in Oregon to customers from Salem, Albany, Hood River, Madras, Bend, Lakeview, Long Creek, Burns, and Pendleton. In addition to sales in Oregon, Beaverton made sales to customers in Montana, California, Alaska, and Washington. Beaverton's advertisements in *The Oregonian* proclaimed, "We're your # 1 in the U.S.A. Yamaha connection."

We agree with the trial court and the Court of Appeals that there was evidence in the record from which a jury could find that the Bend area was part of Beaverton's market; that Beaverton competed with plaintiff for customers from the **[***14]** Bend area; that Yamaha discriminated in the prices it charged Beaverton and plaintiff for 1982 motorcycles; and that such discrimination had the proscribed effect on competition. *ORS 646.040(1)*. The trial court therefore did not err in denying Yamaha's motion for a directed verdict.

II.

We next consider Yamaha's contention that the Court of Appeals erred in affirming that devaluation of inventory was a proper measure of damages as to plaintiff's inventory of 1980 and 1981 motorcycles (the noncurrent inventory). For the purposes of this assignment of error, Yamaha assumes that plaintiff proved actionable price discrimination as to its inventory of 1982 motorcycles (the current inventory) and therefore is entitled to *ORS 646.160* presumed damages for the difference in the price plaintiff and Beaverton paid Yamaha in 1982 for 1982 motorcycles.

At trial, Yamaha moved to strike plaintiff's devaluation evidence, arguing that as a matter of law devaluation of inventory was not a proper measure of damages *as to plaintiff's noncurrent inventory* because plaintiff had in fact sold all of its noncurrent inventory before trial. Yamaha asserted that the proper measure of plaintiff's damages **[***15]** was instead lost **[*342]** profits, *i.e.,* the difference between the prices plaintiff actually received for its noncurrent inventory and the prices it would have received *but for* Yamaha's price discrimination on the 1982 models. The trial court denied Yamaha's motion to strike. On these facts, we agree with Yamaha, and **[**661]** conclude that the trial court erred in denying Yamaha's motion.

Although terming them "devaluation-of-inventory" damages, plaintiff essentially sought (and the jury awarded) damages measured by the difference between the prices Beaverton paid Yamaha in 1982 for 1980 and 1981 motorcycles and the prices plaintiff paid Yamaha in 1980 and 1981 for the same models, a measure of damages identical to presumed damages under *ORS 646.160*. [11]

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[10] Yamaha argues on appeal that there was no evidence at trial that any of those dealers closed because of Yamaha's sale to Beaverton and that other factors contributed to the closures. Although we do not decide that issue, the concurrence in time of those events made such evidence relevant for consideration by the jury.

[11] The jury awarded plaintiff damages of $ 2,166.56 for the difference in price charged to Beaverton and plaintiff on 1982 motorcycles purchased from defendant and $ 23,691.45 for the reduction in value of plaintiff's 1980 and 1981 motorcycles, for total price discrimination damages of $ 25,858.01. The jury also gave plaintiff an identical award of $ 25,858.01 on its alternate breach of contract claim (for the reduction in value of plaintiff's inventory of new and noncurrent motorcycles due to Yamaha's breach of the dealership agreement). The trial court trebled the price discrimination award and entered judgment for plaintiff for $ 77,574.03. The trial court offset that award by $ 29,391, which the parties had stipulated plaintiff owed Yamaha for parts, resulting in a net recovery to plaintiff of $ 48,183.03.

[*16]** In affirming that measure of damages, the Court of Appeals explained:

> "[Yamaha] argues * * * that devaluation of inventory is not a proper measure of damages in this case [for plaintiff's 1980 and 1981 inventory], because plaintiff in fact sold all of the motorcycles in its inventory, most for prices above its actual costs. That fact is not inconsistent with finding that Beaverton's advertising reduced the value of plaintiff's 1980 and 1981 models. The evidence that plaintiff received less than its usual markup for those motorcycles because of the competition from Beaverton is evidence that the competition reduced the value of the inventory. A jury could find that the reduction in value was equal to the difference between the prices that plaintiff and Beaverton paid. Under *ORS 646.160*, there is a conclusive presumption that plaintiff suffered damages equal to the amount of the price discrimination. It is consistent with that provision to permit the jury to apply the same measure of damages to the discrimination on the older models." *Yamaha Store of Bend, Inc. v. Yamaha Motor Corp., supra, 98 Or App at 296-97*.

[*343] On these facts, we **[***17]** disagree that it is "consistent" with *ORS 646.160* to have permitted the jury to apply a devaluation of inventory measure of damages when all of plaintiff's noncurrent inventory had in fact been sold before trial.

At trial, plaintiff expressly disclaimed that it was seeking *ORS 646.160* presumed damages with respect to its noncurrent inventory, apparently, according to the Court of Appeals,

> "because federal cases require that the allegedly discriminatory sales be reasonably contemporaneous. Plaintiff had bought its stock of 1980 and 1981 models in those years, while Beaverton purchased its stock in 1982." *Id., 98 Or App at 296 n 8*. [12] **[***18]**

The trial court specifically instructed the jury that *ORS 646.160* conclusively presumes that plaintiff was damaged in the amount of the discrimination on the 1982 models. [13] Plaintiff, however, was entitled **[**662]** to recover "such further damages" as it may have sustained as to its noncurrent inventory as a result of Yamaha's price discrimination on plaintiff's current inventory. The question is: How are "such further damages" to be measured?

[*19]** **[*344]** For more than a century, ***HN6***[] the general rule in Oregon in assessing damages has been that a plaintiff should recover only such sums as will compensate a plaintiff for the injury suffered as a result of a defendant's wrong. *Budd v. Multnomah St. Ry. Co., 15 Or 413, 419, 15 P 569 (1887)*. [14] Furthermore, when

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[12] Federal cases interpreting the Robinson-Patman Act do require that discriminatory sales be "reasonably contemporaneous." *See, e.g., Rutledge v. Electric Hose & Rubber Co., 511 F2d 668, 677 (9th Cir 1975)*; *Atalanta Trading Corp. v. Federal Trade Com'n, 258 F2d 365, 372 n 6 (2nd Cir 1958)*; *Valley Plymouth v. Studebaker-Packard Corp., 219 F Supp 608, 610 (SD Cal 1963)*. The posture of this case does not require us decide whether the reasonably contemporaneous rule applies under state law, or, if so, how it would apply to these facts.

[13] The trial court instructed the jury in part:

> "With regard to the second claim only, that is the price discrimination claim if plaintiff has proven by preponderance of the evidence, each of the elements necessary to prevail on its price discrimination claim, the second claim, the law conclusively presumes that plaintiff was damaged in the amount of the price discrimination that is the difference between the price charged plaintiff and the price charged Beaverton. This amount may not exceed $ 3,292.24.
>
> "This presumption of damages only applies to plaintiff's price discrimination claim. That presumed price differential cannot be the basis for the measure of damage on the other claim.
>
> "* * *
>
> "Plaintiff seeks damages for reduction in value of plaintiff's 1980 and 1981 motorcycle inventory which plaintiff had on hand at the time of the Beaverton deal. * * * The measure of damages for loss and value of property is the amount of money that is equal to the difference between the value of property in question before the Beaverton sale and the reduced value of the property, if any, resulting from the Beaverton sale."

damages are susceptible to proof with approximate accuracy, the necessary evidence must be supplied. *Porter Const. Co. v. Berry et al, 136 Or 80, 93, 298 P 179 (1931)*. [15]

[*20]** ***HN8***[]

The presumed damages provision of *ORS 646.160* is a specific statutory exception to the general rule just stated. That provision expressly overrides the general rule of compensatory damages by providing for statutory damages without regard to a plaintiff's actual losses; it also provides an express measure of such damages by conclusively presuming that a successful price discrimination plaintiff has "sustained damages equal to the monetary amount or equivalent of the unlawful discrimination." No similar directives are provided in the statutory provision for "such further damages."

We believe that by using the qualifier "further" in *ORS 646.160*, the legislature intended that insofar as possible any additional damages must be compensatory damages designed to restore a plaintiff to the place he or she would have occupied but for the price discrimination. Stated differently, the amount of "such further damages" should be equal to any actual loss to a plaintiff attributable to a defendant's price discrimination. This interpretation of our statute appears to be consistent with federal case law which holds that under the Robinson-Patman Act all price discrimination damages must be proved. **[***21]** *See e.g., J. Truett Payne Co. v. Chrysler Motors* ***[*345]*** *Corp., supra, 451 U.S. at 561-63* ("automatic damages" rejected; plaintiff must show actual damages). Plaintiff cites no legislative history or other authority in support of its argument that on a devaluation of inventory measure of damages was appropriate on these facts, and we have found none.

Plaintiff sold all of its noncurrent inventory before trial and had records demonstrating how much it actually received on those sales. The trial court should have required plaintiff to prove its actual damages with respect to all its claims, except its claim for *ORS 646.160* presumed damages as to its 1982 inventory. Because the trial court erred in denying Yamaha's motion to strike plaintiff's evidence concerning damages pertaining to the 1980 and 1981 models, the judgment awarding plaintiff price discrimination damages of $ 23,691.45 for the reduction in value of its noncurrent inventory, and $ 25,858.01 for breach of contract based upon the same **[**663]** improper theory of damages cannot stand. A new trial is required.

The final issue is the scope of retrial. We first recognize the distinction **[***22]** between the liability and the damages issues. Plaintiff's proof of Yamaha's price discrimination on the 1982 motorcycles and of Yamaha's breach of the dealership agreement was sufficient. Therefore, there is no need for a new trial on the liability issues. Furthermore, proof of plaintiff's price discrimination damages on the 1982 motorcycles was specific. Therefore, as to plaintiff's claim for price discrimination: the judgment in plaintiff's favor on the issue of liability is affirmed; the judgment in plaintiff's favor for $ 6,499.68 ($ 2,166.56 X 3) presumed damages as to plaintiff's 1982 motorcycles is affirmed; the judgment in plaintiff's favor for $ 71,074.35 ($ 23,691.45 X 3) such further damages as to plaintiff's noncurrent inventory is vacated. As to plaintiff's claim for breach of contract: the judgment in plaintiff's favor on the issue of liability is affirmed, the judgment in plaintiff's favor for $ 25,858.01 breach of contract damages is vacated. The case is remanded to the trial court for a new trial only on the issue of price discrimination damages as to plaintiff's noncurrent inventory, and breach of contract damages for Yamaha's breach of the parties' dealership **[***23]** agreement.

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[14] *Accord Millers Mut. Fire Ins. Co. v. Wildish Const. Co., 306 Or 102, 117, 758 P2d 836 (1988)* (just compensation without enrichment); *United Engine Parts v. Ried, 283 Or 421, 432, 584 P2d 275 (1978)* (to make plaintiff "whole"); *Ore. Mutual Fire Ins. Co. v. Mathis, 215 Or 218, 224, 334 P2d 186 (1959)* (same).

[15] Generally, ***HN7***[] a plaintiff must prove lost profits damages with reasonable certainty. *Willamette Quarries v. Wodtli, 308 Or 406, 412, 781 P2d 1196 (1989)*. While the standard for proving damages, apparently, is not in issue here, federal courts sometimes allow a relaxed standard for proving damages in antitrust cases. *See Texaco Inc. v. Hasbrouck, U.S. , , 110 S Ct 2535, 110 L Ed 2d 492 (1990)*; *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565-66, 101 S Ct 1923, 68 L Ed 2d 442 (1981)*. We need not decide here whether the federal rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury is applicable to *ORS 646.160*.

The trial court found that plaintiff was entitled to reasonable attorney fees and costs on its price discrimination **[*346]** claim pursuant to *ORS 646.140* and on its contract claim pursuant to a provision in the parties contract. In the Court of Appeals, Yamaha assigned as error the trial court's award of $ 90,000 attorney fees to plaintiff as being "excessive." Yamaha did not pursue that issue in this court. Nevertheless, because we conclude that the trial court erred in denying Yamaha's motion to strike plaintiff's devaluation of inventory theory of damages, on remand, the circuit court shall reexamine the issue of attorney fees and costs.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part. Remanded to the circuit court for further proceedings consistent with this opinion.

Concord v. Boston Edison Co.

United States Court of Appeals for the First Circuit

September 21, 1990

No. 89-1872

Reporter
915 F.2d 17 *; 1990 U.S. App. LEXIS 16649 **; 1990-2 Trade Cas. (CCH) P69,193

TOWN OF CONCORD, MASSACHUSETTS, ET AL., Plaintiffs, Appellees, v. BOSTON EDISON COMPANY, Defendant, Appellant

Prior History: [1]** Appeal from the United States District Court for the District of Massachusetts; Hon. Andrew A. Caffrey, Senior U.S. District Judge.

Disposition: Reversed.

Core Terms

squeeze, electricity, regulation, prices, ingot, antitrust, wholesale, monopoly, monopolist, rates, monopoly power, costs, levels, customers, competitors, sheet, municipal, retail, fabricating, pipe, buy, anticompetitive, distributors, generation, firms, anti trust law, rate increase, exclusionary, harms, regulated industry

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN1[] **Monopolies & Monopolization, Actual Monopolization**

A firm can engage in a price squeeze only if it operates at two levels of an industry and only if its competitors at one level are also its customers.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Monopolies & Monopolization, Actual Monopolization**

A price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Monopolies & Monopolization, Actual Monopolization**

A price squeeze violates § 2 of the Sherman Act, 15 U.S.C.S. § 2(a), when (1) the firm conducting the squeeze has monopoly power at the first industry level, (2) its price at this level is higher than a "fair price," and (3) its price at the second level is so low that its competitors cannot match the price and still make a "living profit."

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Energy & Utilities Law > Antitrust Issues > General Overview

HN4[] **Sherman Act, Claims**

Under § 2 of the Sherman Act, 15 U.S.C.S. § 2(a), it is unlawful for a firm to monopolize any part of the trade or commerce among the several States. To prove a violation of this statute, a plaintiff must demonstrate (1) that the defendant possesses monopoly power in the relevant market, and (2) that the defendant has acquired or maintained that power by improper means.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN5[] **Monopolies & Monopolization, Actual Monopolization**

"Exclusionary conduct" has been defined as conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Monopolies & Monopolization, Actual Monopolization**

A practice is "anticompetitive" only if it harms the competitive process. It harms that process when it obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

It is unlawful for a monopolist to charge more than a "fair price" for the primary product while simultaneously charging so little for the secondary product that its second-level competitors cannot make a "living profit."

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

The price squeeze is exclusionary if the anticompetitive risks associated with a price squeeze outweigh the possible benefits and the adverse administrative considerations.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Monopolies & Monopolization, Actual Monopolization**

Full price regulation dramatically alters the calculus of antitrust harms and benefits. First, regulation significantly diminishes the likelihood of major antitrust harm. In particular, it diminishes the likelihood of "entry barrier" harm, namely the risk that (1) prices will rise because (2) new firms will hesitate to enter a market and compete after (3) a squeeze has driven pre-existing independent competitors from the marketplace. All three propositions are made doubtful by regulation.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

In a regulated industry, regulators control prices directly. Statutes typically require regulators to maintain prices at "reasonable" levels.

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

Energy & Utilities Law > Electric Power Industry > General Overview

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > General Overview

HN12[] **Antitrust Issues, Exclusionary Conduct**

Regulation in the electricity industry makes it less likely that a price squeeze will actually drive independent distributors from the marketplace. Local electricity distribution is considered a "natural monopoly" with service typically provided by a single franchised company to relatively immobile customers.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

HN13[] **Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes**

The question in a price squeeze case is whether the defendant utility acted illegally in proposing a certain anticompetitive combination of rates.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Price Discrimination, Defenses**

The Constitution guarantees a regulated firm a reasonable return on its investment.

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > Rates

HN15[] **Antitrust Issues, Exclusionary Conduct**

A distributor who disagrees with the utility's, or the Federal Energy Regulatory Commission's (Commission), cost-allocation methods or with its rates, or who believes that a price squeeze will harm it (whether or not the price squeeze also harms the competitive process), has an administrative remedy. It can challenge a utility's rates and practices before the Commission as unjust, unreasonable, or "discriminatory" pursuant to *16 U.S.C.S. §§ 824d*(a, b), 824e(a) and *18 C.F.R. § 2.17(a) (1990)*. As part of its challenge, it can ask the Commission to consider the alleged price squeeze harm.

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

Estate, Gift & Trust Law > Wills > Beneficiaries > Elections

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

Energy & Utilities Law > Electric Power Industry > General Overview

HN16[] **Antitrust Issues, Exclusionary Conduct**

A price squeeze in a fully regulated industry such as electricity will not normally constitute "exclusionary conduct" under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2(a)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Energy & Utilities Law > Electric Power Industry > Electricity Distribution & Transmission > Electricity Generation

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Monopolies & Monopolization, Actual Monopolization**

A 90 percent market share of a utility is enough to constitute a monopoly but 60 percent is probably, and 30 percent is certainly, not enough.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Monopoly power is the power to raise price well above competitive levels before customers will turn elsewhere.

Counsel: William L. Patton with whom Robert J. Stillman, Ropes & Gray, George F. Bruder, Carmen L. Gentile, Bruder, Gentile & Marcoux, John J. Desmond, III and Jeffrey N. Stevens were on brief for Appellant.

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Judges: Breyer, Chief Judge, Campbell and Selya, Circuit Judges.

Opinion by: BREYER

Opinion

[*18] BREYER, Chief Judge,

The chief question raised by this appeal is whether a pricing practice known as a price squeeze violates the antitrust laws when it takes place in a fully regulated industry.

To understand the nature of a price squeeze the reader must keep three basic facts in mind. First, *HN1*[] a firm can engage in a price squeeze only if it operates at two levels **[**2]** of an industry, and only if its competitors at one level are also its customers. Alcoa, the defendant in a famous antitrust case, provides an example of such a firm. *See* *United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945)* (Alcoa). For several decades, Alcoa controlled the domestic production of almost all of America's aluminum ingot. It sold its ingot to independent fabricators, some of whom turned the ingot into aluminum sheet; it also fabricated sheet itself. Both Alcoa and the independents sold the finished sheet to the same group of consumers. Alcoa, therefore, operated at two levels of the aluminum business -- ingot production and sheet production -- and it competed with its customers (the independent sheet fabricators) at the second level.

Second, ***HN2***[] a price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business. Suppose, hypothetically, that Alcoa's price for ingot was $ 100 per ton; that the independents' costs of fabricating ingot **[**3]** into sheet was $ 50 per ton; and that Alcoa's price for sheet was $ 145 per ton. Under these circumstances, the independents, with ingot costs of $ 100 and fabricating costs of $ 50, would have no "room" to make a profit, for they could not charge more than $ 145 for sheet without losing all of their business to Alcoa. Alcoa's prices of $ 100 for ingot and $ 145 for sheet would squeeze the independents out of business.

Third, Judge Learned Hand, in *United States v. Aluminum Co., supra*, wrote that ***HN3***[] a price squeeze violates Sherman Act *§ 2*, *15 U.S.C. § 2(a)*, when (1) the firm conducting the squeeze has monopoly power at the first industry level, (2) its price at this level is "higher than a 'fair price,'" and (3) its price at the second level is so low that its competitors cannot match the price and still make a "living profit." *See id. at 437-38*. Other courts, using substantially similar language, have reached the same conclusion. *See, e.g., Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 808-11 (3d Cir. 1984)*, *cert. denied*, *477 U.S. 908, 91 L. Ed. 2d 572, 106 S. Ct. 3284 (1986)*; **[**4]** *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977)*; *Carl Hizel & Sons, Inc. v. Browning-Ferris Indus., Inc., 600 F. Supp. 161, 161-62 (D. Colo. 1985)*.

This case raises a narrow question about the price squeeze theory of antitrust liability: does Sherman Act *§ 2* forbid a governmentally **[*19]** regulated firm with *fully regulated* prices -- prices that are regulated at both industry levels -- from asking regulators to approve prices that could create a price squeeze? Despite language in some cases suggesting that the answer is yes, *see* [slip op.] pp. 34-36, *infra*, our analysis of the likely effects of a price squeeze in a fully regulated industry leads us to conclude that the answer is no. Effective price regulation at both the first and second industry levels makes it unlikely that requesting such rates will ordinarily create a serious risk of significant anticompetitive harm. At the same time, regulatory circumstances create a significant risk that a court's efforts to stop such price requests will bring about the very harms -- diminished efficiency, higher prices -- that **[**5]** the antitrust laws seek to prevent. We conclude, therefore, that price regulation will, in most cases, prevent a price squeeze from constituting an "exclusionary practice" of the sort that Sherman Act *§ 2* forbids.

We also conclude that, regardless, the plaintiffs in this particular case did not demonstrate the existence of an unlawful exclusionary practice, for the evidence does not support a critical jury finding. It does not show that the defendant, Boston Edison, possessed monopoly power in the primary product market.

For these reasons, we reverse a judgment in favor of the plaintiffs.

I

Background

The private firms that supply American homes and businesses with electricity are called "investor-owned utilities." Most of these firms are fully integrated, operating at all three levels of the electric power industry: (1) they *produce* (or generate) electricity, (2) they *transmit* electricity from generators to local distributors, and (3) they *distribute* electricity at the local level. *See generally* Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, in *Antitrust and Regulation* **[**6]** 175-78 (F.M. Fisher ed. 1985) [hereinafter *Joskow*]; Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum. L. Rev. 64, 67-69 (1972) [hereinafter *Meeks*]. Despite being fully integrated, these firms typically do not distribute only electricity that they themselves have generated. Rather, in many parts of the country, groups of firms have formed power "pools" through which they coordinate the generation, transmission, and distribution of electricity throughout a large geographical area. These pooling arrangements aim to enhance reliable and efficient electric service by matching customer demands (which change minute by minute) with available low-cost supply sources. As a result of power pooling, an integrated utility will often wind up distributing electricity generated by a different, interconnected company. *See generally* 16 U.S.C. § 824a-1 (governing pooling agreements); *New England Power Pool Agreement, 56 F.P.C. 1562 (1976)* (describing the New England Power Pool), *petitions for review denied,* *Municipalities of Groton v. FERC, 190 App. D.C. 399, 587 F.2d 1296 (D.C.Cir. 1978)*; **[**7]** C. Phillips, Jr., *The Regulation of Public Utilities* 585-92 (1988) (discussing coordination among electric utilities) [hereinafter *C. Phillips*]. Even in the absence of explicit pooling arrangements, the many physical interconnections among American utilities, combined with the tendency of electricity to flow instantaneously along interconnected lines to wherever it is demanded, make it likely that electricity distributed by one utility will be supplied by another. One legal consequence of these interconnections and pooling arrangements is that most electricity flows "interstate," permitting federal, as well as state, regulation of electricity. *See* *Cincinnati Gas & Elec. Co. v. FPC, 376 F.2d 506, 507-09* (6th Cir.), *cert. denied*, *389 U.S. 842, 88 S. Ct. 77, 19 L. Ed. 2d 106 (1967)*; *Public Serv. Co. v. FPC, 375 F.2d 100* (7th Cir.), *cert. denied*, *387 U.S. 931, 87 S. Ct. 2054, 18 L. Ed. 2d 992 (1967)*; *see generally* *FPC v. Florida Power & Light Co., 404 U.S. 453, 30 L. Ed. 2d 600, 92 S. Ct. 637 (1972)*.

Investor-owned utilities of the type we have described supply approximately 75% **[*20]** **[**8]** of the nation's electricity. The remainder is supplied by government- and consumer-owned systems. Unlike their investor-owned counterparts, these systems tend *not* to be integrated. The federal government, for example, generates about 10% of the nation's electricity (at systems such as the Tennessee Valley Authority), but sells most of it to independent distributors. Approximately 2,000 municipalities and cooperatives own small-scale distribution companies, but only a handful generate their own electricity; most purchase the electricity they distribute from investor-owned utilities or from the federal government. In contrast to investor-owned systems, municipal systems typically enjoy generous tax and financing subsidies and substantial freedom from regulation. *See generally Joskow* at 175-78; Joskow and Schmalensee, *Markets for Power: An Analysis of Electric Utility Deregulation* 17-20 (1983); Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, *31 UCLA L. Rev. 563, 568* & n. 29 (1984) [hereinafter *Lopatka*]; *Meeks*, 72 Colum. L.J. at 67-69.

The record before us reveals facts typical of the national pattern. The defendant, **[**9]** Boston Edison, is a fully integrated investor-owned utility. It belongs to the New England Power Pool ("NEPOOL"). It transmits electricity (either self-generated or, *e.g.*, secured from other NEPOOL members) to 52 cities and towns in eastern Massachusetts. Each of these towns has only one distribution system serving all of the towns' inhabitants. In 39 of the towns, Edison owns the distribution system. In the remaining towns, either the town itself or another utility owns the distribution system. Concord and Wellesley, the plaintiffs, are two of the towns that own their own distribution systems. They take all of their electricity over Edison's transmission lines, and buy most of it directly from Boston Edison.

Edison's rates are completely regulated. The Federal Energy Regulatory Commission ("FERC," or the "Commission") regulates the rates that Edison charges when it sells electricity at "wholesale" (*i.e.*, when it sells electricity to other firms, including municipal distributors, for resale to final customers). *See* 16 U.S.C. § 824 (regulating the "transmission . . . and . . . sale of electric energy at wholesale in interstate commerce"). Before **[**10]** Edison can increase its rates, it must publish the new rates in the Federal Register and give notice of the proposed increase to each of its wholesale customers. *See* 18 C.F.R. § 35.8 (1990). If an interested party raises a legitimate question about the rate increase, FERC normally will suspend the new rates for up to five months, investigate them, and, if it has not completed its investigation by then, permit them to take effect *subject to refund* in the event it ultimately rejects them. *See* 16 U.S.C. § 824d(d, e). Similarly, the Massachusetts Department of Public Utilities ("DPU") regulates the "retail" rates that Boston Edison charges to consumers in the 39 cities and towns in which it distributes electricity. *See* M.G.L. c. 164, §§ 93-94G. In contrast, as we mentioned earlier, no agency regulates the retail rates that municipal distributors, such as Concord and Wellesley, charge to their customers, for these distributorships are non-profit entities indirectly controlled (through the ballot) by the very customers they serve.

Between 1984 and 1987, Edison filed a series of wholesale rate increases with FERC. Wellesley and Concord vigorously **[**11]** opposed those rate increases before the Commission. In each case, after briefly suspending the rates, the Commission allowed them to take effect subject to refund. The towns sought judicial review of FERC's decisions. Eventually, with one exception not relevant here, *see* *Towns of Wellesley, Concord and Norwood v.*

FERC, 786 F.2d 463 (1st Cir. 1986), this court upheld as lawful the relevant FERC determinations, *see* Towns of Concord and Wellesley v. FERC, 844 F.2d 891 (1st Cir. 1988); Boston Edison Co. v. FERC, 885 F.2d 962 (1st Cir. 1989).

Concord and Wellesley then attacked the same wholesale rate increases on another legal front. They brought this antitrust action in federal district court. They pointed out that these *wholesale* rate increases filed with FERC were not matched by corresponding **[*21]** *retail* rate increases. Thus, over a three-year period, Edison's rates to Concord and Wellesley increased while its rates to its own retail customers in the 39 towns surrounding Concord and Wellesley stayed roughly the same. The effect of this disparity, said Concord and Wellesley, was to put the two towns in a price squeeze. **[**12]** If they did not raise their own retail rates to reflect the higher cost of buying electricity from Edison, they would make less money; but if they raised their retail rates while Edison's stayed the same, customers for whom they and Edison compete (say, a small manufacturer with high energy costs) might decide to forego Concord and Wellesley and settle in a town served by Edison. In light of the resulting potential harm to their electricity distributing businesses, Concord and Wellesley argued that the wholesale price increases, in the absence of corresponding retail price increases, amounted to unlawful monopolization. *See* Sherman Act § 2, 15 U.S.C. § 2(a). A jury agreed, and the district court declined to overturn its verdict. *See* Town of Concord v. Boston Edison Co., 721 F. Supp. 1456 (D. Mass. 1989). We disagree with the district court, and we reverse the judgment.

II

The Price Squeeze

The basic legal principles that govern this monopolization case are well settled. Even though Boston Edison is a regulated firm, it has no blanket immunity from the antitrust laws. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 372-75, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973); **[**13]** *see also* Cantor v. Detroit Edison, 428 U.S. 579, 596 n. 35, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976); Gulf States Utils. Co. v. FPC, 411 U.S. 747, 758-59, 36 L. Ed. 2d 635, 93 S. Ct. 1870 (1973). The ***antitrust law*** relevant in this case makes ***HN4***[] it unlawful for a firm to "monopolize . . . any part of the trade or commerce among the several States." Sherman Act § 2, 15 U.S.C. § 2(a). To prove a violation of this statute, a plaintiff must demonstrate (1) that the defendant possesses "monopoly power in the relevant market," and (2) that the defendant has acquired or maintained that power by improper means. *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983). Like many courts and commentators, we refer to improper methods of acquiring or maintaining monopoly power as "exclusionary conduct." Borrowing from Professors Areeda and Turner, **[**14]** we have defined ***HN5***[] "exclusionary conduct" as "'conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.'" Barry Wright, 724 F.2d at 230 (quoting 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 626, at 83 (1978) [hereinafter *Areeda & Turner*]).

We shall assume for now that Edison has monopoly power in a relevant market and begin by examining whether Edison's pricing practices amount to exclusionary conduct. Traditional antitrust principles will guide our analysis. We shall compare the challenged practice's likely anticompetitive effects with its potentially legitimate business justifications. *See* Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988), *cert. denied*, *488 U.S. 1007, 102 L. Ed. 2d 780, 109 S. Ct. 789 (1989)*; Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9, 10 (1st Cir. 1987); *Meeks*, 72 Colum. L.J. at 80. In doing so, we shall bear in mind that a practice is not "anticompetitive" simply because **[**15]** it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, ***HN6***[] a practice is "anticompetitive" only if it harms the competitive process. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977); Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962); Clamp-All, 851 F.2d at 486. It harms that **[*22]** process when it obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods. *See, e.g.,* Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1st Cir. 1988); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210, 228-29 (D.C. Cir. 1986), *cert. denied*, *479*

U.S. 1033, 107 S. Ct. 880, 93 L. Ed. 2d 834 (1987); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 379 (7th Cir. 1986)*, **[**16]** *on denial of r'hrg*, *802 F.2d 217*, *cert. denied*, *480 U.S. 934, 107 S. Ct. 1574, 94 L. Ed. 2d 765 (1987)*; *Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 315 (8th Cir. 1986)*; *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*, *cert. denied*, *486 U.S. 1005, 100 L. Ed. 2d 192, 108 S. Ct. 1728 (1988)*; *see also* *Reiter v. Sonotone, 442 U.S. 330, 343, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)* ("Congress designed the Sherman Act as a 'consumer welfare prescription.'") (quoting R. Bork, *The Antitrust Paradox* 66 (1978)); *Apex Hosiery Co. v. Leader, 310 U.S. 469, 500-01, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)* ("Restraints on competition" do not constitute antitrust violations unless they "have or [are] intended to have an effect upon prices in the market or otherwise . . . deprive purchasers or consumers of the advantages which they derive from free competition").

Finally, we shall take account of the institutional fact that antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. **[**17]** They must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification. *See* *Barry Wright, 724 F.2d at 234*. (Indeed, the need for clarity and administrability sometimes leads to *per se* rules that prohibit inquiry into the actual harms and benefits of challenged conduct. *See* *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*.) They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.

These last-mentioned administrative considerations are particularly important when courts apply ***antitrust law*** to a regulated industry. That is because "regulation" and "antitrust" typically aim at similar goals -- i.e., low and economically efficient prices, innovation, and efficient production methods -- but they seek to achieve these goals in very different ways. Economic regulators seek to achieve them *directly* by controlling prices through rules and regulations; antitrust seeks to achieve them **[**18]** *indirectly* by promoting and preserving a process that tends to bring them about. An antitrust rule that seeks to promote competition but nonetheless interferes with regulatory controls could undercut the very objectives the antitrust laws are designed to serve. Thus, where regulatory and antitrust regimes coexist, *see, e.g.,* *Otter Tail, 410 U.S. at 372* (electric industry); *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 352, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)* (bank mergers), antitrust analysis must sensitively "recognize and reflect the distinctive economic and legal setting" of the regulated industry to which it applies. Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 565 (1977) [hereinafter *Watson & Brunner*]; *see generally Meeks, supra*.

For reasons we shall now set out, these principles lead us to conclude that a price squeeze of the sort at issue here does not ordinarily violate Sherman Act *§ 2* where the defendant's prices are regulated at both the primary and secondary levels. In so holding, we *are not* saying either that **[**19]** the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere. Rather, we are saying that, in light of regulatory rules, constraints, and practices, the price squeeze at issue here is not ordinarily exclusionary, and, for that reason, it does not violate the Sherman Act. *Cf.* 1 *Areeda & Turner* para. 223d, at 140 (noting that "antitrust courts can and do consider **[*23]** the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation"); *Watson & Brunner*, 22 Antitrust Bull. at 560 (warning that "the dogmatic transposition of monopolization concepts from conventional market settings to regulated industries" may produce results inimical to the goals of antitrust). We reach this conclusion by (1) analyzing the ordinary price squeeze, (2) comparing it to the "regulatory" price squeeze, and (3) noting that regulation makes a critical difference in terms of antitrust harms, benefits, and administrative considerations.

A. Price Squeeze Liability in an Unregulated Industry

To explain our conclusion, we must first discuss the ordinary **[**20]** price squeeze case, the case of an unregulated monopolist whose prices (at, say, the wholesale and retail levels) leave inadequate room for an independent competitor (at, say, the retail level) to survive. Only if the reader understands the major antitrust harms, benefits, and administrative considerations in that ordinary case, and sees how they are rather evenly balanced, will he understand why price regulation tips that balance so significantly towards legality. *Cf.* 3 *Areeda & Turner* para.

729c, at 235-38 (arguing that *Alcoa* overstated the harms, understated the benefits, and disregarded significant administrative burdens associated with the ordinary price squeeze).

The antitrust argument against the price squeeze typically begins by observing that a "one-level" monopolist engaged in a prolonged price squeeze may drive independent competitors out of business and thereby extend its monopoly power to a second industry level. This fact alone, however, does not mean that a price squeeze is anticompetitive. Merely eliminating competitors is not necessarily anticompetitive, for, as we explained earlier, even legitimate business activity that succeeds in helping a firm will **[**21]** likely disadvantage the firm's competitors. *See* [slip op.] pp. 13-14, *supra*, and cases cited. Moreover, the extension of monopoly power from one to two levels does not *necessarily*, nor in an *obvious* way, give a firm added power to raise prices. As several members of the Supreme Court have pointed out, a "widely accepted" (albeit "counterintuitive") economic argument supports the conclusion of many commentators that "there is but one maximum monopoly profit to be gained from the sale of an end-product," 3 *Areeda & Turner* para. 725b at 199. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (O'Connor, J., concurring in the judgment); *see also* R. Bork, *The Antitrust Paradox* 229 (1978) ("Vertically related monopolies can take only one monopoly profit") [hereinafter *R. Bork*]; R. Posner & F. Easterbrook, *Antitrust* 870 (2d ed. 1989) ("There is only one monopoly profit to be made in a chain of production."). (For an intuitive explanation of this "counterintuitive" argument, see Appendix A to this opinion.) What difference does it make, one might ask, whether the monopolist obtains this "maximum **[**22]** monopoly profit" by controlling two industry levels or just one?

At least two arguments have been made in answer to this question. The first is that a monopolist who extends his monopoly to a second industry level raises "entry barriers," thereby fortifying his monopoly position. Assume, for example, that Alcoa has monopolized only ingot production and has raised its prices somewhat above the competitive level. Alcoa's monopoly position in ingot will no doubt deter some new firms from entering ingot production, but it might also attract some new firms hoping to obtain a share of Alcoa's supercompetitive profits. Now assume Alcoa extends its monopoly to sheet production as well, the industry level, say, that consumes most of Alcoa's ingot. New firms might now be more reluctant to enter *ingot* production, fearing that Alcoa, in its capacity as "sheet fabricator-monopolist," would refuse to buy ingot from the new ingot producer, or that it would drop its own ingot prices and take the industry's entire "single monopoly profit" from the sale of sheet. The new firm might conclude that the only prudent way to challenge Alcoa would be to enter the industry at *both* levels at once. **[**23]** Insofar **[*24]** as it is more difficult for a firm to enter an industry at two levels than at one, the monopolist, by expanding its monopoly power, has made entry by new firms more difficult. And insofar as the monopolist previously set prices cautiously to avoid attracting a competitive challenge, the added security of a two-level monopoly could even lead that monopolist to raise its prices. *See* 3 *Areeda & Turner* para. 725h, at 204-08; *see also id.* para. 1011, at 243-54; Shepherd, *Potential Competition Versus Actual Competition*, 42 Admin. L. Rev. 5-34 (1990).

The second argument against permitting extension of monopoly power concerns "non-price" competition. The existence of competitors at a second "level," irrespective of their effects upon price, provides an added incentive for the monopolist to develop better products and better, more efficient ways to produce the product. *See* 2 *Areeda & Turner* paras. 402b2-402b3, at 269-70; *id.* para. 403c, at 272 & n. 3; 3 *Areeda & Turner* para. 725g, at 204. Indeed, a "second-level" independent firm that develops better products or more efficient production methods may thereby obtain the strength **[**24]** needed to challenge the monopolist at the "primary level."

We recognize that there are other arguments one might make about the possible anticompetitive effects of a price squeeze, *see generally* 3 *Turner & Areeda* paras. 725e-725f, at 201-04 (reviewing other arguments); and we realize, as well, that scholars dispute the practical significance of the two arguments just made. *Compare* 3 *Areeda & Turner* paras. 725g-725h, at 204-08 *with R. Bork* at 240-43. Nonetheless, we believe that other arguments (such as those related to economic price discrimination) tend to be inconclusive in respect to anticompetitive effects. *See* 3 *Areeda & Turner* paras. 725e-725f, at 201-04; *R. Bork* at 241-42. We therefore believe that the two arguments just given are the most important of those that favor prohibiting a price squeeze; and we are willing to assume they would justify such a prohibition were there nothing to be said in favor of permitting prices that could create such a squeeze.

There are, however, at least two traditional circumstances in which prices that create a squeeze might simultaneously bring about economic benefits. First, the primary-level monopolist might **[**25]** carry out its second-level activities more efficiently than its independent competitors. If so, prices that squeeze the less efficient second-level competitors, even to the point of forcing them from the business, could (by lowering costs) lower prices, or, in any event, save economic resources. *See* 3 *Areeda & Turner* para. 725d, at 201 ("Whenever vertical integration produces new efficiencies, some of the cost savings . . . [will] be translated into a price reduction and . . . [will] save productive resources."); *R. Bork* at 243.

Second, prices that squeeze a "second-level" firm will benefit consumers whenever the "second-level" firm *is itself* a monopolist. *See* *Fishman v. Estate of Wirtz, 807 F.2d 520, 563* (Easterbrook, J., dissenting) ("That successive monopolies injure consumers is a proposition on which there is unanimous agreement") (collecting authority). If, for example, ingot costs $ 40, the fabricating process costs $ 35, and the profit-maximizing price for sheet is $ 100, an ingot monopolist will charge $ 65 for the ingot, hoping that competition at the fabricating level will keep the total price at $ 100. If a different, independent **[**26]** monopolist dominates the fabricating level, however, that independent monopolist buying ingot at $ 65 will mark up the price by more than $ 35, because he wants to earn monopoly profits as well. The result will be a market price of more than $ 100, resulting in smaller monopoly profits overall (for the final price is too high), but greater profits for the second monopolist than if he sold sheet for only $ 100. (Appendix B to this opinion contains a numerical example that may help the interested reader understand intuitively why this is so.) Under these circumstances, entry by the ingot monopolist into the sheet-fabrication level -- even by means of a price squeeze -- will help the consumer by limiting the final price of sheet to $ 100. *Cf.* *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884, 1891* ***[*25]*** *(1990)* (***HN7***[] "When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an 'anticompetitive' consequence of the claimed **[**27]** violation." (footnote omitted)); *see generally* 3 *Areeda & Turner* para. 725c, at 200-01.

Again, the price squeeze may have additional benefits, *see generally* 3 *Turner & Areeda* paras. 725e-725f, at 201-04, and one can debate the empirical significance of those we have mentioned. But we believe that the two examples we have given show that prices that create a squeeze can, at least sometimes, have important beneficial effects.

Finally, we note that it is not easy for courts to administer Judge Hand's price squeeze test. That test makes ***HN8***[] it unlawful for a monopolist to charge more than a "fair price" for the primary product while simultaneously charging so little for the secondary product that its second-level competitors cannot make a "living profit." *See* *Alcoa*, 148 F.2d at 437-38. But how is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining **[**28]** costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?

We do not say that these questions are unanswerable, but we have said enough to show why antitrust courts normally avoid direct price administration, relying on rules and remedies (such as structural remedies, *e.g.*, prohibiting certain vertical mergers) that are easier to administer. *See* *United States v. Trenton Potteries Co., 273 U.S. 392, 397, 71 L. Ed. 700, 47 S. Ct. 377 (1927)* (observing that "the reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow"); *United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898)* (Taft, J.) (stating that to inquire into the reasonableness of **[**29]** prices is to "set sail on a sea of doubt"), *aff'd*, *175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899)*; 3 *Areeda & Turner* para. 701, at 148-50 ("The courts correctly regard as uncongenial and foreign to the Sherman Act the burden of continuously supervising economic performance.").

To reach Alcoa's conclusion that ***HN9***[] the price squeeze is exclusionary, one must believe that the anticompetitive risks associated with a price squeeze outweigh the possible benefits and the adverse administrative considerations. We do not question that conclusion here, but we qualify it by noting that the harms and benefits (including the more doubtful ones we have glossed over, *see generally* 3 *Areeda & Turner* paras. 725e-725f, at 201-04), are closely balanced. In light of this close balance, we should not blindly and automatically apply Alcoa's price squeeze rules in the presence of significantly different economic circumstances such as full economic regulation.

B. Price Squeeze Liability in a Regulated Industry

[30]** ***HN10***[] Full price regulation dramatically alters the calculus of antitrust harms and benefits. First, regulation significantly diminishes the likelihood of major antitrust harm. In particular, it diminishes the likelihood of "entry barrier" harm, namely the risk that (1) prices will rise because (2) new firms will hesitate to enter a market and compete after (3) a squeeze has driven pre-existing independent competitors from the marketplace. All three propositions are made doubtful by regulation. For one thing, ***HN11***[] in a regulated industry, regulators control prices directly. Statutes typically require regulators to maintain prices at "reasonable" levels. *See, e.g.*, *16 U.S.C. §§ 824d(a)*, *824e(a)* (an electric utility's **[*26]** rates must be "just and reasonable"); *FPC v. Hope Natural Gas Co., 320 U.S. 591, 603, 88 L. Ed. 333, 64 S. Ct. 281 (1944)* (A "reasonable" rate is one that permits the firm to recover its costs and earn a reasonable profit); *see generally* J. Bonbright, A. Danielsen & D. Kamerschen, *Principles of Public Utility Rates* (2d ed. **[**31]** 1988) (describing ratemaking principles) [hereinafter J. Bonbright].

For another thing, factors related to regulation, such as the economic ability of a market to support new entry, or the legal requirement that a firm secure permission to enter, are likelier to determine new entry into a regulated industry than is a new entrant's fear of a two-level monopolist's enhanced retaliatory power. After all, should the regulator decide that new entry is warranted, it typically has the legal authority to prevent an existing "two-level" monopolist from improperly disadvantaging a new "second-level" competitor by, say, refusing to deal to with it or by charging unreasonably high prices. *See, e.g.*, *16 U.S.C. §§ 824f*, 824i-824k (authorizing FERC to order interconnections, sales and wheeling of electricity among utilities); *see also* 2 A. Kahn, *The Economics of Regulation* 113-172 (discussing the concept of "natural monopoly") [hereinafter *A. Kahn*]; *Meeks*, 72 Colum. L. Rev. at 95 & n. 135 (noting that utilities in "all but a handful of states . . . must obtain a certificate of public convenience and necessity to serve an area" with electricity) **[**32]** (collecting statutes).

Finally, ***HN12***[] regulation in the electricity industry makes it less likely that a price squeeze will actually drive independent distributors from the marketplace. Local electricity distribution, after all, is itself considered a "natural monopoly" with service typically provided by a single franchised company to relatively immobile customers. *See Joskow* at 178; *cf.* *Otter Tail, 410 U.S. at 369*. Higher wholesale electricity prices (or lower retail prices elsewhere) will not lead the entire towns of Wellesley and Concord to pull up stakes and move to Dover. And the record lacks convincing evidence that competition between Edison and the plaintiff towns for customers living on the towns' borders, or for mobile high-energy-consuming industrial customers, is sufficiently important to threaten the plaintiffs with bankruptcy should such users switch to Edison. *Cf. Joskow* at 209-13 (arguing that, as a rule, there is little actual competition between electricity distributors). Even if an integrated utility such as Edison managed to set prices that severely **[**33]** squeezed a distributor, it could not take over the municipality's distribution area without the regulator's permission. *See, e.g.*, *M.G.L. ch. 164 § 68* (Massachusetts municipality may not sell its distributorship without regulatory approval).

Second, regulators try to set prices that reflect costs. To the extent that they succeed, an integrated utility's prices are likely to squeeze independent distributors who buy from it at wholesale only if those distributors operate less efficiently, *i.e.*, at higher cost. Consequently, a rule preventing prices that create a squeeze will more likely discourage efficient operations and deprive consumers of prices that reflect lower costs.

Third, for institutional reasons, an antitrust rule making the price squeeze illegal threatens consumers. The plaintiffs say that Edison violated the antitrust laws by *asking* for rates (*i.e., filing* rate proposals) that would produce for Edison a "higher return" on its "wholesale sales than. . . . on its retail sales." *See* Appellee's Brief at 4-8, 35-36. Other courts considering price squeeze claims have also emphasized that the alleged antitrust violation consisted of proposing or requesting **[**34]** rates that would narrow the gap between wholesale and retail rates so as to squeeze existing retail competitors. *See, e.g., City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1179 (8th Cir.*

1981) (**HN13**[] "The question" in a price squeeze case is "whether the defendant utility acted illegally *in proposing* a certain anticompetitive combination of rates") (emphasis added), *cert. denied*, *459 U.S. 1170, 103 S. Ct. 814, 74 L. Ed. 2d 1013 (1983)*; City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763, 768 (D. Del. 1979) (chief allegation in price squeeze case **[*27]** was that defendant "used its power to *initiate* rates . . . to attempt to obtain an anticompetitive rate structure") (emphasis in original). A rule that penalizes the filing of wholesale rate increases would not necessarily lead firms to abandon wholesale rate increases; it could, instead, simply lead them to seek a retail rate increase whenever they seek a wholesale rate increase. (Conversely, it would discourage a utility from conceding that a retail price cut is reasonable **[**35]** unless it is also prepared to concede that a wholesale price cut is reasonable.) In this case, for example, the rule might have permitted Edison to escape liability by filing (or perhaps obtaining) a rate increase in the 39 cities and towns where it distributes electricity itself. Indeed, the rule would encourage Edison to seek a retail rate increase so high that a jury could not find the wholesale/retail gap too narrow. Such a rule of law (which could lead to unnecessary regulatory proceedings and unnecessary rate increases) would seem to work at cross-purposes with basic antitrust objectives. *Cf.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (warning courts against adopting rules or practices that "chill the very conduct the antitrust laws are designed to protect"); Barry Wright, 724 F.2d at 234 ("We must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.").

Fourth, an anti-price-squeeze rule, particularly the "equal profit earned at both levels" rule that plaintiffs **[**36]** advocate, presents special administrative difficulties in the regulatory context. For one thing, **HN14**[] the Constitution guarantees a regulated firm a reasonable return on its investment, *see* Hope Natural Gas Co., supra; Bluefield Water Works v. Public Serv. Comm'n, 262 U.S. 679, 690, 43 S. Ct. 675, 67 L. Ed. 1176 (1923); *see also* 16 U.S.C. §§ 824d(a), 824e(a) (rates must be "just and reasonable"). May courts prevent a utility from asking the regulator for a rate increase should the utility believe that current wholesale returns are, constitutionally speaking, too low? Similarly, what if the utility believes that different risks at different levels of the industry call for somewhat different rates of return?

For another thing, how will juries decide the amount of the firm's investment on which the "rate of return" is calculated? Profit, after all, is a return on a certain amount of investment. Much electricity investment is used to serve *both* wholesale and retail services. Accounting systems for allocating investment between different **[**37]** services or customer classes are notoriously complicated and sometimes arbitrary. *See J. Bonbright* at 495 (noting that dozens of schemes exist for allocation investment among customer classes) (collecting sources); *Joskow* at 180 ("Despite the legal distinction between 'retail sales' . . . and 'wholesale sales,' . . . essentially there is no functional distinction between generation and transmission facilities dedicated to retail and wholesale transactions."). Will juries be permitted to "second guess" the regulator's allocation rules or its specific investment allocation decisions? Is the jury (as may, in a sense, have occurred here) to be permitted to decide that the utility's allocation (following Commission allocation procedures) of, say, $ 100 million investment to distribution and $ 400 million to wholesale, should have been $ 200 million/$ 300 million instead (in which case, of course, the pre-existing 10% profit earned at each level would look like 5% earned at retail and 13% at wholesale). What antitrust benefit would be gained by permitting juries to speculate in this way? Would not the results likely be arbitrary? For that matter, what antitrust benefit would be gained **[**38]** by a rule that freezes prices at levels designed to produce "equal profit rates" using some historically based commission-approved system for allocating investment? Any such court involvement in the rate-setting process could easily discourage utilities from proposing, and commissions from considering, such innovative, economically based, energy-conserving pricing systems as off-peak pricing (charging higher prices for electricity used during peak periods), incremental-cost pricing **[*28]** (charging prices for certain services reflecting the higher costs of hypothetical new construction), or even traditional Ramsay pricing (tailoring rates to reflect the comparative likelihood that higher rates will force customers to discontinue service); for there is no particular reason to believe that such rates would (or would not) reflect "equal" profits according to some particular prior, historical, commission-approved system for allocating investment. *See generally* 1 *A. Kahn* 87-103. At best, permitting judges and juries to speculate in this area would force regulators continually to revisit prior investment-allocation rules and would discourage regulatory efforts to develop (often **[**39]** with a utility's help) a set of economically rational pricing practices -- which, after all, is a common objective of ***antitrust law*** and regulation.

Fifth and finally, ***HN15***[] a distributor who disagrees with the utility's, or the commission's, cost-allocation methods or with its rates, or who believes that a price squeeze will harm it (whether or not the price squeeze also harms the competitive process), has an administrative remedy. It can challenge a utility's rates and practices before the Commission as unjust, unreasonable, or "discriminatory." *See* *16 U.S.C. §§ 824d*(a, b), 824e(a); *18 C.F.R. § 2.17(a) (1990)*. As part of its challenge, it can ask the Commission to consider the alleged price squeeze harm. *See* *FPC v. Conway, 426 U.S. 271, 48 L. Ed. 2d 626, 96 S. Ct. 1999 (1976)*. If FERC permits the rates to take effect after suspension and later determines that a price squeeze exists, it can order an appropriate refund.

In sum, the relevant antitrust considerations differ significantly, in degree and in kind, when a price squeeze occurs in a fully **[**40]** regulated as opposed to an unregulated industry. Indeed, these considerations, which are closely balanced in the ordinary price squeeze, change so significantly when the squeeze takes place in a fully regulated industry that, in our opinion, the legal consequences of the squeeze change as well. That is to say, ***HN16***[] a price squeeze in a fully regulated industry such as electricity will not normally constitute "exclusionary conduct" under Sherman Act *§ 2*.

We are aware that reported opinions in three circuit courts of appeal and several district courts suggest that a price squeeze may be unlawful in the regulated electricity industry. *See* *City of Kirkwood v. Union Elec. Co., 671 F.2d 1173 (8th Cir. 1982)*, *cert. denied*, *459 U.S. 1170, 74 L. Ed. 2d 1013, 103 S. Ct. 814 (1983)*; *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981)*; *City of Mishawaka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980)* *(Mishawaka II), cert. denied*, *449 U.S. 1096, 101 S. Ct. 892, 66 L. Ed. 2d 824 (1981)*; **[**41]** *see also* *City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763 (D. Del. 1979)*; *Borough of Ellwood City v. Pennsylvania Power Co., 462 F. Supp. 1343 (W.D. Pa. 1979)*, *later proceeding*, *570 F. Supp. 553 (1983)*; *City of Batavia v. Commonwealth Edison Co.*, No. 76-C-4388, slip op. (N.D. Ill. Jan 16, 1984). In only one of those cases, however, did the court actually enter, or affirm, a judgment against the defendant; thus, there is extremely little case law *holding* that a public utility price squeeze is exclusionary. Moreover, in all of the cases we have cited, the price squeeze allegation was but one of several allegations of several different kinds of "exclusionary conduct," and the one court that affirmed a Sherman Act *§ 2* judgment against a utility stressed that it might well *not* have done so had the price squeeze stood alone (as it does in the case before us). *See* *Mishawaka II, 616 F.2d at 986* (suggesting that "no one aspect [of the defendant's conduct] standing alone is illegal"). Further, in every case, the price squeeze allegation involved wholesale prices that *exceeded* retail prices, **[**42]** (a matter here in doubt), thereby eliminating some of the "administrative" problems we have found surrounding a jury's efforts to determine the reasonableness of the price "gap." *See* *City of Mishawaka I v. Indiana & Michigan Electric Co., 560 F.2d 1314, 1316 (7th Cir. 1977)* (wholesale price to municipalities "substantially higher" than retail price to industrial customers, threatening municipalities with "financial extinction"); *City of Kirkwood, 671 F.2d at 1176*; *City of Groton, 662 F.2d at 925*; **[*29]** *City of Newark 467 F. Supp. at 766*; *Borough of Ellwood City* 570 F. Supp. at 557; *City of Batavia, supra*. Thus, technically speaking, our holding is consistent with these other cases. Indeed, since we cannot find significant evidence that Edison's price squeeze deprived plaintiffs of a "living profit" (for the plaintiffs earned substantial returns, and even increased their sales, during the price squeeze period), our holding is arguably a consistent application of the rule set forth in *Alcoa* itself.

Nevertheless, we recognize that our reasoning and analysis differs significantly from **[**43]** that in the opinions (other than *Alcoa*) just cited. We have carefully considered these differences and have found nothing to convince us that our analysis is incorrect. Even so, we have limited our holding by stating that "normally" a price squeeze will not constitute an exclusionary practice in the context of a fully regulated monopoly, thereby leaving cases involving exceptional circumstances for another day. And we have stressed that our reasoning applies with full force only when the monopolist who engages in the squeeze is regulated at both industry levels. We recognize that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first. *See* 3 *Areeda & Turner* para. 726e, at 217-20.

III

Monopoly Power

A second, legally fatal problem with plaintiffs' case is that they failed to show that Boston Edison possessed monopoly power in the relevant market. As we have repeatedly pointed out, the traditional, Alcoa-type price squeeze occurs when a monopolist uses its control over the *monopolized* product (*e.g.* **[**44]** , ingot) to obtain a monopoly at a second industry level (*e.g.*, sheet). In this case, it is undisputed that Boston Edison has a (lawful) monopoly at one level of the electricity industry, namely transmission, for a given area normally can support only one transmission system, *see, e.g., Meeks*, 72 Colum. L. Rev. at 87, and Edison owns the transmission grid covering the area that includes Concord and Wellesley. The plaintiffs, however, cannot show (indeed, with one exception, they do not try to show) that Boston Edison used its control of electricity *transmission* to their disadvantage. To the contrary, the record clearly demonstrates that Boston Edison will "wheel" (*i.e.*, transmit) electricity from other producers to any distributor upon request, all for a nominal transmission charge that no one claims is unreasonably high. *See* Record Appendix at 1442, 1451-52, 1704-05 [hereinafter *App.*]. Indeed, Concord and Wellesley buy some of their electricity from the New York Power Authority, which wheels that electricity over Edison's lines, and at least half a dozen municipal distributorships use Edison's lines to obtain *all* of their electric power **[**45]** from non-Edison sources. *See App.* at 1449-50. Concord is a member of NEPOOL, all of whose members have interconnected lines, used to transfer electricity freely among them; and the record suggests that Wellesley is free to join NEPOOL should it wish to do so. The only arguably contrary evidence in the record consists of Concord's claim that Boston Edison refused to connect it to a 115 kv line; but the record does not (1) suggest that Concord needs that connection to buy electricity elsewhere, (2) indicate that the dispute concerns anything other than the connection price, or (3) show that the demanded connection price was unreasonably high.

At the same time, the record fails to show that Edison had monopoly power at the *generation* level, the industry level at which plaintiffs claim Edison charged too high a rate. To the contrary, the record shows that more than a dozen different power generating companies sell wholesale power in New England and that this power flowed freely among NEPOOL members. It shows that municipalities near Concord and Wellesley, municipalities to the north, south, east, and west of Concord and Wellesley, bought their electricity from production companies **[**46]** other than Boston **[*30]** Edison. It shows that Boston Edison's electricity production accounted for less than 12% of the electricity produced by these New England utilities. These facts and figures suggest that Boston Edison is far from attaining the 70% to 90% of the sales in a well-defined marketplace that Judge Hand (and later commentators) thought indicative of monopoly power. *See, e.g., Alcoa*, 148 F.2d at 424 (stating that ***HN17***[] a 90% market share "is enough to constitute a monopoly" but that 60% is probably, and 30% is "certainly," not enough); *City of Mount Pleasant v. Associated Elec. Coop., Inc., 838 F.2d 268, 279-80 (8th Cir. 1988)* (electricity suppliers accessible via wheeling must be included in wholesale market); *Lopatka*, 31 U.C.L.A.L. Rev. at 611 (arguing that the geographic market for wholesale electricity "includes all generation sources from which the municipality could obtain power at relatively insubstantial wheeling costs").

In their efforts to show monopoly power at the generation level, the towns point to three pieces **[**47]** of evidence. First, they say that Concord had a study made "which concluded that it was not economically feasible for the Town . . . to obtain its power requirements from non-Edison sources. . . ." The study in question, however, says that "the reason" the town will have lower power costs in the long run by buying from Edison is that Edison's "rate is based on embedded resources which are lower priced than the new units with which" the town would have to "meet its power supply requirements" if it stopped buying from Edison. This "reason" does not show that Edison has monopoly power. It shows only that Edison can charge lower prices because it bought its generating equipment at older, cheaper prices, (rather like a wheat farmer who, having purchased unusually fertile land long ago, could now sell wheat at lower prices or earn higher profits than other farmers, even in a highly competitive wheat market). In a competitive market a firm that bought older, cheaper generating equipment would simply charge the higher prices that the cost of new, expensive equipment requires its competitors to charge and it would pocket the difference. In a regulated market, the regulator forces the "historically **[**48]** lucky" firm to pass along some, or all, of this potential extra profit to its customers in the form of lower prices. In either case, the "extra" profit resulting from lower costs is not a monopoly profit. It is called an "economic rent." And its presence is consistent with a perfectly competitive marketplace. *See* 2 *Areeda & Turner* para. 510, at 33-34; P.A. Samuelson, *Microeconomics*, at 213-214, 635 (13th ed. 1989); G. Stigler, *The Theory of Price*, at 258-63 (4th ed. 1987). Concord's study, which relates Edison's superior performance to cost advantages, is not evidence that Edison has market power.

Second, plaintiffs point to a provision in Edison's tariff that states that, if they wish to buy power from other firms, they must either (1) give Edison five years advance notice, or (2) compensate Edison for any adverse impact Edison suffers in the subsequent three years. We need not explain all the reasons why this provision does not show that Edison possesses monopoly power, however, because, at a minimum, the record does not show that the tariff either unreasonably, or significantly, limits a customer's ability to buy from others. To the contrary, the plaintiffs have **[**49]** bought power from non-Edison sources, namely the New York Power Authority, despite the provision. And the plaintiffs remain free to challenge before FERC any unreasonably high charge that Edison might try to assess under this provision.

Third, the plaintiffs argue that the kind of electricity supply service they need -- a firm commitment by a generating source to supply their full requirements -- was simply unavailable from any firm other than Edison; hence, Edison had "monopoly power" over the price of this particular kind of service. Plaintiffs offered three pieces of evidence to support this contention: (1) John O'Neil, superintendent of the Concord light plant, in response to the question, "Was there any other firm requirements power available for Concord to purchase from utilities other than Boston Edison?," answered, "Not to my knowledge, no, sir." **[*31]** (2) Maurice Berdan manager of the Wellesley light plant, in response to the question, "Is there any other source of firm requirements wholesale power available to the Town of Wellesley other than Boston Edison Company?", answered (over an objection that the answer "appears to call for an expert opinion and/or for hearsay"), **[**50]** "We had consultants look at it, and I have also had discussions with other people in the industry that we have not found any other sources of power, firm requirements power, that would be available . . ." and it was "public knowledge in the industry that firm requirements power is not available." (3) The minutes of the March 10, 1987 Concord Municipal Light Board meeting report,

> A question was raised as to whether or not Concord could become a customer of New England Power. It was stated that the 'NEES Plan' does not include new large power loads; Princeton's request to return to all-requirements status was rejected.

We do not think this evidence sufficient to show that Edison possessed "monopoly power" with respect to "firm requirements" contracts to supply electricity. For one thing, we do not see how a reasonable juror could conclude from this testimony and minutes that no firm other than Edison would sell "firm requirements" electricity at a price that roughly reflected current production costs. After all, the record is filled with evidence that other municipal distributors bought electricity from other suppliers. Both town witnesses were testifying in the context **[**51]** of a report (discussed at [slip op.] pp. 40-41, above) that said it was less *economical* for the towns to buy electricity elsewhere than from a utility that had especially low historical costs. Neither town witness had himself tried to obtain a "firm requirements" contract for electricity (indeed, Mr. O'Neill conceded that he had "never talked to another utility besides Boston Edison on behalf of Concord"). And neither town witness made clear either the specific basis for his conclusion, nor, for that matter, did either witness say that he meant it was *not possible* to find an alternative supplier at prices reasonably close to current costs of production. To the contrary, David Foote, an Edison witness, who worked for a group of New Hampshire utilities, stated that he had contacted three New England utilities (other than Edison) during the period in question and found that one of them would enter into a "firm requirements" contract to supply electricity.

For another thing, as we explained above, a simple showing that Edison offered a "firm requirements" contract (or any other type of contract) for power *more cheaply* than alternative suppliers does *not* show that Edison **[**52]** had monopoly power. ***HN18***[] Monopoly power is the power to raise price well above competitive levels before customers will turn elsewhere. *See generally* 2 *Areeda & Turner* paras. 501-506, at 322-29. The plaintiffs' evidence shows neither that Edison's rates were significantly lower than the rates of others, nor that any such lower rates reflected anything other than lower costs; and the latter, as we explained earlier, is evidence only of an economic rent, not of monopoly power. *See* [slip op.] pp. 40-41, *supra*. In the face of these economic facts, and other evidence in the record, the three pieces of evidence cited are simply too skimpy to support a "monopoly power" conclusion.

Finally, even though classical price regulation rests upon the premise that the regulated firm maintains a "natural monopoly," we resist any temptation to permit a jury to infer monopoly power from the mere fact of wholesale rate regulation itself. Whatever the historical basis for such regulation, today there is a growing conviction among students of the subject that the electricity generation business **[**53]** (as opposed to the transmission and distribution business) may be able to support several competing firms. *See, e.g.*, P. Joskow, *Regulatory Failure, Regulatory Reform and Structural Change in the Electric Power Industry in Brookings Papers: Microeconomics 1989* at 189-90 (1989); R. Pierce, *A Proposal to Deregulate the Market for Bulk Power*, *72 Va. L. Rev. 1183, 1212-15 (1986)*.

For these reasons, we do not believe plaintiffs met their burden of providing **[*32]** evidence from which a jury could find that Edison had significant monopoly power in the relevant market, *i.e.*, the power to raise price significantly higher than the cost-based level that competition would otherwise bring about.

The judgment of the district court is *Reversed*.

APPENDIX A

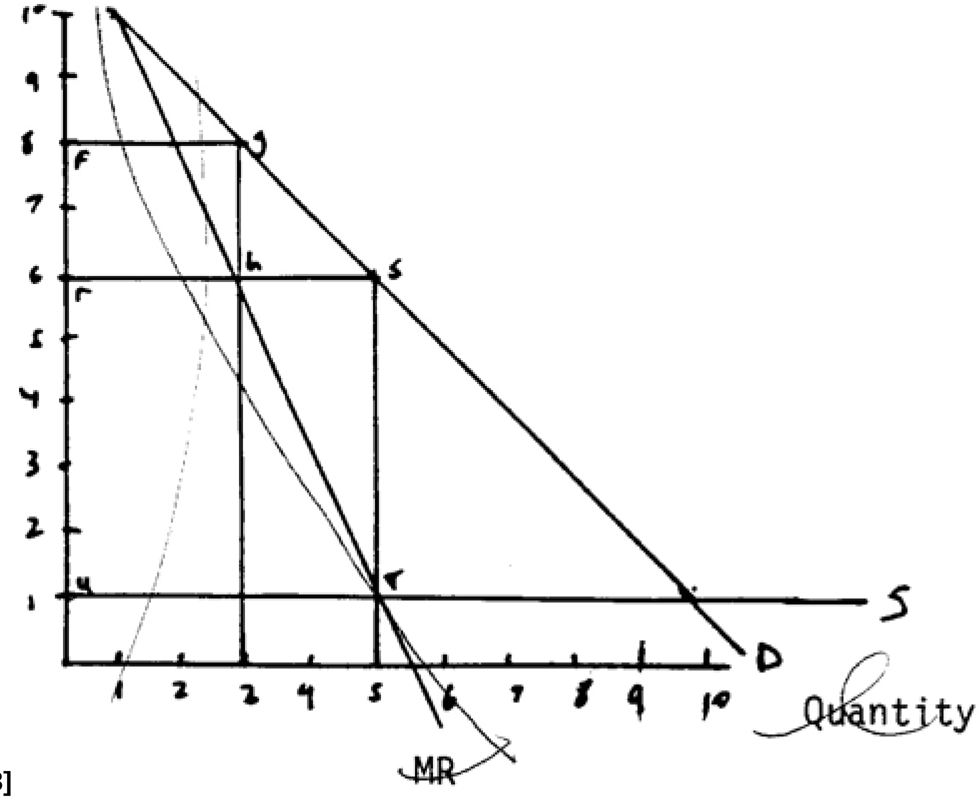
We offer the following highly simplified intuitive explanation of the "single monopoly profit" argument, based upon an example given by Professors Areeda and Turner.

> Assume that copper is used only to produce pipe. Assume that the industry has two "levels:" (1) refining ore into copper ingot and (2) fabricating ingot into pipe. Assume the profit-maximizing price for copper pipe is $ 100. (Charging **[**54]** more would reduce pipe sales to the point where the monopolist would earn less profit; charging less would increase pipe sales, but not enough to make up for lost potential revenue on each sale.) Assume the cost (including a reasonable profit) of refining ore into ingot is $ 40. Assume the cost of fabricating ingot into pipe is $ 35.
> Suppose that the "ingot" stage of the industry is monopolized but the "pipe" stage is competitive. An ingot monopolist would charge $ 65 for its ingot; it would rely upon competition among pipe fabricators to keep the mark-up at $ 35 and the fabricated-pipe price at $ 100; and it would pocket $ 25 ($ 65 minus $ 40) of monopoly profit.
> Suppose, instead, that the "ingot" stage of the industry is competitive but the "pipe" stage is monopolized. Competition at the "ingot" stage would produce an ingot price of $ 40. The pipe monopolist would buy the ingot for $ 40; it would sell the fabricated pipe for $ 100; and (after subtracting the $ 40 cost of ingot and $ 35 cost of fabrication) it would pocket $ 25 of monopoly profit.
>
> Now suppose a single, integrated firm managed to achieve a monopoly at *both* "levels" of the industry. It would sell pipe at the **[**55]** profit-maximizing price of $ 100. After deducting its total costs ($ 40 plus $ 35), it would pocket $ 25 of monopoly profit.
> In each case, the profit-maximizing price remains $ 100 and the monopoly profit is $ 25. This normally will remain so as long as the manufacturing costs associated with ingot and pipe remain the same.

See 3 *Areeda & Turner* para. 728b, at 199.

Appendix B

This is a graphic and a numerical example offered to help provide an intuitive understanding of the possible price effect of having two separate monopolists at two different industry levels.



[*33]

Price	Quantity	Total revenue	M's costs	M's profits	R's costs	R's profits
10	1	10	1	9	6	4
9	2	18	2	16	12	6
8	3	24	3	21	18	6
7	4	28	4	24	24	4
6	5	30	5	25	30	0
5	6	30	6	24	36	[negative]
4	7	28	7	21		
3	8	24	8	16		
2	9	18	9	9		
1	10	10	10	0		

It costs $ 1 to make a widget.

A single monopolist ("M") will maximize his profit by setting a price of $ 6 and selling 5 widgets. His profit is $ 25 (represented by the area "rstu").

If M sells widgets for $ 6 **[**56]** each to an independent retailer ("R") with monopoly power, R will maximize *his* profit by setting a price of $ 8 and selling 3 widgets. His profit is 6 (represented by the area "rhgf").

M's best strategy is enter the retailing level of the industry and to set a final price of (roughly) $ 6.

End of Document

Guralnick v. Supreme Court of New Jersey

United States District Court for the District of New Jersey

September 26, 1990 ; September 26, 1990, Filed

Civil No. 89-3958 (CSF)

Reporter

747 F. Supp. 1109 *; 1990 U.S. Dist. LEXIS 12940 **

MARK S. GURALNICK, et al., Plaintiffs, v. SUPREME COURT OF NEW JERSEY, et al., Defendants

Core Terms

arbitration, arbitration committee, impairment, arbitration system, plaintiffs', pleadings, fee dispute, compulsory, summary judgment, practice of law, supervision, attorney's fees, anti trust law, state interest, classification, deprivation, disputes, violates, fundamental rights, public confidence, judicial system, private party, involuntary, exemption, rights, state action, anticompetitive, Disciplinary, appointed

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Constitutional Law > State Constitutional Operation

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN1[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

The New Jersey Constitution grants exclusive jurisdiction over the admission to the practice of law and the discipline of persons admitted to the New Jersey Supreme Court. N.J. Const., art. 6, § 2. The New Jersey Supreme Court has construed its rule-making powers in this regard very broadly.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Constitutional Law > State Constitutional Operation

HN2[] **Alternative Dispute Resolution, Mandatory ADR**

Acting pursuant to its constitutional power to regulate the practice of law and the discipline of practitioners, the New Jersey Supreme Court provided a system of compulsory binding arbitration for attorney-client fee disputes.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

HN3[] Alternative Dispute Resolution, Mandatory ADR

See N.J. Ct. R. 1:20A-3(a).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN4[] Summary Judgment, Entitlement as Matter of Law

A court will not grant a motion for judgment on the pleadings unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. In considering a motion for judgment on the pleadings, the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. In this fashion the courts hope to insure that the rights of the nonmoving party are decided as fully and fairly on a *Fed. R. Civ. P. 12(c)* motion, as if there had been a trial.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN5[] Discovery, Methods of Discovery

Fed. R. Civ. P. 56(c) provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Administrative Law > Judicial Review > Reviewability > Questions of Law

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN6[] Reviewability, Questions of Law

Due process is not necessarily judicial process. The due process clause of the *U.S. Const. amend. XIV* does not guarantee a trial to a litigant. No court has interpreted the *fourteenth amendment* to include a fundamental right to a trial. No provision in the Federal Constitution forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Neither is the right of appeal essential to due process of law.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN7[] **Procedural Due Process, Scope of Protection**

The due process clause of *U.S. Const. amend. XIV* requires notice and an opportunity to be heard before an impartial observer, and provides the right to confront and cross-examine witnesses prior to the deprivation of a life, liberty or property interest. In examining whether the existing procedure is sufficient, the court must evaluate the private interest which is affected, the probable value of additional or substitute procedural safeguards in protecting against accidental deprivation of that interest, and the public interest, including a review of the administrative and fiscal burden that the additional procedure would entail.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN8[] **Alternative Dispute Resolution, Mandatory ADR**

This court finds that the mandatory fee arbitration system comports with the mandates of due process. There is no fundamental right to have a trial under *U.S. Const. amend XIV*, and sufficient procedural safeguards exist to ensure that plaintiffs' rights are protected.

Constitutional Law > Equal Protection > General Overview

HN9[] **Constitutional Law, Equal Protection**

There are three standards of judicial review for alleged equal protection violations, and the standard to be applied depends upon the basis used for the classification.

Constitutional Law > Equal Protection > General Overview

Education Law > Discrimination in Schools > Racial Discrimination > Equal Protection

HN10[] **Constitutional Law, Equal Protection**

Courts review state classifications based on suspect traits, such as race or national origin, under the strict scrutiny standard. In order to survive this standard, the classification must be narrowly tailored to the achievement of a compelling state interest.

Constitutional Law > Equal Protection > General Overview

Criminal Law & Procedure > ... > Illegal Consensual Relations > Interracial Relations > General Overview

Family Law > Marriage > Nature of Marriage

HN11[] **Constitutional Law, Equal Protection**

Classifications that deprive a person of a fundamental right also receive strict scrutiny.

Constitutional Law > Equal Protection > Parentage

Education Law > Discrimination in Schools > Gender & Sex Discrimination > Segregation Based on Sex

Constitutional Law > Equal Protection > General Overview

HN12[] **Equal Protection, Parentage**

Quasi-suspect classifications, such as those based on gender or illegitimacy, receive middle level scrutiny. This test requires the state law to be substantially related to an important state interest.

Constitutional Law > Equal Protection > General Overview

HN13[] **Constitutional Law, Equal Protection**

The rational basis test requires that the classification be rationally related to the achievement of a legitimate state interest.

Constitutional Law > Equal Protection > Parentage

Constitutional Law > Equal Protection > General Overview

HN14[] **Equal Protection, Parentage**

Because attorneys are not a suspect class, and because the deprivation of a fundamental right is not involved, the strict scrutiny standard is not applicable. Because there is no classification based on gender or illegitimacy, middle level scrutiny is also inapplicable.

Constitutional Law > Equal Protection > General Overview

HN15[] **Constitutional Law, Equal Protection**

The court recognizes the interest of a state in regulating the legal profession and the attorney-client relationship to be a "compelling" one.

Constitutional Law > Equal Protection > General Overview

HN16[] **Constitutional Law, Equal Protection**

A "compelling" state interest meets and surpasses the requirements of the rational basis test, which requires only a "legitimate" interest. This court finds the maintenance of public confidence in the judicial system to be a legitimate state interest.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Constitutional Law > Equal Protection > General Overview

HN17[] **Alternative Dispute Resolution, Mandatory ADR**

Requiring attorneys to justify their fees in an inexpensive forum before an impartial panel is rationally related to the maintenance of the public's confidence in the legal system and to the interest in minimizing the burden on both the client and the attorney. In addition, the arbitration process is apt to result in a much quicker determination than the overburdened court system can provide, allowing the attorneys to recover their fees sooner than if an action was brought in court.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > General Overview

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN18[] **Alternative Dispute Resolution, Mandatory ADR**

This court finds that the mandatory arbitration system is rationally related to a legitimate state interest; therefore, the arbitration system does not violate the *equal protection clause of the fourteenth amendment*.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

HN19[] **Congressional Duties & Powers, Contracts Clause**

See *U.S. Const. art. I, § 10, cl. 1*.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

HN20[] **Congressional Duties & Powers, Contracts Clause**

When a state is a party to a contract and acts to impair that contract, the impairment will be upheld only if the impairment is reasonable and necessary to serve an important public interest and if there is no other means of achieving the state's goal.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

HN21[] **Congressional Duties & Powers, Contracts Clause**

The tripartite analysis for impairment of contracts entered into by private parties is controlling. The three-part test requires (1) a substantial impairment of the contractual relationship, (2) that is justified by a significant and legitimate public purpose, and (3) is based on reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN22[] **Alternative Dispute Resolution, Mandatory ADR**

The privilege of practicing law in New Jersey subjects an attorney to the imposition of reasonable conditions and limitations, including the forfeiture of the right to a jury trial if the client elects to arbitrate a fee dispute.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN23[] **Alternative Dispute Resolution, Mandatory ADR**

See N.J. Ct. R. 1:20A-1(a).

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

HN24[] **Parker State Action Doctrine, Local Governments & Private Parties**

The Sherman Act was not intended to restrain state action or official action directed by a state. Instead, the law was only intended to prohibit private parties from engaging in restraints of trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN25[] **Antitrust & Trade Law, Sherman Act**

There is a two-part test for determining whether parties are exempt from the antitrust laws when they engage in anticompetitive conduct. The anticompetitive conduct must be pursuant to a clearly articulated and affirmatively expressed state policy, and the policy must be actively supervised by the state. It is not enough that anti-competitive conduct is prompted by state action; rather, anti-competitive activities must be compelled by direction of the State acting as a sovereign. Where the anticompetitive conduct is performed by private parties, active state supervision is required in order to have the state action exemption apply.

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

HN26[] **Agency Adjudication, Alternative Dispute Resolution**

The Fee Arbitration Committee operates as a state agency under the supervision and appointment of the New Jersey Supreme Court. Accordingly, this court finds sufficient state "supervision" to hold that the state exemption to the federal antitrust laws.

Counsel: [1]** Mark S. Guralnick, Esq., Garber & Guralnick, Mount Laurel, New Jersey, Attorney for Plaintiffs.

Robert J. Del Tufo, Attorney General of New Jersey, by: Sherrie L. Gibble, Deputy Attorney General, Trenton, New Jersey, Attorney for Defendants Supreme Court of New Jersey, the District Fee Arbitration Committee of the Supreme Court of New Jersey, the District III Fee Arbitration Committee for Burlington and Ocean Counties and Nicholas C. Montenegro, Esquire, Secretary of the District III Fee Arbitration Committee.

Dietrich, Dietrich & Mikulski, by: Thaddeus P. Mikulski, Jr., Esq., Trenton, New Jersey, Attorney for Defendant Yvonne Kiefer.

Judges: Clarkson S. Fisher, United States District Judge.

Opinion by: FISHER

Opinion

[*1110] CLARKSON S. FISHER, UNITED STATES DISTRICT JUDGE

Defendants' motion for judgment on the pleadings and plaintiffs' cross-motion for judgment on the pleadings are before the court. In their complaint, plaintiffs challenge the constitutionality of the New Jersey Fee Arbitration System ("FAS") and charge the New Jersey Supreme Court with violations of federal antitrust laws. [1] For the reasons that follow, summary judgment will be granted in favor of defendants.

[2]** The facts are not in dispute. This controversy arises from a fee dispute between the plaintiffs, Mark Guralnick and Joel Garber, and defendant Yvonne Kiefer. Kiefer hired Garber and Guralnick, attorneys, to represent her in a divorce action and signed a retainer agreement on November 17, 1988. Kiefer was not satisfied with the attorneys' services and refused to pay the full fee charged. The attorneys' fee was $ 2,124, of which $ 1,000 was paid as a

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[1] Plaintiffs' complaint also alleged the violation of the New Jersey Antitrust Act, *N.J. Stat. Ann. §§ 56:9-1 to:9-19* (West 1989); however, plaintiffs declined to address the issue in their motion for judgment on the pleadings. *See* Plaintiff's Brief at 57 n. 10.

retainer, leaving a balance of $ 1,124. Garber and Guralnick instituted an action against Kiefer for the balance in the Superior Court of New Jersey on July 7, 1989. Kiefer filed an answer on August 7, 1989, in which she noted that she had filed a request for fee arbitration.

[*1111] Pending the outcome of the fee arbitration, plaintiffs' state court collection action was stayed. Plaintiffs then brought a *42 U.S.C. § 1983* action before this court and requested a stay of the fee arbitration, which was granted.

In their federal action, plaintiffs seek declaratory and injunctive relief. Plaintiffs claim that the compulsory nature of the New Jersey FAS violates their right to due process and to equal protection under the United States Constitution. **[**3]** Plaintiffs further claim that the FAS violates the contract clause, that it infringes upon their *seventh amendment* right to a jury trial, and that it results in involuntary servitude in violation of the *thirteenth amendment*. Finally, plaintiffs allege that the defendants, through the FAS, have conspired to restrain trade by arbitrarily and capriciously setting attorney's fees in order to reduce competition and impair transactions in interstate commerce.

A. *The New Jersey Fee Arbitration System*

Before turning to the issues in this case, a description of the fee arbitration system that exists presently in New Jersey is necessary. ***HN1***[] The New Jersey Constitution grants exclusive jurisdiction "over the admission to the practice of law and the discipline of persons admitted" to the New Jersey Supreme Court. N.J. Const., art. 6, § 2. The New Jersey Supreme Court has construed its rule-making powers in this regard very broadly. *Winberry v. Salisbury, 5 N.J. 240, 254-55, 74 A.2d 406, 413-14*, *cert. denied*, *340 U.S. 877, 71 S. Ct. 123, 95 L. Ed. 638 (1950)*.

HN2[] Acting pursuant to its constitutional power to regulate the practice of law and the discipline of practitioners, the New Jersey Supreme Court provided a system **[**4]** of compulsory binding arbitration for attorney-client fee disputes. *See* S. Pressler, *Current Rules Governing the Courts of the State of New Jersey* 1:20A-1 to:20A-6 (1990) [hereinafter N.J. Ct. R.]. In *In re LiVolsi, 85 N.J. 576, 428 A.2d 1268 (1981)*, the New Jersey Supreme Court explained its purpose in enacting a system of compulsory fee arbitration:

> Forcing clients to go to court to resolve attorney fee disputes places a heavy burden on the clients. . . . Clients, especially those of limited income, often find it very difficult to procure another attorney to represent them in fee disputes. Also, if a client were forced to give the attorney a retainer that eventually proved to be unreasonably high, the client might not be able to afford the delay of another trial before being reimbursed. . . .
> Imposing these burdens on clients causes "immeasurable" harm to the relationship between the Bar and the public. . . .
>
> Though the matters which come to fee arbitration represent a very small proportion of the total number of fee relationships, they are among the most visible matters to a public greatly concerned about how the judicial system deals with attorney-client disputes. **[**5]** Our success in establishing a fair fee arbitration system will do much to assure the public of the fairness of the judicial system as a whole, and thereby increase the public confidence that is so necessary for that system to operate effectively.

Id. at 599, 604, 428 A.2d at 1279-80, 1282-83 (citations omitted).

Implementing this system of fee arbitration, the New Jersey Supreme Court appointed Fee Arbitration Committees ("Committees") to serve in designated geographical areas. N.J. Ct. R. 1:20A-1. Jurisdiction to arbitrate fee disputes arising within its district is vested in each Committee. N.J. Ct. R. 1:20A-2. A Committee may have as many members as the court determines, but there may be no fewer than eight. At the minimum, the court must select four New Jersey attorneys and two non-attorneys. N.J. Ct. R. 1:20A-3(a).

HN3[] The rules provide in material part:

> A fee dispute shall be arbitrated only upon a client's written request or upon written consent to the attorney's request. Fee Committees shall have authority to consider such a request whether or not the attorney has already received the fee **[*1112]** in dispute. . . . *The request or consent shall include a stipulation by the client*

> **[**6]** *that if an action for payment of the fee is then pending, it shall be stayed pending a determination by the Fee Committee, and the amount of the fee as so determined shall be entered as a judgment in the action*, provided that a client's request for arbitration shall have been filed within sixty (60) days after service of process.

N.J. Ct. R. 1:20A-3(a) (emphasis added).

The arbitration committee hearing must be held before a panel of at least three members, a majority of whom must be attorneys. N.J. Ct. R. 1:20A-3(b). However, if the matter in controversy is less than $ 3,000, it may be heard by a single attorney. *Id*. A majority of the panel will render the Committee's decision. *Id*. Upon the request of a party, a Committee has the power to compel the attendance of witnesses and the production of documents through the issuance of subpoenas. *Id*. The rules of evidence and procedure need not be strictly adhered to during the hearing. *Id*. No transcript or recording of the hearing is made unless ordered by the Director of the Office of Attorney Ethics or the Disciplinary Review Board. *Id*. However, the decision of the Committee and the reasons in support of that decision **[**7]** must be recorded. *Id*.

If an action is pending against the client for collection of the fee, the Committee decision will be entered as a judgment. N.J. Ct. R. 1:20A-3(a). If no such action is pending, the attorney may, by summary action, obtain judgment in the amount of the fee determined by the Committee. *Id*.

There is no appeal on the merits from the determination of an arbitration committee. N.J. Ct. R. 1:20A-3(c). However, in certain instances, either the attorney or the client may appeal to the Disciplinary Review Board, a nine-person body appointed by the New Jersey Supreme Court to review the determinations of District Ethics Committees and Fee Arbitration Committees. *Id*.; N.J. Ct. R. 1:20-4(a), (e). If it is alleged that a Committee member improperly failed to disqualify himself, that the Committee failed to comply with the procedural requirements of the rules or that there was actual fraud on the part of any member of the Committee, an appeal may be taken. *Id*. If, after a hearing, the Disciplinary Review Board finds that there has been a violation of rule 1:20A-3(c), it may remand to the Committee for a new determination, or it may decide the matter itself. **[**8]** N.J. Ct. R. 1:20A-3(d). No appeal may be taken from the decision of the Disciplinary Review Board.

B. *Standard of Review*

Defendants and plaintiffs both moved for judgment on the pleadings under *rule 12(c) of the Federal Rules of Civil Procedure*. ***HN4***[] A court will not grant a motion for judgment on the pleadings

> unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. In considering a motion for judgment on the pleadings, the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. In this fashion the courts hope to insure that the rights of the nonmoving party are decided as fully and fairly on a *rule 12(c)* motion, as if there had been a trial.

Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1054 (3d Cir. 1980) (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1368, at 690 (1969) (footnotes omitted)).

Because plaintiffs presented materials outside the pleadings to this court for its consideration, these motions will be converted into motions for summary judgment **[**9]** in accordance with *Federal Rule of Civil Procedure 12(c)*. *See* *Miskovsky v. United States, 414 F.2d 954, 955 (3rd Cir. 1969)*. However, the standard of review for a motion for summary judgment does not differ from that for a motion for judgment on the pleadings.

HN5[] *Rule 56(c) of the Federal Rules of Civil Procedure* provides that summary judgment shall be granted:

> **[*1113]** if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id.

On a motion for summary judgment, the moving party must demonstrate the absence of an issue of material fact and its entitlement to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In this case, the facts are not disputed. Consequently, the court need only address the issues of law presented to determine which party is entitled to judgment as a matter of law.

C. *The Due Process Clause of the Fourteenth Amendment*

Plaintiffs claim that the FAS violates their substantive and procedural due process rights under the *fourteenth amendment*. Plaintiffs argue that the compulsory **[**10]** arbitration procedure, with its stay of pending court actions and lack of provision for appeal to a court of law, violates their fundamental right of access to a court of law.

HN6[] But "due process is not necessarily judicial process." *Reetz v. Michigan, 188 U.S. 505, 507, 47 L. Ed. 563, 23 S. Ct. 390 (1903)*. The *due process clause of the fourteenth amendment* does not guarantee a trial to a litigant. No court has interpreted the *fourteenth amendment* to include a fundamental right to a trial. As the Supreme Court noted in *Reetz*, "no provision in the Federal Constitution . . . forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question." *Id*. The Court continued, "neither is the right of appeal essential to due process of law." *Id. at 508*.

HN7[] The *due process clause of the fourteenth amendment* requires notice and an opportunity to be heard before an impartial observer, and provides the right to confront and cross-examine witnesses prior to the deprivation of a life, liberty or property interest. *Goldberg v. Kelly, 397 U.S. 254, 267-68, 25 L. Ed. 2d 287, 90 S. Ct. 1011, 1020 (1970)*. In examining whether the existing procedure is sufficient, the court must evaluate **[**11]** the private interest which is affected, the probable value of additional or substitute procedural safeguards in protecting against accidental deprivation of that interest, and the public interest, including a review of the administrative and fiscal burden that the additional procedure would entail. *Mathews v. Eldridge, 424 U.S. 319, 334-35, 47 L. Ed. 2d 18, 96 S. Ct. 893, 902-903 (1976)*.

The private interest in this case, the attorneys' fee, is a significant "property" interest from the plaintiffs' point of view, because it provides the means by which they live and are able to conduct their practice.

The existing procedure for fee arbitration provides notice and a hearing before a Committee of attorneys and laymen. It also provides an opportunity to compel the attendance of witnesses and the production of documents through the use of subpoenas. N.J. Ct. R. 1:20A-3(b).

The plaintiffs claim that the inability to perform discovery and the failure to follow the rules of civil procedure and evidence in the FAS deprives them of their procedural due process rights. Yet the need for discovery should be minimal because the information required to establish the plaintiffs' entitlement to the fee sought should be within the plaintiffs' **[**12]** own records, not those of the client. As stated in *Kelley Drye & Warren v. Murray Indus., 623 F. Supp. 522, 528 (D.N.J. 1985)*, "depositions and extensive pretrial proceedings are precisely what the arbitration procedure is designed to avoid."

The fact that the majority of the Committee members are "trained in the rules of evidence and skilled in distinguishing competent from incompetent evidence and able to impartially judge facts presented at the hearing" alleviates evidentiary concerns. *In re Logan, 70 N.J. 222, 228, 358 A.2d 787, 791 (1976)*. Further, both the plaintiff and defendant are allowed to have counsel present during the Committee hearing, and **[*1114]** the hearings are to be "conducted formally," although it is not necessary to adhere to the rules of evidence and procedure. N.J. Ct. R. 1:20A-3(b). Finally, the findings of the arbitration committee and the reasons in support of those findings are to be recorded. *Id*.

In sum, the existing procedural protections accorded the plaintiffs in the FAS are sufficient. Allowing an appeal of Committee decisions to the courts would significantly increase the burden on the judicial system. "The advantages of swift, inexpensive proceedings **[**13]** outweigh by far any greater likelihood of just results achieved by allowing appellate proceedings. The loss of public confidence is too high a price to pay for some indeterminate improvement in the quality of fee arbitration determinations." *LiVolsi, 85 N.J. at 603, 428 A.2d at 1282*. In addition, forcing clients to resolve fee disputes by going to court places a heavy burden on the client. *Id. at 599*.

HN8[] Accordingly, this court finds that the New Jersey Fee Arbitration System comports with the mandates of due process. There is no fundamental right to have a trial under the *fourteenth amendment*, and sufficient procedural safeguards exist to ensure that plaintiffs' rights are protected.

D. *The Equal Protection Clause*

The plaintiffs allege that the unilateral and compulsory nature of the FAS classifies attorneys and discriminates against attorneys in violation of equal protection.

HN9[] There are three standards of judicial review for alleged equal protection violations, and the standard to be applied depends upon the basis used for the classification.

HN10[] Courts review state classifications based on "suspect" traits, such as race or national origin, under the "strict scrutiny" standard. **[**14]** In order to survive this standard, the classification must be narrowly tailored to the achievement of a compelling state interest. *See Regents of the Univ. of California v. Bakke, 438 U.S. 265, 320, 57 L. Ed. 2d 750, 98 S. Ct. 2733, 2763 (1978)* (enrollment quotas based on race at state funded university violated equal protection because they were not necessary to promote substantial state interest).

HN11[] Classifications that deprive a person of a fundamental right also receive strict scrutiny. *See Loving v. Virginia, 388 U.S. 1, 9-11, 87 S. Ct. 1817, 1822-23, 18 L. Ed. 2d 1010 (1967)* (statute prohibiting interracial marriage received strict scrutiny because it distinguished on basis of race and because it infringed upon fundamental right to marry).

"Quasi-suspect" ***HN12***[] classifications, such as those based on gender or illegitimacy, receive "middle level scrutiny." This test requires the state law to be substantially related to an important state interest. *See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24, 73 L. Ed. 2d 1090, 102 S. Ct. 3331, 3335 (1982)* (gender-based segregation at women-only state-funded university received middle level scrutiny).

HN13[] The "rational basis test" requires that the classification be rationally related to the achievement of a legitimate state interest. *See Williamson* ***[**15]*** *v. Lee Optical of Oklahoma, 348 U.S. 483, 491, 99 L. Ed. 563, 75 S. Ct. 461 (1955)* (statute barring optician from issuing eyeglasses without written prescription from licensed ophthalmologist is rationally related to state's interest in protecting health of its citizens).

HN14[] Because attorneys are not a "suspect class," and because the deprivation of a fundamental right is not involved, the "strict scrutiny" standard is not applicable. Because there is no classification based on gender or illegitimacy, "middle level scrutiny" is also inapplicable.

Therefore, the FAS must withstand the "rational basis" test in order to be held constitutional. The Supreme ***HN15***[] Court has recognized the interest of a state in regulating the legal profession and the attorney-client relationship to be a "compelling" one. *Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 44 L. Ed. 2d 572, 95 S. Ct. 2004, 2015 (1975)*. ***HN16***[] A "compelling" state interest meets and surpasses the requirements of the rational basis test, which requires only a "legitimate" interest. Further, **[*1115]** this court finds the maintenance of public confidence in the judicial system to be a legitimate state interest. *See also LiVolsi, 85 N.J. at 586, 428 A.2d at 1273*. ***HN17***[] Requiring attorneys to justify their fees in an **[**16]** inexpensive forum before an impartial panel is rationally related to the maintenance of the public's confidence in the legal system and to the interest in minimizing the burden on both the client and the attorney. In addition, the arbitration process is apt to result in a much quicker determination than the overburdened court system can provide, allowing the attorneys to recover their fees sooner than if an action was brought in court.

HN18[] Accordingly, this court finds that the New Jersey attorney Fee Arbitration System is rationally related to a legitimate state interest; therefore, the arbitration system does not violate the *equal protection clause of the fourteenth amendment*.

E. *The Contract Clause*

Plaintiffs argue that the deprivation of a contractual right to sue in court for the value of services rendered amounts to an impairment of a private contract in violation of the contract clause. ***HN19***[] The contract clause provides that "no State shall . . . pass any . . . Law impairing the Obligation of Contracts." *U.S. Const., art. I, § 10, cl. 1*.

Plaintiffs rely on the analysis of the United States Supreme Court in *United States Trust Company v. New Jersey, 431 U.S. 1, 52 L. Ed. 2d 92, 97 S. Ct. 1505 (1977)*, in support **[**17]** of their position. In *United States Trust*, legislation passed by New York and New Jersey repealed a covenant entered into by the two states. *Id. at 3, 97 S. Ct. at 1508*. The covenant had limited the New York Port Authority's power to subsidize passenger rail service with revenues from reserves pledged as security for bonds offered by the port authority. *Id*. The Trust Company, as trustee and bondholder, sued for declaratory relief, alleging that the impairment of the bondholder's security amounted to an impairment of contract in violation of the contract clause. *Id*. The Supreme Court held that ***HN20***[] when a state is a party to a contract and acts to impair that contract, the impairment will be upheld only if the impairment is reasonable and necessary to serve an important public interest and if there is no other means of achieving the state's goal. *Id. at 29-30, 97 S. Ct. at 1521*. The court finds the *United States Trust* analysis inapplicable here, because the state is not a party to the contract at issue: the agreement between the attorney and the client.

Instead, this court finds ***HN21***[] the tripartite analysis for impairment of contracts entered into by private parties established by the Supreme Court in *Energy* ***[**18]*** *Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983)*, to be controlling. The three-part test in *Energy Reserves* requires (1) a substantial impairment of the contractual relationship, (2) that is justified by a significant and legitimate public purpose, and (3) is based on "'reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id. at 411-12, 103 S. Ct. at 704*.

First, the impairment alleged by the plaintiffs is not substantial because it does not change the terms of the contract. Rather, it dictates the forum in which disputes regarding the attorney's fee may be adjudicated, if the client so chooses. Plaintiffs have not demonstrated that the imposition of an arbitration committee for attorney fee disputes results in significant changes in the fees charged the clients. The allegation that "among members of the bar, there is a widely held perception that Fee Arbitration Committees typically compromise lawyers' bills" is insufficient. Plaintiffs' Brief at 24, n. 5.

Second, notwithstanding the insubstantial impairment of contract, this court finds the FAS to be justified by a significant and legitimate public purpose: **[**19]** the maintenance of public confidence in the New Jersey judicial system. By providing an inexpensive forum in which to resolve attorney fee disputes, that end is served. The New Jersey Supreme Court in *LiVolsi* fully endorsed American Bar Association reports indicating that forcing clients to go to court **[*1116]** to resolve fee disputes placed a heavy burden on the clients. *LiVolsi, 85 N.J. at 599, 428 A.2d at 1279-80* (citing ABA, Report of the Special Committee on Resolution of Fee Disputes 2-4 (1974)). The Supreme Court also rejected the idea that noncompulsory attorney arbitration would be as effective as compulsory arbitration, noting that "national surveys demonstrate that a significant and growing number of attorneys refuse to arbitrate their fee disputes." *LiVolsi, 85 N.J. at 599, 428 A.2d at 1280*.

Third, in determining whether the impairment is reasonable and appropriate to serve an important public purpose when the state is not a contracting party, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves, 459 U.S. at 412-13, 103 S. Ct. at 705*. Given the quasi-legislative power to "formulate court rules and policy" granted **[**20]** to the New Jersey Supreme Court in the state constitution, deference to the necessity and reasonableness of the FAS is appropriate under *Energy Reserves*. N.J. Const., art 6, § 2.

Accordingly, this court finds the Fee Arbitration System to be a reasonable and necessary exercise of the power of the New Jersey Supreme Court to regulate the practice of law in New Jersey, and that the system does not violate the contract clause of the United States Constitution.

F. *The Right to a Jury Trial*

Plaintiffs allege that the compulsory arbitration system deprives them of their right to a jury trial pursuant to the *seventh amendment of the United States Constitution*.

In *Kelley Drye*, the court addressed the issue of whether the compulsory arbitration system infringed upon *seventh amendment* rights and held that it did not. *623 F. Supp. 522, 526-27 (D.N.J. 1985)*. The court concluded that ***HN22***[] the privilege of practicing law in New Jersey subjected an attorney to the imposition of reasonable conditions and limitations, including the forfeiture of the right to a jury trial if the client elects to arbitrate a fee dispute. *Id*. This court finds no merit to plaintiffs' argument that it must **[**21]** retreat from the position taken in that case.

G. *Involuntary Servitude*

Plaintiffs allege that the FAS

> reduces honest lawyers to compulsory involuntary service. At the very least, it leaves lawyers ethically obligated to represent their clients to the fullest extent, then steals from them the legal protections necessary to collect a reasonable fee.
>
> There is no secret about the fact that fee arbitration committees frequently issue decisions reducing lawyer's fees or altogether eradicating them. This trend results in compulsory, involuntary service . . . as proscribed by the *Thirteenth Amendment*.

Plaintiffs' Brief at 50-51.

The court finds the involuntary servitude argument to be without merit. First, the plaintiffs voluntarily undertook the task of representing Ms. Kiefer in her divorce action. Nothing in their brief indicates otherwise. Second, the plaintiffs voluntarily sought entry into the practice of law in New Jersey, an act that requires submission to the rules and regulations promulgated by the New Jersey Supreme Court.

> ***HN23***[] Every attorney authorized to practice law in the State of New Jersey . . . shall be subject to the disciplinary jurisdiction of the Supreme Court **[**22]** . . . .

N.J. Ct. R. 1:20A-1(a).

Third, plaintiffs do not provide any evidence to justify their sweeping condemnation of the Fee Arbitration Committees. Plaintiffs do not purport to prove that the Committees forgive all of the debt owed by the client to the attorney. Attorneys do receive compensation for their efforts under this system, and plaintiffs do not claim otherwise. Further, in *LiVolsi*, the New Jersey Supreme Court concluded that there was no evidence that the arbitration system caused significant hardship for lawyers. *85 N.J. at 600-01, 428 A.2d at 1280*.

Therefore, this court finds that the argument that the New Jersey Fee Arbitration System places the plaintiffs in involuntary **[*1117]** servitude in violation of the *thirteenth amendment* is without merit.

H. *Federal Antitrust Claims*

Plaintiffs allege that, by allowing price fixing and the determination of fair fees for legal services in restraint of trade, the attorney FAS violates the Sherman Act, *15 U.S.C.A. §§ 1-7* (West 1973 & Supp. 1990).

In *Parker v. Brown, 317 U.S. 341, 351, 87 L. Ed. 315, 63 S. Ct. 307, 313 (1943)*, the Supreme Court held that ***HN24***[] the Sherman Act was not "intended to restrain state action or official action directed by a state." Instead, **[**23]** the law was only intended to prohibit private parties from engaging in restraints of trade. *Id*. In *Parker*, the state actively participated in the creation and enforcement of a program to develop marketing policies for the raisin crop. *Id. at 352, 63 S. Ct. at 314*. The Court concluded that no violation of federal ***antitrust law*** had occurred in *Parker* and noted that the state, as sovereign, had imposed the restraint of trade as an act of government. *Id*.

The Supreme Court refined the "state action" exemption to the Sherman Act in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. In *Midcal*, the California state liquor price control system allowed the producers of wine to dictate the wholesale prices of wine to wholesalers. *Id. at 99, 100 S. Ct. at 940*. The state system authorized the producers to set prices and provided the enforcement mechanism in the event of violation, but the state did not actively participate in the setting of the wine prices. *Id. at 99-100, 100 S. Ct. at 940*. The actual prices were dictated to the wholesalers by the individual wine producers, not by the state. *Id. at 103, 100 S. Ct. at 942*.

The Court established ***HN25***[] a two-part test for determining whether parties are exempt **[**24]** from the antitrust laws when they engage in anticompetitive conduct. The anticompetitive conduct must be pursuant to a "'clearly articulated and affirmatively expressed . . . state policy,'" and the policy must be "'actively supervised'" by the state. *Id. at 105, 100 S. Ct. at 943* (citing *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123, 1135 (1978))*; *see also* *Goldfarb v. Virginia State Bar, 421 U.S. 773, 791, 44 L. Ed. 2d 572, 95 S. Ct. 2004, 2015 (1975)* ("It is not enough that . . . anti-competitive conduct is 'prompted' by state action; rather, anti-competitive activities must be compelled by direction of the State acting as a sovereign."). The Court in *Midcal* concluded that where the anticompetitive conduct was performed by private parties, active state supervision was required in order to have the state action exemption apply. *445 U.S. at 106, 100 S. Ct. at 943*.

Plaintiffs' reliance on *Midcal* is misplaced, because the New Jersey FAS does not allow private parties to set the fees which attorneys may charge their clients. The Fee Arbitration Committees, appointed by the New Jersey Supreme Court pursuant to its constitutional power to regulate the practice of law in New Jersey, are not private parties, but are an extension **[**25]** of the New Jersey Supreme Court. As such, the Committees act in their official capacity to regulate the practice of law in New Jersey by providing a forum for the resolution of attorney fee disputes. The New Jersey Supreme Court appoints the members of the Committees and dictates the rules and regulations by which the Committees operate. Additionally, the arbitration committees are acting pursuant to the New Jersey Supreme Court's policy of maintaining the public's confidence in the state judicial system. *LiVolsi, 85 N.J. at 604, 428 A.2d at 1282*. Therefore, because the state is actively involved, and because there are no private parties engaged in price fixing, the *Midcal* test is not applicable.

In dicta, the Supreme Court noted in *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 n. 10, 85 L. Ed. 2d 24, 105 S. Ct. 1713, 1720 (1985)*, that "in cases in which the actor is a state agency, it is likely that active state supervision would also not be required." In *Hallie*, the Court held that active state supervision is not a requirement for exemption from federal **[*1118]** antitrust laws where the actor is a municipality, rather than a state agency. *Id. at 46*. Although this court would be inclined to follow *Hallie* **[**26]** and hold that active state supervision is unnecessary when the actor is a state agency, it need not do so here because there is sufficient state supervision for the FAS to fall within the "state action" exemption to the antitrust laws.

HN26[] The Fee Arbitration Committee operates as a state agency under the supervision and appointment of the New Jersey Supreme Court. Accordingly, this court finds sufficient state "supervision" to hold that the state exemption to the federal antitrust laws enunciated in *Parker v. Brown* applies.

I. *Conclusion*

Consequently, the New Jersey Fee Arbitration System does not violate federal ***antitrust law***; nor does it infringe upon the rights granted to the plaintiffs under the *fourteenth*, *seventh* and *thirteenth amendments* and *article 1, section 1, of the United States Constitution*.

For these reasons, defendants' motion for summary judgment is granted. Plaintiffs' cross-motion for summary judgment is denied. An order accompanies this opinion. No costs.

ORDER - September 26, 1990, Filed

This matter having come before the court on motion for judgment on the pleadings brought by defendants, New Jersey Supreme Court, the District III Fee Arbitration Committee, **[**27]** Nicholas Montenegro and Yvonne Kiefer, and on cross-motion for judgment on the pleadings brought by plaintiffs, Mark S. Guralnick and Joel Garber; and the court having read and considered the written submissions of counsel; and good cause having been shown,

IT IS on this 26th day of September, 1990,

ORDERED that summary judgment be and hereby is entered in this matter in favor of defendants and against plaintiffs.

Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co.

United States District Court for the Central District of Illinois

September 26, 1990, Decided ; September 26, 1990, Filed

Case No. 89-1120

Reporter

747 F. Supp. 1292 *; 1990 U.S. Dist. LEXIS 12993 **; 1990-2 Trade Cas. (CCH) P69,237

MECHANICAL RUBBER & SUPPLY COMPANY, Plaintiff, v. AMERICAN SAW AND MANUFACTURING COMPANY, and HAGERTY BROTHERS COMPANY, Defendant

Core Terms

pendent, federal court, district court, parties, interstate commerce, removal, antitrust claim, anti trust law, pendent-party, antitrust, alleges, commerce, lines, state ***antitrust law***, federal claim, state claims, complaints, industrial, dealers, blades, courts, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Public Enforcement, State Civil Actions**

Ill. Rev. Stat. ch. 38, para. 60-3(4) prohibits contracting to sell goods on the condition that the lessee or purchaser shall not deal in the goods of competitors where the effect of the condition is to substantially lessen competition or tend to create a monopoly in any line of commerce.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN2[] **Subject Matter Jurisdiction, Federal Questions**

A qualification of the so-called "well-pleaded complaint" rule for determining jurisdiction is that a plaintiff cannot deny a defendant his right to a federal forum by artfully disguising an essentially federal law claim in terms of state law.

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

Ill. Rev. Stat. ch. 38, para. 60-3(4) is substantially identical in terms to § 3 of the Clayton Act, *15 U.S.C.S. § 14*. Under the Clayton Act, insofar as the interstate commerce element is concerned, a complaint can rest on the theory that the acts complained of occur within the flow of commerce, or that the acts complained of occur wholly on a state or local level in interstate commerce, but substantially affect interstate commerce, or on both theories.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Parties

Constitutional Law > Congressional Duties & Powers > General Overview

Governments > Federal Government > US Congress

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN4[] **Supplemental Jurisdiction, Pendent Parties**

A two-part test must be satisfied before a district court can exercise pendent party jurisdiction. The Seventh Circuit states that: First, the court must examine whether the constitutional power to exercise such jurisdiction exists. Second, the court must examine whether Congress limits the court's power to exercise pendent party jurisdiction in the specific statutory provision confronting federal jurisdiction in that case. The constitutional power to exercise pendent party jurisdiction exists if the federal claim is not frivolous, the federal and state claims derive from a common nucleus of operative fact, and the federal and state claims are the kind that the plaintiff is ordinarily expected to try in one judicial proceeding. The statutory power to exercise pendent party jurisdiction depends upon whether Congress in the particular statutory grant at issue has expressly or by implication negated pendent party jurisdiction.

Administrative Law > Sovereign Immunity

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Parties

Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN5[] **Administrative Law, Sovereign Immunity**

A party must show an affirmative grant of jurisdiction under the relevant statute before a pendent party can acquire jurisdiction. It is insufficient to show merely that Congress does not expressly or by implication negate pendent party jurisdiction. A plaintiff must show an independent basis for jurisdiction against the pendent party to establish jurisdiction over the pendent claims.

Counsel: **[**1]** Mr. Phillip B. Lenzini, Peoria, Illinois, Attorney for Plaintiff.

Mr. Ronald L. Hamm, Peoria, Illinois, and Mr. Michael T. Reid, Chicago, Illinois, for American Saw, Mr. Franklin Renner, Peoria, Illinois, for Hagerty Brothers.

Judges: Michael M. Mihm, United States District Judge.

Opinion by: MIHM

Opinion

[*1293] ORDER

MICHAEL M. MIHM, UNITED STATES DISTRICT JUDGE

Before the Court is a Motion by the Plaintiff Mechanical Rubber to remand (#22) this case to state court. Also before the Court is the issue of whether or not this Court has pendent party jurisdiction over Hagerty Brothers Company. These issues have been fully briefed. The Court denies the Plaintiff's Motion to Remand (#22). And, the Court finds it lacks subject matter jurisdiction over Hagerty Brothers.

BACKGROUND

Mechanical Rubber filed an Amended Complaint on December 20, 1989. Count I of the Amended Complaint alleges antitrust violations under Illinois law against American Saw. *See*, ***HN1***[] Ill.Rev.Stat. ch. 38, § 60-3(4). This statute prohibits contracting to sell goods on the condition that the lessee or purchaser will not deal in the goods of the competitors where the effect of the condition is to substantially lessen competition or tend to create a monopoly in any line of commerce. The Amended **[**2]** Complaint alleges that American Saw sold goods to the Plaintiff on the condition that Plaintiff not deal in the goods of competitors of American Saw. Also, it is alleged that the effect of the condition will be to substantially lessen competition or to tend to create a monopoly. The Plaintiff seeks treble damages, injunctive relief, and an award of attorney's fees in Count I.

Counts II through VII of the Plaintiff's Amended Complaint allege various state causes of action against American Saw and Hagerty Brothers.

DISCUSSION

American Saw removed this case to federal court pursuant to *28 U.S.C. § 1441(a)* and *(c)*. Under *28 U.S.C. § 1441(a)*, American Saw asserted that this case was removable because this Court would have original jurisdiction over the state antitrust claim, which is actually a federal antitrust claim disguised as a state antitrust claim. Also, American Saw contends that removal is proper pursuant to *28 U.S.C. § 1441(c)* because the claims against American Saw, particularly the antitrust claim, are separate and independent claims which would be removable if sued upon alone because diversity exists between American Saw and Mechanical Rubber (*see also*, *28 U.S.C. §* ***[**3]*** *1332*).

I. *Was Removal Proper Under 28 U.S.C. § 1441(a)*

American Saw argues that this Court has original jurisdiction over the Amended **[*1294]** Complaint because it states a cause of action under the federal antitrust laws, although the Complaint, through artful pleading, attempts to state a claim under the state antitrust laws.

Mechanical Rubber maintains that a Plaintiff is the master of his complaint and that he can defeat removal to the federal courts by ignoring his federal claims and pursuing only the state claims in state court. *See, People of the State of Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571 (7th Cir. 1982)*; *Jones v. General Tire and Rubber Company, 541 F.2d 660 (7th Cir. 1976)*; *Nuclear Engineering Company v. Scott, 660 F.2d 241 (7th Cir. 1981)*; and *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 1665-1667, 104 L. Ed. 2d 86 (1989)*.

In response, American Saw quotes the following:

> ***HN2***[] A qualification of this so-called "well-pleaded complaint" rule for determining jurisdiction is that a plaintiff may not deny a defendant his right to a federal forum by artfully disguising an essentially federal law claim in terms of state law.

Nuclear Engineering Company, ***[**4]*** *660 F.2d at 249*; *see also, Kerr-McGee*, 667 F.2d at 575; *General Tire and Rubber Company, 541 F.2d at 664*; and *Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397 n. 2, 69 L. Ed. 2d 103, 101 S. Ct. 2424, 2427 (1981)*.

In *Federated Department Stores*, the United States brought an antitrust action against the defendant department stores alleging a violation of the Sherman Act by agreeing to fix the retail price of women's clothing sold in Northern California. Seven parallel civil suits were subsequently filed by private plaintiffs which were consolidated. The district court dismissed the complaints on the ground that the plaintiffs had not alleged an antitrust injury.

The plaintiffs in five of the suits appealed the dismissal to the Ninth Circuit. Moitie and Brown, however, chose not to appeal and instead filed two actions in state court. Although the complaints purported to raise only state antitrust claims, they made allegations similar to those made in the prior complaint. The defendants removed the state actions to federal court. The district court denied the plaintiffs' motions to remand, holding that the complaint, artfully couched in terms of state ***antitrust law***, was in many respects identical **[**5]** with the prior complaints and that the action was properly removed to federal court because the complaint raised essentially federal antitrust claims. (Unpublished district court opinion). The district court further dismissed the complaints on the basis of *res judicata*.

The Ninth Circuit affirmed the district court on the issue of removal but reversed on the issue of *res judicata. Moitie v. Federated Department Stores, Inc., 611 F.2d 1267 (9th Cir. 1980)*.

The Supreme Court reversed the Ninth Circuit on the *res judicata* issue. And, as to the issue of removal, the Supreme Court stated:

> The Court of Appeals also affirmed the district court's conclusion that Brown II was properly removed to federal court, reasoning that the claims presented were federal in nature. We agree that at least some of the claims had a sufficient federal character to support removal. *As one treatise puts it, courts will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally, the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization*. 14 C. Wright, A. Miller, **[**6]** and E. Cooper, *Federal Practice and Procedure*, § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The district court applied the subtle principle to the facts of this case. After an extensive review and analysis of the origins and substance of the two *Brown* complaints, *it found, and the Court of Appeals expressly agreed, the respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state-law claims*. We will not question here that fact finding. *See, Prospect Dairy, Inc.* ***[*1295]*** *v. Dellwood Dairy Company, 237 F. Supp. 176 (N.D. N.Y. 1964)*; *In re Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D. N.Y. 1980)*; *Three J Farms, Inc. v. Alton Box Board Company*, 1979-1 Trade Cases para. 62,423 (S.C. 1978), reversed on other grounds, *609 F.2d 112 (CA 4 1979)*, *cert. denied*, *445 U.S. 911 [100 S. Ct. 1090, 63 L. Ed. 2d 327]* (1980).

Federated Department Stores, 452 U.S. at 397 n. 2.

Exactly what the Supreme Court was affirming is unclear because the district court opinion is unpublished and the Ninth Circuit opinion summarily affirms that portion of the district court opinion regarding the removal of the antitrust claims. However, **[**7]** American Saw quotes extensively from the three lower court opinions which the Supreme Court cited in its explanatory footnote.

Particularly relevant is a quotation from *In re Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980)*. The court stated:

> A federal court need not blind itself to the real gravamen of a claim because plaintiff tenders a blindfold in the form of artificial characterizations in its complaint. Peeking to determine reality is particularly appropriate *where it is apparent that the central federal claim is inseparable from the state law theory, and where the question of federal jurisdiction turns on the out-of-state status of the parties and the interstate nature of the transactions complained of*. (Citations omitted). Where, as here all defendants are unquestionably engaged in interstate commerce, those who are damaged from an alleged restraint of trade find a remedy in the federal, not the

> state, antitrust laws. This conclusion is buttressed in this case by the long-standing holding of the South Carolina Supreme Court, described in more detail below, that the state antitrust statute under which the plaintiffs have attempted to bring their **[**8]** action applies only to intrastate commerce and does not reach interstate commerce of any kind. (Citation omitted).

Id. at 82 (emphasis added); *see also, T.O.C. v. United Artists Theatre Circuit, 631 F. Supp. 832, 834 (N.D. Cal. 1986)*.

Count I of the Amended Complaint alleges that American Saw is a manufacturer of industrial saw blades with its principal place of business in Massachusetts. (Amended Complaint at para. 3). It also alleges that American Saw sells its nationally known Lenox saw blades to industrial distributors in Illinois and elsewhere for resale to industrial and commercial users. (*Id*.).

The antitrust violation alleged is that American Saw sold its saw blades to Plaintiff on the condition that it not deal in the goods of Defendant's competitors, the effect of which may be substantially lessened competition or tend to create a monopoly. It alleges that American Saw has engaged in a practice of terminating other Lenox dealers who begin dealing in competing lines and reinstating such dealers only if the competing lines were dropped. (*Id*. at P 8).

It is undisputed that American Saw's products (saw blades) purchased by Mechanical Rubber were manufactured **[**9]** in Massachusetts and shipped in interstate commerce to the Plaintiff's principal place of business in Peoria, Illinois. Orders for the products were sent by Mechanical Rubber from Illinois to Massachusetts. Payments were made via interstate commerce also.

American Saw asserts that the specific antitrust wrong alleged consists of sales in interstate commerce on the condition that Plaintiff not deal in the goods of competitors of American Saw. As American Saw notes, the state ***antitrust law*** alleged to have been violated, ***HN3***[] Ill.Rev.Stat. ch. 38, § 60-3(4), is substantially identical in terms to § 3 of the Clayton Act, *15 U.S.C. § 14*. Under the Clayton Act, insofar as the interstate commerce element is concerned, the Complaint can rest on the theory that the acts complained of occurred within the flow of commerce, or that the acts complained of occurred wholly on a state or local level in interstate commerce, **[*1296]** but substantially affected interstate commerce, or on both theories. *Kallen v. Nexus Corp., 353 F. Supp. 33 (N.D. Ill. 1973)*.

Thus, American Saw asserts that because of *its out-of-state status and the interstate nature of the transactions complained of*, Mechanical Rubber has **[**10]** alleged a federal antitrust violation and not a state antitrust violation. American Saw concedes it is clear after *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)* that federal ***antitrust law*** is not intended in any direct way to preempt state ***antitrust law*** except where there might be a direct conflict between the two laws. However, it maintains that its position is not that federal antitrust laws preempt the state antitrust laws, but that the federal antitrust laws apply to acts affecting or occurring in the flow of commerce and that the Illinois antitrust laws apply to acts affecting intrastate commerce.

This Court agrees with the Defendant American Saw. Count I is sufficiently federal in character that the Court has subject matter jurisdiction over American Saw and the Plaintiff must properly bring this count under the federal antitrust laws. And, although neither of the parties have cited any law on this point and the Court has found no law on this point, this Court believes that Illinois courts would not extend the application of its ***antitrust law*** so that it would burden interstate commerce.

The Plaintiff's Complaint alleges in relevant part:

> 3. At all times mentioned **[**11]** herein, the Defendant American Saw and Manufacturing Company (hereafter "American Saw"), was engaged in the business of manufacturing and producing and distributing to industrial distributors in the central region of the State of Illinois *and elsewhere the nationally known brand and product line of high quality industrial saw blades commonly known as "Lenox", with its principal place of business in East Long Meadow, Massachusetts*.

> 8. For the purpose of forming and effectuating monopoly power, the Defendant American Saw *has engaged and does engage in a pattern with various Lenox dealers whereby* the distributorships of those dealers who either began offering competing product lines or contemplated offering competing product lines were revoked by the Defendant American Saw and such dealerships were reinstated only if the competing line was terminated or abandoned.

(Plaintiff's Amended Complaint at paras. 3 and 8) (emphasis added).

Paragraph 3 makes it clear that the Defendant American Saw is an out-of-state party who does business nationally in a product line known as Lenox. Further, it is undisputed that the sales, orders, and shipping of American Saw's products were made **[**12]** in interstate commerce. And, from both paragraphs 3 and 8 of the Complaint, it is apparent that the Plaintiff is alleging that American Saw is engaging in a pattern of terminating distributorships on a national level of those dealers who either begin offering competing product lines or who are contemplating offering competing product lines. Thus, this Court finds that the Plaintiff has attempted to avoid removal jurisdiction by artfully casting an essentially federal law claim as a state law claim.

However, as the Defendant American Saw concedes, Count I of the Amended Complaint also states a cause of action in intrastate commerce which may be a cognizable claim under Ill.Rev.Stat. ch. 38, paras. 60-1 to 60-11. Thus, Count I properly alleges claims under state and federal law.

Because the Court has found that this case was removable under *28 U.S.C. § 1441(a)* as this Court would have had original jurisdiction over the antitrust claim if it had originally been brought in federal court, it is unnecessary for this Court to consider whether or not the antitrust claim is a separate and independent claim which would be removable on the basis of diversity if sued upon alone under *28 U.S.C.* ***[**13]*** *§ 1441(c)*.

II. *Does this Court Have Jurisdiction Over Hagerty Brothers Company*

The question in this case is whether the Court has pendent party jurisdiction over **[*1297]** the state law claims against Hagerty Brothers Company. ***HN4***[] A two-part test must be satisfied before a district court can exercise pendent party jurisdiction. *Huffman v. Hains, 865 F.2d 920, 922 (7th Cir. 1989)*. In describing the factors which bear on the Court's decision to exercise its pendent party jurisdiction, the Seventh Circuit stated in *Huffman*:

> First, the court must examine whether the constitutional power to exercise such jurisdiction exists. Second, the court must examine whether Congress has limited the court's power to exercise pendent party jurisdiction in the specific statutory provision confronting federal jurisdiction in that case. (Citation omitted). The constitutional power to exercise pendent party jurisdiction exists if the federal claim is not frivolous, the federal and state claims "derive from a common nucleus of operative fact," and the federal and state claims are the kind that the plaintiff "would ordinarily be expected to try . . . in one judicial proceeding." (Citations omitted). The **[**14]** statutory power to exercise pendent party jurisdiction depends upon whether "Congress in the [particular statutory grant at issue] has . . . expressly or by implication negated" pendent party jurisdiction. (Citations omitted).

Id. at 922-923.

The federal claim is clearly not a frivolous claim as the Court's earlier discussion indicates. Further, both the federal and state claims in this case derive from a common nucleus of operative facts and are claims that a plaintiff would ordinarily be expected to try in one judicial proceeding. Thus, this Court has the constitutional power to exercise jurisdiction over these state claims.

However, the second factor in the *Huffman* test regarding whether or not the Court has the statutory power to exercise jurisdiction has been modified by a subsequent Supreme Court decision. *See, Finley v. United States, 490 U.S. 545, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989)*. In *Finley*, the plaintiff had sued the United States in federal court under the Federal Tort Claims Act for wrongful death. Later, the plaintiff moved to amend her complaint to add state tort law claims against the city and an electric company, claiming that their negligence had caused the death. **[**15]** No independent basis for federal jurisdiction against the city or the electric company existed. The district court allowed the joinder of the additional defendants as pendent parties. The Ninth Circuit reversed, holding that the Tort Claims Act does not permit pendent jurisdiction over additional parties.

In affirming the Ninth Circuit, the Supreme Court distinguished between pendent claim jurisdiction and pendent party jurisdiction. The Court acknowledged that *United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)* held that pendent claim jurisdiction over non-federal claims may exist where parties are litigating other matters properly before the federal court. However, the Court reasoned that pendent party jurisdiction is analytically and fundamentally different from pendent claim jurisdiction in stating:

> We may assume, without deciding, that constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction, and that petitioner's state-law claims pass that test. *Our cases show, however, that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional* ***[**16]*** *power has been congressionally authorized, and will not read jurisdiction statutes broadly*.

Id. 109 S. Ct. at 2006-2007 (emphasis added). The *Finley* Court then went on to quote from its decision in *Aldinger v. Howard, 427 U.S. 1, 15, 49 L. Ed. 2d 276, 96 S. Ct. 2413, 2420 (1976)* the following:

> "The addition of a completely new party," we said, "would run counter to the well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress." (Citation omitted). "Resolution of a claim of pendent-party jurisdiction . . . calls for careful **[*1298]** attention to the relevant statutory language." (Citation omitted).

Finley, 109 S. Ct. at 2007.

Thus, it would appear that the question to be considered is whether or not the statutory language of the statute in question allows pendent party jurisdiction. The existence of this issue is supported by the fact that the *Finley* court noted that mere factual similarity between the state and federal claims is of no consequence to determine the propriety of pendent party jurisdiction because neither the convenience of the litigants nor considerations of judicial economy are sufficient to justify the extension of the ancillary jurisdiction. **[**17]** *Id. at 2008*. The *Finley* Court's analysis then focused on the actual language of the Federal Tort Claims Act to determine whether the text of the jurisdictional statute in any way authorized the inclusion of private defendants. *Id. at 2008-2010*. After concluding that the statutory language did not extend to parties other than the United States, the Court found that pendent party jurisdiction was not available under the Tort Claims Act. *Id*. at 2010.

After *Finley*, federal courts have generally interpreted *Finley* to preclude pendent party jurisdiction unless there exists an independent jurisdictional basis for the pendent party. *Lather v. Beadle County, 879 F.2d 365, 367-368 (8th Cir. 1989)*; *Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1407-1409 (9th Cir. 1990)*; *Ezell v. Burlington Northern Railroad Company, 724 F. Supp. 863, 864-865 (D. Wyo. 1989)*. In fact, one federal court in a footnote went so far as to say that "pendent-party jurisdiction apparently is no longer a viable concept." *Staffer v. Bouchard Transportation Company, 878 F.2d 638, 643, n. 5 (2nd Cir. 1989)*. In addition, one prominent commentator stated:

> It is possible to read *Finley* **[**18]** as only a construction of the Federal Tort Claims Act. Much of the opinion is devoted to an examination of that statute. So read the opinion would be fairly narrow, although it still would be contrary to the strong indication in *Aldinger* that pendent-party jurisdiction would be proper where, as in *FTCA*, federal jurisdiction is exclusive and a refusal to allow pendent-party jurisdiction would require separate suits in state and federal court.
>
> It seems clear, however, that this reading of *Finley* would be too narrow. A fair reading is that the court is distinguishing sharply between pendent claims and pendent parties. Although the *Finley* court assumes, without deciding, that pendent-party jurisdiction would be within the constitutional grant of judicial power, *it holds that "an affirmative grant of pendent-party jurisdiction" must be found in a statute. "[A] grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties*." There may be statutes that affirmatively grant pendent-party jurisdiction, but they surely must

> be exceptional. It is not surprising that lower courts are **[**19]** reading *Finley* as putting an end to that jurisdiction.

Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d, § 3567.2 (emphasis added).

Several district court cases subsequent to the *Finley* decision have allowed claims against pendent parties. *See, Armstrong v. Edelson, 718 F. Supp. 1372, 1376-1377 (N.D. Ill. 1989)*; *Carter v. Dixon, 727 F. Supp. 478, 479-480 (N.D. Ill. 1990)*; *Bailey v. City of Chicago*, No. 89-1021, slip op. (N.D. Ill., June 28, 1990); *Craig v. First American Capital Resources, Inc., 740 F. Supp. 530 (N.D. Ill. 1990)*.

However, the above cases apply the second part of the *Huffman* test as if the Supreme Court had not decided *Finley*. In *Bailey*, the court stated that "the statutory power to exercise pendent party jurisdiction depends upon whether Congress in the particular statutory grant at issue has expressly or by implication negated pendent party jurisdiction." *Bailey*, slip op.

In light of the express language of the *Finley* opinion, the subsequent interpretation of the *Finley* opinion by several circuit courts, and the interpretation of the *Finley* opinion given by a respected **[**20]** commentator, this Court believes that the second factor of the *Huffman* test has been **[*1299]** modified by the *Finley* decision. This Court believes that ***HN5***[] a party must show an affirmative grant of jurisdiction under the relevant statute before a pendent party can acquire jurisdiction. It is insufficient to show merely that Congress has not expressly or by implication negated pendent party jurisdiction as the *Huffman* court required. Interpreting *Finley* so narrowly that it only has application to the Federal Tort Claims Act is untenable in light of the explicit language used by the Supreme Court distinguishing pendent party jurisdiction from pendent claim jurisdiction.

Thus, the Plaintiff must show an independent basis for jurisdiction against the pendent party to establish jurisdiction over the pendent claims. As the Plaintiff does not allege an independent basis for jurisdiction, and the Court cannot find an independent basis for jurisdiction over the Plaintiff's claims against Hagerty Brothers Company, the claims against Hagerty Brothers must be dismissed.

CONCLUSION

The Court DENIES the Plaintiff's Motion to Remand (#22) for the reasons stated herein. And, the Court DISMISSES **[**21]** all claims against Hagerty Brothers Company as this Court lacks subject matter jurisdiction over the Defendant. Thus, the Motion by Hagerty Brothers to Dismiss Count IV of the Amended Complaint (#18) is MOOT.

ENTERED this 26th day of September, 1990.

Pacificorp v. Portland Gen. Elec. Co.

United States District Court for the District of Oregon

September 27, 1990, Decided ; September 28, 1990, Filed

Civil No. 90-524-FR (LEAD), Civil No. 90-592-FR (Consolidated Cases)

Reporter
1990 U.S. Dist. LEXIS 12925 *; 1990-2 Trade Cas. (CCH) P69,274

PACIFICORP, doing business as Pacific Power & Light Company, an Oregon corporation, Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; COLUMBIA STEEL CASTING CO., INC., an Oregon corporation; and PUBLIC UTILITY COMMISSION OF OREGON, Defendants. COLUMBIA STEEL CASTING CO., INC., an Oregon corporation, Plaintiff, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation; PACIFICORP, doing business as Pacific Power & Light Company; MYRON B. KATZ, NANCY RYLES, and RONALD EACHUS, Defendants

Core Terms

territories, electric, motion to stay, allocated, customers, doctrine of primary jurisdiction, argues, electric service, anti trust law, contends, reply

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Dave Frohnmayer, Attorney General, Paul A. Graham, Assistant Attorney General, Salem, Oregon, Attorneys for Public Utility Commission of Oregon, Myron B. Katz, Nancy Ryles and Ronald Eachus.

Judges: Helen J. Frye, United States District Judge.

Opinion by: FINE

Opinion

OPINION

The matters before the court are:

1) the motion to stay (#20) of Portland General Electric Company (PGE);

2) the motion to stay (#30) of the Public Utility Commission of the State of Oregon (PUC);

3) the motion of Columbia Steel Casting Co., Inc. (Columbia) to strike the reply of the PUC (#39); [1] **[*2]** and

4) the motion of Columbia to strike the reply of PGE (#40). [2]

BACKGROUND

In 1972, PGE and Pacificorp, doing business as Pacific Power & Light Company (PP&L), entered into an agreement (the 1972 Agreement) [3] to exchange electric distribution properties and customer accounts in defined areas within and around the City of Portland in order to eliminate duplicate electric utility facilities. In general, PP&L transferred its properties and customers within the Rainier Service District, an area which the agreement labels as "Parcel C," to PGE in exchange for PGE's transfer to PP&L of its properties and customers in areas labeled Parcels A and B in the 1972 Agreement.

[*3] The City of Portland consented to the agreed exchange. [4] The Public Utilities Commissioner approved the agreement. By Order 72-870, the PUC approved "the transfer of certain exclusively served territory in the Rainier area from Pacific Power & Light Company to Portland General Electric Company and approved the transfer and exchange of utility property and facilities and customers between the two companies as applied for." Exhibit 1 to PGE's Motion to Stay, p. 39.

Columbia is within the area identified by the 1972 Agreement as Parcel C. Parcel C is the area from which PP&L transferred its property and customers to PGE. At the time the agreement was signed, Columbia was not a customer of PP&L. Columbia has always been a customer of PGE. Columbia purchases electricity from PGE pursuant to an Agreement for Electric Power Service (PGE Agreement) which is automatically renewed on a yearly basis until one party provides written termination notice to the **[*4]** other party at least thirty days prior to the anniversary date of the start of the first term of the agreement, July 1, 1980.

At present, the electric rates for PP&L's industrial customers, such as Columbia, are less than the electric rates for PGE's industrial customers. Columbia has requested PP&L to provide it with electricity. PP&L owns a transmission line that crosses the plant site of Columbia.

In a letter from Columbia to PGE, [5] **[*5]** dated May 30, 1990, Columbia notified PGE that because PGE had announced that it might seek, through litigation, to prevent PP&L from providing electricity to Columbia, PP&L had not constructed a necessary substation to supply Columbia with alternate electric service. In the letter, Columbia requested PGE to deliver electricity provided by PP&L to Columbia as of 12:00:01 a.m. July 1, 1990, and until the resolution of litigation. In a letter from PGE to Columbia, [6] dated May 30, 1990, PGE stated that Columbia was within the exclusive service territory of PGE and therefore must purchase electricity from PGE.

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[1] Columbia filed a response in opposition to the PUC's motion to stay on August 7, 1990. The PUC filed a reply to Columbia's opposition to the PUC's motion to stay on August 28, 1990. On August 28, 1990, Columbia filed a motion to strike the PUC's reply for failure to comply with the filing deadline. Local Rule 220-3(b) states that "any reply to the opposition [of a motion] shall be served and filed by the moving party within eleven (11) days after service of the opposition statement." Local Rule 220-(3)c states that "no further briefing shall be allowed without leave of court." Without leave of the court and without explanation, the PUC filed its reply in excess of eleven days after service of the opposition statement as required by Local Rule 220-3(b). Therefore, Columbia's motion to strike the reply of the PUC (#39) is granted.

[2] PGE filed a reply to Columbia's opposition to the PUC's motion to stay. Columbia moves to strike the reply because PGE was not the moving party and did not receive leave of the court. PGE was not the moving party, and PGE did not receive leave of this court. Therefore, pursuant to Local Rule 220-3(b) & (c), Columbia's motion to strike the reply of PGE (#40) is granted.

[3] In the complaint, PP&L uses the label "Facilities Agreement" to refer to the 1972 Agreement between PGE and PP&L. However, PGE objects to this label. Therefore, the court has chosen to refer to the agreement as the "1972 Agreement."

[4] Ordinance No. 134416, passed April 26, 1972, effective May 26, 1972.

[5] Exhibit A to Answer and Counterclaims of Columbia, p. 35.

[6] Exhibit A to Answer and Counterclaims of Columbia, p. 37.

On May 31, 1990, PP&L filed this action, Civil No. 90-524-FR, seeking a declaratory judgment against PGE, Columbia and the PUC. PP&L prays for a judgment declaring the rights and obligations of the parties under the PGE Agreement, the the 1972 Agreement, and the Sherman Antitrust Act.

On June 19, 1990, Columbia filed a related action, Civil No. 90-592-FR, now consolidated with Civil No. 90-524-FR (this action), for a declaratory judgment, injunctive relief and damages against PGE, PP&L, and PUC Commissioners Myron B. Katz, Nancy Ryles (now deceased), and Ronald Eachus. Columbia seeks a judicial declaration of the rights and obligations of the parties as follows:

a. that Columbia may terminate the PGE Agreement and take service from Pacific;

b. that PGE does not have an exclusive right to serve Columbia under the terms of the Facilities Agreement;

c. that the Portland City Charter, state utility law and Portland franchise agreements permit Pacific to serve Columbia;

d. that the PUC's Order 72-870 does not empower or authorize PGE **[*6]** to monopolize electric power service to Columbia Steel, nor does it serve to foreclose Pacific from providing electric service to Columbia Steel;

e. that the Portland City Charter prohibits the formation of exclusive service territories within the City of Portland;

f. that the wrongful conduct by defendants PGE and PUC alleged herein, to prevent service to Columbia Steel from alternative electric power suppliers violates state utility laws and Federal and state antitrust laws; and,

g. that Pacific is obligated by applicable Federal ***antitrust law***, state ***antitrust law*** and state utility statutes to serve Columbia Steel upon request.

Columbia Complaint, para. 39.

On July 2, 1990, PGE filed an application with the PUC for orders concerning territorial allocations within the City of Portland. PGE's application requests cumulatively, and not in the alternative, as follows:

1. pursuant to *O.R.S. 756.450* and O.A.R. 137-02-010 to 060, a declaratory order of the PUC affirming that the order [7] allocated exclusive service territory in the City of Portland;

2. pursuant to *O.R.S. 758.420* and O.A.R. 860-25-010, an order of the PUC approving an agreement between PGE and PP&L allocating to **[*7]** PGE certain service territory in the City of Portland; and

3. pursuant to *O.R.S. 758.435* and O.A.R. 860-250-010, an order of the PUC allocating to PGE certain territory in the City of Portland now served exclusively by PGE.

On July 3, 1990, PGE filed a motion to stay this proceeding until after the resolution of its application before the PUC. On July 30, 1990, the PUC filed both its answer to the combined complaints and a motion to stay these proceedings until the related action before it is complete.

In answer to the combined complaint, the PUC denied, due to insufficient knowledge, nearly all of the allegations. However, it did admit that the 1972 Agreement created allocated service territories within the City of Portland and did admit that PP&L is barred from providing electric service to Columbia. PUC Answer, para. 13.

On August 1, 1990, PGE filed its answers to the complaints. PGE alleges that PUC Order 72-870 approving the 1972 Agreement legally created exclusive **[*8]** service territories and that under the state action doctrine, the agreement and the utilities are immune from federal antitrust laws. Alternatively, PGE alleges that the PUC has interpreted its 1972 order as establishing exclusively served territories and that PGE has acted in good faith in complying with the order as interpreted by the PUC.

[7] PUC Order 72-870 approving the 1972 Agreement.

CONTENTIONS OF THE PARTIES

PGE argues that the issues in its related application before the PUC are dispositive of the claims in this case. PGE argues that "the PUC does have the power to immunize the alleged violations of the antitrust laws under the state action doctrine." PGE Reply in Support of Motion to Stay, p. 15 (emphasis in original). PGE contends that the state action doctrine applies if the PUC has clearly articulated and affirmatively expressed state policy and is actively supervising territorial allocation. PGE contends that the PUC should be permitted to resolve any ambiguities regarding the meaning of its order as a material aid to this court in ultimately deciding the case.

PGE contends that both its application with the PUC and this case seek a declaration of prospective rights and obligations as they relate to the provision **[*9]** of electric service by PP&L to Columbia. PGE characterizes the allocation of territories as a technical and a policy decision. PGE argues that the doctrine of primary jurisdiction justifies preliminary action by the PUC. In summary, PGE argues that this court should stay this case until after the PUC has responded to its request for prospective allocation.

The PUC also asserts that the doctrine of primary jurisdiction requires a stay of this case. The PUC acknowledges that an issue raised by Columbia is whether the PUC has authority to allocate territory in cities which franchise two or more utilities. The PUC asserts that because it "has been interpreting territorial allocation statutes for years," it should "have first call." PUC Motion to Stay, p. 8. The PUC contends that "if nothing else, what the PUC decides on PGE's request for prospective allocation of territory is something for which this court should wait." PUC Motion to Stay, p. 9 (emphasis in original).

Columbia responds that the motions to stay should be denied because the doctrine of primary jurisdiction does not apply. Columbia argues that the interpretation of the meaning of the 1972 order is not a technical, but **[*10]** rather a legal, question. Columbia also contends that the administrative proceeding will not address the antitrust aspects of this case. Columbia asserts that "PGE's asserted defense to the anti-trust laws requires a determination by the Court of the legal effect of a contract between PGE and PP&L and the 1972 Order." Columbia's Memo in Opposition, p. 3.

Columbia argues that a central question in this case is whether the law allows territorial allocations within the City of Portland, not whether the territory in question is appropriate for exclusive service. Columbia further asserts that as a party to the case, the PUC can determine and then assert its view of the meaning and effect of the 1972 order.

Columbia also argues that a determination of these issues by the court would assist and instruct rather than interfere with the administrative agency carrying out its lawful mandate.

ANALYSIS

The decision whether to proceed is within the discretion of the court. The doctrine of primary jurisdiction applies where the resolution of d claim before a court requires the resolution of issues by the court, which under a regulatory scheme have been placed within the special competence of **[*11]** an administrative body. In such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views. *United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956)*. The doctrine of primary jurisdiction calls for the referral of a case to an administrative body for preliminary review when issues not within the conventional experience of judges are raised or when the case requires the exercise of administrative discretion. The doctrine of primary jurisdiction promotes the uniform and expert administration of the regulatory scheme.

The PUC is a party to this proceeding and has asserted in its answer that the 1972 Agreement "created allocated service territories within Portland and that Pacific is barred from providing electric service to Columbia." PUC Answer, para. 13. "Allocated territories" can only be created by approval of the PUC. See *O.R.S. 758.400(1)*. Implicitly, the PUC has charged that it has the authority, and has exercised that authority, to create allocated territories within the City of Portland. The PUC has already addressed the issue before this court and will have an opportunity to address it again in this proceeding. Whether **[*12]** PUC Order 72-870 legally created allocated territories within the City of Portland is an issue ripe for judicial determination. The doctrine of primary jurisdiction does not justify a stay of this case.

The motions to stay, PGE #20 and PUC #30, are denied.

CONCLUSION

1. PGE's motion to stay (#20) is denied.

2. PUC's motion to stay (#30) is denied.

3. Columbia's motion to strike the reply of the PUC (#39) is granted.

4. Columbia's motion to strike the reply of PGE (#40) is granted.

DATED this 27 day of September, 1990.

Automotive Electric Service Corp. v. Association of Automotive Aftermarket Distributors

United States District Court for the Eastern District of New York

September 28, 1990, Decided

CV No. 89-4296 (ADS)

Reporter
747 F. Supp. 1483 *; 1990 U.S. Dist. LEXIS 12975 **; 1990-2 Trade Cas. (CCH) P69,208

AUTOMOTIVE ELECTRIC SERVICE CORP., Plaintiff, v. ASSOCIATION OF AUTOMOTIVE AFTERMARKET DISTRIBUTORS, MOTOR AGE, INC. and MOTOR AGE EAST, INC., Defendants

Core Terms

termination, jobbers, membership, cause of action, by-laws, warehouse, sales, company-owned, bad faith, damages, Automotive, ballot, distributor, recommended, secret agreement, territory, reinstatement, injunction, memorandum, discount, parties, cross-examination, contractual, converted, sheet, terms, voted, memo, auto parts, take over

LexisNexis® Headnotes

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

HN1[] **Basis of Recovery, American Rule**

Absent an agreement, statute or court rule, under the present judicial system, under the "American Rule" attorney's fees are not available.

Business & Corporate Law > Agency Relationships > Fiduciaries > General Overview

HN2[] **Agency Relationships, Fiduciaries**

Under the law of Illinois, a fiduciary relationship arises between parties when one reposes trust and confidence in another, and the latter achieves substantial dominance and influence over the actions of the former. The existence of such a relationship must be shown by proof so clear and convincing, so strong, unequivocal and unmistaken that it leads to only one conclusion. Whether there is a fiduciary relationship is a question of fact, not law.

Business & Corporate Law > Agency Relationships > Fiduciaries > General Overview

HN3[] **Agency Relationships, Fiduciaries**

A slightly dominant business position by one of the parties over the other does not, by itself, operate to convert an ordinary business relationship or contractual arrangement into a confidential or fiduciary relationship. A confidential relationship only goes to a situation where one party, because of some close relationship, relies very heavily on the judgment of the other.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN4[] **Breach of Contract Actions, Elements of Contract Claims**

Under the law of Tennessee, the essential elements of a breach of contract claim are the existence of a contract, breach of that contract, and injuries or damages proximately caused by the breach.

Torts > ... > Contracts > Intentional Interference > Elements

HN5[] **Intentional Interference, Elements**

Under New York law, it is well settled that in order to prevail on a claim for tortious interference with contractual relations, the following elements must be proven: (1) the existence of a valid contract between the plaintiff and a third party; (2) knowledge of the contract on the part of the defendant; (3) the defendant's intentional procurement of a breach of the contract by the third party; and, (4) resultant damages caused by the breach. A cause of action for tortious interference with contractual relations does not lie, however, if the contract is one terminable at will, unless there is a showing of fraud, misrepresentation, unfair conduct or other wrongful acts.

Torts > ... > Contracts > Intentional Interference > Defenses

HN6[] **Intentional Interference, Defenses**

A claim for tortious interference with contractual relations may not be asserted against a party to the contract. Only a stranger to a contract, such as a third party, can be held liable for tortious interference with a contract.

Torts > ... > Contracts > Intentional Interference > Elements

HN7[] **Intentional Interference, Elements**

The absence of damages is fatal to the success of a cause of action for tortious interference of a contract. To recover on the cause of action for wrongful interference, a plaintiff has to prove damages resulting from that interference.

Torts > ... > Contracts > Intentional Interference > Elements

HN8[] **Intentional Interference, Elements**

Under New York law, in order to prevail on a claim of tortious interference with prospective economic advantage, a plaintiff is required to show the defendant's interference with business relations existing between the plaintiff and a third party, either with the sole purpose of harming the plaintiff or by means that are dishonest, unfair or in any other way improper. If the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct. Additionally, the tort usually involves interference with a business relationship not amounting to a contract and involves either a severance or injury to that relationship.

Antitrust & Trade Law > Sherman Act > Claims

HN9[] Sherman Act, Claims

The proof required to sustain a claim under the Sherman Act of a conspiracy includes, inter alia, evidence of a relevant product and geographic market, reduction of that market by reason of the conspiracy, and an anti-competitive effect outweighing any pro-competitive benefits.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN10[] Federal & State Interrelationships, Choice of Law

A federal district court adjudicating a diversity action is required to apply the choice of law rules of the forum state within which the court sits. However, the Court need only apply choice of law rules where there is a "true conflict." Otherwise, the controversy is considered a "neutral" case, and the Court is free to apply the law of either one of the states involved.

Business & Corporate Law > Unincorporated Associations

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN11[] Business & Corporate Law, Unincorporated Associations

Both New York and Illinois law are substantially the same with respect to the key issue of the standard of judicial review with regard to the termination or expulsion of members from a private association. The courts are generally reluctant to take a role in dispute resolution between a private, voluntary association and its members, with, however, certain limited exceptions such as bad faith, bias or other wrongful conduct. The charter or articles of incorporation of an Illinois corporation is a contract of a three-fold nature. It is operative as between the corporation and the State and it creates rights and duties as between the corporation and its shareholders, as well as between the shareholders themselves. Judicial review of an association's disciplinary proceedings is favored only where a member's expulsion, technically in strict compliance with the association's by-laws, is influenced by bias, prejudice or lack of good faith.

Business & Corporate Law > Unincorporated Associations

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN12[] Business & Corporate Law, Unincorporated Associations

Under Illinois law, a court will not review the actions of a voluntary association with respect to its members; when a court does intervene, however, the scope of its intervention is exceedingly narrow. Judicial inquiry into the affairs of private, voluntary associations is limited to the question of whether an association has treated its members in accord with its by-laws and rudimentary due process, such as when the association acts in "bad faith" in expelling a member.

Business & Corporate Law > Unincorporated Associations

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN13[] Business & Corporate Law, Unincorporated Associations

A private organization, particularly if tinged with public stature or purpose, may not expel or discipline a member adversely affecting substantial property, contract or other economic rights, except as a result of fair proceedings which may be provided for in organization by-laws, carried forward in an atmosphere of good faith and fair play. New York law is in accord with this principle to the extent that mere procedural compliance with the disciplinary process does not insulate the termination process from judicial scrutiny if it was tainted by bad faith or wrongful, corrupt conduct. Judicial review is unavailable, unless the reason for expulsion is so trivial as to suggest that the action of the association was capricious or corrupt, or unless the association failed to administer its own rules fairly.

Business & Corporate Law > Unincorporated Associations

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN14[] Business & Corporate Law, Unincorporated Associations

Courts are reluctant to interfere with the internal affairs of an association as long as its procedures do not violate standards of fair dealing. Where a private club or association hears and decides an internal dispute, the courts will not review the determination unless there is a showing that the hearing was in bad faith or basically unfair or that the determination was fraudulent or was utterly unsupported by any evidence.

Business & Corporate Law > Unincorporated Associations

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN15[] Business & Corporate Law, Unincorporated Associations

Where the disciplinary process of a voluntary association is tainted by bad faith, a court has not only the power but the duty to exercise its equitable powers to intervene at the behest of an expelled member. Even if there is a facially proper basis for the termination of the member, the process is not insulated from judicial scrutiny if it was stained by bad faith.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Remedies > Injunctions > Grounds for Injunctions

HN16[] Judges, Discretionary Powers

A plaintiff's success on the merits, however, is only the first step in determining whether a court in its discretion should grant the drastic relief of a permanent injunction. The governing standard in determining whether to grant the extraordinary equitable relief of a permanent injunction is as follows: First, the plaintiff must have achieved actual success on the merits. Second, once having demonstrated success, permanent injunctive relief is only available when a remedy at law would be inadequate to afford complete relief. Third, the balance of the equities must tip decidedly in favor of the plaintiff.

Civil Procedure > Remedies > Injunctions

HN17[] **Remedies, Injunctions**

Insofar as fashioning the ultimate remedy, a court has a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct.

Counsel: **[**1]** Lance R. Frank, Esq., Attorney for Plaintiff, Cedarhurst, New York.

Bell, Boyd & Lloyd, Attorneys for Defendant Association of Automotive Aftermarket Distributors, Chicago, Illinois, by: Victor E. Grimm, Esq., Scott M. Mendel, Esq., of counsel.

Hoffinger Friedland Dobrish, Bernfeld & Hasen, Attorneys for Defendant Motor Age, Inc., New York, New York, by: David B. Bernfeld, Esq., Howard A. Gardner, Esq., of counsel.

Judges: Arthur D. Spatt, United States District Judge.

Opinion by: SPATT

Opinion

[*1484] MEMORANDUM DECISION AND ORDER

ARTHUR D. SPATT, UNITED STATES DISTRICT JUDGE

In this case the plaintiff corporation, a member of a national trade organization, alleges that the organization terminated its membership as a result of "bad faith" on the part of the organization and a competitor-member. The plaintiff seeks to be reinstated as a member, among other remedies. There is one crucial issue before the Court: Has the plaintiff established that the trade organization acted in "bad faith" in terminating **[*1485]** the plaintiff's membership so that judicial intervention is appropriate?

BACKGROUND

The plaintiff Automotive Electric Service, Corp. ("the plaintiff") is a warehouse distributor of automotive parts. This type of business purchases automotive parts from manufacturers **[**2]** and other suppliers, stores the parts in a warehouse and sells the parts to jobbers -- mostly retail automotive parts stores and installers. This business is also referred to as an "automotive after market parts business".

The plaintiff is a close corporation owned by the Judelson family for over seventy years, which employs more than fifty persons and has its main office and warehouse in Woodside, Queens, New York. The plaintiff has approximately 400 accounts and its sales volume in 1989 was approximately $ 7,000,000. Its geographic territories are Queens, Brooklyn, Bronx, Manhattan, Westchester, Nassau and Suffolk Counties.

In November 1984, the plaintiff became a member of the defendant Association of Automotive Aftermarket Distributors ("AAAD" or "the Association"), a national trade organization of warehouse distributors. AAAD is an Illinois not-for-profit organization with its primary place of business in Memphis, Tennessee. There are a number of similar trade associations in the warehouse distributor industry. AAAD offers to its members volume discount purchasing and a national account merchandising program involving the supply of Goodyear Tire and Rubber Company ("Goodyear") **[**3]** company-owned retail automotive parts stores ("GASC stores" or "company-owed stores"). Although AAAD has been trying to develop several other national account programs, at the time of the relevant occurrences in this case, it had only one such viable national account, the Goodyear account. Under a contract with Goodyear, members of AAAD are principal providers of the Goodyear company-owned (GASC) stores.

AAAD is governed by a set of by-laws, an Executive Committee and a President. A principal feature of AAAD is their "Parts Plus" program. In the program, the members of AAAD attempt to persuade their jobbers to be Parts Plus jobbers, and operate their stores under the "Parts Plus" logo. AAAD employs the services of Marketing Resources, Inc. ("MRI"), an advertising and marketing agency. The members of AAAD are expected to use their best efforts to implement the Parts Plus program by advertising and active solicitation of Parts Plus jobbers with the object of developing a strong network of Parts Plus members. In August 1986, the membership unanimously adopted certain "Standards of Performance" including a requirement that each member had to vigorously promote and implement the Parts **[**4]** Plus program.

AAAD has thirty-five members of whom twenty-two do less than ten million dollars in sales and nineteen are smaller than the plaintiff. Each member has one vote irrespective of size. The largest member in AAAD is a firm called Parts, Inc., whose business comprises approximately 35% of the total sales of all AAAD members. The Executive Committee is made up of its officers and three members. Despite their membership in this trade organization, the AAAD by-laws do not grant any members exclusive territories or preclude any member from competing with other members in any territory.

Among the provisions in the AAAD by-laws and crucial to the determination to terminate the plaintiff, is the following provision set forth in paragraph 11 of the AAAD by-laws (Plaintiff's Exhibit 5), which permits termination of a member:

> ". . . if, in the opinion of the Executive Committee, a Member demonstrates a lack of sincere intent to be a bona fide, active and participating Member of the Association, or to commit to duly adopted Association programs or objectives. . . ."

AAAD contends that the plaintiff failed to meet the requirements of its Parts Plus program and, during the period 1987 **[**5]** through 1989, despite warnings and meetings, failed to improve its Parts Plus program. On November 16, 1989, the Executive **[*1486]** Committee of AAAD voted to terminate the plaintiff's membership, which, of necessity, would mean that the plaintiff would no longer be permitted to sell to the Goodyear GASC stores under its contract with AAAD. As a result of the involuntary termination of its membership in AAAD, the plaintiff commenced this lawsuit.

In essence, the plaintiff contends in this action that it is the victim of a conspiracy to improperly terminate its membership in AAAD so that a larger and newer member, Motor Age, Inc. ("Motor Age") could take over the plaintiff's valuable Goodyear company-owned stores. This was accomplished, according to the plaintiff, by secret agreements, misrepresentations and a breach of the fiduciary duties and contractual obligations set forth in the by-laws.

The plaintiff further contends that its termination was part of an overall plan by which the larger members would advance their own interests at the expense of the smaller members, so that AAAD will have a cadre of larger, more financially powerful member companies. The plaintiff contends that it was **[**6]** terminated as a result of a conspiracy between the larger members, who control the Executive Committee and Motor Age, to take over the plaintiff's Goodyear accounts.

The plaintiff further contends that it relies upon the Goodyear accounts and will go out of business if it is forced to give up the Goodyear business as a result of its termination as a member of AAAD. It therefore asserts that it will be irreparably damaged unless the Court prevents AAAD from terminating its membership. To that end the plaintiff, among other requests for relief, seeks injunctive relief, reinstatement as a member of AAAD and damages. The complaint contains six causes of action, as follows:

1) Breach of fiduciary relationship;

2) Breach of the membership by-laws;

3) Breach of the agreement between the plaintiff and AAAD specifically as to the Goodyear account;

4) Wrongful interference with the plaintiff's contractual rights;

5) Wrongful interference with the plaintiff's business opportunities; and

6) Violations of the Sherman Act and New York's Donnelly Act.

PROCEDURAL SETTING

Following termination from AAAD, the plaintiff commenced this action in the Supreme Court of the State of New York, Queens **[**7]** County. At the time that the plaintiff filed in state court, a sweeping *ex parte* temporary restraining order ("TRO") was obtained requiring, *inter alia*, AAAD not to interfere with the plaintiff's membership. On December 22, 1989, the defendants removed this case to this Court pursuant to *28 U.S.C. § 1441* on the grounds of diversity (*see* *28 U.S.C. § 1332*). The plaintiff not having requested an extension, the *ex parte* TRO expired on January 1, 1990 (*see* *Fed. R. Civ. P. 65(b)*; *see also* *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 439-40, 39 L. Ed. 2d 435, 94 S. Ct. 1113, 1124* [1974]).

On January 25, 1990, after oral argument by all sides, this Court granted a second TRO preventing AAAD from terminating the plaintiff's membership. The parties later stipulated to an extension of this last TRO, waived discovery and proceeded to a hearing on the plaintiff's application for a preliminary injunction. After commencement of the hearing, the parties agreed, and the Court ordered that the motion be converted to a full trial on the merits of the entire case pursuant to *Fed. R. Civ. P. 65(a)(2)*. In the interim, the defendants moved to vacate the TRO on the grounds that **[**8]** it had expired by its own terms, or, in any event, by operation of law. On February 23, 1990, the Court denied that application and instead granted a temporary or interim injunction preventing AAAD from terminating the plaintiff's membership for the pendency of the trial. Thus, the plaintiff has at all times until the present continued as a member of AAAD and, as such, continued to service its Goodyear company-owned stores.

[*1487] THE TRIAL AND FINDINGS

Since the determinations in this case are, of necessity, factually oriented, the Court is compelled to detail much of the evidence in connection with its findings of fact.

The Plaintiff's Case:

GARY W. DAVIS ("Davis") was the President and a shareholder and director of Matthews Auto Electric, Inc. ("Matthews"), a warehouse distributor operating in Oklahoma, Arkansas and Kansas, which was admitted as a member of AAAD in January 1987. The representative of AAAD with regard to recruitment of Matthews was one Joe Matlock, the Executive Vice President of AAAD. Matthews conducted an aggressive "Parts Plus" promotion and succeeded in converting all of their customers to Parts Plus jobbers. The Matthews promotional costs to convert its **[**9]** jobbers into Parts Plus jobbers was approximately $ 500,000. Six days after the "kick-off" promotional meeting by Matthews to convert jobbers to the Parts Plus program in 1987, Parts, Inc., the largest member of AAAD, purchased the business of Davis' chief competitor. This purchase placed Parts, Inc. directly in the territory of Matthews.

According to Davis, after he vigorously complained to Marvin Almy, the President of AAAD, and Paul Kachapis, the Chairman of the Executive Committee, about the Parts, Inc. intrusion into his territory, the Matthews Company was terminated by AAAD in June 1989 and eventually filed for bankruptcy under Chapter 11 in August 1989. The Matthews firm is still being operated under Chapter 11 procedures.

On cross-examination Davis conceded that the by-laws did not prohibit Parts, Inc. from operating in Matthews' territory or from acquiring another warehouse distributor in Matthews' market area. Further, Davis conceded that from December 1988 to June 1989 Matthews made no payments to AAAD for its purchases of auto parts and also stopped paying dues and promoting the Parts Plus program. Also, in May 1989, Matthews received a notice of possible termination from **[**10]** AAAD and declined to contest its termination.

RICHARD JUDELSON is the Vice-President, Director and a shareholder of the plaintiff corporation and was the plaintiff's principal factual witness. Plaintiff's first contact with AAAD was in 1984 when Joe Matlock contacted them and explained the advantages of joining the defendant-association. With regard to the purchases of auto parts, AAAD furnishes a "group sales allowance" ("GSA") which is a discount given to AAAD, which retains 20% of the amount of the discount and returns 80% of the discount to its members. In 1988 the plaintiff received in excess of $ 100,000 from the GSA plan. These discounts result from better pricing plateaus, group purchases and "entire truckload" prices.

The cost of joining and maintaining a membership in AAAD by the plaintiff included a $ 17,500 initiation fee and annual dues of $ 2,000 per year and marketing dues based on a percentage of annual net sales approximating a total of $ 12,000 per year.

In September 1984, the plaintiff decided to join AAAD and, by October 1984 they were voted in as a member. The plaintiff entered into a written agreement with AAAD with regard to the Goodyear business and plaintiff **[**11]** geared up to serve the Goodyear company-owned stores in their geographical territory. This process involved revising its computer program, purchasing an initial inventory, and adding a night crew to execute Goodyear orders and deliveries.

The plaintiff started its Parts Plus program in the summer of 1985 on advice from Alan Hunsaker, then a Vice-President of MRI. In 1985 the plaintiff's first Parts Plus program was printed and prepared by Hunsaker. Other plans or amendments were prepared annually with the assistance and advice of Hunsaker. The plaintiff arranged dinner meetings for its jobbers in the fall of 1986 to promote the program and within days fifteen customers agreed to enter the program.

According to Richard Judelson, in the summer of 1987, the plaintiff was advised **[*1488]** that their Parts Plus program didn't receive sufficient customer support and Hunsaker recommended that the program be put "on hold" in order to regroup.

At about the same time, the plaintiff got word of a prospective new member of AAAD, the defendant Motor Age, Inc. ("Motor Age"), a warehouse distributor competitor of the plaintiff which sold in plaintiff's territory. Apparently Motor Age was negotiating to purchase **[**12]** another AAAD member named Forshay-Gabriel, a warehouse distributor in Newark, New Jersey. The plaintiff strongly objected to membership by its competitor and so advised Matlock. Although Richard Judelson was told by President Almy in November 1987 that no Motor Age membership application was pending, two days later the plaintiff received a Motor Age application, dated November 18, 1987 and a ballot including a profile from Motor Age that was dated September 8, 1987. The application contained a statement by Almy and Kachapis, which reads, in part, as follows:

> "The application of this member was discussed with the AAAD Executive Committee prior to submission to the membership. We do have existing members in close proximity to Motor Age. It was the consensus of the Executive Committee, however, that we are not at a saturation point in the Metropolitan New York market and that the overall status of the Association would be enhanced by a larger presence in the largest market in the country.
> * * * *
>
> *Existing national account business would remain with the current members who are serving Goodyear*.
>
> The AAAD Executive Committee and President endorse the application of Motor Age and **[**13]** urge your favorable response on this application" (emphasis supplied).

The ballot itself was placed on the same sheet as a memorandum from Joe Matlock dated November 12, 1987, which stated, in part, as follows:

> "Motor Age, should it be accepted, would at once conform to the standards which our members adopted in Montreal last year. They would overnight create a strong Parts Plus presence in a very major autoparts

> consuming area where we have had no program success to date and so, in the interest of AAAD's increased market share, it is highly recommended that you vote favorably for the admission of Motor Age as a AAAD member."

The plaintiff voted "most strongly" to disapprove the application of Motor Age and contacted all of the members of AAAD and urged them to vote against such admission. On November 26, 1987, Almy called and advised the plaintiff that a meeting would be held on November 30, 1987 with regard to the plaintiff's request to be heard in opposition to the application of Motor Age. Jerry Judelson attended the meeting and, along with several other members, stated their reasons for opposing the Motor Age application. No vote was taken on the first ballot.

By application **[**14]** -- memorandum dated December 21, 1987, a second ballot as to Motor Age's admission was circulated to the membership. As with the first ballot, Almy urged the members to vote "yes" on the second ballot. Contrary to prior practice as to the form of the ballots, the second ballot did not contain the option to vote to abstain, despite a request by the plaintiff to include a space to abstain. On January 18, 1988, the plaintiff was advised by Almy that the members approved the Motor Age application for membership.

In April-May 1988 there was a meeting at the plaintiff's office with representatives of the Standards Committee with regard to the Committee's concern about the lack of a viable Parts Plus program by the plaintiff. The Standards Committee advised the plaintiff that it was dissatisfied with the plaintiff's Parts Plus program and gave the plaintiff a deadline of October 1988 to submit a plan and to have a viable program underway by the end of 1988. Thereafter, the plaintiff purchased a Parts Plus sign for its warehouse, answered the telephone "Auto Parts Plus" and placed Parts Plus decals on its trucks, among other efforts. **[*1489]** In addition, Al Schuttinger was made its Parts Plus program **[**15]** manager.

At this time Richard Judelson noticed certain changes in the relationship between the plaintiff and AAAD. Prior to the admission of Motor Age as a member, the plaintiff received approximately six leads from AAAD as to new customers. Subsequent to the admission of Motor Age the plaintiff received no additional leads. Prior to Motor Age's admission the plaintiff was consulted with regard to potential new national account business; that kind of consultation ceased upon the admission of Motor Age.

In addition, in September 1989 the John Deere Co. liquidated a large inventory of auto parts at substantial discounts to AAAD members. Although the plaintiff placed an early order, AAAD unilaterally cancelled the order due to the plaintiff's prospective termination. Since Motor Age was permitted to purchase these discounted products, it gained a competitive advantage. In 1989 there were two instances in which Motor Age purchased certain "Trust" products and plaintiff was not advised of this opportunity. According to Richard Judelson, Motor Age was given a competitive edge over the plaintiff with regard to the two Trust products. Also, Motor Age was provided the opportunity to participate **[**16]** in the new pilot national account program with the Firestone Company, while the plaintiff was denied that right.

In 1989, the Standards Committee initiated a series of steps that culminated in its request to the Executive Committee that plaintiff's membership in AAAD be terminated. A letter was sent by Almy to the plaintiff on April 27, 1989 stating that the Standards Committee recommended that "the termination of membership of Automotive Electric be considered" on the basis of a "lack of sincere intent to be a bona fide, active and participating member". The plaintiff was advised that this matter would be discussed at the Executive Committee meeting of May 23, 1989 to be held at Memphis, Tennessee and that plaintiff's representatives "may be heard at 1:00 p.m. that day." The plaintiff responded in writing and sent representatives to the Memphis Executive Committee meeting.

After an investigation by a delegation of the Standards Committee, the plaintiff received a letter from AAAD dated October 10, 1989 advising it that the matter of plaintiff's termination would be raised again at an Executive Committee meeting at which time plaintiff would be entitled to appear and have an opportunity **[**17]** to be heard. This letter was sent notwithstanding the fact that the plaintiff had, by then, signed up six new Parts Plus stores.

On November 16, 1989 the Executive Committee met, at which time Jerry Judelson and Al Schuttinger appeared and presented the plaintiff's defense to the accusation that it was not properly supporting the Parts Plus program.

By letter dated November 17, 1989, plaintiff was notified that "it was the vote of the Committee to terminate the membership of Automotive Electric effective immediately". The letter stated that:

> "The grounds for termination were failure to commit to duly adopted Association programs and to demonstrate a sincere intent to be a bona fide, active and participating Member of the Association in that you have failed to establish a genuine and effective Parts Plus program in your marketing area."

As to the prospective results of termination of the plaintiff's membership in AAAD, Richard Judelson testified that the Goodyear business constituted 30% of the plaintiff's annual sales. The plaintiff's sales to Goodyear company-owned stores were as follows:

1987	$ 2,266,805.80
1988	$ 2,193,582.07
1989	$ 2,152,019.95

[18]** He also stated that the combination of Goodyear company-owned stores and Trust sales constituted 33 1/3% of the plaintiff's gross sales. In addition, the plaintiff made additional changes in its financial structure in order to take on the Goodyear business. It placed a two million dollar mortgage on its warehouse. It entered into an arrangement with Milberg Factors to factor its receivables due to the need for additional **[*1490]** capital created by the extended payment terms granted to Goodyear in its contract with AAAD. As to the impact of the loss of the Goodyear and Trust business as a result of its termination from AAAD membership, Richard Judelson testified that the plaintiff would not be able to pay its bills, its mortgage payments or its factor. In sum, Judelson testified that without the Goodyear and Trust business, plaintiff could not continue to operate as a warehouse distributor.

On cross-examination, Richard Judelson admitted that the plaintiff has no Parts Plus jobbers on Long Island and in Westchester County, even though both areas are significant markets. In 1985 when plaintiff initiated its Parts Plus program, it had 250 active jobbers and, as a result of its initial promotional **[**19]** efforts fifteen were converted to Parts Plus jobbers. Of these fifteen jobbers, fourteen have since dropped out of the program or gone out of business and only one is still a Parts Plus jobber. Judelson conceded that the plaintiff voted for promulgation of the Standards at the August 1986 membership meeting, that he knew that the plaintiff would have to comply with the standards and that the failure to comply with the standards could result in termination of the plaintiff's membership. Significantly, Richard Judelson conceded that in December 1986, prior to the admittance of Motor Age as a member, Hunsaker stated that the credibility of the plaintiff's Parts Plus program suffered because the plaintiff did not deliver the required elements of the program. This was clear evidence of a problem involving the plaintiff's Parts Plus program prior to the admission of Motor Age. Further evidence of this same problem was set forth in the MRI Service Report of January 19, 1987 which summarized a strategic planning meeting held in December 1986, and referred to the plaintiff's Parts Plus program as follows:

> "II. *The Parts Plus Program*
>
> The Parts Plus Program has delivered less than the **[**20]** desired results i.e., the jobbers on the program not really supporting Automotive Electric Service or the program.
> The overall credibility of the program was mentioned as a concern. This is usually the case if the program deliverables are not delivered or there is a lack of long-range commitment on the part of the warehouse. While every attempt was made to deliver what was promised, the follow through by the jobber or his attitude was not supportive. The commitment was made by the warehouse, but when the support did not come, the commitment of the warehouse began to erode."

By the end of 1986, the number of the plaintiff's Parts Plus jobbers was reduced from fifteen to six. In an evaluation of the plaintiff's Standards and Objectives, dated March 16, 1987, it was stated that the plaintiff's "Parts Plus programs have made little progress in the market. Question management commitment to the program as well as abilities of the company to deliver on the program". In another evaluation of Standards and Objectives dated November 10-11, 1987, all the Parts Plus categories with regard to the plaintiff were answered in the negative including the telling comment that the plaintiff did not **[**21]** actively promote Parts Plus.

Despite warnings in 1988 by AAAD about the need to invigorate their Parts Plus program, the plaintiff did not sign up any jobbers in the program during the year 1988. In fact, the plaintiff agreed to increase its Parts Plus jobbers by the end of 1988 and did not do so even when threatened with termination of membership in AAAD. By the end of 1988 the plaintiff was down to one or two Parts Plus jobbers, a figure less than 1% of its customers. In September 1988, the plaintiff did develop a written Parts Plus Program involving twenty-seven separate elements, which plan was to be implemented prior to the end of 1988. In 1989 some progress was made when plaintiff added a total of six Parts Plus jobbers. In addition, during 1989 the plaintiff participated in another AAAD promotional program by selling seven "Repair America" kits and distributing 2800 "Repair America" booklets.

[*1491] With regard to the plaintiff's claim of prospective financial ruin if it lost the Goodyear business, it was conceded by Richard Judelson that in 1984, prior to membership in AAAD, it had forty employees and sales of five million, while in 1989 it had fifty-five employees and sales of seven **[**22]** million. He further testified that the plaintiff added a staff to service the Goodyear stores at an annual cost of $ 200,000 or $ 30,000 per employee, but admitted that these employees did not work solely on the Goodyear stores. Further, Richard conceded that payment terms on the Goodyear sales were less favorable than other customers in that the Goodyear bills were not paid for an average 125 days. In fact, this late payment plan necessitated the plaintiff's use of a factor. Also, the contract between the plaintiff and AAAD contemplated a non-exclusive right to service the Goodyear company-owned stores, namely, Goodyear could purchase automotive goods from any other warehouse distributor. Also, Judelson conceded that the plaintiff could attempt to sell to the Goodyear stores even if its membership in AAAD was terminated.

In addition, contrary to the plaintiff's contention, the plaintiff's tenure as a member of AAAD does not appear to have been profitable. According to its financial statements, in 1984 the plaintiff had a net profit of $ 746,000; in 1985 a net profit of $ 15,000; in 1986 a net profit of $ 12,000; in 1987 a net loss of $ 112,000; and in 1988 a net loss of $ 32,000. **[**23]** Notwithstanding these figures taken from the plaintiff's financial statements, Richard Judelson testified that actually the plaintiff earned a gross profit of $ 585,000 on the 2.3 million in sales to Goodyear stores in 1987 and also obtains other benefits in purchase discounts of approximately $ 40,000 per year. Judelson also attempted to explain the substantial difference in the 1984 net profit as opposed to the later years while a member of AAAD, in that the 1984 figures included a net gain to the plaintiff as a result of real estate sold in Connecticut that year, while in 1987 the plaintiff suffered an extraordinary loss of $ 120,000 when it sold its Connecticut subsidiary. In sum, however, according to the financial statements, the plaintiff had a net operating loss in each of years 1986, 1987, 1988 and 1989.

GILBERT REYES was employed by the plaintiff as a sales representative. On a ruse, in April 1989 he answered a AAAD advertisement in an auto trade magazine which was promoting the Parts Plus program. Reyes filled out a card requesting Parts Plus jobber information giving his location as his home in Rosedale, Queens, New York and sent it to AAAD. He received a letter from AAAD **[**24]** with enclosures stating that the AAAD Parts Plus distributor for Rosedale, Queens was Motor Age.

JERRY JUDELSON is the Secretary, a Director and the majority shareholder of the plaintiff corporation. He testified that by the end of June 1989 the number of plaintiff's Parts Plus jobbers had increased to six. At the final November 16, 1989 Executive Committee meeting, he advised the members of the Executive Committee that his Deere order had been improperly cancelled and that his firm was no longer being given Parts Plus leads. He exhibited photographs of a Motor Age Parts Plus store without a sign and a Motor Age truck without a Parts Plus sign.

On cross-examination, Jerry Judelson conceded that on November 10, 1987 the plaintiff's Parts Plus program was "on hold" and that it continued "on hold" from the summer of 1987 to the fall of 1988; that at the May 1988 Standards Committee meeting he acknowledged that the plaintiff did not have a Parts Plus program in place and he agreed to do so before the end of 1988; that he was told that "termination" was a possible consequence; and that by September 1988 the plaintiff could not implement all of the 27 separate elements in his proposed Parts **[**25]** Plus program.

ROBERT BERKOWICZ is a certified public accountant who has been the accountant for the plaintiff corporation for only one year. He prepared a statement dated February 27, 1990 regarding the impact of the loss of sales of the

Goodyear company-owned stores. In this regard, Berkowicz relied on the plaintiff's books and records. He did no audit nor did he **[*1492]** conduct any full-fledged accounting review of the plaintiff's records. Berkowicz testified that, in his opinion, the plaintiff earned a gross profit (from sales less cost of goods) of 29% before operating and fixed expenses. Further, it was his opinion that if the plaintiff lost the Goodyear account, it could not pay its current expenses. Therefore, in that event, he would recommend that plaintiff's officers close down the business and go into bankruptcy.

The Court does not credit the testimony of the plaintiff's accountant. He performed no audit of the plaintiff's financial records; no books and records were produced; no financial statements were prepared for 1989; he has no other clients in the auto parts industry; he omitted key operating expenses such as delivery expenses; he assumed that the Goodyear business would **[**26]** not be replaced; he reviewed no original records; his calculation of the gross profit figures of $ 357,000 in 1988 and $ 300,000 in 1989 were contrary to the credible evidence; his report was based on assumptions and figures given to him by Richard Judelson; he accepted the "word" of Richard Judelson in arriving at the 29% gross profit figure; he admitted the 29% gross profit figure was an "educated guess"; he failed to calculate the substantial interest charges involved in factoring the Goodyear accounts receivable; and his covering letter states that "management's assumptions are not necessarily true".

The Court finds that the conclusions stated by Berkowicz were speculative and unsupported by the credible evidence. Indeed, in view of the net operating losses sustained by the plaintiff in 1987 ($ 25,000) and in 1988 ($ 94,000), his testimony is unworthy of belief.

HORACE MARVIN ALMY, also known as MARVIN ALMY, has been the President of the defendant AAAD since August 1, 1985. The total annual sales of AAAD members is approximately 640 million dollars per year. The plaintiff corporation had sales of seven million in 1988 and the defendant Motor Age, the second largest AAAD member, **[**27]** had sales of forty million. During the past years, Almy conceded that some larger members have purchased smaller members. In fact, three of the seven present members of the Executive Committee acquired other AAAD members. Almy stated that one of the goals of AAAD was to bring in one of the largest warehouses in each target area.

Almy testified that Joe Matlock retired on January 31, 1990 as the Executive Vice-President of AAAD. During his employment with the defendant Association, Matlock's two main duties were the solicitation of new members and the development of the Parts Plus program. In connection with his solicitation duties, he recruited both the plaintiff and Motor Age as Association members. It is significant that Matlock was an authorized representative of AAAD for the purpose of procuring new Association members.

Almy testified that the Goodyear company-owned stores were not available to Motor Age when it became a new member, and that there was no agreement with Motor Age or Paul Lehr, its President, for it to obtain the plaintiff's Goodyear accounts. Almy further testified that no such agreement was made by him, Matlock, or with anyone else at AAAD.

After the first "application" **[**28]** and ballot was mailed to the Association members on November 18, 1987, because of concerns raised by the plaintiff and others, the Executive Committee decided to terminate the ballot and investigate further. A second application and ballot was sent out on December 21, 1987. The ballot stated that each member should vote and return the ballot by January 15, 1988. Almy stated that the second balloting resulted in 29 affirmative votes and that only 26 were needed for an affirmative admission vote. On January 18, 1988 Almy advised the members of the results of the balloting -- that Motor Age had been voted in as a member of AAAD.

Almy interpreted the crucial para. 11 of the by-laws as requiring a commitment on the part of members to successfully participate in the Parts Plus program. He stated that successful participation means "results", **[*1493]** not merely good intentions. Almy did not believe that New York City was a difficult Parts Plus program market; certainly no more difficult than other urban areas where Parts Plus programs had greater success.

The by-laws of the Association provide that the members financial information shall be confidential, as follows:

"ARTICLE VII - MEMBER FINANCIAL **[**29]** INFORMATION

> *Section 1*. It shall be the obligation of each Member, within ninety (90) days after the end of its fiscal year, to submit to the Association copies of its balance sheet and statement of income as of the end of and for such fiscal year, *for confidential review by the President*, and to submit available interim financial information within ten (10) days after requested to do so by the President.
> * * * *
>
> *Section 4*. Members shall not have access to specific financial information submitted by other Members or prospective Members unless Member or prospective Member approves such access . . . that he considers essential in making such determination" (emphasis supplied).

With respect to a "working together -- winning together" contest to obtain new Parts Plus jobbers in which the plaintiff was assigned a goal of one, the plaintiff's performance was fifth or sixth out of thirty-nine members. During this "contest", the plaintiff obtained two new Parts Plus jobbers when its assigned goal was only one and then had a total of six Parts Plus jobbers. Motor Age had a goal of eight jobbers and obtained none.

In April 1989, the first letter of termination was sent to the plaintiff. **[**30]** A meeting of the Executive Committee was held in May, 1989 and the plaintiff was afforded an opportunity to be heard. The Executive Committee tabled the Standards Committee recommendation to terminate the plaintiff's membership and sent out two representatives to make an inspection of the plaintiff's Parts Plus jobbers. The two representatives were Carl Molin, the Chairman of the Standards Committee, who had already recommended termination, and Joe Matlock, who, the Court later learned, was not impartial, and had already allegedly entered into a surreptitious agreement to obtain the plaintiff's Goodyear stores for Motor Age. The plaintiff was not afforded an opportunity to accompany the subcommittee members on their investigating rounds, nor was it given an opportunity to provide the subcommittee with a list of its new Parts Plus jobbers, nor was plaintiff provided with a copy of their report.

At the November 16, 1989 Executive Committee meeting at which a vote was taken to terminate the plaintiff's membership, after the plaintiff's representatives were heard and left the meeting, present at the meeting when the termination vote was taken were Marvin Almy and Joe Matlock. Not only **[**31]** did Matlock attend this final Executive Committee meeting but he alone reported to the Executive Committee the negative results of the investigation of the plaintiff's Parts Plus jobbers, which was directly followed by the vote to expel the plaintiff.

One day after the termination vote was taken, on November 17, 1989, letters were sent to the plaintiff, to all suppliers and manufacturers and to Goodyear, that the plaintiff was no longer participating in AAAD projects. At this point, by reason of the plaintiff's termination, Motor Age would have obtained the plaintiff's Goodyear stores.

On cross-examination, Almy emphasized that there were no exclusive geographic areas among AAAD members and that there were overlaps in territorial areas among many of the members including Central California, Dallas-Fort Worth, Birmingham, Chattanooga, Orlando, Albany, Newark and Pittsburgh.

After the first evaluations of the members' Parts Plus programs on March 16, 1987, Almy noted that the plaintiff had made little progress and its management's commitment to the program was questioned. Among the six problem companies to be further observed was the plaintiff. In the second evaluation by the Standards **[**32]** **[*1494]** Committee on November 10-11, 1987, the plaintiff's Parts Plus program continued to rate poorly. In fact, the plaintiff had not even prepared an annual Parts Plus program.

The Standards Committee determined that satisfactory progress had not been made by the plaintiff and a delegation was requested to visit the plaintiff. If there was no improvement, the Standards Committee discussed a recommendation to the Executive Committee for possible termination. No new positive information was ascertained by the delegation and the matter of plaintiff's termination was referred to the Executive Committee. The Executive Committee met on May 23, 1989. The Executive Committee decided to table the question of the plaintiff's termination and to obtain additional information from Matlock, Almy and the AAAD staff.

Thereafter the "fact finding" trip described above was made by Matlock and Carl Molin of the plaintiff's Parts Plus jobbers resulting in an unfavorable report on June 12, 1989. Following this trip, Joe Matlock submitted a report to the Executive Committee and the Standards Committee dated June 7, 1989 and June 12, 1989 (*see* Defendant AAAD Exhibit O), including the following findings:

> **[**33]** "Neither Carl nor I saw or heard anything during our investigation of AESC's Brooklyn-Queens jobbers to indicate that satisfactory progress is being made here with Parts Plus no matter who's at fault.
> The conclusion to be drawn here is that other NY warehouses have been effective, but AESC has experienced four years of failure to achieve Parts Plus objectives in their market."

All the evidence concerning the plaintiff's commitment to the Parts Plus program was not unfavorable. In his evaluation of May 31, 1988, Almy wrote that he believed the plaintiff was dedicated to the Parts Plus program and able to make it work. On October 4, 1988, Hunsaker reported to the Standards Committee that the plaintiff was recommitted and has developed a program. By the end of the second quarter of 1989, the plaintiff had six new jobbers. At the time of its termination, the plaintiff had a total of seven Parts Plus jobbers, all in New York City, of a potential 1,000 jobbers and had sent out 28,000 flyers in an attempt to obtain additional jobbers.

In addition to the plaintiff, the membership of another member, General Auto Parts Distributors of San Francisco, was terminated in April of 1989. However, **[**34]** this firm was in the process of either going out of business or reorganizing so that the termination was really a "formality". The plaintiff was the only member terminated solely because of a lack of commitment to the Parts Plus program.

PAUL LEHR was one of the two significant witnesses in this case. His testimony on direct examination consists of two different segments. Initially, on direct, Lehr was confident, responsive and believable. Then after he was shown certain "surprise" documents, his composure changed and his testimony became evasive and less credible.

Lehr has been in the automotive aftermarket industry since 1975 and is the President of the defendant Motor Age, Inc., a privately held New Jersey corporation incorporated in October 1980. He prides himself as being a "hands-on" Chief Executive Officer. He and his family jointly own 60% of the Motor Age shares. The defendant Motor Age East, Inc. ("Motor Age East"), was a New York corporation which was a subsidiary of Motor Age, being 80% owned by Motor Age. Motor Age East was merged with Motor Age in June 1989 and is no longer in existence.

Lehr first learned of the defendant Association in 1977 and had contact with it **[**35]** at that time, and, in particular, he discussed some matters with Joe Matlock. In the late 1970s, Lehr was a Vice President of a warehouse distributor known as Parts Group, which filed for Chapter 11 in 1980. Lehr was asked to stay on to oversee the orderly liquidation of the four companies constituting the Parts Group. In October 1980 he formed a new corporation called Motor Age, Inc. and made a successful offer for the assets of the four bankrupt **[*1495]** corporations. He operated Motor Age from its old facility in Hackensack, New Jersey until 1985 when he moved to its present location in Bogota, New Jersey.

Lehr testified that his next contact with AAAD was in the Fall of 1986 when he contacted Matlock and Almy about his possible purchase of Forshay-Gabriel and whether he could then become a member of AAAD. This date of contact between Lehr and Matlock in the Fall of 1986 is significant because it was following this period that plaintiff's Parts Plus problems became a growing concern of AAAD, leading to the plaintiff's ultimate termination.

In January of 1987, Motor Age decided not to purchase Forshay-Gabriel. Eight months later, in July-August 1987, Matlock, Almy and Paul Kachapis, Chairman **[**36]** of the AAAD Executive Committee, visited him. He was given a "sales pitch" to join AAAD. Lehr was told that the New York metropolitan area was the largest market in the United States and that there was room for an additional member, such as Motor Age. He was asked to visit MRI and obtain additional data on AAAD.

In this early testimony by Lehr he stated unequivocally that the AAAD representatives made it very clear that the Goodyear company-owned stores in the Motor Age territory were already allocated to other members and that this arrangement would not be changed. In other words, Lehr clearly testified that in July-August 1987 he was told that if Motor Age became a member, it would not be able to service any of the Goodyear company-owned stores already allocated to the members in his geographical area, including, of course, the plaintiff. In sum, he testified that he was told and knew that if he became a member of AAAD, the Goodyear company-owned stores would remain with the existing members:

> "Q Was there any discussion with respect to the potential of Motor Age becoming a supplier to Goodyear stores in connection with prospective AAAD membership?
>
> A Yes. They made it very clear **[**37]** in the conversation that the Goodyear stores were already assigned to -- in the territory I serviced, and the Goodyear stores were assigned to four, maybe five distributors depending again upon how you define the market place.
> Actually, in terms where I was distributing there were five other members who serviced Goodyear and they made it very clear in no case would any existing supply arrangement between an AAAD member and Goodyear store be modified or changed by virtue if I was to become a member.
> * * * *
> Q Was it always very clear it was unavailable to Motor Age and would not be taken from any of the then members of AAAD servicing Goodyear?
> A It was always clear there would be no changing in the existing supply match up were Motor Age to become a member. It was not available."

Motor Age decided to apply for membership in AAAD in November 1987 and, in January 1988, became a member. In September 1989, Lehr became a member of the Executive Committee. Other officers of Motor Age are also presently taking an active role in various committees of AAAD.

After admission to membership, Motor Age converted seventy-one or seventy-two jobbers to the Parts Plus program. However, by early 1989, **[**38]** its Parts Plus jobbers were reduced in number to fifty-five to sixty. (Plaintiff's Exhibit 31 shows fifty such jobbers for Motor Age as of September 1989.) Of these Parts Plus jobbers, however, only six were in the five boroughs of the City of New York, further evidence that New York City is a difficult market for the Parts Plus program.

According to Lehr, the first discussion with a representative of AAAD concerning the acquisition by Motor Age of Goodyear company-owned stores was in May 1989 in a telephone call from Almy:

> "Q There came a time as you described when you received word from Mr. Almy in approximately May of 1989 regarding the potential of Motor Age servicing Goodyear, is that correct?
>
> **[*1496]** A You asked me when was the first time I had a conversation with anyone regarding Goodyear. I said it was a phone call form Mr. Almy in May 1989, that's correct."

At that time, in May 1989, Almy called him with regard to "contingent planning", namely, *if* the plaintiff's membership was terminated would he be interested in servicing the Goodyear company-owned stores and if so, when could he do so. Not surprisingly, Lehr answered "Yes", and that he could do so within thirty to sixty **[**39]** days. In response, Almy said, "Okay, do nothing now, the matter is still under review".

In the summer of 1989, Lehr decided to solicit the independent non-company owned Goodyear stores, which were "fair game" for any member.

According to Lehr, the next Goodyear discussion was at a dinner with Almy in July 1989 when he asked Almy "whether there was anything new on the plaintiff's situation" and Almy said, "No, the matter was still under review".

Lehr testified, with specificity, that when he returned from a Phoenix AAAD meeting on September 26 or 27, 1989 he made a decision to take active steps to take over the plaintiff's Goodyear stores.

On November 16, 1989, the Executive Committee voted to terminate plaintiff's membership. Lehr was not present at this vote. Lehr testified that at that time, he knew for the first time that Motor Age would get the plaintiff's Goodyear stores. Motor Age was poised and ready to serve the plaintiff's Goodyear accounts as of December 17, 1989.

In answer to several pointed questions raised by the plaintiff's trial counsel, Lehr denied that he had any copies or printouts of the plaintiff's GASCs (Goodyear customers) prior to November 1989. In addition, **[**40]** Lehr unequivocally denied that Joe Matlock sent him copies of the plaintiff's sales data prior to 1989.

"Q Did you have that specific information with respect to the plaintiff's GASCs?

A The plaintiff was listed right on the list along with every one else.

Q Did you have that information?

A Not in my possession but I certainly seen it.

Q You had no copies or printouts of it?

A The first time I got a listing in detail of the plaintiff's GASCs I believe was in November or December of 1989 when I was visited by staff.

I don't recall getting the plaintiff's detailed information previously.

Q Is it -- and isn't it a fact that prior to the time you even applied to AAAD Joe Matlock sent you copies of information and data pertaining to plaintiff's sales to its GASCs?

A *Joe Matlock did not send me information on the plaintiff's GASC sale*.

Q Isn't it a fact prior to the time you applied for AAAD membership Joe Matlock promised that Motor Age can have the plaintiff's GASCs if it joined AAAD?

A Absolutely not.

Q Prior to the date you applied Joe Matlock sent you a list what the GASCs were an [sic] information on the plaintiff's sale to its GASC which included monthly **[**41]** sales, annual sales, inventory, turnover terms and other information?

A I had that information on Forshay-Gabriel not on Automotive Electric" (emphasis supplied).

At this point in the trial, from a forceful, confident and persuasive witness, Lehr's posture changed and direct evidence of "bad faith" entered the case, tangibly, for the first time:

"Q Let me show you a document and I ask if this is your signature here?

A This is not my signature, no.

Q Is this?

A Yes, that is.

Q Is this Motor Age stationery?

A Yes.

MR. FRANK: I have a copy for you, counsel.

(Whereupon, there was a pause in the proceedings.)

Q Is that your signature?

A Yes.

[*1497] Q Is that your note, sir?

A This is mine. This is my signature. This is not my signature.

Q This is your signature at a location on this page?

A Yes.

THE COURT: Referring to the right side of the page?

THE WITNESS: Yes.

Q It is on Motor Age letterhead?

A Inter-office stationery.

Q Your signature is below all the typed language on that document, is it not?

A To the right and below.

MR. FRANK: I would move this item into evidence.

THE COURT: Show it to counsel.

MR. FRANK: They have copies now.

MR. GRIMM: *Your Honor, **[**42]** from my point of view I have not seen this document before*. I think it is appropriate to lay a foundation. All he's done is identified his name on one page" (emphasis supplied).

The document shown to Lehr by plaintiff's trial counsel, is the most crucial piece of evidence in this case, and, it was apparent to the Court that Lehr was surprised to see it in the possession of the plaintiff's counsel. Plaintiff's Exhibit 38 is the significant document. The first sheet in Plaintiff's Exhibit 38 is a document entitled "Inter-Office Memo" dated September 10, 1987. The memo includes a typewritten portion and a handwritten part in the right upper border. The typewritten portion is reproduced in its entirety, as follows:

"INTER-OFFICE MEMO

TO: AO FROM: PPL

CD

SUBJECT: AAAD Info DATE: September 10, 1987

Attached is data on Goodyear business that Joe promised us. It appears that his 'guess' at Auto Electric's volume was too high, although the Forshay numbers were correct. In total, the Goodyear volume is about $ 5 1/2 million per year -- still not too shabby.

Paul (handwritten)

[43]** MOTOR

AGE"

On the upper right-hand side of this memo from "Paul", obviously from Paul Lehr, dated September 10, 1987, appears the following handwritten note:

"SB - Start 'AAAD' file in my credenza near All Pro file. P."

Plaintiff's Exhibit 38 also includes a AAAD FAX lead sheet, dated September 8, 1987, which is precisely reproduced, as follows:

"FROM AAAD 9. 8.1987 16:15

AA

AD

ASSOCIATION OF AUTOMOTIVE AFTERMARKET DISTRIBUTORS

(AAAD)

FAX NUMBER 901-278-2228

LEAD SHEET

DATE: 9-8-87

TO: PAUL LEHR

FROM: JOE MATLOCK

TRANSMITTED BY: AE

NO. OF PAGES (INCLUDING THIS PAGE): 5

COMMENTS:_"

Attached to the FAX lead sheet of September 8, 1987 are four pages of figures, including a detailed breakdown of the plaintiff's "Goodyear sales/inventory analysis" for its fourteen Goodyear locations. These figures include the number and amounts of sales and inventory turnover **[**44]** for each of the plaintiff's fourteen Goodyear stores. Another sheet faxed to Lehr lists the "Stores served by Auto Elec." and gives the store number and the location of each store.

The Court takes note of the words by Lehr in the "inter-office memo" of September 10, 1987. "Attached is data on Goodyear business that Joe promised us" and, referring to the Goodyear stores of both the plaintiff and Forshay-Gabriel, "In total, the Goodyear volume is about $ 5 1/2 million per year -- still not too shabby."

To compound Lehr's credibility problem, after having been shown the document containing his handwriting, he denied ever seeing the document:

"MR. FRANK: I will proceed further.

Q Have you seen this document before?

A No.

Q You've never seen this document?

[*1498] A I don't recall seeing it.

Q Have you seen this second page before?

A No, I have not seen the second page.

* * * *

Q Your signature on that addressed with a little note addressed to S B. Is that Sharon, your secretary?

A Yes.

Q Did you write a note: Start AAAD file in my credenza near All Pro file and start this note on that is --

A What is written above is my handwriting.

Q Is your handwriting put on the sheet before **[**45]** or after the typed or printed matter?

A It would appear it was put after it was typed. But I don't recall writing it on this document. It is not my handwriting, it is not signed by me as to the memorandum, but the note on the upper right-hand corner is my handwriting.

Q Isn't it a fact that by this document you boasted to your employees regarding the GASC business that Motor Age was going to get from Forshay-Gabriel and Automotive Electric?

A I didn't write this memorandum so I didn't do the boasting. I say this is my handwriting over here. I did not write the memorandum."

These documents furnish clear and convincing evidence that AAAD sent the confidential Goodyear business of the plaintiff to Motor Age on September 8, 1987 and that Lehr was under the impression, at that time, that Motor Age was, in some manner, to be given the plaintiff's Goodyear accounts. These documents and Lehr's testimony prior to and subsequent to viewing the documents constitute evidence of "bad faith" on the part of both defendants.

On the stand, Lehr unequivocally denied that there was any agreement between Motor Age and AAAD for Motor Age to become a member and take over the plaintiff's Goodyear **[**46]** accounts. Lehr further denied that he ever boasted to his employees that such an agreement existed.

At the conclusion of his direct examination, the testimony of Paul Lehr was interrupted and the plaintiff produced the second crucial witness, one TEDDY GARFINKLE, who was employed by Motor Age for five years between August 1983 and November 1988. After two years Garfinkle was appointed the sales manager of Motor Age.

In 1987 he had conversations with Lehr about Motor Age taking over the Forshay-Gabriel business, and, in particular, its Goodyear stores, because of the high profit margin of the Goodyear business. Garfinkle testified that he had no conversations with Lehr concerning the plaintiff prior to Motor Age joining AAAD. However, Garfinkle testified that, after Motor Age became a member of AAAD, Paul Lehr told him about a "deal" in which Motor Age would obtain the Goodyear business from Forshay-Gabriel and the plaintiff, as follows:

"Q What did Mr. Lehr say?

A Paul told me he made a deal, it was not on paper, but that eventually we would be getting the Goodyear business that was now owned by Forshay Gabriel and Auto Electric.
Q Would you know the full name?

A Auto Electric **[**47]** Service Corp.
* * * *
Q Did Mr. Lehr say it was made before or after joining?
A Made before joining.
Q Would you please tell me as much as you can about what he said that the deal was?
A In relation to getting the Goodyear business, okay, the only thing I was told we were promised we would get the Goodyear business."
* * * *
Q Were you under some impression, without saying what it was?
A Yes.
Q What was the basis of your having this impression?
A I was told by Paul that we did have a secret deal with AAAD.

[*1499] Q Please continue with your spring conversation?
A Paul told me AAAD's legal department recommended at that time it wouldn't be a good idea for them to give Motor Age a program. They were waiting to build a case, I guess, against Automotive Electric for poor performance or whatever the standards of AAAD are."

When Garfinkle asked Lehr for an opportunity for him to familiarize himself with the deal, Lehr handed him a file called his "Goodyear file". He personally received these documents from Lehr in the Spring of 1988. In the "Goodyear file" was Plaintiff's Exhibit 38 including the 1987 "inter-office memo" and the financial data on the plaintiff's Goodyear stores.

[48]** "Q Did Mr. Lehr at any time give or show you any documents pertaining to Motor Age and Goodyear business?
A Yes.
Q When did he do so?
A I was also anxious and I asked if I can familiarize myself with the Goodyear program knowing we were supposed to get this deal and at that point he gave me a file which he called his Goodyear file.
Q When was that?
A That was the spring of '88.
Q Did Mr. Lehr give you some documents?
A Yes.
Q What did he refer -- what did he refer to those document as?
A As his Goodyear file.
Q Did you receive those documents?
A Yes.
Q From whom -- what person did you receive the document from?
A From Paul.
Q Now, let me show you what has been marked Plaintiff's Exhibit 38 for identification and please take a moment to look at that and all pages of it.
(Whereupon, there was a pause in the proceedings.)
A I have looked.
Q Do you recognize this document?
A Yes.
Q What do you recognize it to be?
A This is a document that was part of the Goodyear file given to me by Paul."

Plaintiff's Exhibit 41, found in the Motor Age "Goodyear file" is dated November 30, 1986 and apparently constitutes a detailed description of the automotive **[**49]** parts inventory statistics of the plaintiff Automotive Electric Service Corp. The document contains the monthly sales of the plaintiff.

Garfinkle further testified that he was responsible for converting the Motor Age All Pro jobbers to Parts Plus jobbers and for signing up new Parts Plus jobbers. From January 18, 1988 to October 1988 only one All Pro jobber converted to a Parts Plus jobber. Based on his fifteen years of experience in the automotive aftermarket industry, Garfinkle was of the opinion that the Parts Plus program was a "very hard sell" in urban areas, and it was not a real benefit to jobbers in New York City. This evidence supports the plaintiff's contention that New York City is a difficult area to obtain Parts Plus jobbers.

Garfinkle met the Judelsons in about December 1989, and voluntarily disclosed the documentary evidence (Plaintiff's Exhibits 38 through 41) to them about one month later. Questioned on cross-examination by trial counsel for Motor Age, Garfinkle stated that he resigned from Motor Age when his commissions on two occasions were reduced. An argument with Lehr ensued and he stated that Lehr humiliated him in front of the other salesmen. Obviously, his **[**50]** resignation under these circumstances engendered anger on his part toward Lehr and Motor Age. When offered certain benefits by Lehr on condition that he return all papers, he candidly admitted that he accepted the benefits but surreptitiously kept certain documents and ultimately showed them to a competitor of Motor Age. Garfinkle further conceded that he had a minor business relationship with the plaintiff, involving approximately $ 15,000 in sales.

On cross-examination by counsel for Motor Age, further details surfaced about the alleged "secret agreement" between Lehr and AAAD. In particular Garfield related the substance of a conversation with Lehr **[*1500]** in March-April 1987. At that time Lehr told him he had a secret deal with AAAD to get the Goodyear business. Lehr stated that he no longer needed to purchase Forshay-Gabriel and could put up his own warehouse for Goodyear stores and run Forshay-Gabriel out of business. Lehr further stated that Garfinkle would operate the warehouse for Goodyear business. The plan was for Garfinkle to work one day a week on his old accounts and the other four days on the Goodyear stores.

Garfinkle resigned his position with Motor Age in October 1988; he **[**51]** was not discharged. The cross-examination of Garfinkle did not result in any contradictions or discrepancies. He stuck to his testimony that Lehr had discussed a "secret deal" with him and gave the general terms of the deal. The Court credits the testimony of Garfinkle.

After the completion of Garfinkle's testimony, Paul Lehr resumed the stand. Under "cross-examination" by his own attorney, he reviewed his education (MBAs in finance and accounting) and past employment. Since Motor Age was incorporated in 1980 its sales increased markedly from four million in 1981, fifteen million in 1984, forty million in 1987 to fifty-two million in 1989. He stated that his initial negotiations with Matlock took place in the Fall of 1986 and solely related to the prospective purchase of Forshay-Gabriel. The prospective Forshay-Gabriel purchase negotiations ended just prior to Christmas 1986, and, according to Lehr, that ended his contact with AAAD. Lehr testified that new discussions began in July 1987, when he discussed membership in AAAD with Matlock, Almy and Kachapis. Lehr then admitted that he discussed the Goodyear business at that time and suggested reallocation of the Goodyear business pro **[**52]** rata based on sales. Lehr testified that Matlock laughed at him and said there was no precedent for reassigning Goodyear company-owned stores to incoming members. Then Lehr requested an equal one-third division between the plaintiff, Forshay-Gabriel and Motor Age. He said Matlock was not persuaded but would being the matter before the Executive Committee. It was at this point, according to Lehr, that Matlock agreed to send him the Goodyear financial figures concerning the stores of the plaintiff and Forshay-Gabriel.

The Court notes that in his original testimony, prior to the appearance of Plaintiff's Exhibit 38 and Garfinkle, Lehr testified unequivocally that the AAAD representative made it clear that the Goodyear stores would remain with the old members and that he could not have any of the Goodyear company-owned stores. In his prior testimony, Lehr stated that the first discussions concerning a possible Motor Age acquisition of the plaintiff's Goodyear stores was in May 1989. After seeing Plaintiff's Exhibit 38 and hearing Garfinkle, Lehr moved up those conversations to July 1987, almost two years earlier. This change in dates is significant. If a 1987 secret agreement did in fact **[**53]** exist between AAAD and Motor Age, and Lehr was being considered to take over plaintiff's Goodyear stores, AAAD had two years to "build a case" against the plaintiff.

The Court further notes that on direct examination nothing was mentioned by Lehr about his receipt of the financial data on plaintiff's Goodyear stores or of the "AAAD file" kept in his credenza. Also, on direct examination, Lehr testified that he didn't recall ever seeing Plaintiff's Exhibit 38 or that it was given to Motor Age prior to its membership in AAAD. This testimony was not true, as Lehr later conceded.

In any event, Lehr ultimately conceded that Matlock did send him the plaintiff's Goodyear data and that the handwritten portion of the "inter-office memo" of September 10, 1987 was his. Lehr also conceded that he gave Garfinkle his "Goodyear file" for several months in 1988. He stated, however, that after Garfinkle returned the file, it did not include Plaintiff's Exhibit 38.

Lehr testified on cross-examination by his counsel, that Matlock called him in September-October 1987 and said that the Executive Committee would not agree to his request for reassignment of the Goodyear **[*1501]** company-owned stores. This was quite **[**54]** a variance from his original testimony that no discussion of the Goodyear stores took place until May 1989, almost two years later.

Getting to the crucial issue, on cross examination, Lehr denied that there was any understanding or agreement between Motor Age and AAAD that Motor Age could get the plaintiff's Goodyear company-owned stores or to cause plaintiff's membership to be terminated and that he never told Garfinkle of such a deal. He further stated that any discussions about Goodyear stores related to the independent stores and not to the company-owned stores. (The Court notes that the figures in Plaintiff's Exhibit 38 concern the plaintiff's Goodyear company-owned stores and not Goodyear independent stores.)

As to Ted Garfinkle's testimony regarding a secret deal to acquire the plaintiff's Goodyear stores, Lehr stated that in January, 1987 he told Garfinkle that he was interested in buying Forshay-Gabriel because of its Goodyear stores. The Goodyear company-owned stores are what attracted Lehr to Forshay-Gabriel.

The Court also notes that while Lehr testified that he asked for only one-third of the 5.5 million dollar Goodyear business, he circulated an inter-office memo on **[**55]** September 10, 1987 referring to the entire volume of "about $ 5 1/2 million per year -- still not too shabby". There was no reference in this memo of only a one-third share. The clear import was that -- in some manner -- Motor Age was to obtain the entire 5 1/2 million dollar Goodyear business then held by both Forshay-Gabriel and the plaintiff. The means by which Motor Age would obtain the plaintiff's Goodyear business is less clear. As to the Forshay-Gabriel Goodyear accounts; they would be purchased. As to the Automotive Electric Goodyear business; no mention was made at that time as to the manner of acquisition. Ultimately, fortuitously, the plaintiff's membership in AAAD was terminated and its Goodyear business given to Motor Age. Thus, Motor Age's expectations with regard to the plaintiff's Goodyear business, as indicated in its inter-office memorandum of September 10, 1987, came true.

At this point, the plaintiff Automotive Electric Service Corporation rested.

The Defendants' Case:

ALAN HUNSAKER was formerly employed by MRI since 1983 and has been employed since January 1990 as Director of Marketing for AAAD. While with MRI one of his responsibilities was to implement the **[**56]** AAAD Parts Plus program. Hunsaker assisted the plaintiff in developing a Parts Plus program. He started with plaintiff in October 1985 with a "kickoff" program in which the plaintiff signed up fifteen jobbers within the first two weeks. From these first fifteen jobbers, the plaintiff let the Parts Plus program slide until they were down to very few jobbers. Then the program was slightly rejuvenated in 1989 when the plaintiff added six jobbers.

The progress of the plaintiff in the Parts Plus program is traced by the various service reports filed by Hunsaker. The service report of January 29, 1986 indicated that greater member commitment was required. Hunsaker testified that in 1986 the plaintiff failed to deliver the elements of the Parts Plus program he had worked out for them. In Hunsaker's January 19, 1987 service report he stated that "the commitment of the warehouse began to erode".

Alan Hunsaker testified in detail to a chronological history of failure on the part of the plaintiff to implement a viable Parts Plus program. He stated that the plaintiff put its Parts Plus program "on hold" in June 1987. Further, he stated that plaintiff delivered no Parts Plus program in 1988. However, **[**57]** in September 1988 a program was finally put together for 1988/1989 which Hunsaker felt would be acceptable, if implemented. The program provided for an initial four Parts Plus jobbers and ten to twelve members by the end of 1989. Instead of increasing their Parts Plus jobbers by December 1988, the members fell from four to three. In sum, Hunsaker was of the opinion that the plaintiff lacked commitment to the Parts Plus program and didn't deliver what it promised.

[*1502] During cross-examination, Hunsaker conceded that in 1988, the plaintiff erected a Parts Plus sign at its warehouse and placed Parts Plus signs on its trucks. Also as of October 1988, the plaintiff's telephone was answered "Auto - Parts Plus". Further, in the MRI memorandum dated October 4, 1988, Hunsaker rendered a more favorable report as to the plaintiff's Parts Plus efforts, as follows:

> "Opinion
>
> I feel that Automotive Electric has recommitted to the delivery to the Part Plus program and has developed a program which it will be possible for them to deliver. Areas where problems occurred previously have been addressed and specific individuals designated as responsible for seeing that those are remedied. The target set **[**58]** by Automotive Electric of the initial four Parts Plus members and targeting a total of ten to twelve by the end of '89 is, in my estimation, a realistic and controllable number.
>
> * * * *
>
> Also worth noting is the fact that as I was waiting to see the Judelson's and noticed that the phone was being answered as Automotive Electric Parts Plus. Automotive has also identified their invoices, statements, credit memos, etc. (see attached) which both Parts Plus and Trust logos."

In actuality, by June 1989, the plaintiff had acquired six new jobbers in addition to the one old one and had accomplished half of its target of ten to twelve jobbers with additional time available to the end of 1989. Further, in the April 7, 1989 MRI "Standards Committee Update", Hunsaker stated that the plaintiff, "Has met the guidelines as set forth by the Standards Committee, to a point". One month later, notwithstanding this favorable report by the person directly supervising the plaintiff's Parts Plus program, the Standards Committee recommended plaintiff's termination.

MARK DARNELL MULLER was the President and Chief Executive Officer of Muller Warehouse, Inc. a AAAD member since 1979, operating in the Dallas-Fort **[**59]** Worth area. His firm has approximately fifty-three Parts Plus jobbers. He is a member of the Standards Committee and the Executive Committee.

In the fall of 1987 the Standards Committee focused on five members who were deficient in meeting the standards of the Parts Plus program, including the plaintiff. On-site meetings were scheduled and Muller visited the plaintiff and two other deficient members. Even though the plaintiff was asked to send a representative to the next meeting of the Standards Committee, the plaintiff failed to do so. While one of the five firms went out of business, two of the firms made progress, while the plaintiff and Forshay-Gabriel failed to do so.

In the Spring of 1989, the Standards Committee decided that if the plaintiff did not show more progress it would recommend termination. It was Muller's opinion that after five years and no viable Parts Plus program, it was proper to terminate the plaintiff. Muller conceded, however, that Forshay-Gabriel had no Parts Plus program and was not terminated. Further, he testified that the only visit by AAAD's attorney was to the plaintiff.

PAUL KACHAPIS, the Chairman of the Executive Committee of AAAD, was the final **[**60]** defense witness. He is employed by Alden Warehouse, a AAAD member located in Somerset, Massachusetts. Alden has about forty-eight Parts Plus jobbers. He voted to terminate the plaintiff in order to "raise the standards" of AAAD.

In February 1987, Matlock told him that Motor Age wanted Goodyear business. Kachapis told Matlock that none was available. Also, he stated that he personally told Lehr on three or four occasions that no Goodyear stores were available.

Of importance to this determination, Kachapis testified that the Goodyear company-owned store data was confidential, not available in the industry and would not be divulged to non-members. The Court wonders why then, was the confidential financial data of the plaintiff's Goodyear stores sent to Lehr in September 1987, prior to his becoming a member? Specifically asked **[*1503]** whether he authorized Matlock to give Lehr the financial information concerning the Goodyear stores, prior to Motor Age's membership, Kachapis answered "No". Although Kachapis later said if he was asked he wouldn't have stopped Matlock from supplying this information, the Court does not credit this response.

Both defendants rested.

In rebuttal, the plaintiff produced **[**61]** ALFRED SCHUTTINGER, an employee of the plaintiff for thirty years, an outside salesman and the plaintiff's Parts Plus manager. Schuttinger told the Executive Committee that when Matlock took part in the investigation of plaintiff's jobbers in 1989, he called on the wrong accounts. Also, at the Executive Committee meeting on November 16, 1989, Schuttinger produced letters from the plaintiff's five new Parts Plus jobbers and no Executive Committee member asked to see the letters.

Schuttinger was of the opinion that it was very difficult to sell the Parts Plus program in the New York City area and despite this handicap, the plaintiff signed up six new Parts Plus jobbers in the first six months of 1989. He conceded, however, that the plaintiff had no Parts Plus jobbers in Nassau, Suffolk or Westchester.

All sides rested.

Additional Findings:

1. At the outset, the Court finds that the plaintiff has failed to establish any overall plan by AAAD and the larger members to squeeze out smaller members.

2. The plaintiff had no viable Parts Plus program in 1987 and 1988. In fact, the plaintiff's Parts Plus program was "on hold" from the summer of 1987 to the fall of 1988.

3. New York City **[**62]** is a difficult area to obtain Parts Plus jobbers.

4. At least by September 8, 1987, the defendant Motor Age by Paul Lehr, its President, and the defendant AAAD by Joe Matlock, its Executive Vice-President and authorized soliciting representative, entered into an oral agreement, intended to be secret, by the terms of which, in substance, Matlock promised Motor Age that if it became a member, it would obtain the Goodyear company-owned stores then serviced by the plaintiff. As a part of this agreement there was also discussion of the means by which Motor Age would get the plaintiff's Goodyear accounts, including the possible termination of the plaintiff for failing to commit to a viable Parts Plus program.

5. The Court finds the said secret agreement to permit Motor Age to take over plaintiff's Goodyear business was made before Motor Age became a member of AAAD and the prospect of obtaining the plaintiff's Goodyear business was a substantial factor in inducing Motor Age to enter AAAD.

6. On or about September 8, 1987, the same day that Joe Matlock sent Lehr the confidential financial data on the plaintiff's Goodyear business, the defendant Motor Age sent its "profile" to AAAD, preparatory **[**63]** to applying for membership.

7. At or about or shortly after the date of the Motor Age memorandum of September 10, 1987 (Plaintiff's Exhibit 38), the defendant Motor Age applied for admission to AAAD.

8. In a meeting with Marvin Almy in November, 1987, Richard Judelson inquired as to the status of Motor Age and Almy said no discussions were going on. The Court finds that, contrary to such assertions by Almy, discussions must have been going on, since a ballot and "application" was sent out by Almy on November 18, 1987 including a profile from Motor Age dated September 8, 1987.

9. The first Motor Age ballot was mailed on November 18, 1987, and it said that the Dun & Bradstreet report for Motor Age was favorable and the report was on file in the office (important because of the bankruptcy history of the predecessor of Motor Age). In fact, the Dun & Bradstreet report was dated December 11, 1987, three weeks later. Further Almy was aware that Motor Age's predecessor had been in bankruptcy in the late 1970s but did not report that fact to the membership **[*1504]** when he recommended the admission of Motor Age.

10. Evidence of misrepresentation is demonstrated in the applications for membership from **[**64]** Motor Age. The November 18, 1987 "application" (Plaintiff's Exhibit 10) includes the following representation:

> "Existing national account business would remain with the current members who are serving Goodyear."

This was a fraudulent misrepresentation since, prior to that time, Lehr and Matlock entered into a secret agreement for Motor Age to take over the plaintiff's Goodyear accounts.

11. The Motor Age application states:

> "Goodyear (or other national account) considerations -- None."

This was a fraudulent misrepresentation since, prior to that time, Lehr had made a secret agreement with Matlock to obtain the plaintiff's Goodyear accounts.

12. The Court finds that there were no "irregularities" in the balloting for Motor Age membership which would require vacating its membership in AAAD.

The Court finds that the election of Motor Age to membership in AAAD was proper, valid and substantially complied with the by-law requirements.

13. The Court finds that the plaintiff had adequate notice and opportunity to be heard at the November 16, 1989 Executive Committee meeting at which time a vote to terminate the plaintiff was passed. Therefore, there was no violation of procedural due **[**65]** process with regard to the plaintiff's termination.

14. Despite Forshay-Gabriel not having any Parts Plus program in place, AAAD never terminated or even threatened to terminate its membership.

DISCUSSION

The plaintiff's complaint sets forth six causes of action against both AAAD and Motor Age, all of which arise out of the termination of the plaintiff's membership. The six causes of action include: (1) breach of fiduciary duty; (2) breach of AAAD by-laws; (3) breach of the Goodyear Agreement; (4) wrongful interference with contractual relations; (5) wrongful interference with prospective business opportunities; and, (6) violation of the "laws of the United States of America and the State of New York". The plaintiff seeks damages, permanent injunctive relief and attorney's fees.

Preliminarily, the Court notes that jurisdiction based on diversity is proper, since each of the parties are citizens of different states and the matter in controversy exceeds the sum or value of $ 50,000 (*see* *28 U.S.C. § 1332*).

At the outset, the Court dismisses the plaintiff's claims for monetary relief as a matter of law. First, by reason of the initial TRO and the subsequent interim or temporary **[**66]** injunction, the plaintiff has remained a member of AAAD during the pendency of the trial and to the present time. The plaintiff has continued to service its Goodyear stores as a AAAD member and, as a result, has not suffered any monetary damages.

Although there may have been discussion at the close of the trial concerning the postponement of proof of damages, the Court now rules that there could not be any monetary damages arising from the "bad faith" involved in the secret agreement between AAAD and Motor Age. Significantly in this regard, the plaintiff has, at all times, retained its membership in AAAD and continued to serve Goodyear without interruption.

When asked by the Court what monetary damages the plaintiff is claiming, the plaintiff's counsel raised only the following issues: 1) the AAAD cancellation of the plaintiff's John Deere contract; 2) inclusion of Motor Age in AAAD;

3) additional discounts made to Motor Age and not the plaintiff; 4) AAAD steering jobber leads to Motor Age rather than the plaintiff; and, 5) attorney fees.

The Court finds that none of these alleged theories of damages are viable. In fact, counsel for the plaintiff conceded that there are no damages **[**67]** in the event that the Court finds that the plaintiff would be entitled **[*1505]** only to an injunction directing reinstatement of its membership, as follows:

> "MR. FRANK: Under your Honor's hypothetical -- I would submit that, under those limits, you had circumstances we would not be entitled to damages, other than an injunction for restoration, and of course the plaintiff would ask at that time for an affirmative prohibition against any type of retaliatory action."

The Court also rejects the plaintiff's claim for attorney's fees. It is well settled that ***HN1***[] absent an agreement, statute or court rule, under our present judicial system, under the "American Rule" such attorney's fees are not available (*see* *Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 492, 548 N.E.2d 903, 904, 549 N.Y.S.2d 365, 366* [1989]). The plaintiff has not provided the Court with any such agreement or statute, nor has the Court independently been able to find any authority justifying such an award under these circumstances (*cf.* *Lewis v. S. L. & E., Inc., 629 F.2d 764, 773* [2d Cir. 1980] [district court erred in entering award of attorney's fees absent agreement or statute]).

Accordingly, assuming that the **[**68]** plaintiff is successful on the merits of any cause of action, the only relief properly available at this time is reinstatement as a member of AAAD pursuant to the terms of a permanent injunction. Specifically, as to injunctive relief, the plaintiff seeks: (1) reinstatement as a member of AAAD; and, (2) termination of Motor Age's membership. The Court now turns to the applicable substantive law underlying the causes of action in the complaint to determine whether the plaintiff has established any of the six causes, and if so, whether an injunction should issue.

For the reasons that follow, the Court finds that the plaintiff has succeeded on the merits of the second cause of action, namely, breach of the AAAD by-laws. As to the remaining five causes of action, the Court finds that they are either without merit as a matter of law, or that the plaintiff has failed to sustain its burden of proof.

Accordingly, the five causes of action that are dismissed are initially reviewed, followed by a discussion of the second cause of action and the applicable standard for a permanent injunction.

1. Breach of Fiduciary Duty.

With respect to the first cause of action, the parties agree, and **[**69]** the Court finds, that Illinois, rather than New York law applies (*see* *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621, 77 L. Ed. 2d 46, 103 S. Ct. 2591, 2597* [1983]; *Treco, Inc. v. Land of Lincoln Sav. & Loan, 749 F.2d 374, 377* [7th Cir. 1984]). In any event, as to the elements of a fiduciary relationship, the laws of the two states apparently do not differ (*see* *Sound Video Unlimited, Inc. v. Video Shack Inc., 700 F. Supp. 127, 133* [S.D.N.Y. 1988]).

HN2[] Under the law of Illinois, a fiduciary relationship arises between parties when one reposes trust and confidence in another, and the latter achieves substantial dominance and influence over the actions of the former (*see* *In re Estate of Shedrick, 122 Ill. App. 3d 861, 866, 462 N.E.2d 581, 585, 78 Ill. Dec. 462* [1st Dist. 1984]). The existence of such a relationship "must be shown by proof so clear and convincing, so strong, unequivocal and unmistaken that it leads to only one conclusion" (*Carey Elec. Contracting, Inc. v. First Nat'l Bank, 74 Ill. App. 3d 233, 237-38, 392 N.E.2d 759, 763, 30 Ill. Dec. 104, 108* [2d Dist. 1979]; *see also* *Maguire v. Holcomb, 169 Ill. App. 3d 238, 242, 523 N.E.2d 688, 690, 119 Ill. Dec. 932* [5th Dist.], *appeal denied*, *122 Ill. 2d 577, 530 N.E.2d* ***[**70]*** *248* [1988]). Whether there is a fiduciary relationship is a question of fact, not law (*see* *BA Mortgage & Int'l Realty Corp. v. American Nat'l Bank & Trust Co., 706 F. Supp. 1364, 1372* [N.D. Ill. 1989], *citing* *In re Estate of Wernick, 151 Ill. App. 3d 234, 244, 502 N.E.2d 1146, 1153, 104 Ill. Dec. 486* [1st Dist. 1986], *aff'd in part, rev'd in part*, *127 Ill. 2d 61, 535 N.E.2d 876, 129 Ill. Dec. 111* [1989]).

The Court finds here that the plaintiff failed to establish by clear and convincing **[*1506]** proof that there exists a fiduciary relationship between AAAD and its members. The plaintiff concededly entered AAAD for business purposes. No proof was adduced at trial showing that the plaintiff may have been a "servient" party in the relationship or that AAAD exercised substantial dominion or control over the plaintiff's day-to-day business operations or decision-making. Rather, the proof shows that the plaintiff independently made all necessary business decisions and did not "blindly obey" AAAD's orders.

HN3[] A slightly dominant business position by one of the parties over the other does not, by itself, operate to convert an ordinary business relationship or contractual arrangement into a confidential or fiduciary relationship **[**71]** (*see* *Carey Elec. Contracting, Inc. v. First Nat'l Bank, supra, 74 Ill. App. 3d at p. 238, 392 N.E.2d at pp. 763-64* ["[a] confidential relationship only goes to a situation where one party, because of some close relationship, relies very heavily on the judgment of the other"]).

The Court finds that AAAD did not dominate or influence the actions of the plaintiff. The only actions AAAD had "control" over, if any, are those which the plaintiff obligated itself contractually to do, namely, comply with the membership standards, which included participation and development in the Parts Plus marketing program. Clearly, under such circumstances, there is an interdependence between the parties, rather than one achieving substantial dominance, influence or control over the other. The plaintiff has shown nothing more than the usual contractual business relationship between a trade organization and a member, not a confidential or fiduciary relationship (*see* *Seaboard Seed Co. v. Bemis Co., Inc. 632 F. Supp. 1133, 1136-37* [N.D. Ill. 1986]).

The plaintiff has failed to prove that there was a fiduciary relationship between AAAD and the plaintiff-member. Instead, the proof submitted at trial **[**72]** amply supports a finding that the plaintiff was acting as an independent party in its business relations with AAAD (*see* *Zeilenga v. Stelle Indus., Inc., 52 Ill. App. 3d 753, 757, 367 N.E.2d 1347, 1350, 10 Ill. Dec. 581, 584* [4th Dist. 1977] [no fiduciary relationship existed between not-for-profit manufacturing concern and its members, since plaintiff acted as independent rather than servient party]).

Accordingly, the first cause of action is dismissed.

2. Breach of the Goodyear Contract.

The third cause of action in the plaintiff's complaint alleges that AAAD breached the April 22, 1985 contract, regarding the servicing of Goodyear company-owned stores in the New York-metropolitan area. [1] The parties agree that as to this cause of action, pursuant to the Goodyear Agreement, Tennessee law governs.

HN4[] Under the law of Tennessee, the essential elements of a breach of contract claim are the existence of a contract, breach of that contract, and injuries or damages proximately **[**73]** caused by the breach (*see* *Tedder v. Raskin, 728 S.W.2d 343, 351* [Tenn. App. 1987]). Since there is no dispute as to the existence of a valid contract, the issues are whether there has been a breach, and if so, whether the plaintiff has suffered damages.

Without reaching the issue of whether there has been a breach, the Court finds that there are no damages, since the plaintiff was permitted to continue to service the Goodyear account. Accordingly, the third cause of action is dismissed.

3. Interference with Contractual Rights/Benefits.

The plaintiff's fourth cause of action, to be determined under New York law as the parties have agreed, [2] is based upon a theory of wrongful or tortious interference **[*1507]** with contractual relations. Although not clear from the plaintiff's submissions, the Court agrees with the defendants' interpretation that the claim stems from either the by-laws and/or the Goodyear Agreement.

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[1] Motor Age is not a party to the April 22, 1985 contract.

[2] The plaintiff alleges that New York law applies to the fourth cause of action. The defendants contend that New York and Illinois law are the same, and therefore it does not matter which state's law is applied by the Court. Accordingly, the Court applies the law of the forum state.

[74]** ***HN5***[] Under New York law, it is well settled that in order to prevail on a claim for tortious interference with contractual relations, the following elements must be proven: (1) the existence of a valid contract between the plaintiff and a third party; (2) knowledge of the contract on the part of the defendant; (3) the defendant's intentional procurement of a breach of the contract by the third party; and, (4) resultant damages caused by the breach (*see* *Universal City Studios, Inc. v. Nintendo Co., Ltd., 797 F.2d 70, 75* [2d Cir.], *cert. denied*, *479 U.S. 987, 93 L. Ed. 2d 581, 107 S. Ct. 578* [1986]; *Pennsylvania Engineering Corp v. Islip Resource Recovery Agency, 710 F. Supp. 456, 464* [E.D.N.Y. 1989]; *Israel v. Wood Dolson Co., 1 N.Y.2d 116, 120, 134 N.E.2d 97, 99, 151 N.Y.S.2d 1, 5* [1956]; *Giannelli v. St. Vincent's Hosp., 160 A.D.2d 227, 232, 553 N.Y.S.2d 677, 681* [1st Dep't 1990]; *see generally* 2 F. Harper, F. James & O. Gray, *The Law of Torts* §§ 6.5-6.10 [2d ed. 1986] [overview of elements and application of the tort]).

A cause of action for tortious interference with contractual relations does not lie, however, if the contract is one terminable at will (*see Kaminski v. United Parcel Serv.,* ***[**75]*** *120 A.D.2d 409, 501 N.Y.S.2d 871* [1st Dep't 1986]), unless there is a showing of fraud, misrepresentation, unfair conduct or other wrongful acts (*see* *Koeppel v. Schroder, 122 A.D.2d 780, 505 N.Y.S.2d 666* [2d Dep't 1986]; *see generally* 72 N.Y. Jur. 2d, *Interference* § 9 [1988 & Supp. 1990] [collecting cases]).

As to the defendant AAAD, it is a party to both the by-laws and the Goodyear Agreement. Accordingly, the claim against AAAD is legally insufficient and fails as a matter of law, since it is well settled that such ***HN6***[] a claim may not be asserted against a party to the contract (*see* *Payne v. Kathryn Beich & Nestle, 697 F. Supp. 612, 615-16* [E.D.N.Y. 1988] [citing cases]). Put simply, AAAD cannot be held liable for inducing the breach of a contract to which it is a party (*see* *Murphy v. Capone, 120 A.D.2d 714, 502 N.Y.S.2d 511* [2d Dep't 1986]; *see also* *Koret, Inc. v. Christian Dior, S.A., 161 A.D.2d 156, 554 N.Y.S.2d 867, 869* [1st Dep't 1990] ["it is well established that only a stranger to a contract, such as a third party, can be held liable for tortious interference with a contract"]).

The claim against Motor Age, however, requires a more detailed analysis **[**76]** with respect to both the Goodyear Agreement and the by-laws.

As to the Goodyear Agreement, as noted above, the Court finds that this was a valid contract between the plaintiff and AAAD, and that it is properly characterized as a contract terminable at will upon notice. Although generally such an at-will contract would bar recovery under this theory (*see Kaminski v. United Parcel Serv., supra*), the Court finds here that as a result of the wrongful acts and bad faith of Motor Age, there was attempt to intentionally interfere or procure the breach of the contract so as to bring even an at-will contract within the ambit of this tort (*compare* *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 406 N.E.2d 445, 428 N.Y.S.2d 628* [1980] [absent proof of wrongful conduct, no liability exists for the alleged interference with exclusive distributorship contract terminable at will]). In sum, the Court finds that Motor Age was aware of the existence of this contract and that Motor Age intentionally attempted to procure its breach.

Notwithstanding the proof of the first three essential elements, the plaintiff's claim must be dismissed for failure to prove the fourth, namely, **[**77]** that the plaintiff has sustained damages as a result of the interference. ***HN7***[] The absence of damages, of course, is fatal to the success of this cause of action (*see Litton Indus., Inc. v. Lehman Bros.* *Kuhn Loeb Inc., 709 F. Supp. 438, 453* [S.D.N.Y. 1989]). As stated by the New York Court of Appeals in *Simon v. Noma Elec. Corp., 293 N.Y. 171, 177, 56 N.E.2d 537, 539 (1944)*, "to recover on the cause of action for wrongful interference . . . plaintiff had to prove damages resulting **[*1508]** from that interference". To the extent that the plaintiff relies on the attorney's fees it incurred as part of the damages, the Court finds no applicable exception to the general rule that attorney's fees are not recoverable as damages (*see, e.g.,* *Goldberg v. Mallinckrodt, 792 F.2d 305, 309* [2d Cir. 1986] [exception applies where party's wrongdoing exposes another to litigation with a third party, in which first party is not involved]).

Accordingly, the fourth cause of action is dismissed as against both defendants.

4. Interference With Business Opportunities.

The fifth cause of action alleges prospective interference with the plaintiff's business opportunities. The parties agree that New **[**78]** York law governs.

The Second Circuit summarized this tort ***HN8***[] under New York law, as follows:

> "In order to prevail on a claim of tortious interference with prospective economic advantage, a plaintiff is required to show 'the defendant's interference with business relations existing between the plaintiff and a third party, *either* with the sole purpose of harming the plaintiff *or* by means that are "dishonest, unfair or in any other way improper."' . . . If the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct."

PPX Enters., Inc. v. Audiofidelity Enters., Inc., 818 F.2d 266, 269 (2d Cir. 1987) (citations omitted); *see also Lerman v. Medical Assocs. of Woodhull, P.C., 160 A.D.2d 838, 554 N.Y.S.2d 272, 273* (2d Dep't 1990).

Additionally, the tort "usually involves interference with a 'business relationship not amounting to a contract'" (*PPX Enters., Inc. v. Audiofidelity Enters., Inc., supra, 818 F.2d at p. 270*, *quoting* 32 N.Y. Jur., *Interference* § 40 [1963]), and involves either a severance or injury to that relationship (*see* ***[**79]*** *id*.).

Presumably, the relationship which is the subject of the claim as against AAAD, is between the plaintiff and Goodyear. This relationship arises solely out of the contract between the plaintiff and AAAD over the servicing of the Goodyear account. The plaintiff has not adduced proof showing that Motor Age's "sole motive was to inflict injury". However, the plaintiff has established that Motor Age employed unfair, and improper means to interfere with plaintiff's advantageous business relationship with Goodyear (*see e.g. Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 838* [2d Cir. 1980]). Nevertheless, similar to the discussion concerning the fourth cause of action sounding in wrongful interference with contract, the plaintiff failed to establish any damages.

Based upon the foregoing, the fifth cause of action is dismissed.

5. Violation of "The Laws of The United States and The State of New York".

The plaintiff's all-encompassing sixth cause of action includes allegations of unlawful and unfair trade practices in violation of both federal and state law. Although not specified in the plaintiff's papers or during the course of trial until the last day, it **[**80]** appears that the claim is based on the alleged violations of *section 1* of the Sherman Act, *15 U.S.C. § 1*, and New York's counterpart ***antitrust law***, the Donnelly Act, *N.Y. Gen. Bus. Law § 340*.

Not only has the plaintiff failed to allege the requisite elements of this cause of action under either the Sherman Act or the Donnelly Act, but the evidence adduced by the plaintiff does not establish any price fixing whatsoever.

As to the Sherman Act, nothing was offered to prove the existence of a conspiracy among competitors to fix prices with respect to certain goods (*see International Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 793* [2d Cir. 1987]). ***HN9***[] The proof required to sustain such a claim includes, *inter alia*, evidence of a relevant product and geographic market, reduction of that market by reason of the conspiracy, and an anti-competitive effect outweighing any pro-competitive benefits (*see International Distribution Centers,* ***[*1509]*** *Inc. v. Walsh Trucking Co., supra, 812 F.2d at pp. 793-95*; *see also United States Football League v. National Football League, 842 F.2d 1335, 1360* [2d Cir. 1988]). No such proof was offered here.

To the extent that the plaintiff **[**81]** attempts to state a claim under the Donnelly Act, it is also deficient, since *section 340* of the Donnelly Act is patterned after *section 1* of the Sherman Act and its application is governed under the same standards as those developed under the Sherman Act (*see, e.g., Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 98 n. 4* [2d Cir. 1987], *citing Hsing Chow v. Union Central Life Ins. Co., 457 F. Supp. 1303, 1308* [E.D.N.Y. 1978]). Accordingly, the plaintiff's failure to establish a Sherman Act violation is equally fatal to its Donnelly Act claim. Therefore, the sixth cause of action is dismissed in its entirety.

6. Breach of AAAD By-laws.

Having dismissed five of the six causes of action, the Court now turns to the remaining cause of action; namely, the second cause alleging breach of the membership by-laws by AAAD. As to this cause of action, the parties dispute what state law governs. The plaintiff contends that Illinois law applies; AAAD argues that New York law should control. Thus, a threshold consideration for the Court is to determine this conflicts of law issue.

HN10[] A federal district court adjudicating a diversity action is required to apply **[**82]** the choice of law rules of the forum state within which the court sits (*see* *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020, 1021* [1941]). However, the Court need only apply choice of law rules where there is a "true conflict" (*see* *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 838, 86 L. Ed. 2d 628, 658, 105 S. Ct. 2965, 2988* [1985]; *Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255, 263-64* [2d Cir. 1984]). Otherwise, the controversy is considered a "neutral" case, and the Court is free to apply the law of either one of the states involved.

It appears that ***HN11***[] both New York and Illinois law are substantially the same with respect to the key issue of the standard of judicial review with regard to the termination or expulsion of members from a private association (*compare* *Purpura v. Richmond County Country Club, 114 A.D.2d 460, 461, 494 N.Y.S.2d 371, 372* [2d Dep't 1985] [New York law], *with* *Dannhausen v. Business Publications Audit of Circulation, Inc., 797 F.2d 548, 551* [7th Cir. 1986] [Illinois law]). In both states, the courts are generally reluctant to take a role in dispute resolution between a private, voluntary association and its members, with, however, certain limited exceptions such as bad faith, **[**83]** bias or other wrongful conduct. Applying the law of either state, the Court finds that the plaintiff has sustained its difficult burden proving "bad faith" on the part of AAAD and Motor Age so as to establish its cause of action for breach of the by-laws and that judicial intervention is warranted.

The by-laws of AAAD are an agreement between the association and its members. On this subject, in *Bowman v. Armour & Co., 17 Ill.2d 43, , 160 N.E.2d 753, 755 (1959)* the Supreme Court of Illinois held as follows:

> "The charter or articles of incorporation of an Illinois corporation is a contract of a three-fold nature. It is operative as between the corporation and the State and it creates rights and duties as between the corporation and its shareholders, as well as between the shareholders themselves" (citations omitted).

The threshold consideration for the Court's determination is whether the Court may properly intervene at all in this dispute. Traditionally, the courts relied upon contract, property or tort theories to justify judicial intervention in disputes arising between a private association and its members (*see generally Developments in the Law -- Judicial Control* ***[**84]*** *of Actions of Private Associations*, 76 Harv. L. Rev. 983, 998-1005 [1963] [summarizing various theories]). This approach has changed in favor of judicial review of an association's disciplinary proceedings only where a member's **[*1510]** expulsion, technically in strict compliance with the association's by-laws, is influenced by bias, prejudice or lack of good faith (*see Illinois Supreme Court Review -- Judicial Reinstatement of Members Expelled From Voluntary Associations*, 67 Nw. U.L. Rev. 659, 746-54 [1972]; *see generally* Annotation, *Propriety of Suspension or Expulsion From Trade Association*, 72 A.L.R.3d 422 [1976 & Supp. 1990] [collecting cases]).

HN12[] Under Illinois law, "[a] court will not review the actions of a voluntary association with respect to its members; when a court does intervene, however, the scope of its intervention is exceedingly narrow" (*National Ass'n of Sporting Goods Wholesalers, Inc. v. F.T.L. Mktg. Corp., 779 F.2d 1281, 1285* [7th Cir. 1985]). Accordingly, "judicial inquiry into the affairs of private, voluntary associations is limited to the question of whether an association has treated its members in accord with its by-laws and *rudimentary due process*" **[**85]** (*Dannhausen v. Business Publications, supra, 797 F.2d at p. 551* [emphasis supplied]; *see also* *Virgin v. American College of Surgeons, 42 Ill. App. 2d 352, 368-71, 192 N.E.2d 414, 422-24* [1st Dist. 1963]), such as when the association acts in "bad faith" in expelling a member (*see Illinois Supreme Court Review-Judicial Reinstatement, supra*, 67 Nw. U.L. Rev. at p. 754).

In the leading case of *Van Daele v. Vinci, 51 Ill. 2d 389, 282 N.E.2d 728*, *cert. denied sub nom. Certified Grocers of Ill., Inc. v. Sparkle Feed Center, Inc., 409 U.S. 1007, 34 L. Ed. 2d 300, 93 S. Ct. 438 (1972)*, the Supreme Court of Illinois granted injunctive relief in the form of reinstatement to a member of a voluntary retail grocers' association, where the association's disciplinary procedure deprived the member of basic, "rudimentary" due process because of the existence of bias and bad faith accompanying the termination process. In *Van Daele*, the applicable rule was clearly set forth, as follows:

"We agree 'that ***HN13***[] a private organization, particularly if tinged with public stature or purpose, may not expel or discipline a member adversely affecting substantial property, contract or other economic rights, except as a result of **[**86]** fair proceedings which may be provided for in organization by-laws, carried forward in an atmosphere of good faith and fair play' (*McCune v. Wilson (Fla. 1970), 237 So. 2d 169, 173*.)" (*Id. at p. 394, 282 N.E.2d at p. 732*).

The Court reasoned in *Van Daele* that blind adherence to the association's by-laws with respect to the disciplinary procedure does not insulate the actions from judicial review if the action itself was undertaken in bad faith. This decision directly followed the established principle that courts should not intervene in the affairs of private associations, absent a showing of bad faith or bias.

New York law is in accord with the *Van Daele* holding to the extent that mere procedural compliance with the disciplinary process does not insulate the termination process from judicial scrutiny if it was tainted by bad faith or wrongful, corrupt conduct (*see, e.g., Purpura v. Richmond County Country Club, supra, 114 A.D.2d at p. 461, 494 N.Y.S.2d at p. 372* [1985] ["judicial review . . . is unavailable, unless the reason for expulsion is . . . so trivial as to suggest that the action of the association was capricious or corrupt, or unless the association failed **[**87]** to administer its own rules fairly"]).

The rule in New York was also stated in *Matter of Northrup v. Kirwan, 88 Misc. 2d 255, 263, 387 N.Y.S.2d 221, 227 (Sup. Ct. Monroe County 1976)*, *aff'd*, *57 A.D.2d 699, 395 N.Y.S.2d 389* (4th Dep't 1977), as follows:

"we are met at the threshold with the prevailing rule that ***HN14***[] courts are reluctant to interfere with the internal affairs of an association as long as its procedures do not violate standards of fair dealing" (citations omitted).

Moreover, as set forth in *Bernstein v. The Players, 120 Misc. 2d 998, 1001, 466 N.Y.S.2d 897, 899 (Sup. Ct. N.Y. County 1983)*, in reviewing the decision of a voluntary association under the standard set forth above, the Court may not consider **[*1511]** whether it would have arrived at the same conclusion. Rather such decision is subject to review, only as follows:

"Where a private club or association hears and decides an internal dispute, the courts will not review the determination unless there is a showing that the hearing was in bad faith or basically unfair or that the determination was fraudulent or was utterly unsupported by any evidence. *Madden v. Atkins, 4 N.Y.2d 283, 297, 174 N.Y.S.2d 633, 151 N.E.2d 73* ***[**88]*** *(1958)* (concurring opinion of Judge Desmond); *People ex rel. Johnson v. N.Y. Produce Exchange, 149 N.Y. 401, 44 N.E. 84 (1896)*; *see also Fittipaldi v. Legassie, 7 A.D.2d 521, 525, 184 N.Y.S.2d 226 (4th Dept. 1959)*."

As set forth in great detail above, the evidence presented at trial shows that as to the procedural requirements of the disciplinary process itself, AAAD properly terminated the plaintiff's membership. With the assistance of MRI, the plaintiff developed an initial Parts Plus program in October of 1985. As of 1986, it is apparent that the plaintiff's Parts Plus program declined. Significantly, in March of 1987, the plaintiff's efforts and overall performance was considered deficient under the AAAD membership standards, of which the plaintiff was well aware. By the close of 1987, AAAD effectively had no Parts Plus program in place. In May of 1988, representatives of the Standards Committee met with the plaintiff, as well as other members who were performing poorly, to discuss the implementation of an effective program for the upcoming year. The proof shows that little progress followed.

By early 1989, the plaintiff had three Parts Plus jobbers, one less **[**89]** than it had in May of 1988. Concededly, however, the New York metropolitan area is a very competitive and difficult marketplace to implement such a program. However, in 1989, a real effort was made by the plaintiff to improve its Parts Plus program. It placed the Parts Plus logo on its building, its trucks and in its phone answering. Significantly, it increased its Parts Plus jobbers by six in mid-1989.

The Standards Committee thereafter made a recommendation to the Executive Committee to consider termination of the plaintiff's membership. A hearing was conducted, at which time the plaintiff claimed it complied with the Parts

Plus program, and in fact invited AAAD to do an independent evaluation. AAAD accepted the invitation and conducted an investigation of the plaintiff's jobbers, which, according to the report prepared by Joe Matlock, revealed that they were unaware of the plaintiff's participation in the Parts Plus program. The Executive Committee thereafter held a second hearing on November 16, 1989, at which time, allegedly because of the plaintiff's failure to commit to AAAD programs, the Association decided that it was in the best interests of the Association that the plaintiff's **[**90]** membership be terminated.

In reviewing the plaintiff's Parts Plus performance in 1989, acting with reasonable prudence, the AAAD Executive Committee could have decided that the plaintiff did demonstrate "a sincere interest to be a bona fide, active and participating member of the Association" and have voted to retain the plaintiff as a member. On the other hand, taking into consideration the plaintiff's poor performance during the years 1987 and 1988, notwithstanding the improvement in 1989, the same reasonably prudent Executive Committee could have decided that the plaintiff still lacked the commitment referred to in the by-laws, and voted to expel the plaintiff. In the absence of bad faith, this Court would not have interfered with either decision.

In sum, the Court finds that AAAD substantially complied with the disciplinary or termination process set forth in the Association's by-laws. Absent bad faith or bias, this Court would not intervene in the dispute or review the determination of AAAD to expel the plaintiff. Any technical violation raised by the plaintiff would not, standing alone, warrant judicial intervention. It is the proper policy of the Court to refrain from unnecessarily **[**91]** interfering in the internal affairs of a private, not-for-profit **[*1512]** trade association, which is governed by by-laws.

However, ***HN15***[] where, as here, the disciplinary process is tainted by bad faith, the Court has not only the power but the duty to exercise its equitable powers to intervene at the behest of an expelled member. Even if there is a facially proper basis for the termination of the member, the process is not insulated from judicial scrutiny if it was stained by bad faith.

As set forth above in stark detail, bad faith emerged when a "secret" agreement was reached in 1987 between Motor Age and AAAD to take over the plaintiff's Goodyear accounts. Out of this clandestine and corrupt [3] "meeting of the minds" came the bad faith, which permeated the termination process.

The secret agreement was initially entered into by Paul Lehr on the part of Motor Age and Joe Matlock **[**92]** on the part of AAAD. Joe Matlock was the Executive Vice President of AAAD in charge of soliciting new members and was in a position to bind AAAD. Matlock was subsequently involved in almost every phase of the process that led to the admission of Motor Age and the plaintiff's termination. The initial letter application by Motor Age was sent by Lehr to Matlock (*see* Defendant's Exhibit C). A November 12, 1987 memorandum by Matlock to the members, which was on the same sheet as the ballot, stated the following:

> ". . . it is highly recommended that you vote favorably for the admission of Motor Age as an AAAD member" (Plaintiff's Exhibit 10).

Matlock was a member of the two-person committee that "investigated" plaintiff's Parts Plus program in 1989. Matlock wrote the final June 7, 1989 report which significantly contributed to the vote to expel the plaintiff. The last paragraph of Matlock's report reads as follows:

> "The conclusion to be drawn here is that other NY warehouses have been effective, but AESC has experienced four years of failure to achieve Parts Plus objectives in their market."

The Court notes that Joe Matlock did not testify at this trial. Although Matlock was a key **[**93]** executive of AAAD until he resigned in January 1990, after this litigation commenced, no inference will be taken by the Court by reason of the failure on the part of the plaintiff to prove that Matlock, a retired AAAD employee, was still under the control of AAAD. Nevertheless, it is noted that Matlock never was produced to deny the existence of the secret agreement with Motor Age.

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[3] According to Black's Law Dictionary p. 182 (abridged 5th ed. 1983), the definition of "corrupt" includes: spoiled; tainted; vitiated and morally degenerate.

After the plaintiff's representatives were heard at the Executive Committee meeting on November 16, 1989 and then left the meeting, present when the termination vote was taken were Joe Matlock and Marvin Almy. Matlock not only attended this final Executive Committee meeting at which the vote to expel the plaintiff was taken, but he alone reported the negative results of the recent investigation of the plaintiff's Parts Plus jobbers.

Further, there is evidence in the record that the Legal Department of AAAD was informed of and acquiesced in the secret agreement. Garfinkle testified that:

> "Paul told me AAAD's legal department recommended at that time it wouldn't be a good idea for them to give Motor Age a program. They were waiting to build a case, I guess, against Automotive Electric for poor performance **[**94]** or whatever the standards of AAAD are."

In addition, attorney Johnson, counsel for AAAD personally visited only one of the six firms that were having Parts Plus problems -- the plaintiff.

There is other evidence in the record of preferential treatment accorded to Motor Age at the expense of the plaintiff. Upon admission, Motor Age alone was given a special payment of $ 500 per jobber converted to the Parts Plus program, for a total of $ 42,000 paid by AAAD to Motor Age. Motor Age was permitted to purchase "Trust" labeled products from automotive parts manufacturers Premier and Arc directly **[*1513]** without compelling Premier and Arc to pay GSA discount fees to AAAD. Thus, Motor Age was able to purchase the Premier and Arc products cheaper and could undersell the plaintiff in their competitive territories. This was a special privilege extended to Motor Age, at the plaintiff's expense. Further, notwithstanding its prior order to purchase John Deere cut-price auto parts, plaintiff's order was unilaterally cancelled by AAAD, while Motor Age was permitted to purchase these auto parts at discount, which, again, enabled Motor Age to undersell the plaintiff. In addition, after Motor Age gained membership **[**95]** in AAAD, the leads in the territorial areas shared by Motor Age and the plaintiff, were directed solely to Motor Age.

The bad faith emanating from the secret agreement must have influenced Matlock's actions as he guided the Executive Committee to the ultimate expulsion of the plaintiff.

The documentary evidence consisting of the fax lead sheet from Matlock to Lehr dated September 8, 1987, the Lehr memorandum dated September 10, 1987 commenting on the plaintiff's Goodyear business, and the annexed detailed financial data on the plaintiff's Goodyear stores (Plaintiff's Exhibit 38), coupled with the evasive and contradictory testimony of Paul Lehr and the forthright and believable testimony of Ted Garfinkle, furnishes clear and convincing evidence that there was a secret agreement between AAAD and Motor Age, to bring in Motor Age as a member in order for it to take over the plaintiff's Goodyear business. Given the thrust of the representations by Motor Age in its application promising not to attempt to obtain any such business and the representations by AAAD that it would not tolerate such a takeover, this secret agreement and its sequelae constituted "bad faith" on the part of both **[**96]** defendants.

In sum, at least as to the November 17, 1989 termination, the process was forever tainted; the bad faith so permeated the circumstances leading up to the termination as to deprive the plaintiff of even rudimentary due process. Accordingly, seldom required judicial intervention is appropriate in this case.

HN16[] The plaintiff's success on the merits, however, is only the first step in determining whether the Court in its discretion should grant the drastic relief of a permanent injunction. The governing standard in determining whether to grant the extraordinary equitable relief of a permanent injunction is as follows: First, the plaintiff must have achieved actual success on the merits (*see* *Smithkline Beckman Corp. v. Proctor & Gamble Co., 591 F. Supp. 1229, 1235* [N.D.N.Y. 1984], *aff'd without opn*., *755 F.2d 914* [2d Cir. 1985], *citing* *Sierra Club v. Alexander 484 F. Supp. 455, 471* [N.D.N.Y. 1980]). Second, once having demonstrated success, permanent injunctive relief is only available when a remedy at law would be inadequate to afford complete relief (*see, e.g.,* *New York State NOW v. Terry, 886 F.2d 1339, 1362* [2d Cir. 1989] [must show irreparable harm], **[**97]** *cert. denied*, *495 U.S. 947, 110 S. Ct. 2206, 109 L. Ed. 2d 532* [1990]). Third, the balance of the equities must tip decidedly in favor of the plaintiff (*see* *New York State NOW v. Terry, 704 F. Supp. 1247, 1262* [S. D.N.Y.] [citing cases], *aff'd, but modified on other grounds*, *886 F.2d 1339* [2d Cir. 1989], *cert. denied*, *495 U.S. 947, 110 S. Ct. 2206, 109 L. Ed. 2d 532* [1990]).

Having satisfied the first prong, namely, success on the merits, the next step is to determine whether there exists an adequate remedy at law or whether the plaintiff might suffer irreparable harm absent the issuance of an injunction. To resolve this element, the Court turns to the seminal decision by Judge Friendly in *Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970)* discussing irreparable harm in connection with the attempt by Ford Motor Company to terminate the family run dealership of Semmes Motor, Inc. Although in the context of a preliminary injunction, this Court finds the crisp language of certain passages especially pertinent here, where the factual setting is somewhat similar:

> "Ford's contention that Semmes failed to show irreparable injury from termination **[*1514]** is wholly unpersuasive. Of course, Semmes' past profits would afford **[**98]** a basis for calculating damages for wrongful termination, and no one doubts Ford's ability to respond. But the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award."

See also *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 588 F.2d 24, 29 (2d Cir. 1978)*, *cert. denied*, *440 U.S. 960, 99 S. Ct. 1502, 59 L. Ed. 2d 773 (1979)*.

The Court finds that absent membership in AAAD and the opportunity to service the Goodyear stores, which account for almost one-third of the plaintiff's gross sales, it may have to terminate its business. This is not a case of mere lost profits, but rather the basic existence of a seventy year old business may be threatened. The evidence reveals that in order to prepare to service the substantial Goodyear account, the plaintiff added a night shift, placed a two million dollar mortgage on their warehouse and became involved with a factor with a running balance owed of approximately $ 700,000. Like the plaintiffs in *Semmes*, the Judelsons have a virtually unmeasurable interest in **[**99]** continuing to operate their business and a damage award would, in this Court's view, be inadequate to afford complete relief. In this regard, the Court notes that the remedy of reinstatement by way of an injunction was also found appropriate in *Van Daele*.

As to the balance of hardships, the scale tips decidedly in favor of the plaintiff. There is no question that the "hardship" imposed upon AAAD in keeping the plaintiff as a member is minimal compared to the ruinous financial hardship that would ensue to the plaintiff absent such relief. Accordingly, the Court grants the plaintiff's application for a permanent injunction, based upon it having established the second cause of action.

HN17[] Insofar as fashioning the ultimate remedy, the Court "has a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct" (*Spring Mills, Inc. v. Ultracashmere House, Ltd., 724 F.2d 352, 355* [2d Cir. 1983], *citing* *Seibert v. Sperry Rand Corp., 586 F.2d 949, 951* [2d Cir. 1978]).

In exercising this discretion, the Court frames the terms of the injunction as follows: the defendant AAAD is directed to reinstate the plaintiff as a full member in AAAD, **[**100]** entitled to the same rights and privileges as all other members in good standing. Specifically, AAAD is directed not to interfere with the plaintiff's membership in the association and/or the plaintiff's rights with regard to the Goodyear account, so long as the plaintiff is in full compliance with the provisions of the by-laws and applicable standards set forth by the Standards Committee. In this regard, the performance of the plaintiff for purposes of possible future termination, as with any other member in good standing of AAAD, is to be judged from this day forward.

The complaint is otherwise dismissed as to all of the defendants.

CONCLUSION

For the foregoing reasons, the first, third, fourth, fifth and sixth causes of action are dismissed, as are the plaintiff's claims for damages and attorney's fees. The plaintiff's request to terminate the membership of Motor Age in AAAD is denied. Having succeeded on the merits of the second cause of action, and shown irreparable harm and a balance of the equities in its favor, the plaintiff is granted a permanent injunction as follows: AAAD is directed to reinstate the plaintiff as a full member in good standing as it was prior to the **[**101]** termination on November 17, 1989, entitled to the same rights, privileges and benefits of all other members in good standing who must comply with the by-laws and applicable standards set forth by the Standards Committee. The plaintiff's performance is to be judged from this date forward for purposes of future disciplinary or termination proceedings, if any, and the past activities, actions or performance of **[*1515]** the plaintiff upon which this decision is based, are not to be considered by AAAD.

The Clerk of the Court is directed to enter judgment in favor of the plaintiff on the second cause of action.

SO ORDERED.

Dated: Brooklyn, New York September 28, 1990

Rebel Oil Co. v. Atlantic Richfield Co.

United States District Court for the District of Nevada

September 28, 1990, Decided ; October 1, 1990, Filed

No. CV-S-90-076-PMP (RJJ)

Reporter

133 F.R.D. 41 *; 1990 U.S. Dist. LEXIS 14860 **; 18 Fed. R. Serv. 3d (Callaghan) 983; 1990-2 Trade Cas. (CCH) P69,258

REBEL OIL COMPANY, INC., and Auto Flite Oil Company, Inc., Plaintiffs, v. ATLANTIC RICHFIELD COMPANY, Defendant

Core Terms

discovery, antitrust, pricing, barriers, market power, gasoline, relevant market, predatory, alleges, anti trust law, Clayton Act, Sherman Act, damages

Counsel: **[**1]** William H. Bode, Esq., William Bode & Associates, Washington, District of Colmbia, Donald J. Campbell, Esq., Las Vegas, Nevada for Plaintiff.

Donald C. Smaltz, Esq., Morgan, Lewis & Bockuis, Los Angeles, California, Thomas F. Kummer, Esq., Vargas & Barlett, Las Vegas, Nevada for Defendant.

Judges: Philip M. Pro, United States District Judge.

Opinion by: PRO

Opinion

[*42] ORDER LIMITING DISCOVERY

The Amended Complaint (# 9), filed March 27, 1990, on behalf of Plaintiff Rebel Oil Company, Inc., and Auto Flite Oil Company, Inc. (hereinafter "REBEL") alleges three claims for relief against Defendant Atlantic Richfield Company (hereinafter "ARCO").

REBEL brings this action under Section 4 of the Clayton Act seeking treble damages of at least $ 10,000,000 under three causes of action: Count I -- illegal price discrimination under the Robinson-Patman Act, *15 U.S.C. § 13(a)*; Count II -- illegal price-fixing conspiracy under *Section 1* of the Sherman Act, *15 U.S.C. § 1*; and Count III -- illegal attempted monopolization under *Section 2* of the Sherman Act, *15 U.S.C. § 2*.

REBEL essentially claims that beginning in 1982, ARCO began executing a plan to monopolize the Las Vegas retail discount gasoline market and thereby destroy effective competition **[**2]** from discount marketers like REBEL. REBEL alleges that ARCO schemed to lower its wholesale price of gasoline in Las Vegas below its cost and below its comparable prices in Los Angeles, despite the higher costs of transporting gasoline 250 miles by pipeline from Los Angeles to Las Vegas. REBEL further alleges that ARCO conspired with and coerced its independent dealers to fix the ARCO pump prices at correspondingly below-cost, predatory levels. As a result, alleges REBEL, ARCO's share at the Las Vegas discount gasoline market went from zero to at least an estimated 65% to 80% in less than five years. REBEL alleges that every significant independent discount gasoline marketer in Las Vegas, except REBEL, was put out of business by ARCO's predation.

Extensive discovery requests have been propounded by both parties, and to date, REBEL has produced voluminous documents for inspection by ARCO.

Before the Court for consideration are Defendant ARCO's Motion for a Protective Order Limiting the Scope of Plaintiffs' Discovery (# 24), filed May 29, 1990, and Plaintiffs' Cross-Motion to Compel Discovery from Defendant and for the Entry of a New Scheduling Order (# 26), filed June 13, 1990.

By its **[**3]** Motion for Protective Order, ARCO asks the Court to limit the scope of Plaintiffs' discovery at the outset of this case to the threshold issue which ARCO contends may dispose of the entire action: whether significant entry barriers exist in the Las Vegas gasoline market. ARCO maintains that if REBEL is unable to meet the initial burden of showing that entry barriers exist, all other discovery sought by REBEL would be irrelevant and REBEL's challenge directed to ARCO's low price marketing strategy would fail.

REBEL responds that ARCO's Motion for Protective Order amounts to an effort to block virtually all of the discovery which has been served on it in this action and amounts to an effort to "repeal discovery rules and rewrite ***antitrust law*** for this case."

Clearly the Federal Rules of Civil Procedure empower a district court to control the timing and order of discovery. Rule 26(c) provides in pertinent part that a district court "may make any order which justice requires to protect a party or person **[*43]** from annoyance, embarrassment, oppression, or undue burden or expense, including [an order] . . . . (4) that certain matters not be inquired into, or that the scope of discovery be limited **[**4]** to certain matters." Rule 26(d) allows the Court to issue an Order to control the sequence and timing of discovery "upon motion, for the convenience of the parties and witnesses and in the interests of justice." Rule 26 is a grant of power to impose conditions on discovery in order to prevent abuse of the court's processes, among other things. *Bridge C.A.T. Scan Associates v. Technicare Corp., 710 F.2d 940 (2nd Cir. 1983)*. Where appropriate, a district court may limit a party's discovery as long as the party is able to develop fully its case. *Mid-South Grizzlies v. Nat'l Football League, 550 F. Supp. 558 (E.D. Pa. 1982)*, *aff'd* *720 F.2d 772 (3d Cir. 1983)*, *cert. denied, 467 U.S. 1215, 81 L. Ed. 2d 364, 104 S. Ct. 2657 (1984)*.

Whether the Court should exercise its authority to limit the timing and order of discovery as proposed by ARCO turns upon an application of principles of ***antitrust law*** to the allegations contained in REBEL's Amended Complaint.

The Requirement of "Antitrust Injury"

Section 4 of the Clayton Act, *15 U.S.C. sec. 15*, furnishes the jurisdictional basis for all three private-party antitrust claims advanced in REBEL's Amended Complaint. That statute provides, *inter alia,* that "Any **[**5]** person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ." *15 U.S.C. § 15(a)*. It also provides for treble damages and attorneys fees, creating incentives for private attorneys general. *Id.*

The Supreme Court has repeatedly held that a private party bringing an antitrust suit under Section 4 of the Clayton Act must prove [1] "antitrust injury." *See, e.g., ARCO v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. A plaintiff can show antitrust injury by demonstrating that it suffered an injury that (1) is "of the type the antitrust laws were intended to prevent" and (2) "flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

Recent Supreme Court cases make it clear that the antitrust injury requirement cannot be satisfied without a showing of predatory **[**6]** pricing. *ARCO v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884*

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[1] *See infra,* pp. 44-45.

(1990). The clarity with which this standard can be stated is misleading, however, because the concept of predation defies simple definition. The most commonly accepted indicia of predatory pricing is pricing below cost. What constitutes pricing "below cost" can in itself be a slippery concept. Most courts have adopted a modified Areeda-Turner test at least for the purposes of evaluating Sherman Act cases. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585, n. 8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Transamerica Computer Co. v. IBM, 698 F.2d 1377, 1386 (9th Cir. 1983)*; *ITT Continental Baking Co.,* 3Trade Reg. Rep. para. 22,188 (FTC 1984). Under the Areeda-Turner test, a monopolist, or one with market power, who prices below marginal cost is presumed to engage in predatory pricing. [2]

[7]** Proof of Market Power

Explicit in the Areeda-Turner predation test is a requirement that the plaintiff show the defendant to be a monopolist **[*44]** or one with "market power." Market power exists when (1) a firm has a substantial market share and (2) there are entry barriers in a relevant market. *California v. American Stores, 872 F.2d 837 (9th Cir. 1989)*, *rev'd on other grounds, 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*; *Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360, 363 (9th Cir. 1988)*, *cert. denied, 488 U.S. 870, 102 L. Ed. 2d 149, 109 S. Ct. 180*. Entry barriers are important to the extent that they indicate a company's ability to control prices or exclude competition in the relevant market. *Oahu Gas, 838 F.2d at 366*. The justification behind the entry barriers requirement is that if it is relatively easy for new firms to enter the market, a monopolist will not be able to raise its prices above a competitive level without thereby inviting new competition.

The Supreme Court has recently clarified that even when elements of the substantive antitrust laws are satisfied, a private plaintiff must still satisfy the Clayton Act section 4 requirement of antitrust injury. **[**8]** *ARCO v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*. For instance, in *USA Petroleum,* although plaintiffs had demonstrated a per se violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, they had failed to prove the existence of predatory behavior. In the absence of such proof, summary judgment against them was proper. *Id.*

The Supreme Court explicitly adopted a requirement that all private antitrust plaintiffs demonstrate the existence of predatory behavior in the *USA Petroleum* decision. *Id.* The implicit message in the Supreme Court's decision is that all private antitrust plaintiffs must now demonstrate that defendants have market power. This demonstration entails showing that defendants have a substantial share of the relevant market and that there are entry barriers to that market. After market power is demonstrated, private antitrust plaintiffs must demonstrate the other aspect of predation: pricing below cost.

Standards for Adequacy of Demonstration

What constitutes an "adequate showing" regarding entry barriers in a relevant market is a difficult issue. The Ninth Circuit has established that both market definition and market power are **[**9]** essentially questions of fact appropriate for jury consideration. *Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360, 363 (9th Cir. 1988)*; *Twin City Sportservice v. Charles O. Finley & Co., 676 F.2d 1291, 1299 (9th Cir. 1982)*, *cert. denied, 459 U.S. 1009, 74 L. Ed. 2d 400, 103 S. Ct. 364 (1982)*; *Greyhound Computer Corp. v. International Business Machines Corp., 559 F.2d 488, 496-97 (9th Cir. 1977)*, *cert. denied, 434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 (1978)*. Traditionally, questions of market definition and market power have been raised only in the context of substantive antitrust statutes such as *Section 2* of the Sherman Act.

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[2] Most courts have rejected the hard-to-calculate marginal cost standard and have replaced it with a calculation of reasonably anticipated average variable cost. *See, e.g., Transamerica Computer Co. v. IBM, 698 F.2d at 1386*. The Federal Trade Commission has held that there is a presumption of legality if defendant's prices are above average variable costs. This presumption becomes conclusive if the prices exceed average total costs. *ITT Continental Baking Co.,* 3Trade Reg. Rep. para. 22,188 (FTC 1984). The FTC and others urge capital, executive, and administrative costs, sales expenses, and some elements of promotional expense to be included in the average variable cost computation. Areeda and Turner include only capital costs in their computation.

The Supreme Court has supplied the "antitrust injury" requirement of Section 4 of the Clayton Act. ARCO v. USA Petroleum, 495 U.S. 328, 110 S.Ct 1884, 109 L. Ed. 2d 333 (1990); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). In its interpretation of Section 4 in the context of *USA Petroleum,* the Supreme Court does not clarify whether the "antitrust injury" requirement must be proven as a jurisdictional matter [3] **[**11]** to be decided by the trial court or whether **[*45]** it must be proven during the trial before a jury **[**10]** awards damages. [4]

Obviously, some of the language which supports the interpretation that "antitrust injury" is a requirement to be satisfied before damages are awarded also supports the interpretation that it is a jurisdictional concern: it is axiomatic that if a suit is not allowed to go forward for lack of jurisdiction **[**12]** then the plaintiff will not collect any damages.

A Bifurcated Approach to Discovery

Proving that a defendant has engaged in pricing below cost entails extensive discovery regarding virtually all aspects of a company's business. On the other hand, discovery into relevant markets and entry barriers is a more discrete undertaking. Since under the recent Supreme Court's holding private antitrust plaintiffs such as REBEL must prove the existence of entry barriers and relevant markets, it makes sense for this Court to initially restrict discovery to those topics.

This bifurcated method of conducting discovery includes adequate safeguards to protect the rights of both REBEL and ARCO while greatly streamlining and potentially reducing to cost of the litigation. Burdensome discovery will be eliminated for those cases in which plaintiffs would have no chance of ultimately prevailing.

Conclusion

In focusing on the legitimate needs of the parties to this action for discovery, and in balancing the relative hardships faced by ARCO if the unlimited discovery sought by REBEL is granted as compared to the hardship faced by REBEL if discovery is limited, the Court concludes ARCO's Motion for **[**13]** Protective Order should be granted. ARCO would endure great hardship and expense if it had to comply at this time with the sweeping discovery requests made by REBEL. ARCO would have to present virtually every document in its possession or control regarding its operations in Los Angeles and Las Vegas, including among other things those concerning such broad

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[3] At one point, the Court refers to *Cargill, Inc. v. Monfort of Colorado, Inc.,* stating that "we found that a plaintiff competitor had not shown antitrust injury and thus could not challenge a merger that was assumed to be illegal under § 7 of the Clayton Act . . . ." USA Petroleum, 495 U.S. at 340. Later in that decision, the Court declares, "We have previously recognized that even in cases involving *per se* violations, the right of action under § 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury." Id. at 344 (emphasis in the original). A third time when the Court implies that the antitrust injury must be shown as a jurisdictional concern is where the Court states that it declines to dilute the antitrust injury requirement against vertical, maximum price-fixing schemes, "if such a scheme causes the anticompetitive consequences detailed in *Albrecht,* consumers and the manufacturers' own dealers may bring suit." *Id., referring to* Albrecht v. Herald Co., 390 U.S. 145, 159, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968), *reh'g denied, 390 U.S. 1018, 88 S. Ct. 1258, 20 L. Ed. 2d 169*. Finally, the Court declares that since "respondent's injury . . . . is not 'inextricably intertwined' with the antitrust injury that a dealer would suffer," it "does not militate in favor of permitting respondent to sue on behalf of petitioner's dealers." Id. at 345, *quoting* Blue Shield of Virginia v. McCready, 457 U.S. 465, 484, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982).

[4] "A private plaintiff may not recover damages under § 4 of the Clayton Act merely by showing 'injury causally linked to an illegal presence in the market.'" ARCO v. USA Petroleum, 495 U.S. at 334 (1990), *quoting* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). Likewise, the Court declares, "The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act." Id. at 341. Furthermore, "the antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from an competition-reducing aspect of effect of the defendant's behavior." Id. at 328 (emphasis deleted).

categories of activity as production, transportation and refinement of petroleum products. Additionally, officers and employees of ARCO would be subjected to depositions in these same subject areas. Yet, for the reasons stated above, most of the discovery sought by REBEL from ARCO would prove to be unnecessary unless REBEL can make an adequate showing of market definition and the existence of entry barriers into the Las Vegas retail gasoline market.

IT IS THEREFORE ORDERED that ARCO's Motion for Protective Order Limiting the Scope of Plaintiffs' Discovery (# 24) is granted to the extent that REBEL's discovery of ARCO shall, until further Order of the Court, be limited to the issues of ARCO's share of the relevant retail gasoline market in Las Vegas and to the issue of whether entry barriers exist with respect to that market.

IT IS **[**14]** FURTHER ORDERED that REBEL's Cross-Motion to Compel (# 26) is denied.

DATED: September 28, 1990

Finnegan v. Campeau Corp.

United States Court of Appeals for the Second Circuit

March 15, 1990, Argued ; October 4, 1990, Decided

No. 1005, Docket No. 89-9183

Reporter
915 F.2d 824 *; 1990 U.S. App. LEXIS 17875 **; 1990-2 Trade Cas. (CCH) P69,213; Fed. Sec. L. Rep. (CCH) P95,513

MICHAEL FINNEGAN, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. CAMPEAU CORP., a corporation, R.H. MACY & CO., INC., a corporation and MACY ACQUIRING CORP., a corporation, Defendants-Appellees

Prior History: **[**1]** Appellant, Michael Finnegan, appeals from a judgment of the United States District Court for the Southern District of New York (Haight, J.) entered on October 17, 1989 and reported at *722 F. Supp. 1114*, dismissing his antitrust claim against appellees, R.H. Macy & Co., Inc., Macy Acquiring Corp., and Campeau Corp. pursuant to *Fed. R. Civ. P. 12(b)(6)*.

Disposition: Affirmed.

Core Terms

bidders, anti trust law, Williams Act, bid, regulations, shareholders, stock, disclosure, takeover, Sherman Act, antitrust, tender offer, manipulative, practices, target, rival, target company, fraudulent, implied revocation, securities law, repeal, district court, provisions, contest, damages, cases

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN1[] **Private Actions, Standing**

Under *§ 15* of the Sherman Act, *15 U.S.C.S. § 15*, any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in federal court.

Governments > Legislation > Expiration, Repeal & Suspension

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

HN2[] **Legislation, Expiration, Repeal & Suspension**

Repeal by implication is not favored and not casually to be allowed. Only where there is a plain repugnancy between the antitrust and regulatory provisions will repeal be implied.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Agriculture & Food > General Overview

HN3[] **Legislation, Expiration, Repeal & Suspension**

Repeal by implication may only be found where there is a conflict between the provisions of the antitrust and securities laws.

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Shareholders

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN4[] **Takeovers & Tender Offers, Duties & Liabilities of Shareholders**

The twin aims of the Williams Act, *15 U.S.C.S. §§ 78m(d)-(e)*, *78n(d)-(f)*, are protection of target shareholders and neutrality as between bidders and target companies.

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

HN5[] **Postoffering & Secondary Distributions, Tender Offers**

See *17 C.F.R. § 240.14d-100 (1989)*.

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

HN6[] **Mergers & Acquisitions Law, Takeovers & Tender Offers**

See *15 U.S.C.S. § 78n(d)(2)*.

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Shareholders

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN7[] **Takeovers & Tender Offers, Duties & Liabilities of Shareholders**

Once information regarding an agreement between rival bidders has been revealed in a filing, the target company's shareholders have received the protection Congress and the Securities and Exchange Commission designed for them and there has been compliance with the Williams Act, 15 U.S.C.S. §§ 78m(d)-(e), 78n(d)-(f).

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Securities Law > Postoffering & Secondary Distributions > Tender Offers > Disclosures

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

HN8[] Mergers & Acquisitions Law, Takeovers & Tender Offers

Neither the Williams Act, 15 U.S.C.S. §§ 78m(d)-(e), 78n(d)-(f), nor the Securities and Exchange Commission regulations make a distinction between joint bids made by parties prior to entering a battle for control of the target and those made by parties who are rival bidders at the outset.

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Securities Law > Postoffering & Secondary Distributions > Tender Offers > Disclosures

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

HN9[] Mergers & Acquisitions Law, Takeovers & Tender Offers

The Williams Act, 15 U.S.C.S. §§ 78m(d)-(e), 78n(d)-(f), has language allowing joint bids for target companies and the Securities and Exchange Commission (SEC) promulgates a regulation, regulation 14D-1, 17 C.F.R. §§ 240.14d-1 through 240.14d-101 (1990), that requires disclosure of agreements between bidders. In order for § 14(d) and the accompanying SEC regulation to function as intended, such agreements cannot be subject to suit under the antitrust laws; to permit such a suit would foster a direct conflict between the securities and antitrust laws.

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

HN10[] Mergers & Acquisitions Law, Takeovers & Tender Offers

Among the sections added to the 1934 Act by the Williams Act was § 14(e), 15 U.S.C.S. § 78n(e), which makes it unlawful for any person to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer. Bidders are prohibited under this section from engaging in fraudulent acts involving misrepresentation or nondisclosure, and though the word "manipulation" appears in § 14(e) it has not been viewed as relating to making or withdrawing bids.

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Securities Law > Postoffering & Secondary Distributions > Tender Offers > Disclosures

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

HN11[] **Mergers & Acquisitions Law, Takeovers & Tender Offers**

Because the Securities and Exchange Commission has the power to regulate bidders' agreements under § 14(e), *15 U.S.C.S. § 78n(e)*, and has implicitly authorized them by requiring their disclosure under Schedule 14D-1, *17 C.F.R. §§ 240.14d-1 - 240.14d-101 (1990)*, as part of a takeover battle, to permit an antitrust suit to lie against joint takeover bidders would conflict with the proper functioning of the securities laws.

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

HN12[] **Mergers & Acquisitions Law, Takeovers & Tender Offers**

Allowing antitrust suits to rule out agreements between rival bidders would give target shareholders undue advantage in the takeover context and discourage such activity.

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Judges: Kearse, Cardamone and Mahoney, Circuit Judges.

Opinion by: CARDAMONE

Opinion

[*825] CARDAMONE, Circuit Judge,

Before us is an appeal brought by Michael Finnegan, the representative of disgruntled **[**2]** shareholders of a target company, Federated Department Stores, Inc. (Federated), who alleges that he suffered economic injury actionable under the antitrust laws when R.H. Macy & Co., Inc. (Macy's) and Campeau Corp. (Campeau) -- two rival bidders for a controlling interest in the target company -- entered into a mutually advantageous agreement, effectively reducing the amount of money needed to gain control of Federated.

It is recognized that competition is the touchstone of the antitrust laws, while in the regulated securities industry the emphasis is on requiring full disclosure without otherwise changing the balance in the market for corporate control. Tension and **[*826]** at times conflict exist between these established public policies. That conflict is present in this case. Since we cannot assume that Congress was so muddled that it gave with the right hand of securities regulation that which it then took away with the left hand of ***antitrust law***, this lawsuit may not proceed. Although appellant makes an innovative argument for the application of the antitrust laws -- more suitable for and in fact the topic of a law review article, *see* Rock, *Antitrust and the Market* **[**3]** *for Corporate Control*, *77 Calif. L. Rev. 1365, 1388-90 (1989)* -- those laws have no application to the instant litigation and appellant's redress, if any, must be found under the corporate or securities laws.

BACKGROUND

The allegations of the complaint, which we must accept as true for purposes of reviewing this dismissal under Rule 12(b)(6), are fully set forth in the district court's opinion. *See* Finnegan v. Campeau Corp., 722 F. Supp. 1114 (S.D.N.Y. 1989). We recite only those necessary to our discussion of the issues on appeal. In March 1988 Federated was "put into play," that is, offered for sale to the highest bidder and a battle for its control between Macy's and Campeau began. At first the rival bidders pushed up the price of Federated stock with each submitting a bid one step higher than the other. In April 1988 it dawned on the contestants that constantly raising the price of the target company was economically disadvantageous for them. Consequently, they allegedly reached an understanding under which Macy's agreed to withdraw its latest bid and allow Campeau to acquire Federated. In exchange, Campeau agreed to permit Macy's to purchase **[**4]** two Federated divisions -- I. Magnin and Bullock's Wilshire -- and to pay Macy's $ 60 million to cover its legal and investment banking expenses. The difference between the $ 73.50 a share ultimately paid by Campeau to acquire Federated and Macy's withdrawn bid of $ 75.51 amounted to about $ 172 million. Whether Campeau's purchase was worth the price it had to pay is questionable in light of Campeau's present insolvent condition and Federated's Chapter 11 petition filed in the United States Bankruptcy Court in Cincinnati, Ohio. *See* N.Y.L.J., May 17, 1990, at 7, col. 3.

In his complaint Finnegan charges that the agreement between Macy's and Campeau constitutes a conspiracy in violation of § 1 of the Sherman Act (Act), 15 U.S.C. § 1 (1988). Specifically, he asserts that Macy's and Campeau conspired to "refrain[] from bidding against each other for the purchase of the shares of common stock of Federated in order to supress [sic], . . . and eliminate competition in the market for Federated common stock and to cause the sale of said shares at a price lower than a competitive price." Macy's moved to dismiss Finnegan's complaint under Fed. R. Civ. P. 12(b)(6) **[**5]** and the United States District Court for the Southern District of New York (Haight, J.) granted the motion. *See also Case v. R.H. Macy & Co.*, N.Y.L.J., May 17, 1990, at 25, col. 3 (N.Y. Sup. Ct.) (dismissing claim by Federated shareholders under the state antitrust laws).

In deciding that the present transaction did not involve "trade or commerce" within the ambit of § 1 of the Act the district court relied on Bucher v. Shumway, 452 F. Supp. 1288 (S.D.N.Y. 1978), *aff'd mem.*, *622 F.2d 572* (2d Cir.), *cert. denied*, *449 U.S. 841, 101 S. Ct. 120, 66 L. Ed. 2d 48 (1980)*, and Kalmanovitz v. G. Heileman Brewing Company, 769 F.2d 152 (3d Cir. 1985). *See* 722 F. Supp. at 1116. Following the conclusion that the antitrust laws were inapplicable, it reasoned that applying those laws would be inconsistent with the federal securities laws' regulatory scheme and pointed, as an example, to the limitation of damages under the securities laws to actual damages versus the treble damages available under § 15 of the Sherman Act, as did the court in Schaefer v. First National Bank, 326 F. Supp. 1186, 1192 (N.D. Ill. 1970), **[**6]** *aff'd in pertinent part*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, *425 U.S. 943, 96 S. Ct. 1682, 48 L. Ed. 2d 186 (1976)*. 722 F. Supp. at 1118. Campeau apparently did not move in the district court, though it received the benefit of the dismissal, *see* 722 F. Supp. at 1118, and did not **[*827]** submit briefs or participate in oral argument in our Court in response to Finnegan's appeal from the dismissal of his complaint.

DISCUSSION

As a preliminary matter we note that Finnegan has standing to bring this civil action ***HN1***[] under § 15 of the Sherman Act, 15 U.S.C. § 15 (1988), which provides "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor" in federal court.

A claim analogous to the one at bar was presented in *Bucher*, and dismissal there was affirmed in an unpublished opinion. Appellant urges that we not apply the reasoning of the district court in *Bucher* because his claim is factually distinguishable. In **[**7]** *Bucher* the Signal Companies and Gulf and Western Industries made a joint tender offer for one-third of the outstanding shares of Signal. Suit was brought by shareholders of Signal who alleged that they received a lower price for their shares because Signal and Gulf and Western did not compete against each other for the company and against a third bidder, Dresser Company, but made a joint bid for the company. Presumably the difference between *Bucher* and the present case is that in the former the two bidders, Signal and Gulf and Western, made a joint bid at the outset, while in the case at hand Macy's and Campeau entered the takeover battle as active competitors, and only during the bidding process did they reach agreement on the acquisition of Federated.

I *Applicability of the Sherman Act*

Although we agree with the ultimate conclusion reached in the trial court that the Sherman Act has no application to this case, we reach it for somewhat different reasons. We do not, as did that court, adopt the rationales of *Bucher* and *Kalmanovitz. See* *Finnegan, 722 F. Supp. at 1116*. These courts premised their decisions to dismiss antitrust claims on the theory **[**8]** that the sale of the stock of a single company is not within the meaning of "trade or commerce" under the Sherman Act as that Act was construed in *Apex Hosiery Co. v. Leader, 310 U.S. 469, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)*:

> The end sought [by the Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of *goods and services*, all of which had come to be regarded as a special form of public injury.

Id. at 493 (emphasis supplied). Based upon this language those courts found the Act inapplicable because "a share of stock is not an item of goods." *Bucher, 452 F. Supp. at 1290*; *accord* *Kalmanovitz, 769 F.2d at 156-57*.

We think this isolated statement in *Apex Hosiery* has been misperceived. The Supreme Court did not intend the application of the antitrust laws to be limited to "goods" qua "item of goods." Black's Law Dictionary acknowledges that "goods" is "[a] term of variable content. It may include every species of **[**9]** personal property or it may be given a very restricted meaning." *Black's Law Dictionary* 823 (4th ed. 1968). That the Supreme Court meant the term "goods" to be viewed in the broader sense is evidenced by its holding during the same term as *Apex Hosiery* was decided that the anti-trust laws covered agreements to restrain "the price of a *commodity* in interstate or foreign commerce," *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)* (emphasis supplied), and subsequent Supreme Court decisions have adhered to this broader position, *see, e.g.,* *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)* (per curiam). *See also Black's Law Dictionary* 343 (4th ed. 1968) (defining "commodity" as "any movable or tangible thing that is produced or used as the subject of barter or sale").

The Court also has refused to exempt banks from the antitrust laws simply because they "deal[] in the intangibles of credit and services rather than in the manufacture **[*828]** or sale of tangible commodities." *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 368, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. **[**10]** Following that lead, at least one federal court has applied the antitrust laws to predatory practices involving sales of stock. *See* *Rothberg v. National Banner Corp., 259 F. Supp. 414, 416 (E.D. Pa. 1966)*; *see also* *Strobl v. New York Mercantile Exch., 768 F.2d 22* (2d Cir.) (applying the antitrust laws to commodities futures contracts for Maine potatoes), *cert. denied*, *474 U.S. 1006, 88 L. Ed. 2d 459, 106 S. Ct. 527 (1985)*. Embracing this expansive view of the scope of "in restraint of trade or commerce" within *§ 1* of the Sherman Act, we decline to adopt the district court's narrow holding that the antitrust laws are inapplicable because what is being sold are shares of stock of Federated. *Cf.* *Bozant v. Bank of New York, 156 F.2d 787, 789-90 (2d Cir. 1946)* (L. Hand, J.) (finding that bank was a producer of "goods," i.e. stocks, bonds and commercial paper). That there are few antitrust cases involving sales of stock comports with our belief that such claims are properly brought under the securities and not antitrust laws; it does not establish that the antitrust laws are inapplicable because stock may not be categorized **[**11]** as a manufactured good.

II *Implied Revocation of the Antitrust Laws*

As an alternative ground for dismissing the instant complaint, the district court held that the Sherman Act's application to cases of market manipulation was impliedly revoked by more specific provisions in the Williams Act. It adopted the Seventh Circuit's conclusion in *Schaefer*, 509 F.2d at 1299-1300, that there is an irreconcilable inconsistency between the single damages provided by the securities laws and the treble damages provided by the antitrust laws. We explicitly rejected the *Schaefer* rationale in *Strobl, 768 F.2d at 30*, and accordingly need not revisit this ground for implicit revocation of the antitrust laws.

A. *Doctrine of Implied Revocation*

Nevertheless, the doctrine of implied revocation provides a firm foundation for the district court's dismissal. Although the Williams Act, 82 Stat. 454, *codified at 15 U.S.C. §§ 78m(d)-(e)* & *78n(d)-(f) (1988)*, does not foreclose all antitrust claims arising in the context of market manipulation, we hold that the Sherman Act is implicitly repealed in the circumstances of the case at **[**12]** bar.

The three seminal Supreme Court cases, *Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)*, *Gordon v. New York Stock Exchange, 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975)*, and *United States v. National Association of Securities Dealers, 422 U.S. 694, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975)*, establish the rules for implied revocation of the antitrust laws in the field of securities regulation. To begin with, ***HN2***[] repeal "by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon, 422 U.S. at 682* (quoting *Philadelphia Nat'l Bank, 374 U.S. at 350-51*). The holdings in *Silver* and *Gordon* teach that antitrust laws do not come into play when they would prohibit an action that a regulatory scheme permits. *Strobl, 768 F.2d at 27*.

In *Silver*, the New York Stock Exchange denied its members' request for direct telephone **[**13]** connections to nonmembers located in Texas. Because the Securities and Exchange Commission (SEC) lacked authority to supervise the Stock Exchange's rules on direct telephone connections the antitrust laws were not revoked by implication. The holding in *Silver* was expressly limited to cases involving Stock Exchange rules and orders that lay outside the jurisdiction of the SEC, leaving open the possibility of implied revocation in other contexts. *See 373 U.S. at 358 n.12, 360*. In *Gordon*, the Court examined the other context expressly left open in *Silver*. There the New York Stock Exchange ruling in dispute -- establishing a system of fixed commission rates -- was subject to regulation and approval by the SEC under § 19(b) (9) of the Securities Exchange **[*829]** Act of 1934 (1934 Act), *15 U.S.C. § 78s(b) (1988)*. *422 U.S. at 685*. In *Gordon* the elements of implied repeal were met because allowing the antitrust laws to play a role in the area of commission rates would unduly interfere with the operation of the securities law.

Further, in *National Association of Securities Dealers*, implicit revocation with respect **[**14]** to certain sales and distribution restrictions used in marketing securities of mutual funds was found. The Supreme Court held that because the SEC had the power to authorize such restrictions on sales and distributions under § 22(f) of the Investment Company Act of 1940, *15 U.S.C. § 80a-22(f) (1988)*, and because there was "no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws," there was an implied repeal of the latter laws. *422 U.S. at 722*. By way of contrast, in *Strobl* we found there was no inconsistency between the Commodity Exchange Act and the Sherman Act because price manipulation -- a practice forbidden by the Sherman Act -- was also forbidden by the Commodity Exchange Act. 768 F.2d at 27. As a consequence of the above decisions, ***HN3***[] repeal by implication may only be found where there is a conflict between the provisions of the antitrust and securities laws.

B. *Implied Revocation in this Case*

1. *Purposes of the Williams Act*

In the case at bar, **[**15]** the antitrust laws are inconsistent with the Williams Act and implied repeal is necessary to make the securities regulations work. *See Silver, 373 U.S. at 357*. In 1968 Congress enacted the Williams Act, which amended sections of the 1934 Act, to "close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 Cong. Rec. 854 (1967) (quoted in *Piper v. Chris-Craft Indus. Inc., 430 U.S. 1, 26, 51 L. Ed. 2d 124, 97 S. Ct. 926 (1977))*. Its purpose "is to insure that public shareholders who are confronted by a cash tender offer . . . will not be required to respond without adequate information . . . ." *Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58, 45 L. Ed. 2d 12, 95 S. Ct. 2069 (1975)*.

Declining to pass legislation that benefitted either bidders or incumbent management, Congress instead adopted a "policy of evenhandedness." *Chris-Craft, 430 U.S. at 31*. **[**16]** ***HN4***[] The twin aims of the Williams Act were therefore protection of target shareholders and neutrality as between bidders and target companies. *See* Johnson &

Millon, *Misreading the Williams Act*, 87 Mich. L. Rev. 1862, 1895-96 (1989). These goals are to be reached through the disclosure requirements mandated under the Williams Act.

Section 14(d) of the statute grants to the SEC the authority to prescribe substantive rules and regulations setting forth information necessary to protect shareholders of target companies. Under § 14(d), a bidder for a public company whose shares are registered with the SEC under the 1934 Act must file a Schedule 14D-1 with the SEC on the date of the commencement of the tender offer. The disclosure requirements of Schedule 14D-1 and the language of the Williams Act contemplate agreements between bidders. Item 7 of Schedule 14D-1 reads:

> **HN5**[] *Contracts, Arrangements, Understandings or Relationships with Respect to the Subject Company's Securities*. Describe any contract, arrangement, understanding **[**17]** or relationship . . . between the bidder . . . and any person with respect to any securities of the subject company (including . . . joint ventures . . .), naming the persons with whom such contracts, arrangements, understandings or relationships have been entered into . . . .

17 C.F.R. § 240.14d-100 (1989).

HN6[] Further, § 14(d)(2) of the 1934 Act, 15 U.S.C. § 78n(d)(2) (1988), reads:

> When two or more persons act as a partnership, limited partnership, syndicate, **[*830]** or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

Because disclosure is the means by which Congress sought to protect target shareholders, the prior provisions make clear that **HN7**[] once information regarding an agreement between rival bidders has been revealed in a filing, the target company's shareholders have received the protection Congress and the SEC **[**18]** designed for them and there has been compliance with the Williams Act.

Recognizing the logical implication of the word "group" as anticipating the sort of bid made by Macy's and Campeau, appellant contends that these provisions authorize only those agreements made by bidders prior to engaging in a contest for control of a target company, not agreements made by rival bidders during the bidding process such as was the case here. We are unable to agree with this view because **HN8**[] neither the Williams Act nor the SEC regulations make a distinction between joint bids made by parties prior to entering a battle for control of the target and those made by parties who are rival bidders at the outset. We would think the SEC justified in deeming an agreement such as that alleged here to be a joint bid and to require the parties to file amendments to their existing filings under Schedule 14D-1, *see* 17 C.F.R. § 240.14d-3(b) (1990). Further, joint bids are not that uncommon. For example, in 1984 Reliance Financial Services Corporation and Fisher Brothers jointly offered to purchase Walt Disney Productions, **[**19]** and Waste Management, Inc. and Genstar made a joint offer for SCA Services, Inc. *See* 1 M. Lipton and E. Steinberger, *Takeovers and Freezeouts*, § 1.08(4) (1989 ed.).

2. *Disclosure Under the Williams Act*

Congress drafted **HN9**[] the Williams Act with language allowing joint bids for target companies and the SEC promulgated a regulation -- Regulation 14D-1, 17 C.F.R. §§ 240.14d-1 through 240.14d-101 (1990) -- that requires disclosure of agreements between bidders. In order for § 14(d) and the accompanying SEC regulation to function as intended, such agreements cannot be subject to suit under the antitrust laws; to permit such a suit would foster a direct conflict between the securities and antitrust laws. *Silver, 373 U.S. at 357*; *see also* *Strobl, 768 F.2d at 27* ("antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme might allow"). We cannot presume that Congress has allowed competing bidders to make a joint bid under the Williams Act and the SEC's regulations and taken that right away by authorizing suit against **[**20]** such joint bidders under the antitrust laws.

The SEC also has the power to regulate tender offers under the antifraud provision of the same statute. **HN10**[] Among the sections added to the 1934 Act by the Williams Act was § 14(e), 15 U.S.C. § 78n(e) (1988), which made it "unlawful for any person . . . to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . ." Bidders are prohibited under this section from engaging in fraudulent acts involving misrepresentation or nondisclosure, and though the word "manipulation" appears in § 14(e) it has not been viewed as relating to making or withdrawing bids. *See* *Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8, 86 L. Ed. 2d 1, 105 S. Ct. 2458 (1985)*. Congress aimed to redress fraudulent practices by means of disclosure, and "nowhere in the legislative history is there the slightest suggestion that § 14(e) serves any purpose other than disclosure, or that the term 'manipulative' should be read as an invitation to the courts to oversee the substantive **[**21]** fairness of tender offers." *Id. at 11-12*; *see also* *id. at 9 n.8* ("The process through which Congress developed the Williams Act also suggests a calculated reliance on disclosure, rather than court-imposed principles of 'fairness' or 'artificiality,' as the preferred method of market regulation.").

[*831] Finnegan asserts that the SEC is without authority to regulate agreements between rival bidders such as Macy's and Campeau because the SEC is only empowered to regulate in the area of disclosure. This assertion misperceives the scope of that federal agency's power. The last sentence in § 14(e) states:

> The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

In adding this sentence in 1970, "Congress . . . provided a mechanism for defining and guarding against those acts and practices which involve material misrepresentation or nondisclosure." *Schreiber, 472 U.S. at 11 n. 11*. Under its authority the SEC has promulgated procedural rules providing, **[**22]** *inter alia*, additional withdrawal rights, *see* *17 C.F.R. § 240.14d-7 (1989)*, and that an offer be held open to "all security holders of the class of securities subject to the tender offer," *17 C.F.R. § 240.14d-10(a)(1) (1989)* (All Holders Rule); *Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988)* (upholding the SEC's authority to promulgate the All Holders Rule notwithstanding that it is only tangentially related to ensuring complete disclosure). *See* *CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 79-80, 95 L. Ed. 2d 67, 107 S. Ct. 1637 (1987)*.

The SEC is able to regulate agreements between bidders by virtue of its authority to define fraudulent, deceptive or manipulative practices and to prescribe means to prevent such practices. *15 U.S.C. § 78n(e)*. Through its power to prohibit fraudulent activity, the SEC has supervisory authority over the submission of joint bids or other agreements in the corporate auction contest. *Cf.* *National Ass'n of Sec. Dealers, 422 U.S. at 726-28* (SEC election not to initiate restrictive regulations constituted administrative oversight). Although such **[**23]** agreements are not defined as deceptive practices under the regulations, the fact that they must be disclosed under Regulation 14D-1 clearly implies that the SEC contemplated their existence. That the SEC has chosen not to prohibit agreements between rival bidders as fraudulent or manipulative practices once shareholders are properly informed of them, does not reduce the SEC's supervisory authority over such agreements.

Consequently, ***HN11***[] because the SEC has the power to regulate bidders' agreements under § 14(e), *cf.* *Gordon, 422 U.S. at 685*; *National Ass'n of Sec. Dealers, 422 U.S. at 726-27*, and has implicitly authorized them by requiring their disclosure under Schedule 14D-1 as part of a takeover battle, *cf.* *Silver, 373 U.S. at 357*; *Strobl, 768 F.2d at 27*, to permit an antitrust suit to lie against joint takeover bidders would conflict with the proper functioning of the securities laws.

3. *Neutrality Under the Williams Act*

A further though lesser conflict may also be seen between the antitrust laws and the **[**24]** Williams Act. It surfaces in the legislative policy of maintaining neutrality among bidders, shareholders and target company management. Congress realized "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." S. Rep. No. 550, 90th Cong., 1st Sess. 3-4 (1967). If the antitrust laws were applied to prohibit agreements between rival bidders, it would discourage potential bidders from making a tender offer. Once more than one bidder entered the fray for control of a target company, the shareholders of that company could use the antitrust laws to force a fight to the last ditch, notwithstanding that the bidders could agree on terms more advantageous to themselves. Certainly this would discourage takeover activity -

- an end Congress sought to avoid in enacting the Williams Act. *See* Statement of Senator Williams, 113 Cong. Rec. 854-55 (1967) (the Williams Act seeks "to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids").

[*832] This conflict has been recognized in cases discussing implied **[**25]** preemption of state takeover laws by the Williams Act. *See, e.g.,* *CTS, 481 U.S. 69, 107 S. Ct. 1637, 95 L. Ed. 2d 67*; *Edgar v. MITE Corp., 457 U.S. 624, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982)*. In *MITE*, a plurality of the Supreme Court held that the Illinois Take-Over Act was preempted by the Williams Act because some of its provisions favored target company management in takeover contests, and therefore upset the Act's objective of evenhandedness between the target company and bidders. *457 U.S. at 630-40*. A different result was reached in *CTS*, where the Court stated that even under the broad interpretation of the Act adopted by the plurality in *MITE*, an Indiana takeover statute was not preempted because it did not favor incumbent management over hostile bidders in contests for control. *481 U.S. at 80-87*.

Here, the application of the antitrust laws would upset the balance among incumbent management, target shareholders and bidders which Congress sought to achieve through the Williams Act. ***HN12***[] Allowing antitrust suits **[**26]** to rule out agreements between rival bidders would give target shareholders undue advantage in the takeover context and discourage such activity. Fewer takeover attempts ultimately favor incumbent management whose entrenched position is thereby less subject to challenge. Hence, reasoning by analogy from the logic of *MITE* and *CTS*, the antitrust laws are rendered inapplicable by the Williams Act in the instant case.

CONCLUSION

Accordingly, for the reasons stated above, the judgment dismissing appellant's complaint is affirmed.

End of Document

Lincoln Nat'l Life Ins. Co. v. Silver

United States District Court for the Northern District of Illinois, Eastern Division

October 4, 1990, Decided

No. 86 C 7175

Reporter
1990 U.S. Dist. LEXIS 13669 *

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, et al., Plaintiffs, v. A. DAVID SILVER, ADS PARTNERS, L.P., et al., Defendants

Prior History: **[*1]** Adopting in Part Magistrate's Document of June 26, 1990, Reported at: *1990 U.S. Dist. LEXIS 20884*.

Core Terms

treble damages, survivability, antitrust claim, antitrust, courts, Clayton Act, Counts, punitive, motion to dismiss, anti trust law, Recommendation, second amended complaint, statute of limitations, characterization, provisions, decisions

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Survival of federal claims is governed by federal law. Civil RICO claims are penal and do not survive the death of a party.

Civil Procedure > Parties > Substitution > General Overview

HN2[] **Parties, Substitution**

That the assignment of a claim depends on whether the claim survives the death of a party applies in the context of treble damage claims.

Judges: John A. Nordberg, United States District Judge.

Opinion by: NORDBERG

Opinion

MEMORANDUM OPINION AND ORDER

On September 23, 1986, Lincoln National Life Insurance Company ("Lincoln") filed suit against A. David Silver after Lincoln's investment as a limited partner in Santa Fe Private Equity Fund II, L.P. ("SFPEF II") went awry. Lincoln's Second Amended Complaint, filed on August 25, 1988, alleges claims under federal and state securities laws, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1961 et seq.*, and pendent state law claims. On October 24, 1988, defendant Silver filed a Motion to Dismiss Certain Counts of the Second Amended Complaint.

On June 26, 1990, the Honorable Bernard Weisberg, United States Magistrate, entered a Report and Recommendation advising that the Motion to Dismiss be granted with respect to two counts and denied with respect to four other counts alleging violations of RICO. Pursuant to *Rule 72(b) of the Federal Rules of Civil Procedure*, the defendant filed objections to the Magistrate's denial of his motion to dismiss the RICO counts. The plaintiff responded in support of the Magistrate's Report. After reviewing those portions **[*2]** of the Report to which the defendant objected de novo, this court adopts the Report and Recommendation in part and fails to adopt the Report and Recommendation in part.

FACTS

The court adopts the statement of facts as set forth in the Magistrate's Report and Recommendation.

DISCUSSION

This court agrees with the Magistrate's recommendation to dismiss Count II of the Second Amended Complaint. Count II is based on § 17(a) of the Securities Act of 1933. Such a claim depends on an implied private right of action. The Seventh Circuit, however, has recently followed other courts in refusing to imply such a right of action. *Schlifke v. Seafirst Corp., 866 F.2d 935, 942-43 (7th Cir. 1989)*. The parties have not objected to the Magistrate's finding and recommendation with respect to § 17(a), and this court adopts that portion of his report.

Lincoln has voluntarily requested the dismissal of Count XIV. Thus, the issue of the dischargeability of Silver's indebtedness to SFPEF II is no longer before this court.

The remaining issue presented in Silver's Motion to Dismiss arises out of Counts XI to XIII and Count XIX of the Second Amended Complaint. These Counts allege violations of RICO, **[*3]** specifically violations of *18 U.S.C. § 1962(a) - (d)*. Defendant Silver moved to dismiss those counts on the ground that the assignment of those claims by SFPEF II to Lincoln is invalid.

In his Report, the Magistrate was of the opinion that those claims are assignable under federal law. Silver filed an objection to this portion of the Magistrate's finding. Having reviewed the issue of assignment of RICO claims de novo, this court rejects the portion of the Magistrate's Report denying defendant's Motion To Dismiss Counts XI to XIII and Count XIX and grants Silver's Motion to Dismiss those Counts.

Silver argues that under federal law those claims that do not survive the death of a party are not assignable, and that the Northern District of Illinois, following Seventh Circuit, precedent has determined that RICO claims do not survive. Therefore, Silver urges this court to hold that RICO claims are not assignable.

HN1[] Survival of federal claims is governed by federal law. *Smith v. No. 2 Galesburg Crown Finance Corp., 615 F.2d 407, 413 (7th Cir. 1980)*. *Khan v. Grotnes Metalforming Systems, Inc., 679 F. Supp. 751, 756 (N.D.Ill. 1988)*.

While the Seventh Circuit has not ruled on the issue **[*4]** of the survivability of RICO claims, the Northern District of Illinois has addressed the issue several times, holding on each occasion that civil RICO claims are penal and do not survive the death of a party. Washburn v. Isidore Brown, No. 81 C 1475, *1988 U.S. Dist. Lexis 13474* (N.D.Ill, Nov. 25, 1988); Eliasen v. Hamilton, No. 81 C 123, *1987 U.S.Dist. Lexis 1826* (N.D.Ill. March 9, 1987); First Interstate Bank v. Chapman and Cutler, [1986-1987 Transfer Binder]Fed. Sec. L. Rep. (CCH) para. 92,873 (N.D.Ill. June 12, 1986); First Interstate Bank v. National Republic Bank [1984-1985 Transfer Binder]Fed. Sec. L. Rep. (CCH) para. 91,994 (N.D.Ill. March 10, 1985) ("First Interstate I"); but see *State Farm Fire and Casualty Co. v. Caton, 540 F. Supp. 673 (N.D.In. 1982)*.

Although the issue of the survivability of a RICO claim has been repeatedly addressed at the district court level, no court within the Seventh Circuit has considered the assignability of a RICO claim. There are, however, two federal district court cases on point, both of which allowed the assignment. In Flinn Foundation v. Petro-Lewis Corp., CCH Fed. Secs. L. Repts. [1985 Transfer Binder] para. 92,449 **[*5]** at 92,735 (D.Colo. 1985), the court acknowledged that "there is some case support for the proposition that claims under a statute providing for a penalty are not transferable," but because treble damage claims under the antitrust laws are assignable, so too are RICO claims for treble damages.

Similar reasoning was applied in *In re National Mortgage Equity Corporation Mortgage Pool, 636 F. Supp. 1138, 1155 (C.D.Cal. 1986)*. The National Mortgage court rejected the idea that the assignability of a RICO claim is dependent on whether such a claim is classified as penal or remedial. Federal courts have attempted to characterize treble damage claims in a variety of contexts. While different courts have reached different conclusions regarding, for example, the nature of an antitrust treble damage claim, they have almost universally held such claims to be assignable. The Ninth Circuit itself had found antitrust treble damage claims to be assignable in *Hicks v. Bekins Moving & Storage Co., 87 F.2d 583 (9th Cir. 1937)*, while in another case, *Kline v. Coldwell, Banker & Co., 508 F.2d 226, 235 (9th Cir. 1974)*, it had indicated that such damage awards are punitive. Id.

Characterizing **[*6]** RICO treble damage claims leads to similarly disparate results; thus the "argument . . . that the assignability of RICO claims is wholly dependent on the proper characterization of the treble damage provision as either punitive or remedial is untenable." *636 F. Supp. at 1155*. Having rejected the characterization of a claim as a basis for determining its assignability, the court in National Mortgage relied instead on the parallels between the RICO and the antitrust treble damage provisions. Because antitrust claims are assignable, so too are RICO claims.

In both National Mortgage and Flinn the courts began their analysis with the question of whether the survival of a RICO claim determines its assignability. After discarding that principle, both courts analogized RICO treble damage provisions to those of the antitrust laws. The Plaintiffs make a similar argument in this case. They argue that because RICO's treble damage claim was modeled almost verbatim after the treble damage provision of the Clayton Antitrust Act, this court should follow the weight of the law with regard to antitrust claims and hold RICO claims to be assignable. [1]

[*7] Courts have frequently discussed the utility of relying on the antitrust laws to resolve various interpretive disputes with regard to RICO. In *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 498 (1985)*, however, in the context of establishing what constitutes the requisite injury for a RICO claim, the Supreme Court cautioned against leaning too heavily on the Clayton Act for interpreting RICO, because RICO was enacted in the face of proposals

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[1] Clayton Act claims have been held to be assignable in the Second Circuit, *Mercu-Ray Industries, Inc. v. Bristol Meyers Co., 392 F.Supp. 16, 18 (S.D.N.Y. 1974)*, aff'd sub nom., *568 F.2d 837 (2d Cir. 1974)*, *D'Ippolito v. Cities Service Co., 374 F.2d 643, 647 (2d Cir. 1967)*; the Third Circuit, *In re Fine Paper Litigation, 632 F.2d 1081, 1090 (3d Cir. 1980)*; the Fifth Circuit, *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 656 F.2d 92, 98 (5th Cir. 1981)*, rev'd on other grounds, *460 U.S. 150 (1983)*; the Eighth Circuit, *Louisiana Farmers' Protection Union v. Great A & P Tea Co., 131 F.2d 419, 423 (8th Cir. 1942)*; and the Ninth Circuit, *Hicks v. Bekins Moving & Storage Co., 87 F.2d 583, 585 (9th Cir. 1937)*; and in various district courts as well. See, e.g., *Health Care Equalization Committee v. Iowa Medical Society, 501 F.Supp. 970, 977-78 (S.D.Iowa 1980)*; *Isidor Weinstein Inv. Co. v. Hearst Corp., 303 F.Supp. 646, 649 (N.D.Cal. 1969)*; *Gerr v. Schering Corp., 256 F.Supp. 572, 574 (S.D.N.Y. 1966)*; *Fischer Bros. Aviation, Inc. v. NWA, 117 F.R.D. 144, 146 (D.Minn. 1986)*.

"to add RICO-like provisions to the Sherman Act." In enacting a separate statute, Congress hoped to avoid strangling RICO with Antitrust precedent. Id., citing 115 Cong.Rec. 6995 (1969) (ABA comments on S.2048). While Congress did enact a separate statutory scheme for RICO, it nonetheless was guided in its drafting by the Clayton Act. As the Seventh Circuit stated in *Tellis v. United States Fidelity and Guaranty Co., 805 F.2d 741, 746 (7th Cir. 1986)*, "the treble damage provision in § 1964(c) is virtually identical to the damages provision in the antitrust laws."

Furthermore, in spite of its cautionary note in *Sedima, 473 U.S. 479*, the Supreme Court, borrowed the statute of limitations from the Clayton Act for use in RICO **[*8]** suits. *Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1986)*. In selecting the Clayton Act statute of limitations period, the Supreme Court noted that the disparate nature of the predicate acts underlying a RICO claim mandated a uniform statute of limitations. If courts were left to apply the appropriate state law statutes of limitations, the Court reasoned, plaintiffs and defendants would be placed in a position of guessing which rule would apply to the act forming the basis of the claim.

Whether or not a claim may be assigned is more akin to the statute of limitations question presented in Agency Holding Corp. than it is to the interpretive question presented in Sedima. Like the issue of how long the limitations period should be, the question of assignment is not addressed in the RICO statute. Addressing a RICO issue left untouched by the legislature by reference to the Clayton Act constrains RICO less than does defining an element of a RICO offense in terms of the Clayton Act.

The affinity between the treble damage provisions of the Clayton Act and RICO, coupled with the courts' habit of looking to the Clayton Act for gap-filling needs, counsels this court **[*9]** to look to the multitude of decisions holding Clayton Act claims assignable. But rather than adopting wholesale the principle that treble damage claims are assignable, the policy behind such decisions must be explored.

The court in *National Mortgage, 636 F. Supp. 1138*, found that some of the courts that had held antitrust claims to be assignable had also deemed treble damage awards to be, at least in part, punitive. The court, however, did not focus explicitly on the issue of whether those courts that have found antitrust claims to be assignable have also found them to survive the death of a party. Because the court looked at the characterization of treble damage claims in a variety of contexts, its analysis was skewed. In other words, it is clear that both RICO and the Clayton Act contain elements that are both penal and remedial; thus, depending on the context, a claim may be characterized one way or the other. As the rule determining assignability looks to the characterization of a claim in the context of the survivability of that claim, it is to that context that this court must look.

Most of the jurisdictions which have ruled on the issue of whether treble damage claims under **[*10]** the antitrust acts are assignable have also found such claims to survive the death of a party. For example, the Ninth Circuit in *Hicks, 87 F.2d 583, 585*, found that an action brought under the antitrust acts was not penal in nature, and therefore that such an action survived the death of the party and was assignable. [2] The court in National Mortgage did not mention this opinion, while it did look to a later case, *Kline, 508 F.2d at 235*, in which the Ninth Circuit termed the treble damage provisions of the antitrust acts to be punitive in the context of declining to certify a class for a class action suit. It was in Hicks, however, that the Ninth Circuit established its reasoning for allowing the assignment of an antitrust claim. Assignment was allowed, because, at that time, the Ninth Circuit determined that antitrust claims were remedial, not punitive. If now the consensus in the Ninth Circuit has shifted towards an understanding that at least two thirds of a treble damage award is punitive, that does not change the basis of the original determination regarding the assignment of such claims.

[*11] While the Third Circuit has not explicitly addressed the issue of survival of treble damage claims in antitrust actions, the District Court of New Jersey found them to be punitive and to abate with the death of a party in *Haskell v. Perkins, 28 F.2d 222, 224 (D.N.J. 1928)*. Haskell at first glance appears to buttress the argument of the court in National Mortgage that survivability and assignability have not gone hand in hand with regard to antitrust claims. In

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[2] See also, *Sullivan v. Associated Billposters and Distributors, 6 F.2d 1000, 1009 (2d Cir 1925)* (holding that the common law rule applies to claims of injury to business, not claims of injury to property, under the antitrust laws); *Derdiarian v. Futterman, 223 F.Supp. 265, 271 (S.D.N.Y. 1963)*.

the case in which the Third Circuit found antitrust claims to be assignable, however, *In re Fine Paper Litigation, 632 F.2d 1081 (3d Cir. 1980)*, the court based its decision on cases from the Ninth Circuit, the Second Circuit, and the Southern District of New York, all of which courts have found that antitrust claims survive the death of a party. [3]

[*12] The Eighth Circuit has not addressed the issue of survival of antitrust claims. Nor did it explain its decision in *Louisiana Farmers' Protection Union v. Great A & P Tea Co., 131 F.2d 419 (8th Cir. 1942)*, to allow the assignment of an antitrust claim. While it did not explicitly rely on the penal/remedial distinction, neither did the Eighth Circuit provide an alternative basis for its decision. Thus, Farmers' Protection Union does not suggest to this court that the survivability of a claim is an unsound basis for deciding whether it is assignable.

The only Circuit in which the dichotomy between the issue of assignment and the issue of survival is absolute is the Fifth Circuit. That court held that antitrust treble damage claims were assignable in *Jefferson County Pharmaceutical Ass'n v. Abbot Laboratories, 656 F.2d 92, 98 (5th Cir. 1981)*. The court cited *Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975)* as authority for the proposition, but Copper Liquors does not provide any rationale for its holding. The Fifth circuit had pronounced antitrust treble damage claims to be a penalty and had found that all but actual damages abate with the death **[*13]** of a party in *Rogers v. Douglas Tobacco Board of Trade, 244 F.2d 471 (5th Cir. 1957)*. Thus the decisions regarding assignment could not have been based on the survivability of the claims.

In the end, the decisions do not present a clear pattern either embracing or eschewing survivability as a basis for allowing the assignment of an antitrust claim. Three courts - the Ninth Circuit, the Second Circuit and the Southern District of New York - have explicitly followed the survivability rule in allowing the assignment of antitrust claims. [4] The Third Circuit implicitly relies on such reasoning; while the Eighth Circuit provides no rationale for its holding. Only the Fifth Circuit implicitly breaks with the common law rationale for allowing the assignment of a claim. Because the federal courts have not clearly abandoned the common law rule with respect to ***antitrust law***, this court does not feel compelled to conclude, as did the court in National Mortgage, "that the penal-remedial dichotomy does not control a RICO claim's assignability." *636 F. Supp. at 1155*.

[*14] Having determined that the survival of a claim does determine its assignability, this court looks next to pertinent Seventh Circuit decisions. While the Seventh Circuit has neither addressed the assignability of treble damage claims under the antitrust laws, nor the survivability of antitrust claims, it has addressed the survival of antitrust claims. In holding that treble damage claims under the Sherman Antitrust Act do not abate with the death of the defendant, in *Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)*, the court borrowed language from the Supreme Court in asserting that "treble damages in antitrust suits were 'provided in part for punitive purposes . . . but also to make the remedy more meaningful by counterbalancing "the difficulty of maintaining a private suit. . . ."'" *Id., at 560-561*, citing *Brunswick Corp v. Pueblo Bowl-O-Mat, 429 U.S. 477, 696 n.10 (1977)*, quoting 21 Cong.Rec. 2456 (1890). While the court in Fishman reasoned in general terms, its decision was based in part on the "precise circumstances" of the case. *Id., at 561*.

In spite of the parallel language in RICO and the antitrust acts, the decision in Fishman has not led any **[*15]** court within the Seventh Circuit to adopt its language in the context of RICO claims. In fact, in the two most recent cases to come before the Northern District of Illinois the court has found that RICO treble damage claims are punitive and

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[3] As authority for its decision that antitrust claims are assignable, the Third Circuit in *In re Fine Paper, 632 F.2d at 1090*, relied on *D'Ippolito v. City Service Co., 374 F.2d 643 (2d Cir. 1967)*; *Hicks v. Bekins Moving & Storage Co., 87 F.2d 583*, (9th Cir 1937); and *Mercu-Ray Industries, Inc. v. Bristol-Meyers Co., 392 F.Supp. 16 (S.D.N.Y. 1974)*, aff'd mem., *508 F.2d 837 (2d Cir. 1974)*.

[4] *Hicks v. Bekins Moving & Storage, 87 F.2d 583, 585*, (9th Cir. 1937); *Sullivan v. Associated Billposters & Distributors, 6 F.2d 1000, 1009 (2d Cir. 1925)*; *Derdiarian v. Futterman, 223 F.Supp. 265, 271 (S.D.N.Y. 1963)*.

abate with the death of a party. Washburn v. Isidore Brown, No. 81 C 1475, *1988 U.S. Dist. Lexis 13474* (N.D.Ill, Nov. 25, 1988); Eliasen v. Hamilton, No. 81 C 123, *1987 U.S.Dist. Lexis 1826* (N.D.Ill. March 9, 1987). [5]

[*16] *CONCLUSION*

This court believes that the common law rule, that ***HN2***[] the assignment of a claim depends on whether the claim survives the death of a party, applies in the context of treble damage claims. Because the Seventh Circuit effectively limited its holding on the survival of the antitrust treble damage claims to the facts in Fishman, that holding cannot form the basis for rejecting the line of cases in the Northern District of Illinois which have held that RICO claims are penal in nature and do not survive the death of a party. For this reason the court declines to accept the reasoning of the Magistrate with respect to the defendant's motion to dismiss. The defendant's motion to dismiss is granted without prejudice with respect to Counts XI to XIII and Count XIX of the second amended complaint.

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[5] The Seventh Circuit held in *Tellis v. United States Fidelity & Guaranty Co., 805 F.2d 741, 745-46 (7th Cir. 1986)*, that treble damage claims could best be characterized as penal in nature. While this may support an argument that Fishman should be limited to its particular facts, this court hesitates to place too much emphasis on an assessment that arose in a completely different context. Tellis involved an analysis of the various state statutes of limitations that could be applied to RICO actions, prior to the Supreme Court's application of the Clayton Act statute of limitations in *Agency Holding Corp, 483 U.S. 183*.

Hinkleman v. Shell Oil Co.

United States District Court for the District of Maryland

October 5, 1990, Decided ; October 5, 1990, Filed

CIVIL NO. H-90-869

Reporter
1990 U.S. Dist. LEXIS 21022 *

FRANCIS GEORGE HINKLEMAN Plaintiff vs. SHELL OIL COMPANY Defendant

Subsequent History: Affirmed by *Hinkleman v. Shell Oil Co., 962 F.2d 372, 1992 U.S. App. LEXIS 9822 (4th Cir. Md., 1992)*

Disposition: Defendant's motion to dismiss granted.

Core Terms

amended complaint, purchaser, leases, courts, real estate, termination, gasoline, advertising, merchandise, commodity, alleges, terms, anti trust law, furnishing, processing, connected, resale

Judges: [*1] Alexander Harvey, III, Chief, United States District Judge.

Opinion by: Alexander Harvey, III

Opinion

MEMORANDUM AND ORDER

Presently pending in this civil action is defendant's motion to dismiss Count II of the amended complaint. Plaintiff is Francis G. Hinkleman (hereinafter "Hinkleman"), a Maryland resident who formerly operated a retail service station at 103 Mountain Road in Pasadena, Maryland. Defendant is Shell Oil Company (hereinafter "Shell"), a Delaware corporation engaged in the refining and marketing of petroleum and related products.

The amended complaint in this lawsuit contains two counts. Count I alleges that the franchise agreement between the parties has been wrongfully terminated under federal law. Count II alleges that the administration of defendant's variable rent program violated *§§ 11-204(a) (5) of the Maryland Commercial Law Article*.

Memoranda in support of and in opposition to the pending motion have been submitted and reviewed by this Court. A hearing on this motion is not necessary. *See* Local Rule 105.6. For the reasons to be stated herein, defendant's motion to dismiss Count II of the amended complaint will be granted.

I.

Facts

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[*2] Francis Hinkleman and Shell executed a service station franchise agreement in 1985. On January 4, 1990, Shell sent Hinkleman a certified letter containing a notice of termination of the franchise, to be effective on April 16, 1990. As justification for the terminations, Shell cited Hinkleman's failure to pay timely all sums due to Shell.

On March 23, 1990, Hinkleman filed a one-count complaint in this Court alleging wrongful termination of his dealership under the Petroleum Marketing Service Act, *15 U.S.C. §§ 2801 et seq.* Shortly thereafter, Hinkleman sought a temporary restraining order and preliminary injunction to prevent termination of his dealership. By agreement of the parties, a temporary restraining order was entered by the Court on April 16, 1990 to prevent immediate termination of the dealership. A hearing on plaintiff's motion for a preliminary injunction was then held on May 2. In a Memorandum Opinion filed on May 8, this Court denied plaintiff's motion for a preliminary injunction and ordered plaintiff to surrender the service station on or before May 21, 1990. Hinkleman surrendered the service station to Shell on May 21.

With leave of the **[*3]** Court, plaintiff filed an amended complaint on August 15, containing two counts. Count I seeks monetary damages for violation of the Petroleum Marketing Practices Act. [2] Count II alleges that the administration of defendant's variable rent program [3] violated *§§ 11-204(a)(5), Md. Com. Law Code Ann.*

II

Discussion

[*4] *Section 11-204(a)(5) of the Maryland Commercial Law Article* is a part of the state's antitrust subtitle, which was enacted "to complement the body of federal [***antitrust] law***. . . ." *Md. Comm. Law Code Ann. §§ 11-202(a)(1)*. The Legislature explicitly provided that construction of the antitrust subtitle should be "guided by the interpretation give by the federal courts to the various federal statutes dealing with the same or similar matters. . . ." *Md. Com. Law Code Ann. §§ 11-201(a)(2)*.

Section 11-204(a)(5) provides that a person may not:

> discriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with or without processing, by contracting to furnish, furnishing or contributing to the furnishing of any service or facility connected with the processing, handling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms.

This provision is substantially identical to §§ *2(e) of the Robinson-Patman Act,* Codified at *15 U.S.C. § 13(6)*. That statute is as follows:

> Furnishing services or facilities **[*5]** for processing, handling, etc.
> (e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

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1 The factual background of the parties' dispute is more fully described in this Court's Memorandum Opinion of May 8, 1990. For purposes of the pending motion, less detail is necessary.

2 In its memorandum in support of the pending motion, Shell has advised that it will soon move for summary judgment on Count I. The deadline for submission of substantive motions in this case is November 30, 1990.

3 As is customary in the petroleum business, Shell owns the realty on which its service stations are located. Under Shell's variable rent program, Shell dealers receive rent discounts for gasoline orders above specified levels. Thus, the more gasoline a dealer orders *from* Shell, the less rent he pays *to* Shell. Shell negotiates agreements involving rent discounts with each individual dealer, and provisions pertaining to rent discounts therefore differ from dealer to dealer.

Count II of the amended complaint alleges that Shell's variable rent program (hereinafter the "VRP") violates § 11-204 (a)(5). Plaintiff contends that Shell discriminated against him in favor of other Shell dealerships by not according him Proportionally equal terms under the VRP. According to plaintiff, Shell was aware that the gasoline volume levels in its lease agreement with plaintiff were Unreasonable and that plaintiff's inability to meet these levels would eventually lead to termination of his franchise.

In its motion to dismiss, Shell asserts that this Court should construe the Maryland statute in the same manner as federal courts have construed § 2(e) of the Robinson-Patman **[*6]** Act. Shell argues that the VRP could not violate § 2(e) because the VRP is not related to advertising or other promotional allowances and services. In support of this contention, Shell asserts that a real estate lease is not a tangible commodity for resale and that its VRP is not connected with the advertising or promotion of gasoline.

Plaintiff responds that the plain language of the Maryland statute indicates that the prohibitions of §§ 11-204(a)(5) apply to Shell's VRP. Plaintiff contends that decisions under § 2(e) of the Robinson Patman Act should not control this Court's interpretation of Maryland's § 11-204(a)(5). In support of this assertion, plaintiff argues that the state antitrust subsection was intended to expand federal law, that federal case law does not bind courts construing state ***antitrust law***, and that the Maryland statute defines "service" to include leases. *See* Md. Com. Law Code Ann. § 11-201(9).

A motion to dismiss under Rule 12(b)(6), F.R.Civ.p., should be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). **[*7]** In determining whether to dismiss a complaint, this Court must view the well-pleaded material allegations in a light most favorable to the plaintiff, with the alleged facts accepted as true. 2A *Moore's Federal Practice,* Para. 12.07 [2.-5) (2d ed. 1987); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 594-97 (1969).

On the record here, this Court concludes that defendant has met its burden of demonstrating that Count II of the amended complaint fails to state a claim under § 11-204(a)(5), Md. Com. Law Code Ann. First, the Court is satisfied that Maryland's § 11-204(a)(5) is substantially identical to § 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e). No cases have been cited construing § 11-204(a)(5) in a manner different from § 2(e), and the Court is not aware of any such authorities. Second, it is well established that federal case law guides any interpretation of Maryland's antitrust laws. *See* Quality Discount Tires, Inc. v. Firestone Tire & Rubber Co., 282 Md. 7, 12, 382 A.2d 867 (1970); Neugebauer v. A.S. Abell Co., 474 F. Supp. 1053, 1071 (D.Md. 1979) (Young, J.); Purity Products Inc. v. Tropicana Products Inc., 702 F. Supp. 564, 574 (D.Md. 1988) **[*8]** (Harvey, J.), *aff'd, 887 F.2d 1081 (4th Cir. 1989)*. Under these circumstances, this Court will interpret Maryland's § 11-204(a) (5) as imposing the same legal duty as does § 2(e) of the Robinson-Patman Act.

"The purpose of § 2(e) . . . is to strengthen the prohibition against unfair price discrimination disguised in the form of advertising or pronlotional services provided to purchasers on a discriminatory basis." Purdy Mobile Homes, Inc. v. Champion Home Bldrs. Co., 594 F.2d 1313, 1317 (9th Cir. 1979). See also Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 678 (9th Cir. 1975); Cecil Corley Motor Co. v. General Motors Corp., 380 F. Supp. 819 (M.D. Tenn. 1974). It is thus apparent that § 2(e) of the Robinson-Patman Act is concerned exclusively with discrimination in the advertising, promotion or merchandising of a Commodity for resale. Accordingly, it has been held that § 2(e) applies only to services or facilities connected with the *resale* of the product by the purchaser. Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 546 (9th Cir. 1983), *cert. denied, 465 U.S. 1038, 79 L. Ed. 2d 712, 104 S. Ct. 1315 (1984).* **[*9]**

Apart from these broad criteria, courts have not formulated a test to determine when § 2(e) applies. Instead, the issue has been left for resolution on a case-by-case basis. [4] Examples of services held covered under § 2(e)

[4] Further guidance is provided by regulations published by the Federal Trade Commission. These regulations list the following examples of services within the scope of § 2(e): handbills, displays, demonstrations, catalogs, storage cabinets, accepting returns for credit, prizes or merchandise for conducting promotional contests. 16 C.F.R. § 240.5 (1990). One commentator has

include: advertisements, demonstrators, partial payment of customer's salaries, right to return merchandise, and mailings to clients of favored customers. E. Kintner, *Federal* ***Antitrust Law*** § 27.6 (1983) (citations omitted).

[*10] Courts have been unwilling to apply *§ 2(e)* to every case in which a supplier of a product discriminates among customers. *Section 2(e)* has been ruled inapplicable in cases involving the following services: allocation of merchandise (including willingness to sell at all), availability and terms of credit, and delivered. E. Kinter, *Federal* ***Antitrust Law****, supra* at § 27.6. Significantly, two courts have held that *§ 2(e)* does not apply to real estate leases or real estate transactions. *Rea v. Ford Motor Co., 355 F. Supp. 842, 869 (W.D. Pa. 1973)*, *rev'd in part on other grounds, 497 F.2d 577 (3d Cir.)*, cert. *denied, 419 U.S. 868 (1974)*; *Export Liquor Sales, Inc. v Ammex Warehouse Co., 426 F.2d 251 (6th Cir. 1970)*, *cert. denied, 400 U.S. 1000, 27 L. Ed. 2d 451 (1971)*.

When these principles of federal case law are applied to the allegations of the amended complaint, it is apparent that no violation of *§ 2(e) of the Robinson-Patman Act* has been alleged. The allegedly discriminatory rents charged by Shell do not help favored dealers merchandise gasoline. *See Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534.* **[*11]** The leases and the gasoline are therefore not related closely enough for *§ 2(e)* to apply. Although it could be argued that Shell's alleged discrimination in its VRP hindered plaintiff's attempts to merchandise gasoline (for example, by raising his "overhead" costs), the argument proves too much, inasmuch as the statute focuses on the form of the alleged discrimination and not its effect.

The fact that the allegedly discriminatory service is directly related to real estate is also an important factor here. The leasing of real estate involves a type of transaction which is quite different from the sort of services which courts have ruled are covered by *§ 2(e)*. As noted hereinabove, two courts have explicitly held that real estate transactions are outside the scope of the statute. Finally, as defendant points out, every parcel of real estate is essentially unique and terms of a real estate lease would not lend themselves to being discriminatory.

For these reasons, this Court concludes that since Count II of the amended complaint does not allege a violation of the Robinson-Patman Act, it likewise does not state a claim under *§ 11-204(a)(5) of the Maryland Commercial Law*. Count **[*12]** II does not allege discrimination in the advertising, promotion or merchandising of gasoline. The leases involved here can be characterized as "connected" with retail sales of gasoline only in the most attenuated sense. Moreover, *§ 11-204(a)(5)* does not apply to real estate leases. Accordingly, Count II must be dismissed.

III

Conclusion

For the reasons stated, it is this *5th* day of October, 1990, by the United States District Court for the District of Maryland,

ORDERED that defendant's motion to dismiss Count II of the amended complaint be and the same is hereby granted.

Alexander Harvy III

Chief, United States District Judge

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theorized that "to fall Within the category of a 'service or facility,' the benefit: (1) must be of a kind which facilitates resale by the purchaser (rather than the original sale to the purchaser); (2) must be accorded to the buyer 'in connection with' (or bearing some relationship to) the 'sale' of a commodity; and (3) must be with respect to a product the purchaser is reselling rather than consuming. E. Kintner, *Federal* ***Antitrust Law*** § 27.6 (1983).

Abcor Corp. v. AM Int'l, Inc.

United States Court of Appeals for the Fourth Circuit

May 8, 1990, Argued ; October 15, 1990, Decided

No. 89-2205

Reporter

916 F.2d 924 *; 1990 U.S. App. LEXIS 18122 **; 1990-2 Trade Cas. (CCH) P69,217

ABCOR CORPORATION; JAMES G. KIBLER, SR., Plaintiffs-Appellants, v. AM INTERNATIONAL, INC., Defendant-Appellee

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. No. CA-89-669-A.

Disposition: Affirmed.

Core Terms

customers, anticompetitive, summary judgment, monopolize, district court, prices, competitors, terminated, employees, machines, hired, specific intent, negotiations, predatory, destroy, drive, anti trust law, profit margin, discount, probability of success, antitrust violation, Sherman Act, antitrust, merits

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN1[] **Antitrust & Trade Law, Sherman Act**

A plaintiff seeking to establish attempted monopolization under § 2 of the Sherman Act must show three things: (i) the defendant formed a specific intent to monopolize the market, (ii) the defendant engaged in anticompetitive or predatory conduct designed to further that intent, and (iii) a dangerous probability of success. On a motion for summary judgment made by the defendant, the plaintiffs are entitled to have all reasonable inferences drawn in their favor. The plaintiffs must, however, produce evidence to support a finding on each essential element to their case. Fed. R. Civ. P. 56(e).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN2[] **Standards of Review, De Novo Review**

The court reviews the decision of the district court to grant summary judgment de novo.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3[] **Monopolies & Monopolization, Attempts to Monopolize**

Attempted monopolization requires a specific intent to destroy competition or build monopoly. A desire to increase market share or even to drive a competitor out of business through vigorous competition on the merits is not sufficient. The plaintiff must show that the defendant sought to create a monopoly by circumventing the competitive process. The requisite intent may be shown through direct evidence or through inference by showing anticompetitive practices.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] **Summary Judgment, Motions for Summary Judgment**

When a motion for summary judgment is made and supported as provided in *Fed. R. Civ. P. 56*, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but must set forth specific facts showing that there is a genuine issue for trial.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN5[] **Sherman Act, Claims**

To prove a violation of § 2 of the Sherman Act, plaintiffs must also show that the defendant engaged in anticompetitive or predatory conduct designed to further an intent to monopolize.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6[] **Summary Judgment, Entitlement as Matter of Law**

Mere assertions by the plaintiffs are not enough to survive summary judgment.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] Regulated Practices, Trade Practices & Unfair Competition

A seller has the right to choose with whom it wishes to deal.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN8[] Regulated Practices, Trade Practices & Unfair Competition

The right to refuse to deal is not unfettered.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN9[] Summary Judgment, Evidentiary Considerations

To avoid summary judgment, the plaintiffs must produce not merely colorable but significantly probative evidence.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Family Law > ... > Dissolution & Divorce > Fault Based Grounds > Abandonment & Desertion

HN10[] Monopolies & Monopolization, Attempts to Monopolize

Special concern is to be given to finding antitrust violations for hiring personnel away from competitors. Courts should be careful not to impede the ability of the employee to market his or her skills.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN11[] Regulated Practices, Trade Practices & Unfair Competition

Courts are to be circumspect in converting ordinary business torts into violations of antitrust laws. To do so would be to create a federal common law of unfair competition which was not the intent of the antitrust laws.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN12[] **Monopolies & Monopolization, Attempts to Monopolize**

The antitrust laws were designed to protect competition, not competitors. The elimination of a single competitor, standing alone, does not prove anticompetitive effect.

Counsel: Argued: Daniel S. Koch, Kurz, Koch & Doland, Washington, District of Columbia, for Appellants.

Arthur Douglas Melamed, Wilmer, Cutler & Pickering, Washington, District of Columbia, for Appellee.

On Brief: James S. Kurz, Patrick W. Reilly, Kurz, Koch & Doland, Washington, District of Columbia, for Appellants.

Thomas S. Connell, Ana Maria Martinez, Wilmer, Cutler & Pickering, Washington, District of Columbia, for Appellee.

Judges: Phillips, Circuit Judge, Smith, Senior Judge, United States Court of Appeals for the Federal Circuit, sitting by designation, and Young, Senior District Judge for the District of Maryland, sitting by designation.

Opinion by: YOUNG

Opinion

[*925] YOUNG, Senior District Judge

Abcor Corporation (Abcor) and its owner, James Kibler, appeal the grant of summary judgment by the district court in favor of the defendant AM International, Inc. (AMI), in this antitrust action alleging an illegal scheme to drive Abcor out of business. Because we find no material issues of fact, we **[**2]** affirm the judgment of the district court.

I.

AMI manufactures and services Multigraphics printing equipment worldwide. **[*926]** Abcor provides maintenance and repair services for AMI machines in the Washington, D.C., area. Abcor's owner, James Kibler, was a service technician at AMI until 1973 when he left to start his own company servicing AMI machines. He took six AMI employees with him at the time and over the years has hired numerous AMI employees. While AMI is a much larger company overall, Abcor has become the dominant service company for AMI machines in the Washington area. Of the 3,000 such machines in the Washington area, 2,200 are serviced in-house by the owners. Of the remaining 800 machines, Abcor services about 400, AMI services 200, and other competitors service 200.

In January 1987, AMI began negotiations with Abcor to purchase the company. The parties apparently reached a preliminary agreement, but AMI terminated the negotiations. AMI decided that it would rather compete for a larger market share in Washington rather than purchase one through the acquisition of Abcor, and it is clear that AMI did in fact step up its efforts to gain a larger share of the market. **[**3]** The dispute in the case turns on whether those efforts were legal competition on the merits or illegal anticompetitive measures designed to drive Abcor out of business.

Plaintiffs allege that AMI took the following steps to destroy Abcor:

1. created a low-priced, deceptive service contract to target Abcor's customers;
2. improperly used a list of Abcor's customers and financial information allegedly obtained during the acquisition negotiations to solicit Abcor's customers and undercut Abcor's prices;
3. inhibited Abcor's purchase of AMI parts by terminating Abcor's over-the-counter access to parts in AMI's Washington area supply depot and terminated its acceptance of telephone orders from Abcor in the Chicago parts center (requiring written orders);
4. attempted to spread false information about Abcor to the effect that the company was going to go out of business; and
5. hired Abcor employees to hurt the company and steal customers.

Abcor and its sole owner, Kibler, filed suit in the Federal District Court for the Eastern District of Virginia alleging violation of § 2 of the Sherman Act for monopolization and attempted monopolization in addition to state **[**4]** law violations based on defamation and tortious interference with business relations. After substantial discovery, the district court granted summary judgment in favor of the defendants. The district court found that a genuine issue of fact existed concerning the market definition and whether there was a dangerous probability of success in the attempt to monopolize. However, these issues were rendered immaterial by the holding of the court that the plaintiff had failed to produce evidence to support a finding of (1) an intent to monopolize, (2) anticompetitive activity, or (3) antitrust injury. The court dismissed the federal claims and then exercised its discretion to dismiss the pendent state law claims without prejudice. Abcor now appeals to this court, and we affirm.

II.

HN1[] A plaintiff seeking to establish attempted monopolization under § 2 of the Sherman Act must show three things: (i) the defendant formed a specific intent to monopolize the market, (ii) the defendant engaged in anticompetitive or predatory conduct designed to further that intent, and (iii) a dangerous probability of **[**5]** success. *White Bag v. International Paper, 579 F.2d 1384, 1387 (4th Cir. 1974)*. On a motion for summary judgment made by the defendant, the plaintiffs are entitled to have all reasonable inferences drawn in their favor. The plaintiffs must, however, produce evidence to support a finding on each essential element to their case. *Rule 56(e), Fed. R. Civ. P.*; *Matsushita Electric Industry Co. v. Zenith Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. ***HN2***[] We review the decision of the district court to grant summary judgment *de novo*.

[*927] 1. *Specific Intent to Monopolize*

The Supreme Court has held that ***HN3***[] attempted monopolization requires "a specific intent to destroy competition or build monopoly." *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*. A desire to increase market share or even to drive a competitor out of business through vigorous competition on the merits is not **[**6]** sufficient. *United States Steel Corp. v. Fortner Enterprises, 429 U.S. 610, 612 n.1, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)* ("No inference of intent to monopolize can be drawn from the fact that a firm with a small market share has engaged in nonpredatory competitive conduct in the hope of increasing sales."). The plaintiff must show that the defendant sought to create a monopoly by circumventing the competitive process. The requisite intent may be shown through direct evidence or through inference by showing anticompetitive practices. *See, e.g., Conoco Inc. v. Inman Oil Co., 774 F.2d 895, 905 (8th Cir. 1985)*.

The district court found that the "sporadic activity on the part of AMI is insufficient to show . . . specific intent . . . to destroy Abcor's ability to compete in the alleged market. . . ." [1] Abcor argues that the court ignored both direct and circumstantial evidence that AMI sought to destroy Abcor through anticompetitive tactics.

[7]** Abcor's strongest direct evidence of intent derives from deposition testimony by Kibler. Kibler testified that an AMI manager called him shortly after AMI decided not to buy Abcor and said that AMI had decided that it did not need to buy Abcor because it could acquire its business through competition. An AMI salesman provided some corroboration by testifying that "top management" at AMI felt that it "could eventually get the business a little at a time, and therefore it wasn't worth it, buying it outright."

Plaintiffs argue that in the context of a motion for summary judgment the court must accept Kibler's inference that these statements imply a plan to destroy Abcor through illegal, anticompetitive actions. Plaintiffs seek to bolster this inference by arguing that since AMI had not been successful competing with Abcor in the past (resulting in its low market share), its renewed effort must have involved more than just straightforward competition on the merits.

The argument fails, however, because the statements quoted above do not show any evidence of illegal intent. By themselves, the statements show only that AMI planned to increase its competitive activity in the Washington **[**8]**

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[1] We assume, without deciding, that the relevant market consists of the servicing and repair of AMI machines in the Washington, D.C., area. As we discuss below, the district court found a genuine issue of fact concerning the market definition. Because of our disposition of the other issues in this case, however, we need not reach the issue of market definition.

area. While plaintiffs attempt to rely on Kibler's testimony that he interpreted AMI's statements and actions as indicative of illegal anticompetitive intent, he had no basis from which to make such an inference. In essence, he seeks to create a material factual dispute by asserting that he believes AMI had an anticompetitive plan. These bald assertions are not enough to survive summary judgment. ***HN4***[] "When a motion for summary judgment is made and supported as provided in [*Rule 56*], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*.

Even if the record does not contain sufficient direct evidence to support a finding that AMI possessed the specific intent to monopolize the relevant market through anticompetitive means, plaintiffs assert that the trier of fact may also infer specific intent from a series of anticompetitive acts. Plaintiffs argue that AMI engaged in at least five separate illegal, anticompetitive acts. However, as discussed **[**9]** more fully herein, none of the actions relied upon by plaintiffs rise to the level of illegal competition. Even viewing the acts as a whole, the record reveals no more than vigorous competition **[*928]** which did not rise to the level of an antitrust violation.

2. *Anticompetitive Activity*

HN5[] To prove a violation of § 2 of the Sherman Act, plaintiffs must also show that the defendant engaged in anticompetitive or predatory conduct designed to further an intent to monopolize. Here plaintiffs allege that AMI engaged in a series of anticompetitive activities designed to destroy Abcor. We address each in turn.

a. Discriminatory and Deceptive Pricing

In the past, Abcor has been able to offer its maintenance and repair services at prices about 20% less than those offered by AMI. Plaintiffs contend that AMI responded by instituting price reductions that, although they did not rise to the level of predatory pricing, were nonetheless deceptive. AMI allegedly offered its standard service contract, the Preventive Maintenance Agreement (PMA), to at least one Abcor customer at a substantial **[**10]** discount and then falsified its own records to hide this discount to avoid giving a similar discount on its General Services Administration (GSA) contract. In particular, one AMI employee testified that, when he could not locate a file during discovery, he was told to create a dummy contract and "bring it to court." AMI also began offering a new Full Maintenance Agreement ("FMA"), which plaintiffs assert was deceptive because it offered essentially the same service as the PMA, but at a lower price. [2] Plaintiffs assert that the FMA was a special contract designed for use solely in the Washington area against Abcor.

The GSA contract referred to by plaintiffs requires AMI to give comparable price discounts on its GSA Schedule Contract as it gives to an "identified customer or category of customers." AMI suggests that any price cuts to Abcor customers **[**11]** would not invoke this clause because the "identified category of customers" was limited to states. Despite substantial discovery, plaintiffs remain unable to counter AMI's explanation of the GSA contract price reduction clause. In any event, Abcor may not complain of an antitrust violation if AMI violated a duty to a third party by engaging in what would otherwise be legitimate competition on the merits.

A further problem with plaintiffs' argument arises because the price cuts were not predatory, *i.e.*, selling below cost to drive Abcor permanently out of the market to enable future monopolistic behavior. Given that AMI faced stiff competition in the Washington area from Abcor, it was entitled to respond with non-predatory price cutting. If anything, AMI's actions suggest enhanced competition.

While plaintiffs admit that the price cuts by AMI were not predatory, they nonetheless contend that the price discounts were irrational and anticompetitive because AMI risked having to reduce its GSA contract price just to compete with Abcor. This argument encounters several problems. First, as discussed above, plaintiffs have not produced evidence to show that AMI actually risked reductions **[**12]** in its GSA contract prices. Second, they have neither contended nor shown that the discounted prices were below costs. As a result, even if AMI had to reduce

[2] The alleged deception would not have harmed consumers because they would ostensibly have received the same service as under the PMA contract, but at a lower price.

prices on the GSA contract, the price scheme would not be predatory. Finally, the evidence clearly indicates that AMI did not expect to reduce its prices on the GSA contract and was thus not expecting to suffer the losses asserted by plaintiffs. Whether or not such an action would violate AMI's contract with GSA concerns GSA, not Abcor.

b. Misuse of Confidential Financial and Customer Information

Plaintiffs argue that AMI obtained Abcor's customer list during the negotiations to acquire Abcor and then used that list to solicit Abcor customers. This argument encounters at least two problems. First, while it is clear the AMI has an Abcor customer list, plaintiffs do not know how AMI obtained the list. Kibler cannot remember **[*929]** whether or not he supplied AMI with a list during the negotiations. AMI could well have obtained the list through legitimate means. Kibler admitted that Abcor has an AMI customer and price list. If legally obtained, the defendant was free to use it to locate potential customers for solicitation. **[**13]** Second, Abcor admits that its customer list is not secret. AMI sold all of the equipment in the alleged market, so it knows who requires service.

Plaintiffs also contend that AMI obtained financial information during the acquisition negotiations and used the information to infer Abcor's profit margin. With such information, they assert, AMI could then determine exactly how low it had to cut prices to eliminate Abcor's profits. AMI responds by pointing out that it obtained only aggregate financial information, nothing with specific information on profit margins. While use of financial information revealed in acquisition negotiations would abuse Abcor's confidence in revealing the information, such use would not necessarily constitute a violation of the antitrust laws. Moreover, nothing in the record shows that AMI actually used the information in this way. ***HN6***[] Mere assertions by the plaintiffs are not enough to survive summary judgment.

c. Selective Denial of Parts

For many years, Abcor was able to purchase parts for AMI machines over-the-counter at AMI's parts depot in the Washington area. **[**14]** In mid-1988, AMI terminated this service for all "non-end users" (including Abcor) and terminated Abcor's ability to order parts by telephone from the Chicago parts center. Abcor is free to order parts, but it must do so in writing. While Abcor has not lost any customers because of these decisions, plaintiffs allege that the new system inhibits Abcor's ability to handle emergencies. These hindrances, they argue, were instituted as part of an overall plan to destroy Abcor.

AMI responds that the Washington area parts depot is only for AMI servicing. It sometimes lets machine owners servicing their own equipment buy directly to foster goodwill. AMI declines to sell locally to Abcor because it feels Abcor should bear its own inventory costs. The plaintiffs are free to purchase parts from Chicago. In fact, total purchases have increased in recent years. If Abcor wants to ensure emergency access to a supply of parts, it may do so by maintaining its own stockpile rather than "free riding" on the inventory costs incurred by AMI. AMI says it terminated its acceptance of phone orders to avoid confusion and disputes over orders. [3] In addition, AMI points out that Abcor has not lost a contract **[**15]** because it was unable to get parts.

In general, ***HN7***[] a seller has the right to choose with whom it wishes to deal. For example, in *Olympia Equip. Leasing v. Western Union Telegraph, 797 F.2d 370 (7th Cir. 1986)*, the defendant Western Union had encouraged competition in the telex equipment market by having its salesmen sell competing equipment, including the plaintiff's. When Western Union ceased having its own salesmen market competing equipment, the plaintiff filed suit. The court held that "a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or otherwise pulling its competitive punches." *797 F.2d at 375*. The plaintiff had no right to "free ride" on the sales force of the defendant. **[**16]** *Id. at 377-78*. *Cf.* *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)* (monopolist film maker did not have to facilitate competition from other camera manufacturers by revealing new film prior to marketing).

[3] AMI acknowledges that it sometimes allows phone orders from individual customers that are smaller with a lower risk in case of error.

HN8[] The right to refuse to deal, however, is not unfettered. The plaintiffs here point to the decision in *General Industries Corp. v. Hartz Mountain Corp., 810 F.2d 795 (8th Cir. 1987)*. In *Hartz*, the court upheld a verdict for the plaintiff under the Sherman **[*930]** Act. Plaintiff, a former distributor for the defendant Hartz, was terminated after it began to carry competing brands. The court noted that "although a refusal to deal, without more, does not violate the antitrust laws, the Supreme Court has found that 'if accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the [Sherman] Act.'" *810 F.2d at 802* (quoting *Times-Picayune, 345 U.S. at 625*).

AMI's change in parts **[**17]** policy simply does not rise to the same level of anticompetitive activity. The defendant in *Hartz* completely severed business relations with the plaintiff. By contrast, AMI has not eliminated Abcor's access to parts. It has only eliminated Abcor's "free ride" by shifting the inventory cost to the plaintiff.

d. Lies and Misinformation

Plaintiffs further contend that AMI engaged in a campaign of spreading lies and misinformation to create the impression that Abcor was going out of business. These accusations stem from two events. In the first, Bonnie Dunsing, an AMI employee, testified that an AMI manager, Ron Gallier, instructed her to call Abcor customers and tell them that Abcor was going out of business altogether. While Abcor was in fact going out of the graphics *supplies* business, it was continuing its *service* business. Dunsing refused to make the calls and was terminated soon thereafter for revealing confidential information to a competitor. AMI responds by arguing that Dunsing misconstrued her instructions because, as she admitted, Gallier never specifically referred to the *service* business, only to going out of business in general.

In the second incident, **[**18]** an AMI salesman told the AFL-CIO, a large Abcor customer, that Abcor was going out of the supplies business and might soon go out of the service business as well. While plaintiffs concede that the AMI salesmen said nothing untrue, the customer was left with the incorrect impression that Abcor would be going out of business entirely. AMI corrected the misunderstanding as soon as it became aware of the mistake.

The record contains evidence indicating that both incidents may have occurred and the incidents lend some weight to the plaintiffs' allegations. Nevertheless, these two incidents alone do not, without more, constitute enough evidence to support a finding of attempted monopolization. ***HN9***[] To avoid summary judgment, the plaintiffs must produce not "merely colorable" but "significantly probative" evidence. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

e. Hiring of Abcor Employees

The plaintiffs allege that AMI hired two Abcor service technicians, when they were not needed, to hurt Abcor and help solicit Abcor customers. **[**19]** As AMI points out, Kibler is a former AMI employee who started Abcor with six former AMI employees. Abcor has consistently hired AMI employees and used them to garner customers away from AMI. The fact that AMI has now hired two back is only a sign that it is fighting back. Kibler himself described the situation as "you lose two, you get two back."

In the specific instances at issue here, nothing suspicious taints the hiring of the two employees. Both had strong motivations to leave Abcor. One was divorcing Kibler's daughter. The second was experiencing personal problems, had left Abcor before, and had been reprimanded on numerous occasions at Abcor. AMI claims, and Abcor does not dispute, that both employees initiated the contact. Moreover, ***HN10***[] special concern must be given to finding antitrust violations for hiring personnel away from competitors. Courts should be careful not to impede the ability of the employee to market his or her skills. III Areeda & Turner, ***Antitrust Law*** § 738d (1978).

f. AMI's Actions Viewed as a Whole

Plaintiffs argue that even if each individual action cited **[**20]** above does not amount to **[*931]** an antitrust violation, the court should look at the defendant's actions as a whole and infer a pattern of anticompetitive activity. While the court should view the entire record, the actions here do not support a finding of anything more than aggressive competition. Even if AMI has engaged in some unfair competition, as we noted in *Military Services*

Realty, Inc. v. Realty Consultants of Virginia, Ltd., 823 F.2d 829, 832 (4th Cir. 1987), **HN11**[] "'courts should be circumspect in converting ordinary business torts into violations of antitrust laws. To do so would be to 'create a federal common law of unfair competition' which was not the intent of the antitrust laws.'" [4] The "sporadic activity" identified by the plaintiffs does not amount to an antitrust violation.

[21]** 3. *Antitrust Injury*

The district court held that plaintiffs had failed to produce evidence of any antitrust injury. The court noted that Abcor had not lost a single customer or contract or any loss of market share, and nothing indicated any loss stemming from illegal, anticompetitive activity. The Sherman Act is designed to protect competition, not competitors. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962).

The plaintiffs point to testimony from its economic expert indicating that Abcor's profit margin had declined in the last two years, just after AMI is alleged to have started its campaign to drive Abcor out of business. While Abcor's profit margin may have declined, the plaintiffs have failed to show a causal link to anticompetitive activity. More aggressive competition on the merits from AMI may also have reduced Abcor's profit margin as it struggled to respond. For example, having to warehouse its own supply of parts rather than relying on AMI may have increased Abcor's costs. Plaintiffs' expert, who was unfamiliar with the term "antitrust injury" prior to his deposition, did not identify the source of **[**22]** the reduced profit margin.

4. *Market Definition and Dangerous Probability of Success*

Plaintiffs seek a narrow market definition limited to the servicing of AMI equipment in the Washington, D.C., area. AMI argues that servicing of similar equipment made by other manufacturers and servicing of other reproductive equipment, such as photocopying machines, should be included. The district court found a genuine issue of fact existed concerning market definition and refused to grant the defendant's motion for summary judgment on this issue.

The district court also declined to grant summary judgment on the issue of dangerous probability of success. AMI argues that, in the Fourth Circuit, no dangerous probability of success exists as a matter of law unless the defendant controls 70% of the market. *See* White Bag Co. v. International Paper Co., 579 F.2d at 1387. AMI has, at most, 25% of the relevant market. In fact, Abcor dominates the local market. Plaintiffs argue that if AMI succeeded in driving Abcor out of the market, AMI would probably attain more than 70% of the market. The fact that Abcor has a bigger share now, they contend, is negated by the much greater **[**23]** size of AMI overall.

Because we affirm the district court's grant of summary judgment on the issues of specific intent and anticompetitive activity, we need not, and do not, reach these other questions.

III.

Plaintiffs have produced evidence to show that AMI sought to increase its market share and perhaps even to drive Abcor out of the market completely. However, **HN12**[] "the antitrust laws were designed to protect competition, not competitors. The elimination of a single competitor[,] standing alone, does not prove anticompetitive effect." Military Serv. Rlty., 823 F.2d at **[*932]** 832 (citations omitted). When the record is viewed as a whole, it shows no more than that the defendant began a campaign of more aggressive competition, which has not been very successful. Injury to Abcor, if any, is the result of more competition, not predatory action. We therefore affirm the grant of summary judgment in favor of the defendant by the district court.

AFFIRMED.

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[4] Quoting Merkle Press, Inc. v. Merkle, 519 F. Supp. 50 (D. Md. 1981) (citing Mar Food Corp. v. Doane, 405 F. Supp. 730, 731 (N.D. Ill. 1975).

Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp.

United States District Court for the District of New Jersey

October 15, 1990, Decided ; October 15, 1990, Filed

Civil Action No. 88-499

Reporter
1990 U.S. Dist. LEXIS 13882 *; 1990 WL 156107

GULFSTREAM III ASSOCIATES, INC., GULFSTREAM IV ASSOCIATES, INC., Plaintiffs, v. GULFSTREAM AEROSPACE CORP., a Delaware corporation; GULFSTREAM AEROSPACE CORP., a Georgia corporation; GULFSTREAM AMERICAN CORP., ATLANTIC AVIATION CORP.; CESSNA AIRCRAFT CO.; GATES LEARJET CORP.; BRITISH AEROSPACE, INC.; CANADAIR CHALLENGER, INC.; MITSUBISHI AIRCRAFT INTERNATIONAL, INC., Defendants

Notice: [*1] NOT FOR PUBLICATION.

Core Terms

purchaser, manufacturer, antitrust, overcharge, assigned, negotiated, Aircraft, purchase price, Clayton Act, airplane, price-fixer

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1[] **Appellate Jurisdiction, Interlocutory Orders**

28 U.S.C.S. § 1292(b) provides in part: When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN2[] **Regulated Industries, Higher Education & Professional Associations**

Due process prohibits issue preclusion against a non-party to the first litigation of the issue.

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN3[] **Antitrust & Trade Law, Clayton Act**

Section 4 of the Clayton Act at 15 U.S.C.S. § 15(a) provides in part: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN4[] **Purchasers, Direct Purchasers**

Receipt of title is irrelevant to the determination of a direct purchaser.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

HN5[] **Clayton Act, Claims**

The direct purchaser rule applies regardless of the applicability of the rationale underlying the rule.

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Judges: Alfred M. Wolin, United States District Judge.

Opinion by: WOLIN

Opinion

OPINION

Defendant Cessna Aircraft Company has moved pursuant to *28 U.S.C. § 1292 (b)* to certify this Court's August 30, 1990 order denying in part Cessna's motion for summary judgment. Cessna has requested that the Court certify the following question of law:

Did the District Court correctly find that Gulfstream Associates, Inc. had standing as a direct purchaser of the Gulfstream III, serial no. 426, aircraft, for the purposes of recovering antitrust damages in circumstances where plaintiff assigned its contract to purchase the aircraft, did not pay the purchase price and did not receive title to or take delivery of the aircraft?

Cessna has also requested a stay of the action pending the appeal it seeks. For the reasons stated below, the Court will decline to grant an interlocutory **[*2]** appeal.

I. BACKGROUND

On August 30, 1990, the Court issued an order which, among other things, denied "Cessna's motion for summary judgment which arises out of the purchase of Gulfstream III, serial no. 426. . . ." August 30, 1990 Order at 2. The Court also issued an accompanying 22 page opinion which sets forth certain undisputed facts relevant to the issue now before the Court. Plaintiff Gulfstream III Associates, Inc. negotiated a price of $ 9,975,000, subject to an escalation clause, with the manufacturer, Gulfstream Aerospace Corporation. August 30, 1990 Opinion at 12. Plaintiff then assigned the contract to JB & A Aircraft, Inc. for $ 10,020,000. Id. The assignment to JB & A was independently negotiated between plaintiff and JB & A. Id. at 13. Plaintiff paid $ 3,497,500 to the manufacturer in cash deposits before the assignment, Id. at 12, and remained liable after the assignment for the full amount of the balance on its contract with the manufacturer. Id. at 14. R.H. Macy & Co. in turn received an assignment from JB & A and took delivery of the airplane. Id. at 13. Plaintiff then received $ 2,984,657.30 from Macy's and JB & A. Id. The difference **[*3]** between this payment and plaintiff's deposit to the manufacturer was $ 512,841.70, an amount which plaintiff took as a loss in its tax return. Id.

The Court held that plaintiffs, despite assigning their contract to JB & A, had standing to bring their antitrust claim under the direct purchaser doctrine of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061 (1977)*. Opinion of August 30, 1990 at 15. It is this holding which Cessna now seeks to challenge via interlocutory appeal.

II. DISCUSSION

HN1[] Title *28 U.S.C.A. § 1292 (b) (Supp. 1990)* provides in relevant part:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

Plaintiff does not dispute that the order on which Cessna seeks an interlocutory appeal involves, in the terms of *§ 1292 (b)*, "a controlling question of law. . ." Plaintiff does dispute, however, **[*4]** that there is "substantial ground for difference of opinion" as to the question of law decided. Plaintiff's Memorandum of Law in Opposition at 4-6. [1]

This Court has held twice that plaintiff has standing to bring its antitrust claim against Cessna. On January 11, 1988, in a related case, Judge Lechner held that Gulfstream III Associates, Inc. was the direct **[*5]** purchaser of the same airplane which is currently at issue. *Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053, 1073 (D.N.J. 1988)*

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[1] Plaintiff also argues that an interlocutory appeal will not materially advance the termination of the litigation. Plaintiff's Opening Memorandum at 6-7. If the Court certified the question presented and the Third Circuit Court of Appeals held that plaintiff has no standing, this case would be completely finished at the trial court level. On the other hand, plaintiffs may or may not appeal the Court's dismissal of their other claims. See August 30, 1990 Order at 2 (dismissing plaintiffs' claims concerning other airplanes). Because the Court holds that there is no substantial ground for difference of opinion, it will not reach the advancement of litigation issue.

(relying on Illinois Brick and *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224 (1968))*. [2] Thus, the August 30, 1990 Opinion was the second time that this Court has held that plaintiff has standing to bring its claim. The Court's consistency on this issue creates some doubt as to the substantiality of ground for difference of opinion.

[*6] The current state of the law leaves even less doubt that plaintiff has standing to bring its claim under § 4 of the Clayton Act, *15 U.S.C. § 15*. [3] **[*7]** The United States Supreme Court recently reaffirmed the direct purchaser rule in *Kansas v. Utilicorp United, Inc., 110 S. Ct. 2807 (1990)*:

The rationales underlying Hanover Shoe and Illinois Brick will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.' The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. . . . In sum, even assuming that any economic assumptions underlying the Illinois Brick rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in Hanover Shoe, and adhered to it in Illinois Brick, we stand by our interpretation of § 4. *110 S. Ct. at 2817* (citation omitted; brackets in original). [4]

Cessna argues that the direct purchaser rule does not govern the issue of plaintiff's standing because plaintiff is not a purchaser at **[*8]** all. Letter Memorandum of October 9, 1990. Cessna argues that because plaintiff never took delivery of the airplane, never received title to it, never paid the purchase price, and assigned its contract of purchase, plaintiff did not purchase the airplane and therefore has no standing. Cessna's Opening Memorandum at 9-11.

The fact that plaintiff never took possession of the airplane does not render plaintiff a non-purchaser. Plaintiff was allegedly harmed when it paid an artificially high price resulting from the price-fixing conspiracy with which plaintiff has charged Cessna and other manufacturers. Whether plaintiff actually comes into possession of the airplane is irrelevant to whether, as alleged, it suffered that harm. ***HN4***[] Receipt of title is likewise irrelevant to the determination of a direct purchaser. See In re Fertilizer Antitrust Litigation, 1979-2 Trade Cas. (CCH) para. 62,894, at 79,174-75 (E.D. Wash. 1979) (assuming passage of title directly from defendant price-fixers to plaintiff consumers, only consignee retailers had standing under Illinois Brick).

The Court also rejects Cessna's argument that plaintiff did not pay the purchase price to the manufacturer and therefore **[*9]** cannot be considered a purchaser. The Court found that "plaintiff paid $ 3,497,500 in cash deposits towards the Gulfstream III, serial no. 426, prior to the assignment." August 30, 1990 Opinion at 12. The fact that

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[2] Because Cessna was not a party to Rosefielde, Judge Lechner's decision could not have had any preclusive effect on the Court's recent determination of the standing issue. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329, 91 S. Ct. 1434, 1443 (1971)* ***HN2***[] (due process prohibits issue preclusion against non-party to first litigation of issue). The August 30, 1990 indicates that Judge Lechner's decision had no collateral estoppel effect on the Court's recent decision on standing. See August 30, 1990 Opinion at 15 n.1 (referring to, but not relying on, Rosefielde).

[3] ***HN3***[] Section 4 of the Clayton Act provides in relevant part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ." *15 U.S.C.A. § 15(a) (Supp. 1990)*.

[4] Cessna argues that Utilicorp aids its argument in favor of certification pursuant to *28 U.S.C § 1292(b)* because the district court in Utilicorp certified the direct purchaser issue to the Tenth Circuit Court of Appeals. Cessna Reply Memorandum at 4. When the district court certified the issue, however, the Seventh Circuit decision which the district court had followed had recently been withdrawn. ***In re Wyoming Tight Sands Antitrust Cases, 695 F. Supp. 1109, 1119 (D. Kan. 1988)***, aff'd, *866 F.2d 1286 (10th Cir. 1989)*. By the time the Tenth Circuit answered the certified question, the Seventh Circuit had issued an en banc opinion reversing its original stance. *866 F.2d at 1293*. The Supreme Court granted certiorari to resolve the conflict between the Seventh and Tenth Circuits. 110 S. Ct. at 2811. There is no such history in this case. In fact, Cessna has not brought to the Court's attention any apposite case from any court to support its position.

these payments represented only a fraction of the price plaintiff negotiated with the manufacturer does not make plaintiff any less a purchaser. In Hanover Shoe, the Supreme Court refused to apportion the overcharge paid between direct and indirect purchasers. *392 U.S. at 493, 88 S. Ct. at 2231*. In Illinois Brick, the Supreme Court construed Hanover Shoe to rest "on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *431 U.S. at 734-35, 97 S. Ct. at 2069*. The overcharged direct purchaser, and not any remote party in the chain of distribution, is the party injured so as to have standing. *Id. at 729, 97 S. Ct. at 2066*. See also P. Areeda & D. Turner, ***Antitrust Law***, para. 337 (1978) (middleman ordinarily recovers from **[*10]** offender without deduction for amount of injury passed on to consumer). The manufacturer in this case overcharged plaintiff if it overcharged anyone.

Cessna cites *New York v. Hendrickson Bros., Inc., 840 F.2d 1065* (2d Cir.), cert. denied, *488 U.S. 848, 109 S. Ct. 128 (1988)* for the proposition that a plaintiff must pay the purchase price to have standing. Cessna's Opening Memorandum at 12. In Hendrickson, the State of New York had standing under the Clayton Act because it had contracted with an antitrust conspirator, even though the federal government contributed 75 percent of the contract price. *840 F.2d at 1079*. Although Cessna attempts to distinguish Hendrickson on the ground that the federal government merely reimbursed the state government, Cessna's Reply Memorandum at 5-6, the federal government was held to be an indirect purchaser because it "neither dealt with the contractors nor owed them any funding duty." *840 F.2d at 1079*. JB & A and Macy's likewise did not negotiation the prices they paid directly with the alleged co-conspirator and did not owe funding duties to it. On the other hand, JB & A and Macy's, as well as plaintiff, may have had funding obligations **[*11]** to the manufacturer. See Closing Memorandum, Sale of Gulfstream III to R.H. Macy & Co., Inc., [5] Cessna Exhibit 57 in support of its cross-motion for summary judgment. Only one of the three can have standing, however, and so funding obligations cannot be the dispositive factor in this case. Plaintiff negotiated a price directly with the manufacturer and was the first of the potential purchasers to make payments to the manufacturer.

Under certain circumstances, a plaintiff can have standing without making any payment to the alleged price-fixer. In Fertilizer Antitrust Litigation, retailers who sold on consignment were held to have standing even though the retailers received money from defendants, rather than paying them. 1979-2 Trade Cas. at 79,175. **[*12]** The court reasoned that the consignment retailers had to decide whether to pass on or absorb the alleged overcharge. Id. The same reasoning governs here in a far less extreme application of Illinois Brick. Plaintiff is suing to recover for a 15 percent overcharge of the purchase price, August 30, 1990 Opinion at 9, or $ 1,496,250 (before trebling). This amount is well below the $ 3,497,500 plaintiff paid the manufacturer before assigning its contract. Although the loss that plaintiff took was only $ 512,842.70, this number does not reflect how much of the alleged 15 percent overcharge plaintiff may have absorbed. At least where the amount of the payments made is greater than the alleged overcharge, a purchaser has standing despite not having paid the entire purchase price.

Plaintiff's assignment of its contract, after it made payments under the contract, does not destroy its standing. The price which plaintiff negotiated with the manufacturer put it at risk with respect to any antitrust violation that went into determining that price. Although plaintiff presumably sold its interest to its assignee at an even higher price than it would have in the absence of the alleged violation, **[*13]** "the buyer is equally entitled to damages if he raises the price for his own product." *Hanover Shoe, 392 U.S. at 489, 88 S. Ct. at 2229*. Unlike the assignors, plaintiff negotiated a price directly with the alleged price-fixer. Having done so, plaintiff did not lose its standing by assigning its contract.

A subsidiary question is whether, in assigning its contract, plaintiff also assigned its potential claims for antitrust violations. As a general proposition, a claim under the Clayton Act can be assignable. *In re Fine Paper Litigation, 632 F.2d 1081, 1090 (3d Cir. 1980)* (holding assignments of Clayton Act claims not in conflict with Illinois Brick). In Fine Paper, however, the parties to the assignment executed express assignments of antitrust rights. *632 F.2d at*

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[5] The Court gives little weight to the characterization of this transaction as a sale by the manufacturer to Macy's. There is little reason to believe the parties to the closing had the arcana of antitrust standing in mind when they named the closing memorandum.

1089. In contrast, Cessna has not pointed to any language in plaintiff's assignment to JB & A that so much as alludes to rights under the antitrust laws. See Purchase Agreement Assignment, Cessna Exhibit 56 in support of its cross-motion for summary judgment. On this record, the Court will not infer an assignment of plaintiff's Clayton Act rights.

Plaintiff's direct contractual obligations and payments **[*14]** to an alleged price-fixer give plaintiff standing to sue under the Clayton Act. Especially in light of the Supreme Court's recent holding in Utilicorp that ***HN5***[] the direct purchaser rule applies regardless of the applicability of the rationale underlying the rule, *110 S. Ct. at 2817*, the Court can not state that there is substantial ground for difference of opinion that plaintiff has standing.

III. CONCLUSION

For the foregoing reasons, the Court will deny Cessna Aircraft Company's motion to certify pursuant to *28 U.S.C. § 1292 (b)*.

An appropriate order is attached.

ORDER

In accordance with the Court's opinion filed herewith,

It is on this day of October, 1990,

ORDERED that defendant Cessna Aircraft Company's motion to certify pursuant to *28 U.S.C. § 1292 (b)* is denied.

End of Document

Whirlpool Corp. v. U.M.C.O. Int'l Corp.

United States District Court for the Southern District of Florida

October 16, 1990, Decided ; October 16, 1990, Filed

Nos. 85-3466-CIV-WMH, 88-0868-CIV-WMH

Reporter

748 F. Supp. 1557 *; 1990 U.S. Dist. LEXIS 14128 **; 1991-1 Trade Cas. (CCH) P69,445

WHIRLPOOL CORPORATION, Plaintiff/Counter-defendant, v. U.M.C.O. INTERNATIONAL CORP., UMCO S.A., UMCO, C.A., and R. CLAYTON UMBEL, Defendants/Counter-plaintiffs; U.M.C.O. INTERNATIONAL CORP., Plaintiff, v. WHIRLPOOL CORP., Defendant

Core Terms

terms, parties, dealer, distributorship, established relationship, summary judgment, contrahendo, termination, culpa, summary judgment motion, good faith, prices, negotiations, non-movant, unilateral, products, detrimental, recommendation, contractual, distributor, bargaining, purchasers, antitrust, contracts, disparate, impaired, grounds, price discrimination, law of the case, Robinson-Patman Act

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Discovery, Methods of Discovery**

See *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN2[] **Summary Judgment, Entitlement as Matter of Law**

In assessing whether the movant has met his burden under *Fed. R. Civ. P. 56(c)*, the court should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. All reasonable doubts about the facts should be resolved in favor of the non-movant. If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN3[] Summary Judgment, Entitlement as Matter of Law

The party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] Summary Judgment, Entitlement as Matter of Law

On a motion for summary judgment, the moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied, notwithstanding that the non-moving party has introduced no evidence whatsoever.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN5[] Summary Judgment, Opposing Materials

In opposing a motion for summary judgment, the non-moving party may not rest upon mere allegations, but must rebut any facts presented by the moving party in order to demonstrate the existence of a genuine and material issue of fact for trial. Furthermore, the mere existence of a scintilla of evidence in support of the non-movant's position is insufficient; there must be evidence on which a jury could reasonably find for the non-movant. In determining whether this evidentiary threshold has been met, the trial court must view the evidence presented through the prism of the substantive evidentiary burden applicable to the particular cause of action before it. If the non-movant fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN6[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is mandated, if after adequate time for discovery, the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party would bear the burden of proof at trial.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Energy & Utilities Law > Utility Companies > Service Terminations

HN7[] **Price Discrimination, Competitive Injuries**

Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause. P.R. Law 75, *P.R. Laws Ann. tit. 10, § 278a*.

Civil Procedure > Trials > Bench Trials

HN8[] **Trials, Bench Trials**

The "law of the case" doctrine is the rule under which the trial court and appellate courts are bound by any findings of fact or conclusions of law made by the appellate courts in a prior appeal of the case at issue. The purpose of the doctrine is to bring an end to litigation by foreclosing the possibility of repeatedly litigating an issue already conclusively decided.

Contracts Law > Contract Interpretation > General Overview

HN9[] **Contracts Law, Contract Interpretation**

Where a contract is unambiguous, its literal meaning must be applied. *P.R. Laws Ann. tit. 31, § 3471*.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN10[] **Price Discrimination, Competitive Injuries**

The stated purpose of P.R. Law 75, *P.R. Laws Ann. tit. 10, § 278a*, is to provide a protective supplement to all dealer/supplier contracts in an effort to equalize the bargaining inequity between the large principals and the smaller dealers. The traditional provisions which regulate contracts between parties have shown their inefficacy in protecting the legitimate rights of the representative or agent, making it thus necessary to legislate in order to regulate this relationship and guarantee that manufacturers act in good faith, fairly, and not in an arbitrary manner, and to safeguard the rights and justified expectation of the representatives and agents inherent to the relationship.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Governments > Legislation > Interpretation

HN11[] **Price Discrimination, Competitive Injuries**

The expressed legislative intent is to protect the legitimate expectations and interests of distributors or agents in ways in which traditional principles of contract law had not been effective. The termination of dealerships could no longer be left up to the reparations provided by general contract law.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN12[] **Price Discrimination, Competitive Injuries**

It shall be unlawful for any person, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale in Puerto Rico, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in Puerto Rico, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. Puerto Rico Anti-Monopoly Act, *P.R. Laws Ann. tit. 10, § 263(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN13[] **Robinson-Patman Act, Claims**

The Puerto Rico Anti-Monopoly Act (Act), *P.R. Laws Ann. tit. 10, § 263* is patterned after, and in all material respects is identical to the Clayton Act, § 2(a), 38 Stat. 730, as amended by the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*. Accordingly, federal precedents construing the Robinson-Patman Act are applicable to the interpretation of Act *§ 263*.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN14[] **Price Discrimination, Competitive Injuries**

A party must be allowed a reasonable latitude in setting its credit terms, but must be prevented from cloaking discriminatory pricing under the veil of available credit. There is no requirement that all buyers be offered the same credit terms, merely that they be evaluated under the same standards for granting or denying credit.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN15[] **Remedies, Damages**

A private plaintiff may not recover damages under Clayton Act, § 4 or P.R Law 75, *P.R. Laws Ann. tit. 10, § 268(a)* merely by showing injury causally linked to an illegal presence in the market.

Antitrust & Trade Law > Clayton Act > Claims

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN16[] **Clayton Act, Claims**

In order to state a cause of action under Clayton Act, § 4 or P.R. Law 75, *P.R. Laws Ann. tit. 10, § 268(a)*, a plaintiff must show antitrust injury, meaning that the alleged injury is of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Governments > Legislation > Interpretation

HN17[] **Price Discrimination, Competitive Injuries**

The legislative intent of P.R. Law 75, *P.R. Laws Ann. tit. 10, § 278a* is to equalize the parties bargaining power and to balance the contractual conditions of two groups unequal in their strength. The distributor is to be not only protected from arbitrary terminations, but also from undue practices on the part of principals or grantors.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Governments > Legislation > Interpretation

HN18[] **Price Discrimination, Competitive Injuries**

In enacting and amending P.R. Law 75, *P.R. Laws Ann. tit. 10, § 278a*, the Puerto Rico legislature recognizes that principals possess the economic clout not only to eliminate dealers outright, but also without fully eliminating them, to gradually reduce and impair the extent of their previously established relationships.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Business & Corporate Law > ... > Causes of Action > Fiduciary Duties > Good Faith & Fair Dealing

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN19[] **Price Discrimination, Competitive Injuries**

P.R. Law 75, *P.R. Laws Ann. tit. 10, § 278a*, leaves principal and dealer free to change or bargain in good faith the prices and credit terms for the sale of the franchised product. Law 75 simply supplements the contract law to the extent necessary to protect weaker dealers from the abusive employment of one-sided contract terms by economically superior principals.

Counsel: [1]** Attorney for Plaintiff: Philip T. Crenshaw, West Palm Beach, Florida.

Attorney for Defendant: Peter W. Homer, Miami, Florida.

Judges: William Hoeveler, United States District Judge.

Opinion by: HOEVELER

Opinion

[*1558] WILLIAM HOEVELER, UNITED STATES DISTRICT JUDGE

This action involves two consolidated cases, both of which are before the Court on two motions for summary judgment by Whirlpool Corp. (hereinafter "Whirlpool"), against UMCO International (hereinafter "UMCO").

I. Background

In late 1984, UMCO entered into negotiations with Whirlpool to establish a distributorship in Puerto Rico for Whirlpool products. UMCO's stated objective was to take over what it feels was an "exclusive" distributorship in Puerto Rico which was formerly enjoyed by the Protane Gas Company. On December 21, 1984, UMCO executed a standard Whirlpool distributorship to be effective December 28, 1984, for a one year period ending December 28, 1985. There is no explicit term in the agreement which grants to UMCO the same exclusive rights and privileges that it contends were previously held by Protane Gas. It is UMCO's disappointment over its unrequited desire to be Whirlpool's "exclusive dealer" which **[**2]** animates the conflict now unfolding before this Court.

Whirlpool's interests did indeed lie beyond an exclusive relationship with UMCO. Approximately six weeks prior to Whirlpool's execution of the agreement with UMCO, Whirlpool had entered into another distributorship agreement with Western Auto Sales (hereinafter "Western Auto"), which contemplated entering the Puerto Rican market sometime in 1985. UMCO, however, was not wholly in the dark concerning this agreement between Whirlpool and Western Auto, and had in fact made inquiries as to what impact the Whirlpool/Western Auto liaison would have on the Whirlpool/UMCO relationship.

In the Fall of 1985 Whirlpool began supplying Western Auto of Puerto Rico, and the relationship between UMCO and Whirlpool soured. By Spring of 1985 UMCO had initiated this action against Whirlpool in the Superior Court of Puerto Rico. The allegations included violations of Law 75, Dealers' Contracts, *10 L.P.R.A. sec. 278 et seq.* for impairment of its distributorship agreement; and violations of the Puerto Rico Anti-Monopoly Act, *10 L.P.R.A. sec. 263* (the Puerto Rican counterpart of the Robinson-Patman Act) for price discrimination. This action was removed **[**3]** on grounds of diversity of citizenship in April of 1985 to the United States District Court for the District of Puerto Rico.

Now in federal court, UMCO moved to enjoin Whirlpool from selling its products to Western Auto. The plot then thickens. Pursuant to this motion for injunction, there was an evidentiary hearing during which Whirlpool learned of certain dealings **[*1559]** which caused it to conclude that UMCO had been bribing Whirlpool's sales manager. In redress for these alleged bribes, Whirlpool initiated its own proceedings before this Court for violations of the Federal Racketeering Influenced Corrupt Organizations Act (RICO).

In an effort to sort out the chain of events, a brief recapitulation might prove helpful. First, UMCO expresses its desire to be an exclusive Whirlpool dealer, signs a non-exclusive dealership contract, and files suit against Whirlpool when Whirlpool begins dealing with Western Auto. Then, Whirlpool learns of suspected bribes being made by UMCO to Whirlpool's man in the field, and responds to this affront with a RICO action in the Southern District of Florida. The two actions were consolidated. Now before this Court are Whirlpool's two motions **[**4]** for summary judgment. The first motion arises from UMCO's first action, which for clarity's sake will hereinafter be called the "Puerto Rico Action". The second motion is directed against UMCO's counterclaims in the second action, hereinafter to be referred to as the "Florida Action". The two motions are examined in turn, below.

II. Standard on Summary Judgment

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in *Rule 56(c) of the Federal Rules of Civil Procedure*:

> HN1[] The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

As set forth in the Rule, summary judgment may be entered only where there is no genuine issue of material fact. Moreover, the moving party bears the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142, 154 (1970)*. **[**5]**

In applying this standard, the Eleventh Circuit has explained that:

> HN2[] In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Adickes, 398 U.S. at 157, 90 S. Ct. at 1608*; [*Environmental Defense Fund v.*] *Marsh*, 651 F.2d at 991 [5th Cir. 1981]. All reasonable doubts about the facts should be resolved in favor of the non-movant. *Casey Enterprises v. Am. Hardware Mutual Ins. Co., 655 F.2d 598, 602 (5th Cir. 1981)*. If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. *Marsh*, 651 F.2d at 991; *Lighting Fixture & Elec. Supply Co. v. Continental Insurance Co., 420 F.2d 1211, 1213 (5th Cir. 1969)*. Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply, 420 F.2d at 1213*. **[**6]** . . .
>
> Moreover, HN3[] the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes v. S.H. Kress & Co., 398 U.S. at 160, 90 S. Ct. at 1609-10*; *Marsh*, 651 F.2d at 991. HN4[] The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied, notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg, 370 F.2d 605, 611-612 (5th Cir. 1967)*. *See*, *Dalke v. Upjohn Co., 555 F.2d 245, 248-49 (9th Cir. 1977)*.

Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-1369. (11th Cir. 1982).

HN5[] In opposing a motion for summary **[**7]** judgment, the non-moving party may not rest upon mere allegations, but must rebut any facts presented by the moving party in order to demonstrate the existence of a genuine and material issue of fact for trial. *Adickes 398 U.S. at 160, 26 L. Ed. 2d at 156*. Furthermore, the mere existence of a scintilla of evidence in support of the non-movant's position is insufficient; **[*1560]** there must be evidence on which a jury could reasonably find for the non-movant. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 214 (1986)*. In determining whether this evidentiary threshold has been met, the trial court must "view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. *Id. 477 U.S. at 254, 91 L. Ed. 2d at 215*. If the non-movant fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. *Id. 477 U.S. at 253, 91 L. Ed. 2d at 215*. Moreover, **[**8]** HN6[] summary judgment is mandated, if after adequate time for discovery, the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party would bear the burden of proof at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 91 L. Ed. 2d 265, 273, 106 S. Ct. 2548 (1986)*.

III. The Puerto Rico Complaint

There are two main thrusts to UMCO's Puerto Rico action. First, UMCO argues that Whirlpool's dealings with Western Auto are in violation of Puerto Rico's "Law 75" which protects the rights of distributors against suppliers. Second, UMCO alleges that the Whirlpool/Western Auto relationship is in violation of the Puerto Rico Anti-Monopoly Act *10 L.P.R.A. Section 263*, which is the Puerto Rican equivalent to the Robinson Patman Act.

A. UMCO'S CLAIM UNDER LAW 75

In Count I of the Puerto Rico action, UMCO claims that Whirlpool's dealings with Western Auto were detrimental to the established exclusive dealing arrangement between UMCO and Whirlpool, and thus in violation of Law 75, which provides that:

> **[**9]** *HN7*[] Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause.

10 L.P.R.A. Sec. 278a. "The Legislature of Puerto Rico enacted Law 75 with the purpose of injecting stability and creating leverage between the parties to a distributorship contract, in order to impede arbitrary impairments or termination by principals after a distributor had created a favorable market for its product." *General Office Products Corp. v. Gussco Mfg. Inc., 666 F. Supp. 328, 330 (D. Puerto Rico 1987)* *citing* 18 *Dario de Sesiones* 1531 (1964).

Whirlpool's simple response to UMCO's claim under Law 75 is that there was no exclusive dealing arrangement between the parties, and thus Whirlpool's supplying to Western Auto can visit no injury to the "established" UMCO/Whirlpool relationship. The task at hand is therefore to determine whether exclusivity was **[**10]** in fact a component of the relationship established between the parties, or merely the fanciful yearning of UMCO.

1. *Law of the Case*

This, however, is not the first occasion that a court of law has pondered the fact or fancy of exclusivity between the parties at bar. While this action was pending in the District Court for the District of Puerto Rico, Whirlpool filed a motion for summary judgment which raised the identical argument now faced by this Court. The District Judge in Puerto Rico, Carmen Consuelo Cerezo, referred the matter to United States Magistrate Justo Arenas, who issued a Report and Recommendation on June 29, 1987, recommending that the motion for summary judgement on this claim under Law 75 be denied. In an Order dated April 18, 1988, Judge Cerezo adopted the recommendation of the Magistrate. Presently consolidated with another action before this Court, Whirlpool presents this motion for summary judgment in what is effectively "another bite at the apple." Understandably, UMCO claims that this issue, already having been decided by Judge Cerezo, should not be reopened by this Court, and further suggests that this Court **[*1561]** is barred from revisiting the **[**11]** issue by the doctrine of the "law of the case".

The "law of the case" doctrine is not, however, as restrictive of the this Court's jurisdiction as UMCO would believe. The Eleventh Circuit case of *Robinson v. Parrish, 720 F.2d 1548 (11th Cir. 1983)*, is particularly instructive on this point. In *Robinson*, a subsequent judge granted a motion for summary judgment which an earlier judge had rejected. The Eleventh Circuit held that plaintiffs were "misguided in arguing that the 'law of the case' doctrine should have barred the district judge below from ruling contrary to the previous district judge":

> The "law of the case" doctrine is "the rule under which the trial court and appellate courts are bound by any findings of fact or conclusions of law made by the appellate courts in a prior appeal of the case at issue." *United States v. Burns, 662 F.2d 1378 (11th Cir. 1981)*. The purpose of the doctrine is to bring an end to litigation by foreclosing the possibility of repeatedly litigating an issue already conclusively decided *White v. Murtha, 377 F.2d 428 (5th Cir. 1967)*. **[**12]** . . .
> To hold that a district court must rigidly adhere to its own rulings in an earlier stage of a case would actually thwart the purpose of the doctrine. New developments or further research often will convince a district court that it erred in an earlier ruling, or the court may simply change its mind. We believe it would be wasteful and unjust to require the court to adhere to its earlier ruling in such an instance.

Robinson, 720 F.2d at 1549-50. *See also* *United States v. Williams, 728 F.2d 1402 (11th Cir. 1984)*; *Cale v. Johnson, 861 F.2d 943, 948 (6th Cir. 1988)* (denial of summary judgment motion does not foreclose granting of motion by subsequent judge); *Paulson v. Greyhound Lines, Inc., 628 F. Supp. 888, 891* (D. Minn.), *aff'd*, *804 F.2d 506 (8th Cir. 1986)* (law of the case did not prevent granting of motion for summary judgment even though predecessor judge had twice denied same motion). In light of the authority discussed above, it is clear that no barrier precludes reexamination of Whirlpool's motion. Having now revisited the matter however, the Court concurs with the result **[**13]** reached by the Magistrate that the summary judgment be denied, but differs (as explained below) with the basis on which such a result should be premised.

2. *Reexamination of the Issues Presented*

Under Law 75, Whirlpool is prohibited from acting to the detriment of the "established relationship" between itself and UMCO. Accordingly, the first issue confronted by the Magistrate, and reexamined now, regards the exclusivity of the contractual relationship between the parties.

a. Exclusivity of the Contract

The contract itself is unambiguous; it contains no term granting or even implying exclusivity. It is a well settled tenet of Puerto Rican law that where a contract is unambiguous, its literal meaning must be applied. *31 L.P.R.A. Section 3471*. Moreover, Plaintiff actually requested an exclusivity clause, which was denied by Whirlpool. Transcript of the Preliminary Injunction hearing at page 213. [1] Furthermore, the very plausibility of an exclusive contract is undermined by Plaintiff's established knowledge before the signing of the contract, of Western Auto's planned entry into the Puerto **[**14]** Rican market for the sale of Whirlpool products. (Tr. 197, 200, 317-318, 332-333). In whole, the Magistrate concluded, and this Court agrees, that the contract gives no support whatsoever to UMCO's claim of exclusivity. Failing to demonstrate exclusivity from the face of the contract, UMCO shifts its argument beyond the world of *written* contract and into the largely uncharted realm of "Aquilian fault", or *in culpa contrahendo* -- the basis on which the Magistrate grounded his decision to recommend denial of the motion.

[*1562] b. In Culpa Contrahendo

Having concluded that the contract was not intended to be exclusive, the Magistrate nevertheless denied Whirlpool's motion for summary judgment based on the arcane principle of *culpa in contrahendo*. As stated in the Magistrate's Report and Recommendation:

> In Puerto Rico, the civil code, grounded on values of good faith and the doctrine **[**15]** of *culpa in contrahendo*, may impose extra-contractual liability ("Aquilian fault") under Art. 1802, *31 L.P.R.A. Section 5141*, [2] on whoever acts in a tortious or wrongful manner during preliminary negotiations. *Produciones Tommy Muniz, Inc. v. Comite Organizador de los VIII Juegos Panamericos (COPAN), 113 D.P.R. 517, 529, 13* Official Translations 666, 679 (1982) (unjustified withdrawal from negotiations breached good faith imposed by precontractual relations and abused the legal right to withdraw, imposing liability for damages): "Good faith . . . imposes on the parties negotiating or attempting to negotiate, an archetype of social conduct, loyalty and fidelity to the word given . . . and consists in that every party to the contractual relation commits himself trustingly to the loyal conduct of the other party. Each confides in that the other will not defraud him . . . The parties are under the obligation to conduct themselves according to good faith in the sense that each is burdened by a reciprocal loyalty to observe a conduct that is socially valuable and demandable." *Id. at 528, 13* Official Translations at 678.

The Magistrate continues: **[**16]**

> Concomitantly, the exercise of a right carried out in an abusive manner is a source of liability, such abuse occurring when it "exceeds the limits imposed by good faith or by the social or economic end of said right." *Id*. (quoting *Velilla v. Pueblo Supermarkets, Inc., 111 P.R. Dec. 585, 588 (1981)*, and citing *Soriano Tavarez v. Riviera Anaya, 108 P.R. Dec. 663 (1979))*. Just as withdrawal from precontractual negotiations when consummation is reasonably expected constitutes conduct actionable under Art. 1802, *Id. at 529*, 13 Official Translations at 678-679, so also here, setting up a reasonable expectation of compliance with a critical term

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[1] Further references to the transcript of the preliminary injunction hearing will be referred to as "Tr.".

[2] The civil law doctrine of *culpa in contrahendo* is embodied in Art. 1802, ***31 L.P.R.A. sec. 5141*** which states that: A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party so aggrieved does not exempt from liability, but entails a reduction of the indemnity.

> upon which plaintiff moved in reliance, and subsequent noncompliance, if all elements are proven, imposes liability under Art. 1802. . . .
>
> United States law is not unaware of the underlying values of good faith and of the doctrine of *culpa in contrahendo*. Case law acknowledges precontractual liability on grounds similar to those applied by civil law in notions of good faith and *culpa in contrahendo*, through the legal institutions of "promissory estoppel," *Hoffman v. Red Owl Stores, Inc., [26 Wis. 2d 683], 133 N.W.2d 267 (1965)*; **[**17]** *Chrysler Corporation v. Quimby, [51 Del. 264], 144 A.2d 123 (1958)*, and "negligent misrepresentation," *Guilbert v. Phillips Petroleum Company, 503 F.2d 587 (6th Cir. 1974)*. *See also* Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv.L.Rev. 401, 448 (1964).

Ultimately, in his recommendation, the Magistrate concludes that based on the doctrine of *culpa in contrahendo*, the motion for summary judgment should be denied since "if the elements are proven, the noncompliance would be an act detrimental to the relationship in [violation of Law 75]."

[18]** After study of the doctrine, however, this Court hesitates to apply it to the facts at bar. The doctrine of *culpa in contrahendo* which literally means "fault in negotiating" dates back to 1861 and was first introduced in Germany to remedy "instances where a party by 'lack of diligence' had prevented the consummation of ***HN8***[] a valid contract . . . [Thus the negligent party is] held liable to the innocent party who had suffered damages [in reliance] on the validity **[*1563]** of the contract." See generally, Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harvard L. Rev. 401 (1964). While this doctrine has not been adopted in this country except in Louisiana [3] and in Puerto Rico, it has been discussed by other jurisdictions as well. However, of the all cases found referring to the doctrine, none involves circumstances in which a contract was actually consummated by the parties. Rather, the doctrine appears to have been applied without exception only to situations in which one of the parties relied upon a contract being formed at some point in the future, and failing such contractual binding was **[**19]** prevented from realizing certain reasonable expectations. *See* *Kethley v. Draughon Business College, 535 So. 2d 502*, (La. App. 2 Cir. 1988); *Associated Executive Control, Inc. v. Bankers Union Life Insurance Co., 425 So. 2d 800 (La. App. 4 Cir. 1983)*; *Unit Two Architects, Inc. v. Modica, 376 So. 2d 979 (La. App. 1 Cir. 1979)*; *West Baton Rouge Parish School Board v. T.R. Ray, Inc., 367 So. 2d 332 (La. 1979)*; *Coleman v. Bossier City, 305 So. 2d 444 (La. 1975)*. In the case of *Snyder v. Champion Realty Corp., 631 F.2d 1253 (5th Cir. 1980)*, the former Fifth Circuit addressed the applicability of *culpa in contrahendo* to a case involving a brokerage contract for payment of a commission upon sale of a tract of land. The contract provided that the brokers would be paid the excess of any money over $ 125 per acre paid for the land by a buyer procured by them. Thereafter, a buyer who was originally willing to pay $ 150 per acre, defaulted twice on the sale and the seller negotiated directly with the buyer to effect a sale on credit at a lower price. The brokers sued to recover their **[**20]** commission and the court affirming summary judgment in favor of the defendant seller held:

> The plaintiffs, somewhat uncertain how to pigeon-hole their claim, argue that despite the terms of the brokerage contract, Champion is guilty of "legal fault", a kind of constructive bad faith, under the civilian doctrine of *culpa in contrahendo*. The doctrine is, in general terms, the civilian equivalent of the common law concept of promissory estoppel. It is used as a basis for compensating one party for his expenses incurred in reliance on another party's offer to form a unilateral contract where that offer is withdrawn before acceptance. See Comment, *Culpa in Contrahendo, in German French and Louisiana Law*, 15 Tul.L.Rev. 87 (1940). *It has nothing to do with this case*. (emphasis added).

631 F.2d at 1255-56.

[21]** Even the primary case relied on by the Magistrate in his recommendation, *Produciones Tommy Muniz, Inc. v. Comite Organizador de los VIII Juegos Panamericos (COPAN), 113 D.P.R. 517, 529, 13* Official Translations 666, 679 (1982) involved a situation where contract formation *was prevented* by unjustified withdrawal of one of the

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[3] *See generally*, *La.Rev.Stat. Sec. 37:145* and *La.Civ.Code Art. 1878* and Art. 1967, Louisiana Statutes Annotated. *See also,* *Kethley v. Draughon Business College, 535 So. 2d 502, 506 n. 2 (La. App. 2 Cir. 1988)*.

parties. Indeed, Puerto Rico case law indicates that the doctrine is a doctrine of "extra-contractual liability" which does not apply where a contract has been consummated. *Produciones Tommy Muniz, Inc. v. Comite Organizador de los VIII Juegos Panamericos (COPAN), 113 D.P.R. 517, 529, 13* Official Translations 666, 676-679 (1982). *See also Arroyo v. Caldas*, 68 P.R.R. 639, 641 (1948) (Section 1802 (*culpa in contrahendo*) is "confined to . . . fault or negligence without there existing a prior obligation or a contract."); *Falcon v. E.M. Amy & Sons, Inc*., 87 P.R.R. 527, 533 (1963) ("Since the action filed herein stemmed from the nonperformance of the contractual obligation, it does not arise by virtue of Section 1802").

The Magistrate cited to no case in which this doctrine was applied **[**22]** to a contract already in existence. Nor has UMCO alerted this Court to any such authority. In short, although providing an interesting historical detour, this Court does not find that the doctrine of *culpa in contrahendo* provides a theory with which UMCO can overcome Whirlpool's motion for summary judgment. However, as examined below, there is another **[*1564]** basis whereby UMCO may successfully withstand summary judgment.

c. Impairment of the "Established Relationship"

Having explored the little known terrain of *in culpa contrahendo*, the Court presently returns to a scrutiny of the statute under which UMCO pursues its claim: Puerto Rico's Law 75, which states that:

> Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the *established relationship* or refuse to renew said contract on its normal expiration, except for just cause.

10 L.P.R.A. Sec. 278a. (emphasis supplied).

Failing to demonstrate that its contractual relationship with Whirlpool was "exclusive", UMCO nonetheless **[**23]** claims that the "established relationship" between the parties provided for exclusivity, and that Whirlpool's dealings with Western Auto were therefore in contravention of Law 75. Thus the threshold inquiry concerns the nature of the "established relationship" between the parties. Whirlpool argues that the relationship is established by the terms of the contract which do not provide for exclusivity. In response, UMCO contends that the "established relationship" provision of Law 75 is not limited to the integrated contract, but rather includes the "understanding" between the parties that the relationship was to be exclusive.

HN9[] The stated purpose of Law 75 is to provide a protective supplement to all dealer/supplier contracts in an effort to equalize the bargaining inequity between the large principals and the smaller dealers:

> The traditional provisions which regulate contracts between parties have shown their inefficacy in protecting the legitimate rights of the representative or agent, making it thus necessary to legislate in order to regulate this relationship and guarantee that **[**24]** manufacturers act in good faith, fairly, and not in an arbitrary manner, and to safeguard the rights and justified expectation of the representatives and agents inherent to the relationship.

Medina & Medina v. Country Pride Foods, Ltd., 858 F.2d 817, 820 (1st Cir. 1988) (*quoting* 18 Dario de Sesiones 1531 (1964)). Indeed, as one commentator recently explained:

> ***HN10***[] The expressed legislative intent was to protect the "legitimate expectations and interests" of distributors or agents in ways in which traditional principles of contract law had not been effective. The termination of dealerships could no longer be left up to the reparations provided by general contract law.

Vidal, *The Concept of Just Cause for the Lawful Termination of a Dealership Under the Dealer's Contracts Law of Puerto Rico*, 58 Revista Juridica U.P.R. 261, 267 (1989). Thus, an interpretation of law 75's protection of the dealer's "established relationship" with the supplier cannot be limited to the provisions of the contract, b***HN11***[] ut rather extends to a protection of the "legitimate **[**25]** expectations" of the dealer.

However, since the UMCO/Whirlpool contract does not provide for exclusivity, UMCO clearly has the burden of demonstrating a factual dispute as to whether the "established relationship" provided for exclusivity. In support of this burden, UMCO presents the sworn statement of Robert Segota, the Latin American and Caribbean sales manager for Whirlpool from October 1978 to August 1985, who testifies that it was Whirlpool's practice to treat their distributors as exclusive dealers in their "prescribed marketing areas". Accordingly, Mr. Segota explains that Protane Gas Co., UMCO's predecessor, was considered the Whirlpool's exclusive distributor for Puerto Rico. It is Mr. Segota's opinion that when UMCO acquired the Whirlpool distributorship from Protane, that this acquisition was on an "exclusive basis". Mr. Segota states that UMCO was informed by Whirlpool that Western Auto would be entering the market as a retailer, and therefore subject to the wholesale markups traditional to the appliance industry for retail appliance dealers, thereby benefitting from prices that were "significantly **[*1565]** lower than the prices at which Western Auto Puerto Rico would **[**26]** be purchasing the products." Mr. Segota further states that he understood, and informed UMCO, that Whirlpool would ship to a Western Auto's regional distribution center (warehouse) and thereafter unload and reload for shipment to Puerto Rico and therefore Western Auto would have significantly higher freight and transportation costs. Thus, according to Mr. Segota, Whirlpool gave UMCO every reason to believe that UMCO would not be in direct competition with Western Auto for the Puerto Rican market. Mr. Segota's statement alone raises a disputed fact as to the nature of the "established relationship" between UMCO and Whirlpool.

Additionally, the affidavit of Clayton Umbel, the president of UMCO sets forth that:

> 5. During UMCO's negotiation and discussions with Whirlpool regarding the acquisition of Protane's assets, I questioned Whirlpool and was informed by its representatives that a large chain retailer, Western Auto, would soon commence purchasing and selling the Whirlpool product line through its retail outlets in Puerto Rico. I was assured, however, that Western Auto would not receive distributor prices and, therefor, UMCO would not be in direct competition with Western Auto **[**27]** at the same functional level of distribution.
> 6. Upon inquiry into the nature of Western Auto's pricing and distribution system with Whirlpool, I was informed that potential areas of conflict existed between UMCO and Western Auto regarding pricing and distribution of spare parts. In response to my telex, I was informed that Western Auto would not be in a position to sell spare parts at wholesale prices because Western Auto would buy these parts as a dealer. This representation was consistent with dealer contracts and with previous statement to me from Whirlpool that its prices to Western Auto would not place UMCO and Western Auto in direct competition in the Puerto Rico market.

As reflected by the testimony of both Robert Segota and Clayton Umbel, there remains a controverted issue of fact as to the nature of the relationship established between the parties, thus rendering inappropriate Whirlpool's motion for summary judgment on this issue.

B. UMCO'S CLAIM OF PRICE DISCRIMINATION

In Count III of its Puerto Rico complaint, UMCO claims that Whirlpool violated *Section 263* of the Puerto Rico Anti-Monopoly Act, *10 L.P.R.A. Sec. 263*, by charging lower prices to Western Auto than **[**28]** were offered to UMCO. ***HN12***[] *Section 263(a)* provides:

> It shall be unlawful for any person, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale in Puerto Rico, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in Puerto Rico, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

HN13[] This statute was patterned after, and in all material respects is identical to Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the the Robinson-Patman Act, *15, U.S.C. Sec. 13(a)*. Accordingly, federal precedents construing the Robinson-Patman Act are applicable to the interpretation of *Section 263*. [4]

[4] Puerto Rico commentators and courts have stated that interpretations of the Federal Robinson-Patman Act are to be looked to in construing ***Section 263***. *See, e.g.*, Estrella, ***Antitrust Law*** *in Puerto Rico*, 28 Revista Juridica del Colegio de Abogados, No. 3, pg. 615 (It is hornbook law that when a statute is adopted from a foreign jurisdiction, it is presumed to be adopted with the interpretation of the jurisdiction of origin.). *See also Corretger v. District Court*, 1951, 72 PRR 704, 710.

[29]** UMCO contends that its actual price of doing business for the same product was greatly different from the price enjoyed by Western Auto since Western Auto received advantageous credit terms while UMCO **[*1566]** was wholly denied credit, and Western Auto benefitted from a warranty reimbursement program which was denied UMCO. In response, Whirlpool maintains that it is entitled to summary disposition for this claim on two grounds. First, Whirlpool argues that disparate credit terms and warranty programs cannot, as a matter of law, form the basis of an action under either the Robinson-Patman Act or *Section 263*. Second, Whirlpool claims that even if disparate credit terms were discriminatory, then UMCO's claim must still fail since it has failed to show "antitrust injury", whereby claimant must show that the alleged injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884, 1189 (1990)*.

1. *Disparate Credit Terms as Price Discrimination*

Regarding the alleged discrimination in credit terms, Whirlpool **[**30]** maintains that such credit variance is not, as a matter of law, actionable under the Robinson-Patman Act or *Section 263*. This contention is not, however, supported by the case law. In the case of *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)*, the Supreme Court stated, albeit in the context of price-fixing agreements, that credit terms are "inseparable" from price:

> It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price.

Because credit, by its very nature, involves delicate assessments concerning financial strength, business experience, and many other factors, a court should be cautious in allowing disparate credit terms to provide the basis for a price discrimination claim. This caution should not, however, induce blindness to a particularly egregious use of credit which could operate effectively to produce wide variance in price. [5] In short, **[**31]** ***HN14***[] a party must be allowed a reasonable latitude in setting its credit terms, but must be prevented from cloaking discriminatory pricing under the veil of available credit. There is no requirement that all buyers be offered the same credit terms, merely that they be evaluated under the same standards for granting or denying credit. As stated by one court: "a manufacturer is free to extend different [credit] terms to competing purchasers so long as it makes its decisions in a non-discriminatory manner, i.e., the same standards of credit worthiness must be extended to all applicants for credit who are in competition with each other." *Carlo C. Gelardi Corp. v. Miller Brewing Co., 502 F. Supp. 637, 647 (D.N.J. 1980)*.

[32]** In the case at bar, UMCO has provided testimony that its prior favorable credit terms were completely revoked by Whirlpool in late October 1985, while Western Auto continued to enjoy Whirlpool's credit. As recounted by the president of UMCO, Mr. R. Clayton Umbel:

> 9. As of October 30, 1985, UMCO had 120-day payment terms with Whirlpool and a $ 500,000 open line of credit with Whirlpool. UMCO also had previously provided Whirlpool with standby letters of credit totaling approximately $ 2.3 million. . . . [Then] Without prior warning, by letters dated October 30, 1985, UMCO received notice that the existing credit practices between Whirlpool and UMCO were immediately cancelled . . . .
>
> 10. At no time prior to these actions did Whirlpool express any dissatisfaction with UMCO's performance or any of its obligations under the distributorship agreements. Whirlpool did not provide any reasons prior to its actions as described in paragraph 9 above.
>
> 11. As a result of Whirlpool's unilateral modification of the credit terms, UMCO was permitted to purchase products for the remainder of the distributorship **[*1567]** year only on a cash basis or irrevocable letter of credit. UMCO's **[**33]** Puerto Rican distributorship was impaired. UMCO was unable to fill orders for

[5] *See e.g., Craig v. Sun Oil Company of Pennsylvania 515 F.2d 221, 224 (10th Cir. 1975)* ("We do not say that there could not be a discrimination in credit of such magnitude or nature as to constitute a violation, but no such extreme situation was alleged here").

> November and December 1985 because it did not have the cash flow with which to buy products from Whirlpool. Prior to the change in credit terms, UMCO had negotiated and paid for stand-by letters of credit which it was unable to use following the change. The cancellation of the credit terms also caused UMCO to raise the prices of Whirlpool products to UMCO's customers.
> 12. In contrast, Western Auto was provided with more favorable credit terms. . . .

The above statements support the allegation that the credit term discrimination was sufficiently extreme to create an action for price discrimination, thus precluding summary judgment on this issue. [6]

2. *Antitrust Injury*

UMCO's treble damage claim is brought under the Puerto **[**34]** Rico counterpart to Section 4 of the Clayton Act, *10 L.P.R.A. Sec. 268(a)*. As most recently articulated by the Supreme Court, ***HN15***[] a private plaintiff may not recover damages under Section 4 of the Clayton Act (or *Section 268(a)*) merely by showing injury causally linked to an illegal presence in the market. *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884, 1189 (1990)*. ***HN16***[] In order to state a cause of action under Section 4 or *Section 268(a)*, a plaintiff must show "antitrust injury", meaning that the alleged injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield* at 1189. Thus, even if UMCO shows that Whirlpool's disparate credit terms were in violation of *Section 263*, its claim is nevertheless insufficient as a matter of law unless it can establish that the alleged injury flowed from the anti-competitive practice challenged, and not some other **[**35]** cause.

Whirlpool contends that UMCO has failed to show antitrust injury since its damages resulted, not from any discriminatory actions by Whirlpool, but rather through UMCO's own competitive shortcomings. [7] In response, Plaintiff has submitted the affidavit of UMCO's president, Mr. R. Clayton Umbel, in which it is stated that Whirlpool's pricing discrimination through disparate credit terms caused UMCO to be "unable to fill orders for November and December 1985 because it did not have the cash flow with which to buy products from Whirlpool." There is no need to probe further; such testimony creates a controverted issue of fact as to the damages flowing from Whirlpool's alleged price discrimination, and is therefore sufficient to preclude summary judgment on this matter.

[36]** IV. THE FLORIDA ACTION

As noted in Section I of this Order, 1985 was a bad year for the Whirlpool/UMCO relationship. In the Fall of 1985, Whirlpool suspected UMCO of bribing Whirlpool's Caribbean sales manager. On October 30, 1985, Whirlpool notified UMCO by letter that it would not be reappointed in Puerto Rico when its current distributorship agreement expired on December 31, 1985. In the same letter, Whirlpool further notified UMCO that, for the remaining two months of the agreement, Whirlpool would accept UMCO's orders only if they were accompanied by payment in full or were covered by a confirmed irrevocable letter of credit acceptable to Whirlpool's Credit Department. Then, on October 31, 1985, Whirlpool filed this action ("Florida Action") before this Court alleging violations of the Federal Racketeering Influenced Corrupt Organizations Act (RICO). UMCO filed counterclaims to this Florida action, **[*1568]** which are now the target of this motion for summary judgment.

Count I of UMCO's counterclaim, alleges that Whirlpool violated Puerto Rico's Law 75 by cutting off UMCO's credit without warning. Counts III & IV allege wrongful termination of UMCO's Venezuelan and Colombian **[**37]** distributorship respectively.

A. UMCO's COUNTERCLAIM UNDER LAW 75

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[6] Since the motion is denied on the basis of discriminatory credit terms, it is unnecessary to explore whether or not the warranty reimbursement program can be considered a component of price at this time.

[7] Specifically, Whirlpool contends that UMCO's failure effectively to compete is a self-inflicted injury stemming from the inefficiencies of its two-tiered marketing system. Western Auto, by contrast, utilizes a direct marketing arrangement.

In Count I of its counterclaim in the Florida action, UMCO claims that Whirlpool's unilateral curtailment of UMCO's credit is in violation of Puerto Rico's law 75, which protects dealers against any acts of the principal that are "detrimental to the established relationship" of the parties. In support of its motion for summary judgment, Whirlpool maintains that its actions were merely an exercise of its rights under the Distributorship Agreement, and thus were consistent with, rather than detrimental to, the "established relationship" between the parties. Specifically, Section 8 of the Distributorship Agreement provides Whirlpool with the option of unilaterally determining the credit terms applicable to UMCO's purchases:

> Credit terms applicable to purchases from Whirlpool will be determined by Whirlpool's Credit Department in Benton Harbor, Michigan, U.S.A. You will pay Whirlpool for all products ordered by you from Whirlpool at the prices and upon the terms on which each such order is accepted by Whirlpool.

UMCO does not dispute Whirlpool's interpretation of the meaning of Section 8. Rather, UMCO grounds **[**38]** its claim in the appeal to a higher authority: Law 75, which (as previously noted in Section III-A, *supra*) provides that:

> Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause.

10 L.P.R.A. Sec. 278a.

HN17[] The "legislative intent [of Law 75] was to equalize the parties bargaining power and to balance the contractual conditions of two groups unequal in their strength . . . . The distributor was to be not only protected from arbitrary terminations, but also from *undue practices* on the part of principals or grantors." *General Office Products Corp. v. Gussco Manufacturing, Inc., 666 F. Supp. 328, 330 n. 4 (D.P.R. 1987)* (emphasis added) *See also Marina Industrial, Inc. v. Brown Boveri Corp., 114 D.P.R. 64, 85 (1984)*. **[**39]** ***HN18***[] In enacting and amending Law 75, the Puerto Rico legislature recognized that principals possessed the economic clout not only to eliminate dealers outright, but also "without fully eliminating them, . . . to gradually reduce and impair the extent of their previously established relationships." House Commerce and Industry Committee Statement of Motives of Act No. 75. Law 75 was therefore drafted to protect dealers not only from termination but from practices short of termination which impaired the dealers' established relationships.

Thus, the fact that the integrated contract provided for Whirlpool's unilateral alteration of credit terms does not immunize exercise of this contractual provision from Law 75 scrutiny. UMCO claims that Whirlpool effectively terminated the UMCO/Whirlpool relationship by making it impossible for UMCO to place orders. If Whirlpool were allowed freely to terminate UMCO's credit simply because such a right were embodied in Clause 8 of the distributorship agreement, then Whirlpool could avoid the protection of Law 75 simply through the drastic manipulation of credit terms as UMCO alleges has happened in the **[**40]** case at bar. Were Whirlpool correct, principals would be free to employ their superior bargaining position to engraft such unilateral powers as credit withdrawal into the dealer/supplier contracts, and then use these provisions to create such an unfavorable situation for the dealer as to force **[*1569]** termination. Such an interpretation would vitiate the stated protection of Law 75.

By contrast, the requirement that principals exercise their contract rights in good faith consistent with their "established relationships" preserves both the policies of Law 75 and the parties' freedom of contract. Law 75 does not require that Whirlpool never change UMCO's credit terms; it only requires that any change be made in good faith consistent with their "established relationship." *Medina & Medina, 858 F.2d at 822-23* (Law ***HN19***[] 75 leaves "principal and dealer free to change or bargain in good faith the prices and credit terms for the sale of the franchised product."). Law 75 simply supplements the contract law to the extent necessary to protect weaker dealers from the abusive employment **[**41]** of one-sided contract terms by economically superior principals.

In light of the above discussion, Whirlpool would only be entitled to summary judgment on Count I of the Florida Action were it to demonstrate as an undisputed matter of fact that it had altered the credit terms of the established UMCO/Whirlpool relationship in good faith. Such showing is not supported by the record before the Court. Whirlpool's motion for summary judgment on Count I of the Florida Action is therefore denied.

B. UMCO's VENEZUELAN AND COLOMBIAN DISTRIBUTORSHIP

Whirlpool's final motion for summary judgment is directed at UMCO's claim for lost profits that would have been generated under the Venezuela and Colombia distributorship had they not been terminated by Whirlpool. UMCO received notice from Whirlpool of the termination of these distributorships at the same time it received notice of the termination of its Puerto Rico distributorship. Whirlpool argues that the only profits to which UMCO may reasonably be entitled to, if any, are those profits which UMCO would have received during the course of the agreement, January 1, 1986 through December 31, 1986, and not beyond its expiration.

As suggested **[**42]** in Whirlpool's memorandum of law, and as indicated in the Section 21 of the Distributorship Agreements, the Agreements are to be interpreted under Michigan law. The memoranda filed on this issue, however, deal only fleetingly with the issue's interpretation under Michigan law. The Court therefore requests that the parties rebrief the issue with a focus on the law that should govern the Venezuela and Colombia Distributorship Agreements. As movant, Whirlpool shall submit its memorandum within twenty days from the date of this Order. Response and reply memoranda shall be filed in accordance with local rules.

DONE AND ORDERED. in chambers at Miami, Florida, this 16th day of October, 1990.

Anaheim v. Southern California Edison Co.

United States District Court for the Central District of California

October 22, 1990, Decided ; October 22, 1990, Filed

Case No. CV 78-810 MRP

Reporter

1990 U.S. Dist. LEXIS 18215 *; 1990-2 Trade Cas. (CCH) P69,246

CITIES OF ANAHEIM, RIVERSIDE, BANNING, COLTON AND AZUSA, CALIFORNIA, Plaintiff, v. SOUTHERN CALIFORNIA EDISON COMPANY, Defendant

Core Terms

squeeze, customers, monopolist, rates, transmission, antitrust, wholesale, bulk, competitor, electricity, electric power, anti trust law, monopoly power, courts, low cost, purchases, collateral estoppel, Surplus, proceedings, retail, cases, regulation, compete, refusals, prices, refund, path, price discrimination, anticompetitive, damages

LexisNexis® Headnotes

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Wholesale Rates

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN1[] **Antitrust Issues, Exclusionary Conduct**

A price squeeze under the antitrust laws has been defined as occurring when a vertically integrated company with monopoly power at the wholesale level but competition at the retail level deliberately sets its wholesale rates so high that its wholesale customers cannot compete in the retail market. A price squeeze then is a form of price discrimination that has an anticompetitive effect. It may be caused by differences or inconsistencies in federal and state ratemaking policies and procedures (regulatory price squeeze) or by intentional acts of a monopolist taken to disadvantage or eliminate competitors (predatory price squeeze).

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Sherman Act, Claims**

To prove a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, plaintiffs must establish three elements: (1) the possession of monopoly power in the relevant market, (2) the willful acquisition or maintenance of that power, and (3) causal antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN3[] **Monopolies & Monopolization, Actual Monopolization**

The determination of whether a defendant possesses monopoly power involves a two-step inquiry. First, the court must determine what constitutes the relevant market, that is, the arena within which the strength of the competitive forces is measured. Second, the court must evaluate whether a defendant exercises monopoly power in that market. The relevant market is defined by reference both to the product which is being sold and to the geographical area in which the product is sold.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] **Regulated Practices, Market Definition**

Where the monopolist is alleged to have impaired the customer-competitors' ability to compete by raising the wholesale rates, the relevant product market is the wholesale market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Regulated Practices, Market Definition**

Under the antitrust laws, the relevant geographic market is the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Monopolies & Monopolization, Actual Monopolization

A firm cannot impose monopoly prices if buyers are free to purchase a competitor's goods.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN7[] Regulated Practices, Market Definition

Where the alleged monopolist is regulated, traditional market share analysis is not necessarily indicative of the monopolist's power to control prices.

Antitrust & Trade Law > Regulated Industries > General Overview

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN8[] Antitrust & Trade Law, Regulated Industries

The price squeeze theory of antitrust liability is concerned with gaps in the regulatory scheme that result from the dual federal and state regulation of the investor-owned utility's rates. While a utility does not have total control over its rates, the utility has the power to adversely affect competition within the system of dual regulation. By manipulating the timing and amount of its rate filings, it is possible for the utility to ensure that the rates of its wholesale customers are unjustifiably high in relation to the rates of its retail customers. It is possible for the disparity in rates to be obtained by a utility's inaction as well. For example, the utility could simply decline to take any steps to redress a price disparity created by the inconsistent actions of the federal and state regulatory agencies.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN9[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The fact that the monopolist's control of prices may be checked by the regulatory system in the form of refunds does not completely close the gap in the regulatory scheme that result from the dual federal and state regulation of the investor-owned utility's rates -- refunds may be inadequate. Refunds are often received only after many years of agency proceedings by which time the customer-competitor may have lost its customers, delayed improvements or ultimately been squeezed out of the market. The dual regulatory system offers an obvious, ready made illegal opportunity with a legitimate gloss.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Sherman Act, Claims**

The second element of a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, is the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Even where monopoly power is lawfully acquired, the monopolist may not maintain that power by engaging in exclusionary conduct. Exclusionary conduct is defined as conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to maintaining monopoly power.

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

HN11[] **Antitrust Issues, Exclusionary Conduct**

As to the issue of price discrimination, the plaintiff customer/competitor has the burden of establishing that a rate differential existed, and defendant utility then has the burden of proving the cost justification for the disparity.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

HN12[] Regulated Industries, Energy & Utilities

There is no minimum period of time for which a plaintiff must establish price discrimination in order to show that there is a price squeeze.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Governments > Legislation > Statutory Remedies & Rights

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN13[] Actual Monopolization, Anticompetitive & Predatory Practices

A distinction can be made between a utility caught in the web of dual regulation and one that deliberately seeks to take advantage of the regulatory systems to maintain or extend its monopoly power. Although a utility does have a constitutional and statutory right to earn a reasonable return on its investment, as a monopolist, it also must take care that otherwise lawful acts do not have anticompetitive effects. Its relationship as a monopolist-supplier to its customer-competitors must be carefully weighed along with its knowledge of the probable consequences of its overall conduct in judging whether its actions were those of the reasonable regulated firm.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > US Federal Energy Regulatory Commission

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

HN14[] Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes

In contrast to the Federal Energy Regulatory Commission, which looks only to the end result in determining if a refund is required, an antitrust court looks to all of a utility's conduct and justifications to infer innocent or culpable intent.

Energy & Utilities Law > Antitrust Issues > General Overview

Torts > ... > Duty > Affirmative Duty to Act > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Energy & Utilities Law > Natural Gas Industry > Liquefied Natural Gas

HN15[] **Energy & Utilities Law, Antitrust Issues**

The monopolist's special position imposes on it what may be characterized as affirmative duties to aid its competitor. However, these duties arise only when there is no justification for refusing to aid a competitor.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN16[] **Regulated Industries, Energy & Utilities**

If only the filing of rate applications and the failure to mitigate the effects of a probable price squeeze created thereby provide a basis for finding the requisite specific intent under § 2 of the Sherman Act, 15 U.S.C.S. § 2, the court must find that plaintiffs have not met their burden on the issue.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Sherman Act, Claims**

The third element of a claim under § 2 of the Sherman Act, 15 U.S.C.S. § 2, that must be established is causal antitrust injury. In an antitrust case, the plaintiff must show not only that the defendant's acts caused the injury, but that the plaintiff's injury is of a type the antitrust laws were intended to prevent.

Antitrust & Trade Law > Regulated Industries > General Overview

Energy & Utilities Law > Utility Companies > Rates > Overcharging

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN18[] **Antitrust & Trade Law, Regulated Industries**

Plaintiffs cannot show antitrust injury simply by establishing the amount of an overcharge, and the utility's overcharge is not an accurate measure of plaintiff's antitrust damages.

Antitrust & Trade Law > Regulated Industries > General Overview

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

HN19[] **Antitrust & Trade Law, Regulated Industries**

In a case involving a price squeeze by a regulated utility, an antitrust court should confine its definition of antitrust injury to that injury that cannot be redressed by the regulatory scheme itself.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN20[] **Antitrust & Trade Law, Sherman Act**

A court in a essential facility case under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, is dealing with the allegation that monopoly power in one market is being used to injure competition in a second market. Thus, to prevail in an essential facility case, a plaintiff first must establish that a defendant possesses monopoly power in the market that provides some structure, service or item to plaintiff. Next, a plaintiff must show that a defendant is in competition with plaintiff in a second market. Finally, a plaintiff must demonstrate that the denial of the structure, service or item constitutes the unlawful use of monopoly power under the essential facility doctrine. There are four elements necessary to establish liability under the essential facility doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN21[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The essential facility doctrine defines a facility as essential not based on the characteristics of the facility withheld, but based on the effect on competition of the withholding of the facility.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN22[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To determine whether a monopolist's structure, service or item should be classified as an essential facility, a court must assess the extent to which the monopolist's refusal of access actually impairs the ability of the customer-competitor to compete. Moreover, a court must determine whether the competitor can avoid injury by using an alternative to the monopolist's structure, service or item. The application of the essential facility doctrine is most compelling where the monopolist's refusal makes it legally or physically impossible for its competitor to compete at all in the relevant market. In most cases, however, the refusal does not physically or legally exclude the competitor from the relevant market; the competitor can always secure an alternative to the monopolist's facility at some price. In such cases, a court is called upon to determine whether the competitor's alternatives to the use of the monopolist's facility are so expensive that the structure, service or item will be deemed an essential facility.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN23[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The essential facility cases apply a test of reasonableness, finding a facility to be essential where the monopolist's refusal severely impairs the competitor in the relevant market and leaves the competitor without reasonable alternatives.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN24[] Actual Monopolization, Anticompetitive & Predatory Practices

Even where the harm to the competitor is sufficient to establish that the monopolist's structure, service or item is an essential facility, a monopolist's refusal to deal may not violate § 2 of the Sherman Act, 15 U.S.C.S. § 2. A monopolist may justify the refusal to deal by pointing to legitimate business reasons for the refusal.

Antitrust & Trade Law > Regulated Industries > General Overview

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Real Property Law > Inverse Condemnation > Defenses

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN25[] Antitrust & Trade Law, Regulated Industries

While a regulated monopolist's actions in response to a regulatory agency's dictates enjoy a limited antitrust immunity, the monopolist must show that, at the time of the various anticompetitive acts it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN26[] Regulated Practices, Monopolies & Monopolization

A utility's concern that its other customers would suffer by the granting of access to an essential facility is a legitimate business justification for denying access.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN27[] Regulated Practices, Monopolies & Monopolization

A monopolist's interest in extracting and maintaining monopoly profits does not justify anticompetitive conduct.

Counsel: [*1] PAUL G. BOWER, ARTHUR L. SHERWOOD, RICHARD D. HALL, DANIEL G. SWANSON, GIBSON, DUNN & CRUTCHER, DAVID N. BARRY III, THOMAS E. TABER, JANET K. LOHMANN, SOUTHERN CALIFORNIA EDISON COMPANY, By Arthur L. Sherwood, Attorneys for Defendant, Southern California Edison Company.

Judges: Mariana R. Pfaelzer, United States District Judge.

Opinion by: PFAELZER

Opinion

OPINION

Plaintiffs, the Cities of Anaheim, Riverside, Azusa, Banning and Colton ("Cities"), each own and operate an electricity distribution system and are the exclusive providers of electric service to the retail customers within their respective municipal boundaries. The Cities are located within the broad southern and central service territory of defendant Southern California Edison Company ("Edison"), a fully integrated investor-owned utility that generates, transmits and distributes electricity. Edison provides electric service at retail to customers who are situated within the Edison service area but not within the Cities' borders. In addition, Edison purchases electricity from and sells electricity to other utilities located inside and outside this service area. The Cities purchase from Edison at wholesale a substantial portion of the electric power **[*2]** which the Cities resell at retail to their customers.

The Cities, then, are *both* customers of and competitors with Edison. The Cities are customers of Edison for wholesale electric power. Edison and the Cities are also competitors, each seeking to attract large industrial customers to locate within their respective service areas. Further, Edison and the Cities compete with each other to provide superior rates and service. The Cities' dual relationship with Edison as both customers and competitors furnishes the foundation of the Cities' allegations of antitrust liability.

The Cities claim that two types of conduct by Edison violated *§ 2* of the Sherman Act, *15 U.S.C. § 2*. First, the Cities contend that Edison engaged in a price squeeze. The Cities maintain that the defendant charged its wholesale electricity customers a higher rate than it charged its large industrial customers, effectively impairing the Cities' ability to compete for customers. Second, the Cities contend that Edison unlawfully denied them access on certain Edison-controlled transmission lines essential for the transmission of low cost electric power from the Pacific Northwest.

This case began before Judge Malcolm **[*3]** Lucas, who entered a number of orders to which this memorandum will refer. The case was transferred to this Court, which, after vacating several previously entered orders, conducted a bench trial and took the matter under submission. Subsequently, Edison brought on a Motion for Collateral Estoppel which was heard by the Court and also taken under submission. This Memorandum reflects the Court's disposition of the trial and the motion.

I. *STATEMENT OF FACTS*

A. *Edison's transmission network*

Edison, like almost every major utility, maintains what is known as a "control area." In this area, Edison is responsible for coordinating the generation, transmission and distribution of electricity. Edison's control area is the same as its service area, excluding the cities of Los Angeles, Burbank, Glendale and Pasadena, which operate their own control areas. Since the Cities are located within Edison's control area, Edison is responsible for ensuring that the Cities have access to as much wholesale electric power as they need at any time.

In its control area, Edison operates a transmission network which consists of two types of lines. Extra High Voltage ("EHV") transmission lines -- **[*4]** lines operated at frequencies above 230kV -- are used to transmit large blocks of electric power from remote generation sources. This high voltage power, which is usually sold in large volume, is referred to as "bulk power." Edison's local matrix -- a system of transmission lines operated at 220kV -- connects Edison with neighboring utilities including the Los Angeles Department of Water and Power ("LADWP") and the California Department of Water ("DWR"). The EHV lines bring bulk power to the local matrix. After power is delivered to the local matrix, the power is transmitted to either Edison's or the Cities' distribution substations. These substations, in turn, transform the power into low voltages for delivery to retail customers. The low voltage electric power distributed to retail customers is referred to as retail electric power.

Prior to 1972, the Cities were "full requirements" customers of Edison, purchasing all of their wholesale electric power from Edison. The Cities entered into full requirements contracts with Edison in the mid-1960s because the terms of the contracts were considered attractive by the Cities at that time. In 1972, in part as a result of antitrust claims **[*5]** brought by the Cities, the parties entered into settlement agreements. These agreements released Edison from antitrust liability for conduct prior to that time. Moreover, the agreements contemplated a framework within which the Cities could begin to acquire electric power from sources other than Edison. These alternate sources are referred to as "resources" of electric power.

After five years of negotiation, Anaheim and Riverside entered into Integrated Operations Agreements ("IOAs") with Edison. The IOAs serve two purposes. First, the IOAs establish a method for determining how Edison should adjust its rates for wholesale customers who purchase some of their electric power from sellers other than Edison. Second, the IOAs assure that customers who purchase from sellers other than Edison will have access to the Edison-controlled transmission lines. The IOAs with Anaheim and Riverside became incorporated into Edison's rates schedules in 1979. Azusa, Banning and Colton entered into similar agreements with Edison that became part of Edison's rates schedules in 1981.

The most significant adjustment of an Edison customer's rate under an IOA depends on whether the particular customer's alternate **[*6]** electricity resource is characterized as "integrated" or "non-integrated." The labeling of a resource as integrated implies that the resource, in effect, is planned for and operated as part of the Edison system. On the other hand, the description of a resource as non-integrated indicates that Edison has not incorporated the resource into its system, but is merely transmitting the resource over Edison lines to the consumer. The characterization of a given resource as integrated or non-integrated significantly affects the wholesale price of electricity to a customer. Edison's wholesale rates include a charge for the amount of electricity used (the "demand charge") and a charge reflecting Edison's cost of maintaining and constructing electricity generation facilities sufficient to meet a customer's needs. If Edison integrates a resource proposed by a wholesale customer, Edison gives the customer credit (a "capacity credit") for the reduction in generating capacity Edison must maintain. If Edison declines to integrate the resource, the customer continues to pay for Edison's cost of maintaining sufficient generating capacity to meet the customer's demand at all times. Under the IOAs, Edison **[*7]** has considerable discretion in the decision to treat the Cities' resources as integrated or non-integrated.

In addition to establishing a system to adjust the prices paid by the Cities, the IOAs provide for the transmission of the Cities' bulk power purchased from sellers other than Edison. Because Edison owns all local transmission lines leading to the Cities, Edison schedules the transmission of any electric power purchased by the Cities. Under the IOAs, Edison has guaranteed the Cities access to the local transmission matrix; this guarantee is called a "firm transmission right." Edison has also provided the Cities with "interruptible transmission rights" on Edison's other transmission lines. For example, the Cities have an interruptible transmission rights on the Pacific Intertie, the group of EHV lines to the Pacific Northwest on which Edison and other regional utilities have rights. From the perspective of the Cities, interruptible transmission service is less desirable than firm transmission service because interruptible transmission service may be curtailed by the provider of it at any time and for any reason; in contrast, firm transmission is available at all times and allows **[*8]** the utility to schedule its purchases in advance.

From 1976 to 1985, Anaheim and Riverside received capacity credit for only one resource, the San Onofre Nuclear Generating Station. As a result, Anaheim and Riverside purchased nearly all of their capacity requirements from Edison. In addition, Azusa, Banning and Colton purchased all of their capacity requirements from Edison. [1] **[*9]** Since 1985, however, Anaheim and Riverside have received capacity credit for other resources, in part because of Special Condition 12, which became part of Edison's rates schedules in 1983 and provided for a shorter period of

[1] Anaheim purchased 96.8%, Riverside 97.2% and Azusa, Banning and Colton 100% of their wholesale capacity requirements from Edison during the period from 1975 through 1985. Anaheim and Riverside did make purchases from suppliers other than Edison during that period. Since these purchases were not integrated, the total amount of electricity purchased from Edison was 87.5% for Anaheim and 89.4% for Riverside.

time for giving Edison notice of the availability of capacity resources. As a result, Anaheim and Riverside are now less dependent on Edison for their firm bulk power. [2]

B. *The price squeeze claim*

The Cities' first claim of conduct violative of *§ 2* is that Edison engaged in a price squeeze. Historically, Edison's wholesale rate ("R-2") was the same as the rate charged to Edison's large industrial customers (for convenience, "A-8"), and the rate of return on these two rate classes was lower than for other classes. In 1973, the oil embargo caused fuel and electricity prices to escalate, and Edison sought increases in both the R-2 and A-8 rates. A utility's wholesale rates are regulated by the Federal Energy Regulatory Commission ("FERC"), *16 U.S.C. § 824*. In order to increase a wholesale rate, a utility must file a proposed rate schedule with the FERC. The proposed rate may be suspended for up to five months, after which it automatically **[*10]** takes effect, subject to refund with interest if the rate is later found by the FERC not to be just and reasonable. *See 16 U.S.C. § 824d(e)*. In contrast, a utility's retail rates are subject to regulation by a state agency -- in the case of Edison, the California Public Utilities Commission ("CPUC"), *Cal. Pub. Util. Code §§ 701*, *703*. In California, a retail rate does not go into effect until the CPUC has approved it. [3] To increase the rates for both the A-8 and R-2 customers, it was necessary for Edison to commence two separate rate proceedings with two separate regulatory bodies.

Edison commenced proceedings with the CPUC to raise the A-8 rate to its industrial customers in June 1974. There was a delay in the CPUC's decision-making process, and Edison sought interim relief for a partial rate increase pending the CPUC's final **[*11]** determination. On December 30, 1975, the CPUC granted Edison only a portion of that interim relief, resulting in an interim rate increase of only 8.7% for the A-8 class. Edison received a final decision from the CPUC on December 21, 1976, forty months after Edison had filed its application. This decision permitted a change in the A-8 rate to become effective on January 13, 1977, but allowed only about one-third of the increase originally requested by Edison.

In the meantime, on October 31, 1975, Edison filed ER76-205 with the FERC seeking an increase in the R-2 rate. Edison sought the minimum one day suspension of the proposed rate increase; and despite the Cities' urging that the rates be suspended for five months, the FERC granted Edison a one month suspension. Edison's proposed R-2 rate went into effect on February 1, 1976. The R-2 rate that went into effect on that date was higher than the A-8 rate, and continued to be higher than the A-8 rate even after the CPUC allowed the A-8 rate to be raised effective January 13, 1977.

The Cities protested the wholesale rate increase and intervened in the ER76-205 proceeding. The Cities took the position that the rates were not just and reasonable **[*12]** both because the rates did not accurately reflect increases in Edison's costs of service and because the disparity between the R-2 and the A-8 rate resulted in a price squeeze. Edison, however, continued to charge its proposed rates pending a determination by the FERC as to the propriety of those rates. The administrative proceedings on the ER76-205 rate schedule spanned thirteen years. [4]

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[2] Anaheim's capacity provided by Edison was 68% in 1986, 35% in 1987 and 1988 and 24% in 1989; Riverside's capacity provided by Edison was 74% in 1986, 45% in 1987, 49% in 1988 and 40% in 1989. Edison's Memorandum of Points and Authorities in support of Response to Cities' Motion for Leave to File Third Amended Complaint, Ex. F & G.

[3] In the time period relevant to this suit, there was no requirement that the CPUC make a decision concerning a rate change by any set date after the application for the change was filed.

[4] The initial hearings before the Administrative Law Judge ("ALJ") on both the cost of service issue and the price squeeze claim were held in August 1977. The ALJ issued an initial decision on June 1, 1978, approving the rate increase in part and ordering refunds to the Cities of $ 4.4 million. The Cities' price squeeze claim was rejected. *Southern California Edison Co.,* 3 FERC para. 63,033 (1978). The FERC affirmed the ALJ's findings on the cost of service issue, and in an appeal dealing only with this issue, the Court of Appeals affirmed. *Southern California Edison Co.,* 8 FERC para. 61,198 (1979), *reh'g denied in part and granted in part,* Opinion 62-A, 10 FERC para. 61,260 (1980), *aff'd sub. nom. Cities of Anaheim v. FERC, 669 F.2d 799 (D.C. Cir. 1981)*. The FERC disagreed, however, with the ALJ's price discrimination analysis and remanded the price squeeze claim for a second phase of hearings.

[*13] After the second phase of price squeeze proceedings before the Administrative Law Judge ("ALJ"), but before he issued his opinion, the Cities commenced this antitrust suit against Edison alleging that the price squeeze not only resulted in rates that were not just and reasonable, but that the creation of the price squeeze violated the antitrust laws. Shortly before the antitrust case was tried, the ALJ issued an initial decision finding that the rate differential had resulted in a price squeeze and ordered refunds to the Cities of $ 3,805,496 plus interest. *Southern California Edison Co.,* 34 FERC para. 63,086 (1986) (*"FERC_III").* After this Court concluded the trial of this case, the FERC issued its opinion affirming in part and reversing in part the ALJ's decision; the FERC affirmed the finding that a price squeeze existed, but found the overcharge to be in the amount of $ 2,642,000. See *Southern California Edison Co.,* 40 FERC para. 61,371 (1987) (*"FERC_IV"), reh'g denied in part and granted in part,* 50 FERC para. 61,275 (1990) (*"FERC_V").* Edison has paid that amount with interest.

C. *The foreclosure claim*

The Cities' second claim of conduct in violation of **[*14]** *§ 2* is that they have been denied firm access on the Pacific Intertie. The Pacific Intertie has been and continues to be an important transmission facility for Edison because it gives Edison and other California utilities entitled to use it access to Pacific Northwest suppliers, including the Bonneville Power Authority ("BPA"), a federal agency that generates and sells hydroelectric power. Although utilities in that region are preferred for the electric power generated by the BPA, the BPA does sell power outside the Pacific Northwest when it is available, usually as a result of favorable water conditions. This electric power is known as BPA Surplus and, as with the other electric power sold by the BPA, is subject to a preference clause for publicly-owned entities. *16 U.S.C. § 832c(a)*. Pacific Northwest power, particularly the BPA Surplus, is significantly lower in price than other bulk electric power available in the western United States.

The Pacific Intertie consists of two 550kV AC lines running from Oregon through California and one 800kV DC line running from Oregon through Nevada. The AC lines are owned by several entities. In Oregon, the BPA owns one line within Oregon and shares **[*15]** ownership of the other line with Portland General Electric Company. In California, the AC line is owned by the Pacific Gas & Electric Company ("PG&E") from the California-Oregon border to the Midway substation near Bakersfield; it is owned by Edison from Midway to Lugo, except for two relatively short segments in northern California, one owned by the United States Bureau of Reclamation (the "USBR") and another by the Pacific Power & Light Company. The DC line is owned by the BPA north of the Nevada-Oregon border, and from the Oregon-Nevada border to Sylmar is owned 50% by Edison and 50% by the cities of Los Angeles, Burbank, Glendale and Pasadena.

In California, the Pacific Intertie is effectively controlled by Edison, PG&E and San Diego Gas & Electric ("SDG&E") (collectively the "California Companies") through a series of contracts, the most important of which is the California Companies Pacific Intertie Agreement ("CCPIA"). The CCPIA provides that the Intertie capacity owned by Edison and PG&E on both the DC and AC lines is shared among PG&E, Edison and SDG&E 50%, 43% and 7%, respectively. These percentages were developed by the California Companies based on each company's maximum **[*16]** load as a percentage of their combined maximum loads (including, in the case of Edison, the Cities'). SDG&E does not own any portion of the Pacific Intertie, but pays a transmission charge to PG&E and Edison representing 7% of the costs of ownership and maintenance.

The CCPIA also provides for the sharing of rights and obligations incurred by the California Companies under EHV agreements with DWR, Sacramento Municipal Utility District ("SMUD") and USBR. Under these agreements, DWR, SMUD and USBR are entitled to certain transmission service on the Intertie for the purpose of purchasing power from the Pacific Northwest. Under the DWR's EHV agreement, the DWR has an entitlement to 300Mw of firm transmission over the Intertie. PG&E, Edison and SDG&E share, in a ratio of 50-43-7, any of DWR's entitlement that DWR is not using.

Anaheim and Riverside have attempted to gain firm access on the Pacific Intertie in order to purchase low cost electric power by exercising their statutory preference for BPA Surplus. In 1976, Anaheim contacted Edison asking if any transmission service on the Pacific Intertie was then available. As a result of that inquiry, Edison met with Anaheim and Riverside in **[*17]** 1977. Edison indicated that transmission service was not generally available when low cost Northwest electric power could be purchased and that when transmission service was available, Edison was required by contract to offer it first to PG&E and SDG&E.

In January 1978, Anaheim and Riverside attempted to obtain firm access on the Intertie by contracting with DWR for a portion of DWR's Intertie entitlement. The DWR's EHV contract, however, required that the consent of Edison, PG&E and SDG&E be obtained before the DWR assigned any of its Intertie rights. Edison, as well as PG&E and SDG&E, refused to agree to the assignment to Anaheim and Riverside on the ground that DWR did not have rights under its transmission contract to provide transmission service to other entities. While the interpretation of the contract language in question is disputed by the Cities and Edison, Edison's interpretation appears to be legally correct. Apparently recognizing its doubtful contractual posture, the DWR informed Anaheim and Riverside that it could not assign its transmission rights to those cities without the consent of the California Companies.

In part because of Edison's position that it had to have **[*18]** a specific proposal to consider before it could determine whether to allow Anaheim and Riverside firm transmission on the Intertie, those two cities made a request for the firm transmission of 175Mw of electric power they had contracted to purchase from the BPA and the City of Tacoma. Anaheim and Riverside asserted, as all of the Cities have in this case, that firm transmission was necessary to make purchases under these contracts because BPA Surplus and Northwest bulk electric power is sold on a pre-scheduled basis, at least one day in advance. Edison rejected Anaheim's and Riverside's request stating that Edison needed all of its entitlement to transmit firm, low cost electric power into the Edison system for the benefit of all of its customers, including Anaheim, Riverside and the other plaintiff Cities. Edison did offer Anaheim and Riverside interruptible transmission service on the Intertie at that time, but Anaheim and Riverside maintained that interruptible service was inadequate. Edison's refusals to grant any firm access on the Intertie was one of the two central causes of the Cities' commencement of this antitrust action in 1978.

After the action was filed, further attempts **[*19]** were made to obtain access on the Intertie through participation in an upgrade of the DC line of the Pacific Intertie. The existing Intertie participants had upgraded the Intertie in 1979 and 1982, and in 1984 considered upgrading the capacity again. Riverside, Anaheim and Colton each contacted Edison requesting participation in the upgrade. Edison denied those cities any ownership participation in Edison's share of the upgrade. In denying this request, Edison noted that it anticipated full usage of the DC line upgrade in order to benefit all of Edison's customers and that it would be financially unsound for Edison to utilize less than its full share of the upgrade. Edison did not grant the Cities firm access on the Intertie.

II. *PRICE SQUEEZE*

Plaintiffs contend that Edison violated the antitrust laws by creating a price squeeze when it changed the historic relationship between the R-2 and A-8 rates and charged the Cities a higher rate for wholesale electric power than it charged certain of its large industrial customers for retail electric power. ***HN1***[] A price squeeze under the antitrust laws has been defined by one court as occurring when a vertically integrated company with monopoly **[*20]** power at the wholesale level but competition at the retail level deliberately sets its wholesale rates so high that its wholesale customers cannot compete in the retail market. *City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1176 n.4 (8th Cir. 1982)*, *cert. denied, 459 U.S. 1170 (1983)*. A price squeeze then is a form of price discrimination that has an anticompetitive effect. [5] **[*21]** It may be caused by differences or inconsistencies in federal and state ratemaking policies and procedures ("regulatory price squeeze") or by intentional acts of a monopolist taken to disadvantage or eliminate competitors ("predatory price squeeze"). Though the electric utility price squeeze has a relatively brief history as a theory of antitrust liability, it has been recognized by a number of courts. [6]

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[5] It is the FERC's view that "price discrimination becomes 'price squeeze' when the disparity between wholesale and retail rates causes an anticompetitive effect, i.e., the wholesale customer loses or is likely to lose retail load, thereby 'squeezing' the wholesale customer out of the retail market." *FERC IV,* 40 FERC at 62,151.

[6] *City of Mishawaka v. American Elec. Power Co, 616 F.2d 976 (7th Cir. 1980)*, *cert. denied,* ***449 U.S. 1096 (1981)***, *reh'g denied,* ***450 U.S. 960 (1981)***; *City of Kirkwood, 671 F.2d 1173*; *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir.*

The opportunity for a regulated utility to engage in a predatory price squeeze is created by the dual regulatory system that governs electric rates. It is possible for a utility intending to seriously impair or eliminate its competitors to take advantage of this dual regulatory scheme by timing its applications for new rates so as to ensure that over a given period of time, its customer-competitors pay wholesale rates that are unjustifiably higher than the retail rates then in effect. *See* Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of* Action, *31 UCLA L. Rev. 563,* **[*22]** *623-30 (1984)*; *see also City of Mishawaka v. American Elec. Power Co., 616 F.2d 976, 982-84 (7th Cir. 1980)*, *cert. denied, 449 U.S. 1096*, *reh'g denied, 450 U.S. 960 (1981) ("Mishawaka II").*

As stated, in *FERC IV,* the FERC found that over the 11-1/2 month period, from February 1, 1976 to January 12, 1977, Edison's R-2 wholesale rate exerted a "regulatory price squeeze" on its R-2 customers, including the Cities, in the amount of approximately $ 2,642,000. *FERC IV,* 40 FERC at 62,165. This decision affirmed in part and reversed in part the Initial Decision of the Administrative Law Judge in *FERC III* and required Edison to pay a refund, with interest, to the R-2 class. *See FERC IV,* 40 FERC at 62,180-81. In reaching this decision, the FERC necessarily made findings on a number of the issues litigated in this case. Thus, before considering the elements of the Cities' predatory price squeeze claim, the Court must comment briefly on Edison's contention that the Cities are collaterally estopped from relitigating issues that were resolved against them in the price squeeze proceedings before the FERC.

A. *Collateral estoppel as to findings made by the FERC*

[*23] The FERC, in determining whether a wholesale rate is unjust or unreasonable, must consider whether wholesale rates are unduly discriminatory and anticompetitive in relation to retail rates. *Federal Power Comm'n v. Conway Corp., 426 U.S. 271, 279 (1976)*. If the rates are found to be unduly discriminatory and anticompetitive, the FERC's obligation is to set a rate which covers the cost of service, but which also eliminates or reduces as much as possible the anticompetitive relation between the wholesale and retail rates. The rate must be set within the reasonable cost zone at a point that minimizes price discrimination. Thus, when a wholesale customer believes that a price squeeze has occurred, it may, as the Cities did here, intervene in the FERC's rate proceedings to litigate that issue. Because the federal court has broader powers to remedy a price squeeze found to be predatory as well as anticompetitive, and in addition, because treble damages are available, the customer may also be motivated to file an antitrust suit based on the same facts. As a result, two tribunals with different mandates and procedures may conduct price squeeze inquiries that are theoretically, but not **[*24]** practically, independent of each other.

Although Edison lost on the regulatory price squeeze issue in the *FERC IV* proceeding, Edison argues that, in this case, the Court should give preclusive effect to certain findings the FERC made with respect to the Cities' evidence in that proceeding. Edison makes this argument because the result of giving preclusive effect to those findings would be to deprive the Cities of most of the evidence they used to prove price discrimination, anticompetitive effect and damages in this case. While Edison's arguments are not without substance, the Court has concluded that the FERC's findings should not be given collateral estoppel effect in this case.

The guidelines governing the circumstances under which agency determinations should be accorded preclusive effect in subsequent judicial proceedings are at best unclear. Although courts have been willing to give preclusive effect to agency findings in some cases, *see* 14A C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4475 (2d ed. 1985) [hereinafter Wright & Miller); *Restatement (Second) of Judgments § 83* (1982), it is by no means true that courts routinely accord that effect to agency **[*25]** findings in the same way they do to judicial determinations. *See* Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation,* 46 Geo. Wash. L. Rev. 65, 87 & n.140 (1977); Note, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?, 73 Cornell L. Rev. 817, 818 (1988)*; *see also Lyle v. Secretary of Health and Human Services, 700 F.2d 566, 568 n.2 (9th Cir. 1983)* (stating that in the administrative law context, the principles of collateral estoppel and res judicata are applied less rigidly than in the context of courts).

1981). *But see Town of Concord v. Boston Edison Company,* F.2d (1st Cir. 1990); *City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763 (D. Del. 1979)* (disallowing antitrust remedy for price squeeze by electric utility).

The analysis that courts have tended to apply in the "administrative collateral estoppel" context requires that, in addition to considering traditional collateral estoppel requirements, a court determine whether the agency's procedure provided an adequate substitute for judicial procedure and whether the particular statutory scheme involved suggests that preclusive effect should or should not be granted. *See* Wright & Miller, *supra,* § 4475; *see also* P. Areeda & H. Hovenkamp, ***Antitrust Law*** para. 323.2f (Supp. 1989). A leading Ninth Circuit case **[*26]** in this area generally incorporates these concerns into a three-part inquiry:

(1) whether the [agency] was acting in a judicial capacity;

(2) whether the issue presented to the district court was actually litigated before the [agency); and

(3) whether its resolution was necessary to the [agency's] decision.

See *Exxon Corp. v. Fischer, 807 F.2d 842, 845-46 (9th Cir. 1987)*, *modified on other grounds, 817 F.2d 1429 (9th Cir. 1989)*.

The Court assumes for the purpose of this discussion that the third concern of *Exxon* would be satisfied with respect to the issues involved here. Accordingly, these issues are examined solely in the light of the first and second concerns expressed in *Exxon.*

The first *Exxon* factor derives from *United States v. Utah Construction Co., 384 U.S. 394 (1966)*. The *Utah* Court stated in dicta that courts should give preclusive effect to agency determinations that otherwise meet collateral estoppel requirements, where "an administrative agency is acting in a judicial capacity." *Id. at 422*. Among the varied forms of administrative proceedings that have developed, a spectrum that ranges from decisions that lack all protections provided **[*27]** by Article III courts, *see, e.g.*, *Nasem v. Brown, 595 F.2d 801, 806-807 (D.C. Cir. 1979)* (finding that agency did not act in a judicial capacity where the decision was based solely on a written record), to those that provide most of those protections, *see, e.g.*, *Amos v. Commissioner, 360 F.2d 358 (4th Cir. 1965)* (finding that tax court exercises judicial functions), is clearly discernible. Proceedings that fall somewhere in the middle may present difficult questions, but, as Edison points out, the FERC price squeeze proceedings do not belong in this middle category. The FERC proceedings provided a hearing and the opportunity to rebut opposing evidence and cross-examine witnesses. Further, the FERC made findings and conclusions after considering testimony, briefs and argument. Nearly identical characteristics satisfied the Ninth Circuit panel in *Exxon* that a state agency was "acting in a judicial capacity." *See* *Exxon, 807 F.2d at 846* (finding that the Coastal Commission was "acting in a judicial capacity" when it decided a question of law after a hearing, with the opportunity to present and rebut evidence, and made findings and conclusions after carefully considering **[*28]** the parties' supporting statements). The FERC was unquestionably acting in a judicial capacity, within the meaning of *Utah.*

Exxon's second factor -- that the issue presented to the district court has been actually litigated before the agency -- is the critical point on which the resolution of the collateral estoppel question in this case rests. This factor reflects *both* the traditional collateral estoppel requirement that an issue has been actually litigated, as well as the concern unique to the administrative estoppel context: that the issue before the court be substantively the same as the issue that was before the agency. *See generally* *Restatement (Second) of Judgments § 83, comment b* (stating that "the essential question is whether, within the context of the larger purpose of the administrative proceeding, an issue is formulated as it would be in a court, and decided according to procedures similar to those of a court"). Edison argues that all of the issues for which it seeks collateral estoppel effect were actually litigated, and that this requirement is therefore satisfied. Careful analysis persuades the Court to the contrary.

The first step in applying Exxon's "actually **[*29]** litigated" test is to define the issues which concerned the agency and those that concern the court because the level of abstraction chosen in defining "issue" is actually determinative of the question of whether this requirement for estoppel is met. Both parties appear to agree that the FERC's finding of a "price squeeze" is not an issue that could be collaterally estopped. They both recognize that the issue before the FERC as to whether a regulatory price squeeze existed is very different from the issue before this Court as to whether a price squeeze that violated *§ 2* existed. The latter requires a showing of exclusionary intent, whereas the former can be simply the result of a clash between the ratemaking procedures and policies of state and federal regulatory bodies.

An earlier case that addressed the question of whether the FERC's conclusion with respect to a price squeeze claim could estop a federal court's determination of an antitrust price squeeze claim concluded that the FERC's decision had no such effect. *See* Borough of Ellwood City v. Pa. Power Co., 570 F. Supp. 553, 560 (W.D. Pa. 1983) [hereinafter *Ellwood City).* The question presented in *Ellwood City* -- whether **[*30]** the FERC's finding of no price squeeze collaterally estopped litigation of the price squeeze issue in a district court -- is easier to answer now than it was in 1983 when *Ellwood City* was decided because in *FERC IV,* the difference between the type of price squeeze addressed by the FERC and that addressed by an antitrust court is clearly defined. The inquiry here is more involved than that of the court in *Ellwood City,* however, in that Edison seeks to collaterally estop the Cities as to individual findings upon which the FERC's conclusion of a regulatory price squeeze rests. Neither the *Ellwood City* case, nor any other price squeeze case, appears to have addressed this precise argument. Thus, it is appropriate to look at a few of these findings to illustrate why collateral estoppel should not apply.

1. *The price discrimination issue*

a. *The finding that the Cities' bill comparison analysis does not measure price discrimination*

The FERC, in reversing the finding that the Cities' bill comparison analysis was an alternative method of determining the existence of price discrimination even where a more reliable comparative rate of return analysis was available, **[*31]** stated that of the measurement methods presented to it, the bill comparison was inferior and therefore should not be used. At the time, the FERC had before it several different studies by the Cities and by Edison. The FERC chose to use one of Edison's studies, with adjustments, as the best method for measuring the existence of price discrimination. The situation in which this Court finds itself is significantly different. In this antitrust case, the burden is on the Cities to establish a *prima facie* case of price discrimination. The Court may determine that the Cities have not met this burden, in light of Edison's superior studies, or that Edison's studies rebut the Cities' case in whole or in part. However, the question of whether any part of the Cities' bill comparison evidence was reliable enough to support a *prima facie* case of price discrimination was not the issue actually litigated by the FERC. Indeed, we have no way of knowing what the FERC would have decided if it had had to make a determination based on the Cities' studies standing alone. The one thing that is clear is that the FERC did not find the Cities' analysis so wholly invalid that the analysis cannot be used **[*32]** for any purpose in this case. The Court can give attention to the FERC's criticism of the Cities' analysis, but the Cities are not collaterally estopped to rely on them in this case.

b. *The finding that the Cities' comparative rate of return study does not use the correct A-8 coincidence factor in calculating retail costs*

The same observation may be made with respect to the disposition of this issue. The FERC did not address whether or not the Cities' comparative rate of return analysis should be rejected, but rather, as between the Cities' use of an 89.1% coincidence factor and Edison's use of an 82% coincidence factor, which factor was superior. The FERC did not conclude that one was clearly correct and the other clearly erroneous. It simply stated that it had doubts about the use of the Cities' figure, whereas no one had challenged Edison's figure as unreasonable. The FERC then used Edison's comparative rate of return study. The FERC's reasons for choosing or rejecting a particular study or part of a study may be useful to the Court in deciding what weight to give that study, but the issue the FERC ultimately determined is not formulated as it would be in a court. This issue **[*33]** is thus not appropriate for the application of collateral estoppel.

c. *The finding that the Cities' analyses did not account for synchronization of fuel costs*

The question of whether or not the FERC actually litigated the validity of the Cities' studies and found them to be invalid based on the failure to adjust for fuel expenses is somewhat more involved. It is undisputed that *FERC IV* affirmed *FERC III's* finding that the Cities' failure to adjust for fuel undercollections invalidated their comparative rate of return study. In the two previously discussed situations, the FERC was merely deciding that, of the studies before it, the Cities' were inferior, not that the Cities' studies were invalid. Still, in this situation, as in the previous two, the character of the proceeding must be kept in mind. When the FERC declares a study "invalid" and then uses another party's valid study, it is exercising an option available to it within the context of ratemaking. Clearly this Court would not be bound to treat the Cities' analyses as wholly invalid in the antitrust context though the FERC's view might well be considered persuasive on this point.

The same comments apply with equal **[*34]** vigor to Edison's argument that the Cities' analyses rely on incorrect time periods.

d. *The finding that the Cities' analyses do not account for valid policy differences between the FERC and CPUC*

The issue of whether or not tax normalization is a genuine policy difference that an antitrust court should recognize as having a significant effect on the analysis of price discrimination was not litigated in the FERC proceedings. The FERC was concerned with whether or not Edison should be allowed to adjust its A-8 rate of return figures to reflect tax normalization. Ultimately, the FERC decided that Edison could not adjust its figures because it had not been required to use tax normalization. Obviously, the statement that differences in tax accounting procedures were genuine policy differences is not a "finding" for collateral estoppel purposes.

2. *The actual anticompetitive effect and damages issues*

Edison argues that the Cities are collaterally estopped from proving actual harm to competition based on the FERC finding that the Cities presented no evidence that they had lost actual customers or failed to annex specific territories, and the further finding that Edison had rebutted **[*35]** the Cities' claims of actual anticompetitive effect. Suffice it to say that the FERC does not use the same legal standards in reaching a conclusion of "no actual anticompetitive effect," as would an antitrust court. Moreover, collateral estoppel as to this issue is unnecessary because the Cities have conceded that no customers or territories were lost due to the price squeeze. The question before this Court is whether the Cities can prove an antitrust violation without showing lost customers. *Cf. Mishawaka II, 616 F.2d at 986-87* (requiring proof of specific injuries).

3. *The Court's discretion to adopt the FERC's findings*

As to a final point, even if it could find that the requirements for the application of collateral estoppel had been met on the issues specified by Edison, the Court would be hesitant to conclude that the FERC's findings should be given preclusive effect because the regulatory scheme governing rates does not contemplate that such administrative decisions are to preclude independent judicial action. Wright & Miller, *supra,* § 4475; *cf. Ellwood City, 570 F. Supp. at 560* (declining to give preclusive effect to the FERC decision that no price squeeze existed **[*36]** because "courts can afford relief the FERC cannot provide"). The FERC is concerned only with "regulatory price squeezes," or price differentials that have an anticompetitive effect without regard to intent. *See FERC* IV, 40 FERC at 62,176. Thus, although the FERC and the federal court address many of the same facts, their concerns, requirements and perspectives are significantly different; as the FERC itself stated, it does not engage in "comprehensive antitrust proceedings." *FERC IV,* 40 FERC at 62,168; *FERC V,* 50 FERC at 61,872 n.10. Moreover, as the Cities argue, the FERC's responsibility is to determine whether wholesale rates are consistent with its statutory and regulatory requirements whereas the Court's responsibility is to determine whether Edison's conduct violated the antitrust laws, irrespective of the FERC's regulatory requirements.

While this difference in the mandates of the two tribunals causes the Court to refuse to apply collateral estoppel principles in this case, it is still important to recognize that the Court is not prevented from exercising its discretion to adopt portions of the FERC's price squeeze analysis and conclusions where the Court deems **[*37]** it appropriate to do so. It is within the Court's discretion to selectively adopt some of the FERC's findings to avoid a duplication of efforts. The Court also should take into account the fact that the FERC has exhaustively considered the economic issues involved in determining the existence and amount of the price squeeze and "has substantially greater expertise in the area." *Mishawaka II, 616 F.2d at 988*. Thus, while the Court is not bound by the FERC's findings, the Court need not disregard them so long as the Court is satisfied that the FERC's analysis is consistent with its own.

Finally, Edison correctly points out that prior to the trial in this case, Judge Lucas ruled that the FERC's finding that the Cities and Edison are in competition collaterally estopped litigation of that issue in this antitrust case. [7] Edison argues that fairness requires that the Cities, having benefitted from estoppel on that issue, should be precluded from arguing that collateral estoppel does not apply to other issues. The Court, of course, recognizes that its conclusions here may not be wholly consistent with the view expressed in Judge Lucas' prior orders. The possibility of inconsistency, **[*38]** however, should not control the disposition of the remaining issues in the case. [8] Having explained the reasons for determining that collateral estoppel of particular issues decided by the FERC does not bar the litigation of the Cities' antitrust price squeeze claim, the merits of those claims should now be addressed.

B. *Section 2 analysis*

HN2[] To prove a violation of *§ 2*, plaintiffs must establish three elements: (1) the possession of monopoly power in the relevant market, (2) the willful acquisition or maintenance of that power, and (3) causal antitrust injury. *Oahu Gas Service, Inc. v. Pacific Natural Resources Inc., 838 F.2d 360, 363 (9th Cir. 1988)*, *cert. denied, 109 S.Ct 180 (1988)*; *Catlin v. Washington Energy Co., 791 F.2d 1343, 1347* ***[*39]*** *(9th Cir. 1986)*.

1. *Monopoly Power*

HN3[] The determination of whether Edison possesses monopoly power involves a two-step inquiry. First, the Court must determine what constitutes the "relevant market, *i.e.* 'the arena within which the strength of the competitive forces is measured,'" *Grason Electric Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1519 (E.D. Cal. 1983)*, *rev'd on other grounds, 770 F.2d 833 (9th Cir. 1985)*, *cert. denied, 474 U.S. 1103 (1986)* (quoting P. Areeda, *Antitrust Analysis* 133 (2d Ed. 1974)). Second, the Court must evaluate whether the defendant exercises monopoly power in that market. *See, e.g., United States v E.I. du Pont De Nemours & Co., 351 U.S. 377, 391-94 (1956)*. The relevant market is defined by reference both to the product which is being sold and to the geographical area in which the product is sold.

A utility price squeeze case, however, does not fit easily into the traditional antitrust analysis, and particularly is this true with respect to the analysis employed in determining the relevant market. In a price squeeze case, two product markets -- wholesale and retail -- are involved. The Cities assert, and Edison has not **[*40]** disputed, that the relevant wholesale product is firm bulk electric power ("bulk power") and that the relevant retail product is low voltage electric power delivered to end-use consumers. The Court must determine whether the Cities are required to show that Edison possessed monopoly power in the retail, the wholesale, or both markets to satisfy the first element of an antitrust claim. [9] In *Mishawaka I,* the district court held that a showing of monopoly power in *either* the retail or the wholesale market would establish this element of *§ 2* price squeeze claim. *City of Mishawaka v. American Elec. Power Co., Inc., 465 F. Supp. 1320, 1325 (N.D. Ind. 1979)* *("Mishawaka I"), aff'd except as to remedies, 616 F.2d 976 (7th Cir. 1980)* *("Mishawaka II"), cert. denied, 449 U.S. 1096 (1981)*. This Court finds more persuasive the conclusion reached in *Borough of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307 (3d Cir. 1982)*

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[7] Order Specifying Certain Facts to be without Controversy, filed May 18, 1981 [hereinafter 1981 Order].

[8] The Cities did not rely solely on Judge Lucas' order and in fact did litigate the issue of competition before this Court. *See* Part II.D.2, *infra.*

[9] In *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275-76 (2d Cir. 1979)*, *cert. denied,* ***444 U.S. 1093 (1980)***, the Court adopted the "monopoly leveraging" theory. The Court held that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of *§ 2*, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability." *Id. at 276*. The Ninth Circuit has not adopted the flexible standard for monopoly leveraging Set forth in *Berkey.* In *Catlin v. Washington Energy Co.,* the Ninth Circuit noted that it had not adopted *Berkey* in any of its decided cases, but instead has found *§ 2* violations based on anticompetitive conduct by the monopolist in the second market. *791 F.2d 1343, 1346 (9th Cir. 1986)* (discussing *M.A.P. Oil Co. Inc. v. Texaco, Inc., 691 F.2d 1303 (9th Cir. 1982)*, and *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir. 1983)*, *cert. denied,* ***465 U.S. 1038 (1984))***. In *Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 996 n.10 (9th Cir. 1986)*, *cert. denied,* ***479 U.S. 1031 (1987)***, the Ninth Circuit recognized "the debate concerning the anticompetitive effects of leveraging."

[hereinafter *Lansdale].* In *Lansdale,* the court held that ***HN4***[] where the monopolist is alleged to have impaired the customer-competitors' ability to compete by raising the wholesale rates, the relevant product market is the wholesale market. *Id* ***[*41]*** *. at 312*. The Cities, then, were required to establish that Edison possessed monopoly power in the bulk power market, *i.e.,* the wholesale market in which the relationship of Edison and the Cities was that of supplier and customer.

[*42] It is, in addition, necessary to define the relevant geographic market. The Cities contend that the relevant geographic market for bulk power is Edison's control area and that Edison possesses the power to control prices in that market since it owns and controls all of the transmission lines to the Cities. Edison contends that the relevant geographic market is larger than its control area because the Cities could have purchased, and in some instances did purchase, bulk power from distant suppliers. Edison maintains that the relevant geographic market for bulk power consists of fifteen states in the western United States and part of Canada, and that competitive forces in that market prevented Edison from controlling the price of bulk power available to the Cities.

HN5[] Under the antitrust laws, the relevant geographic market is the "market area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal, 365 U.S. 320, 327 (1961)*. If the Cities had the opportunity to purchase from suppliers in a large geographic area, the market should be defined broadly; and, under traditional market analysis, it would be more difficult **[*43]** to show that Edison possessed monopoly power. ***HN6***[] "A firm cannot impose monopoly prices if buyers are free to purchase a competitor's goods." *General Business Systems v. North American Philips Corp., 699 F.2d 965, 972 (9th Cir. 1983)*. But Edison cannot establish that the geographic market extends beyond its control area simply by demonstrating that the Cities' potential suppliers are widely dispersed. While the Cities had suppliers other than Edison in the western United States, the Cities were not completely free to purchase bulk power from these other suppliers. Edison owns all the transmission lines surrounding the Cities, and had nearly absolute discretion to permit or to refuse integration of the Cities' proposed purchases. From 1975 to 1985, the Cities purchased virtually all of their bulk power requirements from Edison, receiving capacity credit for only one proposed resource. Although Edison did transmit to the Cities a certain amount of bulk power from other suppliers, these purchases were not integrated, and most were transmitted on an interruptible basis. Recognizing the commercial realities of the situation in the relevant time period, Edison was in a monopoly position **[*44]** with respect to the Cities' bulk power supply. *See* *Otter Tail Power Co. v. United States, 410 U.S. 366, 369-370 (1973)*, *reh'g denied, 411 U.S. 910 (1973)* (relevant geographic market determined to be defendant utility's control area because of defendant's control over transmission lines). The Court reaches this conclusion as a matter of fact, not as a matter of law. *See* *Lansdale, 692 F.2d at 311*.

To show that Edison possessed monopoly power in the bulk power market in its control area, the Cities must establish that Edison had "'the power to control prices or exclude competition'" in that market. *United States v. Grinnell Corp., 384 U.S. 563, 571 (1966)* (quoting *United States v. E.I. du Pont de Nemours & Corp., 351 U.S. at 391*)). In antitrust cases involving unregulated industries, courts rely on evidence of the defendant's market share to assess whether the defendant exercises monopoly power. *MCI Communications v. American Telephone & Telegraph Co., 708 F.2d 1081, 1106-1107 (7th Cir. 1983)*, *cert. denied, 464 U.S. 891 (1983)*. Edison argues here that the presence of regulation made it impossible for it to control prices or exclude competition within the meaning **[*45]** of the antitrust laws. Edison is correct that ***HN7***[] where the alleged monopolist is regulated, traditional market share analysis is not necessarily indicative of the monopolist's power to control prices. *See* *MCI Communications, 708 F.2d at 1107*. Indeed, utilities usually exercise monopoly power with respect to their customers and are regulated because it has been determined that competition should not prevail in that industry. *See* Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards,* 22 Antitrust Bull. 559, 566 (1977).

The presence of regulation limits, but does not wholly negate, Edison's ability to control prices and to obtain monopoly profits. "Insensitivities, gaps or delays" in the system of regulation may enable the regulated monopolist to obtain more than competitive returns and to improperly affect actual or potential competition in a related market. P. Areeda & H. Hovencamp, ***Antitrust Law*** para. 518.3d (Supp. 1989); *see also* *Central Telecommunications v. TCI Cablevision, 800 F.2d 711, 726 (8th Cir. 1986)*.

HN8[] The price squeeze theory of antitrust liability is concerned with gaps in the regulatory scheme that result from **[*46]** the dual federal and state regulation of the investor-owned utility's rates. While a utility does not have total control over its rates, the utility has the power to adversely affect competition within the system of dual regulation. By manipulating the timing and amount of its rate filings, it is possible for the utility to ensure that the rates of its wholesale customers are unjustifiably high in relation to the rates of its retail customers. It is possible for the disparity in rates to be obtained by a utility's inaction as well. For example, the utility could simply decline to take any steps to redress a price disparity created by the inconsistent actions of the federal and state regulatory agencies.

HN9[] The fact that the monopolist's control of prices may be checked by the regulatory system in the form of refunds does not close the gap completely -- refunds may be inadequate. Refunds are often received only after many years of agency proceedings by which time the customer-competitor may have lost its customers, delayed improvements or ultimately been squeezed out of the market. As the Seventh Circuit recognized in *Mishawaka II,* the dual regulatory system offers an "obvious, ready **[*47]** made illegal opportunity with a legitimate gloss." *616 F.2d at 983-84*.

Thus, because Edison was in a position to control and did exercise control over the Cities' bulk power supply, and because the dual regulatory scheme does not foreclose and indeed provides the opportunity for anticompetitive conduct, the Court finds that Edison possessed monopoly power in the bulk power market in its control area.

2. *Competition*

To prevail on a price squeeze claim, the Cities must demonstrate that they are not only customers but also competitors of Edison. The Cities' status as customer-competitors of Edison is a threshold issue in their price squeeze case. Judge Lucas found at an early stage in the case that the parties were collaterally estopped from disputing the FERC finding on this issue. [10] Nevertheless, since evidence on this issue was presented to this Court, discussion of it is appropriate here.

In the electric utility industry, retail competition can exist at three different levels: competition **[*48]** for the right to serve all the customers in a given territory (franchise competition), competition for individual customers (*e.g.* large industrial customers), and fringe area competition for customers on the periphery of the service area of rival utilities. *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 930 (2d Cir. 1981)*. Although initially arguing both customer and franchise competition, at trial the Cities appeared to abandon their customer competition claim and focused mainly on franchise competition.

Franchise competition is the rivalry between an investor-owned electric utility and a municipally-owned utility for the right to serve a defined group of customers, usually a city or a community. A community within the control area of an investor-owned utility may choose to condemn through eminent domain proceedings the private utility operating within its boundaries. Conversely, if the community is operating its own utility, it may choose to sell it to the privately-owned utility. Within Edison's service area, then, retail customers have only two choices: Edison or a municipally-owned utility. In addition to competition for the right to provide service, franchise **[*49]** competition between a private utility and a municipally-owned utility may take the form of yardstick competition -- the competitive pressure on utilities generated by comparisons of their rates and quality of service with those of neighboring utilities.

The Cities have shown that there was franchise competition between Edison and the Cities. Although Edison last acquired a municipally-owned utility in the 1960s, [11] **[*50]** Edison considered and developed plans to take over a number of municipally-owned systems during the 1960s and came close to acquiring Colton's system. [12] In

[10] 1981 Order at 3(f)(i).

[11] In 1965, Edison acquired Desert Cooperative Inc., which distributed electricity in the community of Twenty-Nine Palms in San Bernardino County.

recognition of possible municipal takeovers, Edison monitored the development of community interest in publicly-owned utilities, which became more common in the 1970s as fuel prices increased. In late 1974, Edison formed a municipal ownership task force to respond to "municipal threats." The task force, together with Edison's resale accounts staff, prepared and disseminated information to Edison's representatives designed to assist them in discouraging customers interested in municipal ownership.

The Cities also showed that Edison monitored the retail rates charged by the municipally-owned utilities and provided rate comparisons to its industrial customers. Similarly, the Cities regularly monitored Edison's rates in order to be competitive with it. Anaheim, for example, adopted a policy in 1976 to maintain rates that were at least five percent lower than rates Edison charged to adjacent communities.

The evidence presented at trial amply supports the finding of Judge Lucas that the Cities and Edison were competitors.

3. *Anticompetitive conduct*

As stated, ***HN10***[] the second element of a *§ 2* violation is the "willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. at 570-71*. Even where monopoly power is lawfully acquired, the monopolist may not maintain that power by engaging **[*51]** in exclusionary conduct. Exclusionary conduct is defined as "'conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to . . . maintaining monopoly power.'" *Barry Wright Corp. v. ITT Grinnell, 724 F.2d 227, 230 (1st Cir. 1983)* (quoting III P. Areeda & D. Turner, ***Antitrust Law*** para. 626 (1978)).

The Cities contend that the amount and timing of the October 1975 wholesale rate filing that resulted in the rate increase for the Cities and the resulting price discrimination constituted exclusionary conduct under *§ 2*. ***HN11***[] As to the issue of price discrimination, the Cities had the burden of establishing that a rate differential existed, and Edison then had the burden of proving the cost justification for the disparity. *See Mishawaka II, 616 F.2d at 984* (noting defendant utility's failure to justify rate differential).

In finding a regulatory price squeeze, the FERC determined that the rate differential between the R-2 and A-8 rates from February 1, 1976 to January 12, 1977 was not cost-justified and resulted in a price squeeze. *FERC IV,* 40 FERC at 63,161-62. **[*52]** In making this determination, the FERC rejected the Cities' contention that the price squeeze lasted over a longer period: from February 1, 1976 to January 15, 1978. In this Court, the Cities sought to establish the existence of a price squeeze for a 23-1/2 month period rather than an 11 or 11-1/2 month period. *FERC* IV, 40 FERC at 62,163.

That a rate differential between the R-2 and A-8 rates existed from February 1, 1976 to September 13, 1977 was held to be an issue without controversy by Judge Lucas, [13] and that this differential continued until January 15, 1978 was not disputed. Determining whether these rates were discriminatory over this entire period, however, is an involved inquiry. Edison, of course, sought to prove that no price squeeze ever existed and that Edison's rates were cost-justified over the entire period, including the period that the FERC found Edison to have been engaged in a regulatory price squeeze. Edison's experts testified at length that the Cities' bill comparison study was inaccurate because of its failure to take into account the costs of service. The Court is persuaded that Edison's experts are correct in making this criticism of the bill comparison **[*53]** study.

Edison also contends, as it did before the FERC, that the time period used by the Cities to show price discrimination is inappropriate, and that the entire time period the rates were in effect, the 43 month "locked-in" period, must be considered. The Court finds this argument to be without merit. First, ***HN12***[] there is no minimum period of time

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[12] Although the measure did not receive the two-thirds vote necessary to pass, in 1965 sixty percent of the Colton voters voted to sell the system to Edison.

[13] Order Granting Defendant's Motion for Reconsideration and Modification, June 18, 1981.

for which a plaintiff must establish price discrimination in order to show that there is a price squeeze. *See* City of Groton, 662 F.2d at 934 (five month period long enough to support price squeeze claim if substantial sums involved). Second, there is no support for the contention that competitive prices charged in the latter part of the locked-in period somehow mitigate the discriminatory prices from February 1, 1976 to January 12, 1977. *Cf.* Ohio Valley Elec. Corp. v. General Elec. Co., 244 F. Supp. 914, 941 (S.D.N.Y 1965) (in § 1 tying case, price increases in the period after **[*54]** the alleged conspiracy in existence not relevant).

After lengthy review of the presentation made by both the Cities and Edison as well as the analysis of this issue made by the FERC, the Court is persuaded that it should adopt the FERC's conclusion that an unjustifiable rate differential existed from February 1, 1976 until January 12, 1977. As stated, the Court is free to make its own decision as to amount and duration of the price squeeze. Having satisfied itself as to the wisdom of the FERC's findings, the Court concludes that the Cities were subjected to a price squeeze as ultimately found by the FERC.

One other aspect of Edison's conduct remains to be examined. Edison did not take steps to prevent the price squeeze from occurring, nor did Edison attempt to ameliorate the effects of the squeeze on the Cities when the Cities complained about it. Edison took the position that it was entitled to a reasonable rate of return from the customers affected by the two rate applications, and it stuck with that position. This aspect of Edison's conduct is addressed in the next section as part of the analysis of intent.

4. *Intent*

As a price squeeze can result from the nature of the dual **[*55]** regulatory system despite the absence of any exclusionary intent on the part of the utility in creating it, distinguishing between innocent and exclusionary conduct in this context has proved troublesome for both the FERC and the courts. [14] The FERC has resolved this problem by confining its inquiry to the "regulatory price squeeze" for which intent is not an element. *FERC IV,* 40 FERC at 62,151. Most courts have resolved the dilemma by requiring plaintiffs in cases involving regulated utilities to prove "something more" than general intent. In Mishawaka II, 616 F.2d at 985, the Seventh Circuit held that "[i)n the particular circumstances of a regulated utility . . . entitled to recover its cost of services and provide its investors with a reasonable rate of return, we believe that something more than general intent should be required to establish a Sherman Act violation." The Circuit restated this position in MCI Communications, 708 F.2d at 1108, where, in analyzing the requirement of "willfulness" in a case involving a regulated public utility, it held that the district court had not erred in requiring the plaintiff to prove that each anticompetitive act of the defendant **[*56]** had been done with the intent to maintain a monopoly in the relevant market. The Second Circuit has also adopted this view. City of Groton, 662 F.2d at 931.

In utility price squeeze cases, courts have rested their finding of specific intent on a consideration of the utility's overall conduct in relation to its customer-competitors and not merely on the filing of discriminatory rates alone. *See* Lopatka, *supra,* at 605 n.206 (citing cases). The reason for this result is relatively simple. Regulated utilities like Edison are required to make rate filings in two different agencies; they must engage in this conduct to run their business. Thus, unless the amounts and the timing of the rate filings in the two agencies are so outrageously discriminatory as **[*57]** to clearly indicate the utility's exclusionary intent in creating the price squeeze, the trier of fact cannot draw any inference of intent from the filings alone. There must be other conduct which, when taken together with the creation of the price squeeze, permits the Court to find that the utility intended willfully to maintain its monopoly power in violation of § 2. This other conduct furnishes the basis for an inference of "something more" than general intent.

Thus, in Mishawaka II, 616 F.2d at 984-85, the court gave significant weight to the district court's finding of the existence of threats to municipal wholesale power supplies and the defendant utility's policy of acquisition of municipal systems. In *Town of Concord v. Boston Edison Company,* F.2d (1st Cir. 1990), the First Circuit held that "a price squeeze in a fully regulated industry such as electricity will not normally constitute 'exclusionary

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[14] See *generally* Lopatka, *supra,* at 603, 615 (distinguishing between predatory and innocent price squeezes); *see also* Watson & Brunner, *supra,* at 576-79 (describing general difficulty of identifying culpable behavior in the regulatory context).

conduct' under Sherman Act *§ 2*," stating that in all of the price squeeze cases dealt with in other circuits, "the price squeeze allegation was but one of several allegations of several different kinds of 'exclusionary conduct,'" the price squeeze allegation being **[*58]** insufficient standing alone.

Although the First Circuit in *Town of Concord* virtually rules out the possibility that a *§ 2* violation could be found based on a price squeeze allegation standing alone, it obviously does not say, nor do any of the other cases cited here say, that price squeeze conduct should be viewed as irrelevant in assessing the utility's intent.

HN13[] A distinction can be made between a utility caught in the web of dual regulation and one that deliberately seeks to take advantage of the regulatory systems to maintain or extend its monopoly power. Although a utility does have a constitutional and statutory right to earn a reasonable return on its investment, as a monopolist, it also "must take care that otherwise lawful acts do not have anticompetitive effects." *Oahu, 838 F.2d at 368*. Its relationship as a monopolist-supplier to its customer-competitors must be carefully weighed along with its knowledge of the probable consequences of its overall conduct in judging whether its actions were those of the reasonable regulated firm. *City of Groton, 662 F.2d at 931*.

Edison has argued that the evidence shows that it did not have the requisite intent for a *§ 2* violation **[*59]** because before both agencies it applied for rates that would produce identical revenue to cost ratios, would become effective simultaneously and would not result in a price squeeze. Edison contends that, but for an unusually long delay on the part of the CPUC in approving the retail rate increase, no price squeeze would have occurred; Edison therefore argues that it should not be held responsible. Moreover, Edison maintains that it did everything it reasonably could have done to avoid the result of the two rate increases being approved at different times. Edison informed the CPUC of the serious hardship any delay would cause and requested interim rate relief if the final decision were to be further delayed. Although Edison could have taken steps to reduce the wholesale rate, it claims it did not do so because such action would have resulted in a less than five percent rate of return on those customers.

The Court finds Edison's characterizations of the events leading to the price squeeze untenable for several reasons. First, the CPUC's delay did not take Edison by surprise. Even before Edison filed its rate increase with the FERC, Edison knew that it would not receive a ruling from **[*60]** the CPUC before the latest possible date on which the wholesale rate would take effect. Notwithstanding this knowledge, Edison filed the wholesale rate increases. Moreover, Edison asked for the minimum suspension of one day; if granted, this would have created a price squeeze even if the CPUC had issued its decision on the earliest possible date predicted by Edison. Edison's explanation that it applied for the one day suspension because it had always done so and had always received a five month suspension is implausible. Moreover, Edison did not passively acquiesce in whatever extension the FERC granted, but in fact vigorously opposed the Cities' request for a five month suspension.

Second, nothing in the record supports Edison's contention that it took steps to avoid the price squeeze. Rather, it is evident from the testimony that Edison did everything it could to obtain the highest possible rate of return from each class of customers without regard to the effect it would have on the relationship between rates. While Edison may have attempted to prod the CPUC into action on its retail rate application, Edison's motivation was clearly its desire to salvage declining revenues from **[*61]** the retail class. It was not trying to prevent a price squeeze. Indeed, even the original rate design sent to the two agencies was not intended to avoid the price squeeze.

Third, Edison's argument that any delay in the increase of its wholesale rates would have resulted in an unacceptably low rate of return of less than four percent with respect to its wholesale customers does not totally convince the Court. Although in general Edison is correct that a utility should not be required to take a beating before the FERC because it took a beating before the CPUC, Edison did have less restrictive alternatives available to it which would have mitigated the anticompetitive effects of its actions. Edison was not confronted with the "either/or" choice of an unacceptably low rate of return or going forward with its request for 9.14%. For example, it could have reduced its request to some middle point that would have paralleled the interim relief of 8.7% requested at the CPUC. It could have chosen not to use tax normalization, a procedure not permitted by the CPUC, in the calculations submitted to the FERC. However, Edison took neither these nor any other steps to avoid the price squeeze that **[*62]** was bound to result and as a consequence, it cannot successfully argue that the squeeze was unintentional. Edison clearly had the general intent to do what it did. The question is whether Edison's conduct in this regard can support an inference of the specific intent required in a *§ 2* regulated utility case.

To hold a utility responsible under *§ 2* where it knows that its requests for rates in two different regulatory agencies are likely to create a price squeeze would not read the intent element out of that section altogether as Edison contends. ***HN14***[] In contrast to the FERC, which looks only to the end result in determining if a refund is required, an antitrust court looks to all of the utility's conduct and justifications to infer innocent or culpable intent, a well-established approach in antitrust jurisprudence. [15] *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985)* (intent analysis subsumed in conduct analysis); *Drinkwine v. Federated Publications, Inc., 780 F.2d 735, 740 (9th Cir. 1985)*, *cert. denied, 475 U.S. 1087 (1986)*, *reh'g denied, 476 U.S. 1131 (1986)* (specific intent necessary for attempted monopolization claim may be inferred **[*63]** from clearly exclusionary conduct); III P. Areeda & D. Turner, ***Antitrust Law*** para. 626a (1978). If, after examining all of Edison's conduct and justifications, the Court could conclude that Edison had the required specific intent to violate *§ 2*, there would be no legal impediment to finding antitrust liability for the price squeeze.

Looking only at Edison's conduct with respect to the price squeeze, the Court certainly has no difficulty in concluding that, in filing the rate applications, Edison was interested only in its own rate of return on its **[*64]** investment and that it had little or no interest in protecting the Cities from the effects of a probable price squeeze. However, the Court cannot conclude that Edison filed the rate applications and thereby created the squeeze with the intent of taking over the Cities' or any other municipality's utility's electricity distribution system. Nor can the Court conclude that Edison was after any other customers of the Cities. Edison may have been somewhat ruthless in seeking to secure what it considered a satisfactory rate of return; but that does not permit an inference that Edison intended to extend or maintain its monopoly power in so doing. In short, other than the filings themselves, the only price squeeze conduct on which a finding of *§ 2* intent on the part of Edison could be based is the failure to assist the Cities and the failure to protect them against the effects of a squeeze.

Unless Edison had an affirmative duty to protect and assist the Cities in this situation, the Court finds it difficult to draw an inference of exclusionary intent from its failure to do so. In *Oahu,* the Ninth Circuit stated that ***HN15***[] the "monopolist's special position" imposed on it "what may be characterized **[*65]** as affirmative duties" to aid its competitor. However, these duties "arise only when there is no justification for refusing to aid a competitor." *838 F.2d at 368*. In that case, the monopolist was charged with violating the antitrust laws by electing not to produce propane gas for the plaintiff, a retail seller of propane gas. The monopolist's decision "had been based not only on economic factors but also on a desire to restrict the supply of propane potentially available to [the plaintiff]." *Id.* The Circuit stated that in situations "where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct." *Id.* The Ninth Circuit reversed the trial court's judgment of antitrust liability, holding that the monopolist's decision not to produce propane because to do so would not have been economically efficient was a legitimate business reason. This justification precluded antitrust liability. *Id.* The rule of *Oahu* has since been explained and discussed in *Image Technical Service, Inc. v. Eastman Kodak Co., **[*66]** 903 F.2d 612, 620 (9th Cir. 1990)*.

Applying the teaching of *Oahu* to the proof here, it is evident that even if Edison could be found to have created the price squeeze partially out of a desire to restrict competition by the Cities, it had legitimate economic reasons for seeking what it regarded as a just and reasonable rate of return in the two regulatory agencies. Thus, under *Oahu,* it had no affirmative duty to mitigate the effect of any price squeeze that might occur as a result of the timing and amount of the two applications. The Court need not consider what the result would be in a case in which the amount and timing of the filings are so egregious as to evidence *only* an intent to maintain or extend monopoly power because that is clearly not the situation here.

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[15] Edison has also argued that certain regulatory differences between the CPUC and the FERC must be taken into account in determining whether a price discrimination exists at all. Since Edison controlled the time and amount of the rate increase, the rate differential cannot be attributed to regulatory differences. The regulatory differences, however, like any differences in the cost of service, may be appropriately considered in measuring the quantum of discrimination.

As a final point respecting intent, the Cities argued throughout the case that the intent necessary to establish a *§ 2* violation could be inferred, if not from Edison's price squeeze conduct, then certainly from its denial of firm access to the Intertie. This argument is consistent with the existing case law which requires that the overall conduct of the monopolist utility be examined to determine whether or **[*67]** not it had the specific intent to violate the antitrust laws. The troublesome problem in this case is that, as discussed in a later part of this opinion, the Court finds that Edison had legitimate business reasons for denying the Cities firm access to the Intertie. Since the Court has not found that Edison's conduct with respect to the Intertie was in violation of the antitrust laws, the Court can hardly use that conduct as a basis for inferring the specific intent necessary for a violation of *§ 2* on the price squeeze claim.

In engaging in this detailed analysis of Edison's conduct, and the inferences to be drawn from it, the Court is not neglecting the forest in favor of a close examination of the leaves of every tree in it. The Court is mindful that the Cities urged it to consider the "synergistic effects" of Edison's acts, and that the case was presented and argued that way. However, this Court must, as the court in *City of Groton* did, analyze the Cities' claims and Edison's conduct with respect to them separately. *662 F.2d at 928*. And ***HN16***[] if, as is the case here, only the filing of the rate applications and the failure to mitigate the effects of a probable price squeeze created **[*68]** thereby provide a basis for finding the requisite specific intent under *§ 2*, the Court must find that the plaintiffs have not met their burden on this issue. What they have proved would not have been enough in *Mishawaka II,* and it is not enough here.

5. *Antitrust injury and damages*

HN17[] The third element of a *§ 2* claim that must be established is causal antitrust injury. *Oahu, 838 F.2d at 363*; *Catlin v. Washington Energy Co., 791 F.2d at 1347*. In an antitrust case, the plaintiff must show not only that the defendant's acts caused the injury, but that the plaintiff's injury is of a type the antitrust laws were intended to prevent. *Brunswick Corp. v. Pueblo Bowl-o-Mat Inc., 429 U.S. 477, 487 (1977)*. The Cities' only claims of injury resulting from the price squeeze are the amount of the overcharge and their litigation expenses for intervening in the FERC rate proceedings. The Cities concede that they have not lost any customers, and the Cities have not introduced any evidence of delayed capital improvements, lost revenues or profits or any other injury to their ability to compete for the provision of service to retail customers. With respect to the overcharge, the Cities **[*69]** contend that since excessive price is "injury of the type the antitrust laws were intended to prevent" the appropriate measure of damages is the price increment that "flows from" the distortion of the market caused by the monopolist's anticompetitive conduct. *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979)*, *cert. denied, 444 U.S. 1093 (1980)*. Edison responds that the Cities' reasoning was rejected in *Mishawaka II, 616 F.2d at 989*, which held that damages in a price squeeze case can be proved only by a showing of specific injury such as lost customers, revenues or profits, or by a showing that the FERC's refund with interest did not make the plaintiffs whole. Edison further argues that the *Mishawaka II* result is compelled by *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561 (1981)*, in which the Supreme Court held that automatic damages based on a difference in price may not be awarded in a treble damage claim for violations of the Robinson-Patman Act because such a price differential is not itself proof of antitrust injury.

Every writer and judge who has approached the problem of defining antitrust injury and awarding antitrust **[*70]** damages in a utility price squeeze case has been struck by the complexity of the task. Obviously, assuming that a predatory price squeeze is found, an award of treble the difference between the higher wholesale rate the plaintiff paid and the lower retail rate in effect would be legally and practically wrong because some of the difference in the rates would necessarily be attributable to factors other than the defendant's conduct in violation of the antitrust laws. The same objection of inaccuracy might be made to trebling the amount of the refund awarded by the FERC in cases where an unreasonably low retail rate was in effect during the squeeze. *See* Lopatka, *supra,* at 637.

The Court has given exhaustive consideration to the FERC's method of calculating the amount of the overcharge involved here. Although the Court declines to give collateral estoppel effect to the findings that support the refund ordered by the FERC, it has decided to adopt the overcharge analysis used by that agency. Thus, it is the conclusion of the Court that if the amount of the overcharge were determinative of the measure of damages to be awarded in this case, the Court would find the overcharge to be **[*71]** in the amount found to have been unjustifiably excessive in *FERC IV.* Having reached that decision, however, the Court must also conclude that it agrees with the reasoning of the Seventh Circuit in *Mishawaka II* that ***HN18***[] the Cities cannot show antitrust injury simply by establishing the amount of the overcharge, and that the utility's overcharge is not an accurate measure of the Cities' antitrust damages. *Mishawaka II, 616 F.2d at 989*. The Court has another reason for this view in addition to those argued by Edison. The rationale for finding that a price squeeze by a regulated utility can be a violation of the antitrust laws -- that antitrust courts can remedy gaps in the regulatory scheme -- supports the *Mishawaka II* conclusion that ***HN19***[] an antitrust court should confine its definition of antitrust injury to that injury that cannot be redressed by the regulatory scheme itself. *Mishawaka II, 616 F.2d at 989*. This result is not compelled by *J. Truett Payne,* as Edison contends, nor is it based on an obvious distinction between the Cities' theory and that upheld in *Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489 (1968)*. *See Mishawaka II, 616 F.2d* ***[*72]*** *at 988-89* (distinguishing *Hanover Shoe* on the ground that in that case, absent antitrust action, plaintiff would have continuously suffered the overcharge arising from defendant's abuse of its monopoly position). [16] Rather, it is based on the need to reconcile the respective roles of the regulatory agencies and federal courts in this context. Courts have dealt with the differing interests of these agencies and the courts at the intent stage of the *§ 2* analysis, *City of Groton, 662 F.2d at 932*, or at both the intent and the injury stages of the analysis. *Mishawaka II, 616 F.2d at 989*.

[*73] The remedy afforded by the regulatory scheme for a price squeeze is designed to ensure that any unjustifiable charge is refunded with interest. However, the refund is not always a "complete cure" for the impairment of the customer-competitor's ability to compete. *Mishawaka II, 616 F.2d at 986*. In those situations, the customer-competitor should be entitled to seek damages from the Court in the antitrust case for the injury not compensated by the action of the agency. The *Mishawaka II* conclusion -- that in price squeeze cases, antitrust courts should remedy the antitrust injury not redressed by the FERC -- seems a sensible reconciliation of the regulatory and antitrust schemes.

The Cities have urged the Court to disregard the holding in *Mishawaka II,* to treat the overcharge as an antitrust injury and to award antitrust damages flowing from it. The Cities also argue that because the FERC refunds did not flow from the antitrust violation but are instead analogous to settlement payments, the refund payments should not be offset before trebling. *See Los Angeles Memorial Coliseum Comm'n v. National Football League, 791 F.2d 1356, 1380 (9th Cir. 1986)*, *cert. denied, 484* ***[*74]*** *U.S. 826 (1987)* (Nelson, J., dissenting).

The Court has already stated its reasons for declining to award damages in the amount of the overcharge, thus rendering a decision on the offset question unnecessary. However, if the Court had reached that issue, the law of the Ninth Circuit would have required that the refund be offset before trebling. *See Los Angeles Memorial Coliseum Comm'n., 791 F.2d at 1374* (antitrust plaintiff only entitled to treble the amount necessary to compensate it for injury caused by defendant's violation).

The only remaining damages claimed by the Cities are their litigation expenses for challenging the R-2 rate in the FERC proceedings. In the Ninth Circuit, litigation costs incurred as a result of an action filed in violation of the

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[16] *J. Truett Payne v. Chrysler Motors Corp., 451 U.S. 557 (1980)* does not control this case. *Truett Payne* held that price discrimination alone could not establish both the fact and the measure of injury for a treble damage claim under § 4 where the plaintiff had established price discrimination in violation of the Robinson-Patman Act, *15 U.S.C. 13(a)*. The Robinson-Patman Act outlaws price discrimination by "any person engaged in commerce," where the effect "may be substantially to lessen competition or tend to create a monopoly . . ." *15 U.S.C. § 13(a)*. Because Robinson-Patman is a prophylactic statute, a court cannot infer from the fact of a violation that the defendant's behavior has caused the plaintiff any injury. *Truett Payne, 451 U.S. at 569* (Powell J., dissenting); *cf. Brunswick, 429 U.S. 477* (addressing § 7 of the Clayton Act, also a prophylactic statute); *see also* Areeda, *Antitrust Violations Without Damage Recoveries,* 89 Harv. L. Rev. 1127, 1130-33 (1976) (describing relationship between substantive liability under § 7 of the Clayton Act and damage recoveries). In contrast, *§ 2* prohibits unlawful use of monopoly power because such conduct is harmful to competition. One kind of violation of *§ 2* is charging monopoly prices, which a plaintiff can show harms it directly. *Hanover Shoe, 392 U.S. at 489*. The electric utility price squeeze has not generally been attacked under the Robinson-Patman Act, in part because of uncertainty over whether courts would find electricity to constitute a commodity for purposes of the Act, *compare City of Newark, 467 F. Supp. at 774* (not a commodity) *with City of Kirkwood, 671 F.2d at 1181* (is a commodity), but perhaps also because of the limitations of *Truett Payne.*

antitrust laws constitute antitrust injury as defined in Brunswick. Rickards v. Canine Eye Registration Found., 783 F.2d 1329, 1336 (9th Cir. 1986), *cert. denied, 479 U.S. 851 (1986)*. This principle was established in *Handgards*, *Inc. v. Ethicon*, *Inc.,* in which the court held that the costs of defending a "bad faith" patent infringement suit "flowed" from the defendant's antitrust wrong. Handgards, 601 **[*75]** F.2d 986, 997 (9th Cir. 1979), *cert. denied, 444 U.S. 1025 (1980)*.

Edison disputes the applicability of *Handgards* to this case arguing that intervenors in regulatory proceedings are unlike defendants forced to defend a patent infringement action brought in bad faith. A violation of the antitrust laws, however, may occur through the abuse of the processes of administrative agencies as well as courts of law, Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1254 (9th Cir. 1982), *cert. denied, 459 U.S. 1227 (1983)*. Nevertheless, the controlling fact on this issue is that Edison, as a regulated industry, has no choice but to file for rate increases in the FERC and the CPUC. Unlike an unregulated monopolist, Edison cannot conduct its business without making such filings. Where the legitimacy of the amounts and timing of these filings is disputed, as it is here, and the monopolist's position is partially vindicated in the regulatory agency, as it was here, it is inappropriate to award litigation expenses on the authority of *Handgards.*

Finally, in arguing that even if such litigation costs constitute antitrust injury, the Cities should be **[*76]** required to segregate the amount of expenses attributable to the "bad faith" nature of the filing from the amount the Cities would have incurred in litigating a typical rate case, Edison points up a serious problem: as a practical matter, the bad faith portion of the Cities' FERC litigation expenses could not be segregated by any reasonable trier of fact. This Court agrees with Edison that the Cities would likely have intervened in these and all other rate proceedings involving themselves and Edison whether a price squeeze existed or not. The Cities and Edison are part of a regulated industry; the parties in *Handgards* were not. The case is simply inapposite.

The Court agrees with the *Mishawaka II* court [17] that the Cities' litigation expenses for their intervention in the FERC proceedings are not an injury the antitrust laws were designed to prevent nor are these expenses properly awardable as antitrust damages.

[*77] III. *FORECLOSURE*

The Cities also claim that Edison violated § 2 by denying the Cities' requests that Edison allocate to them a portion of Edison's transmission rights on the Pacific Intertie. Although a monopolist is not generally required to aid a competitor, courts have, in a distinct category of cases, imposed liability under § 2 on the monopolist who refuses to aid a competitor where cooperation is essential to the preservation of competition. *See* Aspen Skiing, 472 U.S. at 601; Oahu, 838 F.2d at 368. These are cases in which the monopolist controls a structure, service or item essential to the competitor's ability to compete with the monopolist. Because the monopolist in this situation stands in relation to its competitor not only as a rival, but also as the supplier, or potential supplier, of something essential to the competitor's business, it is possible for the monopolist to use this advantage to inflict injury on its competitor. By charging an unreasonably high price, imposing unreasonable conditions on access, or withholding access to the structure, service, or item entirely, the monopolist-supplier can disadvantage the customer-competitor in, or exclude it **[*78]** from, the market in which the two compete. *See* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) (monopolist in professional photographic equipment market sets price so high at wholesale that customer who competes with monopolist at retail will be driven from retail market).

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[17] The Court does include in price squeeze damages the expenses of litigating the defendants' attempt to withdraw as wholesale suppliers. Mishawaka II, 616 F.2d at 989-90.

Courts and commentators have used the term "essential facility" to describe the kinds of structures, services and items that monopolists may be required to share with their competitors. [18] *See, e.g., MCI Communications, 708 F.2d at 1132-33* (local telephone exchange is an essential facility). Citing the essential facility doctrine, the Cities argue that the Pacific Intertie is an essential facility, that the Cities are not only competitors, but also customers, and that Edison's refusals to grant them firm transmission paths on the Intertie violate *§ 2*.

[*79] A. *The essential facility doctrine*

As in a *§ 2* price squeeze case, ***HN20***[] a court in a *§ 2* essential facility case is dealing with the allegation that monopoly power in one market is being used to injure competition in a second market. [19] **[*81]** *MCI Communications, 708 F.2d at 1133*; *Otter Tail, 410 U.S. at 377*. Thus, to prevail in an essential facility case, the plaintiff first must establish that the defendant possesses monopoly power in the market that provides some structure, service or item to the plaintiff. Next, the plaintiff must show that the defendant is in competition with the plaintiff in a second market. Finally, the plaintiff must demonstrate that the denial of the structure, service or item constitutes the unlawful use of monopoly power under the essential facility doctrine. Courts have articulated four elements necessary to establish liability under the essential facility doctrine:

(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

*MCI Communications, 708 F.2d **[*80]** at 1132-33*. Remarkably, this test fails to identify how a court should determine what constitutes an essential facility. Without explicit guidance as to how to make this determination, some courts *seem* to apply an "I know it when I see it" [20] test based on an examination of the inherent qualities of the monopolist's structure, service or item. *Olympia Equipment Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986)*, *reh'g denied, 802 F.2d 217 (1986)*, *cert. denied, 480 U.S. 934 (1987)* (reasoning that an advertising list is not the kind of thing that a monopolist can be required to share); *Consolidated Gas Co. of Florida v. City Gas Co. of Florida, 665 F. Supp. 1493, 1534 (S.D. Fla. 1987)*, *aff'd, 880 F.2d 297 (11th Cir. 1989)*, *vacated, 889 F.2d 264 (1989)*, *reinstated 1990 U.S. App. LEXIS 16430 (1990)* (gas pipeline is an essential facility because it is like an electric line). The apparent emphasis of some cases on the nature of the monopolist's facility reflects superficial analysis, however, and obscures the *ratio decidendi* of the essential facility cases.

In the refusal to deal context, the prohibition of *§ 2* is directed at the monopolist who, in its capacity as a supplier, discriminates against a customer-competitor in order to injure the competitor in the market in which it competes. A monopolist does not run afoul of *§ 2* by foreclosing access to a structure, service or item, no matter how unique or spectacular that structure, service or item may be. Rather, a monopolist violates the antitrust laws by using its power over a structure, service or item to injure or foreclose competition in the relevant market. *See Robinson v. Magovern, 521 F. Supp. 842, 913 (W.D. Pa. 1981)*, *aff'd, 688 F.2d 824 (3d Cir. 1982)*, *cert. denied, 459 U.S. 971 (1982)* (although doctor was excluded from using the only hospital with a residency program, relevant inquiry does not concern the nature of the hospital, but the effect of the exclusion on the doctor's ability to perform in the relevant market for open-heart surgery). Thus, ***HN21***[] the essential facility doctrine -- properly conceived **[*82]** -- defines

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[18] Courts have also applied the essential facility doctrine to find violations of § 1 of the Sherman Act. *See, e.g., Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977)*, *cert. denied,* ***436 U.S. 956 (1978)*** (holding a restrictive covenant in a stadium lease violates § 1 where use of stadium is essential to potential market entrant.)

[19] In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)*, the Supreme Court did not base its decision on the essential facility doctrine, but the reasoning of *Aspen* nevertheless influenced the analysis to be employed in essential facility cases.

[20] *Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)* (Stewart, J., concurring).

a facility as essential not based on the characteristics of the facility withheld, but based on the effect on competition of the withholding of the facility.

HN22[] To determine whether a monopolist's structure, service or item should be classified as an essential facility, a court must assess the extent to which the monopolist's refusal of access actually impairs the ability of the customer-competitor to compete. Moreover, a court must determine whether the competitor can avoid injury by using an alternative to the monopolist's structure, service or item. The application of the essential facility doctrine is most compelling where the monopolist's refusal makes it legally or physically impossible for its competitor to compete at all in the relevant market. *See, e.g., MCI Communications, 708 F.2d at 1132-33* (where it is physically impossible for competitor to compete with monopolist in the long-distance phone service market without access to local telephone exchange, and where government regulation prohibits construction of alternate local network, exchange is an essential facility).

In most cases, however, the refusal of the structure, service or item does not physically or **[*83]** legally exclude the competitor from the relevant market; the competitor can always secure an alternative to the monopolist's facility *at some price.* In such cases, a court is called upon to determine whether the competitor's alternatives to the use of the monopolist's facility are so expensive that the structure, service or item will be deemed an essential facility. *See Consolidated Gas Co. of Florida, 665 F. Supp. at 1534* (holding that where alternative to monopolist's pipeline is the construction of new pipeline at cost of $ 250,000 to plaintiff, monopolist's pipeline is essential facility); *Gamco, Inc. v. Providence Fruit & Produce Building, 194 F.2d 484, 487 (1st Cir. 1952)*, *cert. denied, 344 U.S. 817 (1952)* (building treated as an essential facility because "to impose upon the [competitor] the additional expense of developing another site, attracting buyers, and transhipping his fruit and produce by truck is clearly to extract a monopolist's advantage.").

Whether a facility is essential, then, "involves vexing questions of degree," P. Areeda & H. Hovencamp, ***Antitrust Law**,* para. 736.2b at 723 (Supp. 1989). ***HN23***[] The essential facility cases apply a test of reasonableness, **[*84]** finding a facility to be essential where the monopolist's refusal severely impairs the competitor in the relevant market and leaves the competitor without reasonable alternatives. *See MCI Communications, 708 F.2d at 1132-33*.

HN24[] Even where the harm to the competitor is sufficient to establish that the monopolist's structure, service or item is an essential facility, a monopolist's refusal to deal may not violate *§ 2*. A monopolist may justify the refusal to deal by pointing to legitimate business reasons for the refusal. *Gamco. Inc., 194 F.2d at 488* (monopolist bears burden of showing refusal to deal was reasonable); *Town of Massena v. Niagara Mohawk Power Corporation,* 1980-2 Trade Cases (CCH) para. 63,526 (N.D.N.Y. 1980) (collecting other cases) (business and engineering reasons justify refusal to share electric transmission facilities); *see Oahu, 838 F.2d at 363* (when antitrust laws impose affirmative duties on a monopolist, the monopolist does not violate the antitrust laws if the anticompetitive conduct is justified by legitimate business reasons).

The Cities claim that Edison's refusals to allow them firm transmission paths on the Pacific Intertie constitute the denial **[*85]** of access to an essential facility. Once it is established that Edison possesses monopoly power in the bulk power market, the Cities' claim is governed by a two-part inquiry. First, the Cities must establish that Edison's refusals to give them firm transmission significantly impaired the Cities' ability to compete in the retail market and that the Cities had no reasonable alternative to the Intertie. Second, if the Cities make such a showing, Edison can avoid liability by proving that its refusals were justified by legitimate business concerns.

Applying this analysis, the Court finds that the Cities have failed to show that Edison's denial of firm transmission on the Intertie significantly affected the Cities' ability to compete with Edison in the retail electricity market. Therefore, one of the requirements for a finding that the Pacific Intertie is an essential facility has not been met. Moreover, even if the Cities had established that the refusals of access to the Intertie significantly impaired their ability to compete and that they had no reasonable alternative to it, Edison's legitimate business concerns justified its denial of the Cities' requests.

B. *The Cities were not* **[*86]** *denied access to an essential facility*

As discussed in the analysis of the price squeeze claim, Edison is a monopolist with respect to the Cities' supply of bulk power because it owns and controls the transmission lines linking the Cities to Edison and other generation resources. [21] The Cities' ability to compete with Edison is dependent on access to bulk power. Since a utility can contract to purchase bulk power only if that utility has rights of access to a transmission path for the power bought, the Cities are unable to consummate bulk power transactions without Edison's cooperation.

It is undisputed that through various agreements with the Cities, Edison **[*87]** has allowed the Cities firm as well as interruptible access over some of its lines at some times. The Cities have gained greater access in recent years. The Cities complain, however, that Edison has foreclosed firm access to the one transmission path that is indispensable to them: the Pacific Intertie. Excluded from the Intertie, the Cities contend that a vital resource at the other end -- BPA Surplus and other low cost Northwest power -- is practically unavailable for their use.

Capitalizing on the impulse to view the essential facility doctrine as a doctrine concerned with the inherent qualities of the monopolist's facility, the Cities attempted to shift the focus of this claim away from competition in the relevant market, and toward the Pacific Intertie itself. The Cities introduced evidence at trial to show the unique attributes of the Intertie and the irreplaceability of BPA Surplus and low cost Northwest power. They established the practice of selling BPA Surplus on a prescheduled basis; the importance of having a firm transmission path on the Intertie in order to purchase BPA Surplus; the lack of alternative transmission paths; and the low prices of BPA Surplus and other Northwest **[*88]** power.

Although the Cities succeeded in proving that the Pacific Intertie is for all practical purposes the only transmission path for the delivery of BPA Surplus to Southern California, and that BPA Surplus -- when available -- was less expensive in the relevant time period than other sources of bulk power, these facts alone are not sufficient to make the Intertie an essential facility. As stated, whether the Pacific Intertie is an essential facility as to the Cities is a function of the harm to the Cities' competitive viability caused by not having access to it.

A careful examination of the evidence relating to the Cities' and Edison's bulk power transactions reveals that Edison's refusals to share firm access to the Intertie have not been shown to have handicapped the Cities' competitive viability in any serious way. When any bulk power purchased by the Cities or Edison is imported into Edison's control area, it is mixed together -- bulk power is obviously fungible, regardless of the source of generation. Edison then has the responsibility of dispatching to the Cities a sufficient amount of electric power to meet their needs and giving to the Cities energy credits, and, if the **[*89]** resources are integrated, capacity credits, for their purchases.

Because Edison has provided the Cities with firm access on the local transmission matrix, the Cities are able to purchase bulk power from neighboring utilities. Edison, meanwhile, has a continuing obligation to meet all the Cities' bulk power needs at the Cities' request. The inability to make direct purchases from the Northwest with a firm transmission path on the Intertie does not leave the Cities cut off from sufficient amounts of power, nor does it constitute a refusal by Edison to transport or "wheel" power from other suppliers. [22] From the Cities' perspective, then, the advantage of access to the Intertie is not related to the quantity or quality of the power, but solely to price, reflected in the form of capacity or energy credits.

[*90] The real question here is not only whether the Cities should have access to low cost power, but whether the Cities should have that access at the expense of Edison's other customers. With rights to a firm path on the Interie,

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[21] The Court has not separately analyzed whether the Cities have established Edison's monopoly power for the foreclosure claim. For the purposes of this discussion, the Court will assume that the Cities have made any additional showing necessary to the extent the analysis of this element of a *§ 2* essential facilities claim differs from a *§ 2* price squeeze claim.

[22] Settlement agreements require Edison to provide the Cities with all their bulk power requirements and to wheel power that the Cities obtain elsewhere. Therefore, this case does not present the question of whether the Intertie is essential because Edison has cut off the Cities' access to power. *Cf. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)* (vertically integrated utility must transmit power over its lines to municipalities that compete with the utility at retail).

the Cities would be able to contract with Northwest sellers to purchase directly from them when low cost firm bulk power is available. If the Cities made those purchases of low cost bulk power, Edison would be responsible for importing that power into the Edison system, and dispatching it to the Cities. Without the Cities having a firm path on the Intertie, the identical operation would occur, but with a different cost result to the Cities. When BPA Surplus and other low cost power is available in the Northwest, Edison fully utilizes its rights on the Intertie to purchase the maximum amount of the low cost power for the benefit of all of its customers. That fact is undisputed. Thus, whenever it is available, Edison will always import as much of the low cost electric power over its transmission lines into its control area as possible. The only difference created by granting firm access on the Intertie to the Cities is that the Cities pay for the power at the rate **[*91]** the Northwest seller charges, whereas without access to the Intertie, the Cities in effect buy BPA Surplus and other low cost Northwest power through Edison and share the benefit of that low cost power with all of Edison's customers.

Edison's refusals to share its firm transmission path on the Intertie, then, deprive the Cities of one thing only: the ability to contract directly with sellers to purchase BPA Surplus or other low cost Northwest power. [23] The Cities' emphasis on the lack of substitutes for the Intertie misdirects the Court's inquiry. It is substitutes for power at *the price of* BPA Surplus and other low cost Northwest power, not substitutes for the Intertie, that are the primary concern in assessing the competitive harm to the Cities.

The Cities argue that making direct purchases from the BPA and other Northwest sellers is the **[*92]** only way to get power at those low prices; but when Edison imports low cost power from outside its own control area, the savings from the economy purchase are fully accounted for in the cost of bulk power that Edison sells at wholesale. Courts generally require wholesale rates to reflect the "rolled in" cost of energy -- a utility may not allocate the low cost purchases to its own customers and the higher cost purchases to its resale customers. *See generally* *Nevada Power Co. v. Federal Power Comm'n, 589 F.2d 1002 (9th Cir. 1979)*. Thus, while Edison maintains control over the purchases of BPA Surplus and other low cost Northwest power by refusing to share the Intertie, Edison does not abuse this control to extract a monopolist's advantage. A city that purchases all of its power from Edison indirectly benefits from the low prices paid by Edison for the BPA Surplus and Northwest power.

The Cities raise two arguments in an attempt to show that purchasing from Edison is not a viable alternative to firm access on the Pacific Intertie. First, the Cities argue that they share fully in Edison's savings from Northwest purchases only if they buy all of their energy requirements from Edison. **[*93]** The Cities are correct that a city that purchases some of its bulk power from sources other than Edison will have a smaller percentage of its total power needs supplied at Northwest prices. However, the Cities presumably choose to buy energy from other sources only when they can obtain a price below that which would be charged by Edison. While the Cities may obtain less power at the Northwest prices, the Cities' total cost for obtaining bulk power in all likelihood will still fall below the cost of purchasing its requirements from Edison. Under these circumstances, the Cities can hardly suffer any competitive disadvantage relative to Edison. The Court agrees with Edison's expert that the financial benefit to the Cities of "perfectly equal access" would not have had a significant impact on the Cities' ability to compete in the retail electricity market.

Second, the Cities argue that purchasing their power from Edison is not an adequate substitute for firm access to the Intertie because the Cities are prevented from exercising their statutory preference for BPA Surplus. *16 U.S.C. § 832c(a)*. The Cities claim that the preference clause not only allows the Cities priority over Edison in **[*94]** making purchases of BPA Surplus, but imposes a duty on Edison to afford firm transmission to the Cities to achieve that preference. Thus, the Cities, having a firm path on the Intertie, claim the right to actually displace Edison in making some of its purchases.

The Cities' argument that their preference with respect to bulk power gives them the right to displace Edison on Edison's transmission path is so lacking in substance that the Court is compelled to dismiss it without further discussion. Moreover, the Cities' whole argument asks the Court to turn the essential facility doctrine on its head.

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[23] In reaching this conclusion, the Court has accepted the Cities' argument that the interruptible service offered by Edison was not a reasonable alternative to firm access.

Rather than seeking to impose a duty to deal based on the harm that would result to competition from the monopolist's refusal, the Cities seek to impose a duty to deal based on the extent to which a competitor might benefit if it had unlimited access to the monopolist's facility. The antitrust laws, however, have never been interpreted as placing on a monopolist a duty to affirmatively aid its competitors at a detriment to its own customers. *See* Hecht, 570 F.2d at 992-93 (essential facility need not be shared if it would inhibit defendant's ability to serve defendant's customers). The **[*95]** antitrust laws impose affirmative duties on monopolists dealing with their customer-competitors when the refusal to deal hampers competition with the monopolist. *See* Olympia Equipment Leasing, 797 F.2d at 378. All that the Cities have shown is that their cost of power would be lower and that they would therefore benefit from access. Despite the Cities' unpersuasive attempt to show that Edison denied them firm access to the Intertie as part of a long-term effort to take over their distribution systems, the Cities actually made no showing at all that their competitive viability was seriously impaired by Edison's refusal to grant firm access to them. To impose on Edison an affirmative duty to assist the Cities under those circumstances would be contrary to the Supreme Court's unambiguous pronouncement that the "antitrust laws . . . were enacted for 'the protection of *competition,* not *competitors.*'" Brunswick Corp. v. Pueblo Bowl-o-Mat Inc., 429 U.S. at 488 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

The Court, therefore, concludes that the Cities have not shown that they were denied access to an essential facility.

C. *Legitimate business reasons* **[*96]** *justify Edison's refusals of access*

Even if the Court could reach the legal conclusion that the Pacific Intertie is an essential facility as to the Cities, Edison showed legitimate business reasons justifying its refusals to grant the Cities' request for firm access to it. Courts do not find a violation of § 2 if the refusal to grant access to an essential facility is justified by legitimate business reasons. *See Massena,* 1980-2 Trade Cases (CCH) para. 63,526 at 76,812-813; Hecht, 570 F.2d at 992-93. Edison has proffered three justifications for its refusals to grant firm access to the Pacific Intertie. First, Edison argues that regulatory imperatives justified the refusals. Second, Edison argues that concerns over reliability of electric service led to the refusals. Third, Edison contends that the refusals were justified by the desire to share the savings of low cost bulk power with all of Edison's customers. Although the Court rejects Edison's claims based on regulatory imperatives and reliability, the Court finds the final justification sufficient to render Edison's conduct not in violation of § 2.

1. *Regulatory Imperatives*

Edison contends that it was justified in **[*97]** refusing to allow the Cities a firm path on the Pacific Intertie because the CPUC forbids a utility from taking any action that unnecessarily harms the utility's customers. ***HN25***[] While a regulated monopolist's actions in response to a regulatory agency's dictates enjoy a limited antitrust immunity, the monopolist must show that,

at the time [of] the various anticompetitive acts . . . it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority.

Phonetele Inc. v. American Tel. & Tel. Co., 664 F.2d 716, 737-38 (9th Cir. 1981), *cert. denied, 459 U.S. 1145 (1983)*.

The Cities have demonstrated that the CPUC had no jurisdiction over agreements between the Cities and Edison concerning the sharing of Intertie access. [24] *See* Nantahala Power & Light Company v. Thornburg, 476 U.S. 953, 966 (1986). Moreover, if the CPUC could regulate such an agreement, Edison never sought the opinion of the CPUC as to whether it objected to Edison's sharing Intertie access with the Cities. Edison has not established to the Court's satisfaction that the CPUC would have prohibited the sharing of firm transmission **[*98]** paths on reasonable terms. Finally, Edison has failed to show that its concern over CPUC regulation is anything but a post-

[24] CPUC did not review transmission agreement between Edison and Pasadena over Palo Verde line because FERC was the proper regulatory authority.

hoc legal argument. Edison never informed the Cities, at the time it refused the requests for firm access to the Intertie, that regulation by the CPUC required the denial.

2. *Reliability*

Edison also argues that it denied access to the Intertie to ensure the reliability of its own retail electric service. The Cities offer persuasive reasons why this putative justification must be rejected. First, the access requested by the Cities was not of sufficient magnitude to significantly affect Edison's ability to provide consistent reliable service. Second, Edison could have ensured reliability without denying access. If Edison was concerned about having a sufficient amount of bulk energy to respond to emergencies, Edison could have arranged to repurchase power **[*99]** during crisis periods. Thus, Edison would remain in complete control of its system's reliability whether or not the Cities had access to the Intertie. Access to the Intertie is really a matter of calculating the price of power; it has nothing to do with the reliability of the system.

3. *Protection of other customer groups*

The evidence establishes that Edison denied access to the Intertie because Edison contributed to the construction of it and wished to use it to benefit all of its customers. Edison saw no reason why the Cities should benefit from the low cost surplus to a greater extent than other Edison customers. This is a legitimate business justification for Edison's refusals of firm access to the Intertie. Edison was itself using all of the available capacity on the Intertie at the times when the Cities requested firm access to it. Edison provided the Cities with interruptible service on the Intertie at times when Edison was not using the line. Lack of available capacity has long been accepted as a legitimate reason for the denial of access to an essential facility. *See, e.g., Hecht, 570 F.2d at 992-93* (stadium booked every day); *Gamco, 194 F.2d at 487*.

Even if lack **[*100]** of capacity were not a legitimate business justification, ***HN26***[] Edison's concern that its other customers would suffer is. *See Massena,* 1980-2 Trade Cases (CCH) para. 63,526 at 76,812-813. It is undeniable that if the Cities received a larger proportion of the low cost power purchases transmitted over the Intertie, then Edison's other customers would pay more for their electric power. For the purpose of this antitrust analysis, the precise calculation of how much more is unimportant; it is not disputed that it would result in an increase. The Cities insist that if they had firm access to the Intertie, the Cities would always be able to fill the capacity with BPA Surplus because of the federal preference. If displaced, the economic benefit of that BPA Surplus and other low cost Northwest power transmitted over the Intertie would be shifted from Edison to the Cities.

It is important to distinguish Edison's legitimate business justification -- the increased costs to its customers -- from profit maximization. ***HN27***[] A monopolist's interest in extracting and maintaining monopoly profits does not justify anticompetitive conduct. *See* *Otter Tail, 410 U.S. at 380* (use of monopolist's "weapons" **[*101]** to ensure long run financial performance does not to justify refusal to deal); *Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990)* ("a monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits"). Edison's rates to its customers are based on its energy and capacity costs and a rate of return approved by the regulatory agencies. An increase in its costs therefore will not increase Edison's profits so much as its customers' electric bills.

The Cities suggest that the increase in Edison's costs need not adversely affect Edison's other customers, because the increase would be small and Edison could simply accept a lower rate of return than that approved by regulatory agencies or cut the salaries of corporate officers. The Court does not regard the Cities' suggestion as a serious one; furthermore, the antitrust laws do not require so much of a lawful monopolist.

The alleged *§ 2* violation in this case occurred when, having contributed to the construction of the Intertie with the aim of reducing the rates of all its customers -- including the Cities -- Edison refused to **[*102]** credit the Cities with firm access on it because to do so would reduce the Cities' costs of bulk power at the expense of Edison's other customers. On this theory, the Cities cannot prevail.

IV. *CONCLUSION*

An antitrust court always addresses a few simple questions: what did the defendant do, what were its reasons for doing it, and how has competition been hurt by it? Thus, the Court looks at the defendant's overall conduct and the reasons the defendant gives for it to see if the conduct was reasonably necessary to competition on the merits.

Applying that simple analysis here, what Edison did with respect to the price squeeze came dangerously close to being unreasonable under the antitrust laws, and what it did with respect to the request for access on the Pacific Intertie was carefully calculated to be, and it was, reasonable. Putting the two types of conduct together does not work the magic of synergism to make a *§ 2* violation.

Judgment must be for Edison.

JUDGMENT - October 22, 1990, Filed

This action came on regularly for trial in the United States District Court for the Central District of California, the Honorable Mariana R. Pfaelzer, Judge, presiding. Witnesses were sworn **[*103]** and testified and exhibits were offered and admitted. After hearing and considering the evidence and arguments of counsel, the matter was submitted for decision by the Court. The issues having been duly heard and the Court having made its findings of fact and conclusions of law,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff Cities of Anaheim, Riverside, Banning, Colton and Azusa take nothing in this action, that this action be dismissed on the merits and with prejudice, that defendant Southern California Edison Company shall have judgment against the plaintiff Cities, and that defendant Southern California Edison Company shall recover from the plaintiff Cities its costs in this action in the amount of $.

End of Document

J.V.B. Enterprises, Inc. v. Marshall

Court of Appeals of Minnesota

October 22, 1990, Decided ; October 30, 1990, Filed

No. C7-90-806

Reporter

1990 Minn. App. LEXIS 1073 *; 1990 WL 163106

J.V.B. Enterprises, Inc., Appellant, v. City of Marshall, Respondent

Notice: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

Prior History: Appeal from District Court, Lyon County; Hon. George A. Marshall, Judge.

Disposition: Affirmed.

Core Terms

liquor license, trial court, constitutional right, anti trust law, summary judgment, genuine issue of material fact, application of the law, statutory authority, due process of law, writ of mandamus, adequate remedy, state law, regulated, damages, immune

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN1[] **Appellate Review, Standards of Review**

On review of a grant of summary judgment, the appellate court must determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN2[] **Antitrust & Trade Law, Exemptions & Immunities**

See *Minn. Stat. § 325D.55, subd. 2* (1988).

Governments > Local Governments > Licenses

HN3[] **Local Governments, Licenses**

The City of Marshall has statutory authority to regulate liquor licenses within the City. *Minn. Stat. §§ 340A.401*-.416 (1988).

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Licenses

HN4[] **Local Governments, Claims By & Against**

The denial of an application for a liquor license is a discretionary act. The City of Marshall has immunity pursuant to *Minn. Stat. § 466.03, subd. 6* (1988).

Governments > State & Territorial Governments > Licenses

Governments > Local Governments > Licenses

HN5[] **State & Territorial Governments, Licenses**

A liquor license is not a property right but is in the nature of a privilege, and, as such, subject to reasonable regulations.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN6[] **Constitutional Law, Substantive Due Process**

Due process of law is not violated if there is an adequate remedy under state law.

Counsel: Joseph V. Bot, Marshall, Minnesota, For Appellant.

George C. Hoff, Hoff & Allen, Eden Prairie, Minnesota, For Respondent.

Judges: Foley, Presiding Judge, Robert H. Schumacher, Judge, and Klaphake, Judge.

Opinion by: SCHUMACHER

Opinion

UNPUBLISHED OPINION

Appellant J.V.B. Enterprises, Inc. (JVB), challenges the trial court's grant of summary judgment in favor of respondent City of Marshall (City). The trial court concluded, and we agree, that the City did not violate antitrust laws of Minnesota, the City is immune from liability, and JVB's constitutional rights were not violated because it had no property interest in the liquor license. We affirm.

FACTS

The City Council of Marshall denied JVB a liquor license and JVB brought an action for a writ of mandamus. The trial court found the City Council unreasonably denied JVB's application for a liquor license and a writ of mandamus was issued. JVB, however, never subsequently requested the license because the competition had increased and it decided not to **[*2]** open the club.

JVB subsequently initiated this action, claiming damages resulting from the City Council's denial of its application for a liquor license. JVB contends it is entitled to damages for alleged violation of the antitrust laws of Minnesota, and also claims violation of constitutional rights. The trial court granted the City's motion for summary judgment and dismissed JVB's cause of action.

DECISION

HN1[] On review of a grant of summary judgment, this court must determine "whether there are any genuine issues of material fact" and "whether the trial court erred in its application of the law." *Offerdahl v. University of Minnesota Hospitals & Clinics, 426 N.W.2d 425, 427 (Minn. 1988)*. There are no genuine issues of material fact. Therefore, the only issue is whether the trial court erred in its application of the law.

1. MINNESOTA ***ANTITRUST LAW***, *MINN. STAT. §§ 325D.49*-.66

The City did not violate the Minnesota ***antitrust law*** because its actions fall within an exemption pursuant to *Minn. Stat. § 325D.55, subd. 2* (1988), which provides:

HN2[] Nothing contained in *sections 325D.49 to 325D.66*, shall apply to actions or arrangements otherwise permitted, or regulated **[*3]** by any regulatory body or officer acting under statutory authority of this state or the United States.

HN3[] The City has statutory authority to regulate liquor licenses within the City of Marshall. *Minn. Stat. §§ 340A.401*-.416 (1988).

2. IMMUNITY FROM LIABILITY

HN4[] The denial of an application for a liquor license is a discretionary act. The City has immunity pursuant to *Minn. Stat. § 466.03, subd. 6* (1988).

3. CONSTITUTIONAL RIGHTS

JVB was not deprived of its property without due process of law. ***HN5***[] A liquor license "is not a property right but is in the nature of a privilege, and, as such, subject to reasonable regulations." *Cleveland v. Rice County, 238 Minn. 180, 185, 56 N.W.2d 641, 644 (1952)*. Additionally, the United States Supreme Court has held that ***HN6***[] due process of law is not violated if there is an adequate remedy under state law. *Parratt v. Taylor, 451 U.S. 527, 538, 101 S.Ct. 1908, 1914 (1981)*. In this situation, there was an adequate remedy under state law, namely, the issuance of a writ of mandamus. The trial court correctly concluded that the City did not violate JVB's constitutional **[*4]** rights.

Affirmed.

King Provision Corp. v. Burger King Corp.

United States District Court for the Middle District of Florida, Jacksonville Division

October 22, 1990, Decided ; October 22, 1990, Filed

Case No. 90-310-Civ-J-14

Reporter

750 F. Supp. 501 *; 1990 U.S. Dist. LEXIS 15264 **; 1991-1 Trade Cas. (CCH) P69,324

KING PROVISION CORPORATION, a Florida corporation, Plaintiff, v. BURGER KING CORPORATION, a Florida corporation, Defendant

Core Terms

removal, well-pleaded, district court, federal court, alleges, state court, antitrust, federal law, commerce, contends, attorney's fees, preemption, state-law, cases

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

HN1[] **Removal, Specific Cases Removed**

A defendant may remove to a federal court any civil action founded on a claim or right arising under the laws of the United States, pursuant to *28 U.S.C.S. § 1441(b)*. There are two ways in which a case may, for removal purposes, "arise under" federal law. First, a plaintiff's well-pleaded complaint simply may raise issues of federal law. Second, a complaint may raise a select type of claim that is singled out by Congress for federal preemption. Pursuant to the well-pleaded complaint rule, a court must look solely to the four corners of a complaint to determine whether or not a claim arises under federal law. Removal jurisdiction does not exist simply because a plaintiff can choose a federal claim instead of, or in addition to, a state claim advanced. Furthermore, a federal law defense will not support removal jurisdiction, even if the defense is anticipated in a complaint's allegations. The well-pleaded complaint rule makes a plaintiff the master of a claim; the plaintiff may avoid federal jurisdiction by exclusive reliance on state law.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN2[] **Subject Matter Jurisdiction, Federal Questions**

In certain limited circumstances, a federal court may look behind a complaint to preclude a plaintiff from defeating federal question jurisdiction through "artful pleading," that is, by disguising a federal claim as a claim arising under state law. One such circumstance involves state-law claims which are completely preempted by federal law. Federal preemption is ordinarily a federal defense to a plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint and therefore, does not authorize removal to federal court. One corollary of the well-pleaded complaint rule is that Congress may so completely preempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN3[] **Public Enforcement, State Civil Actions**

State courts are not precluded by federal ***antitrust law*** from adjudicating claims arising under state ***antitrust law***.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN4[] **Subject Matter Jurisdiction, Federal Questions**

A prior federal adjudication is required before a court may peek behind the four corners of a plaintiff's complaint.

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN5[] **Removal, Postremoval Remands**

A federal district court may order a defendant to pay attorney fees and costs incurred by a plaintiff as a result of an improper removal, pursuant to *28 U.S.C.S. § 1447(c)*. Such a decision is within the sound discretion of the trial court.

Counsel: **[**1]** Attorneys for Plaintiff: David M. Wells and William W. Deem, Mahoney, Adams & Criser, Jacksonville, Florida.

Attorneys for Defendant: James E. Cobb, Jacksonville, Florida, and Chris S. Coutroulis, Tampa, Florida.

Judges: Susan H. Black, United States District Judge.

Opinion by: BLACK

Opinion

[*502] ORDER

SUSAN H. BLACK, UNITED STATES DISTRICT JUDGE

This case is before the Court on the plaintiff's Motion to Remand, filed on May 18, 1990. The defendant filed its response in opposition on June 8, 1990. Pursuant to the Court's Order of June 5, 1990, the Attorney General of Florida was permitted to file a memorandum of law addressing the issues raised in the plaintiff's motion. The Court heard oral argument on July 26, 1990. Also pending is Defendant's Request, in the Alternative, for Stay and Certification of Order Granting Remand, filed on August 1, 1990, to which the plaintiff filed a response in opposition on August 2, 1990, and the defendant's Motion to File Supplemental Authority in Connection with Plaintiff's Motion to Remand, filed on September 18, 1990, to which the plaintiff filed a response in opposition on September 28, 1990.

This case was originally filed in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida. The Complaint **[**2]** alleges that the plaintiff, a Florida corporation operating from Jacksonville, and the defendant, a Florida corporation operating from Miami, pursuant to four distributorship agreements, competed to distribute supplies to Burger King's independent franchisees located in a number of states, including Florida. Complaint at 3-5, paras. 4, 9, 10, 15, filed on April 20, 1990. The Complaint alleges that the defendant conceived and engaged in a course of conduct with the purpose and intent of eliminating the plaintiff as a competitor. *Id*. at 8-10, PP 26-27. The Complaint specifically alleges that, through this conduct, the defendant has monopolized trade and commerce in the State of Florida, *id*. at 15, P 45; has attempted to monopolize trade and commerce in the State of Florida, *id*. at 17, P 51; has entered into combinations and conspiracies to monopolize trade and commerce **[*503]** in the State of Florida, *id*. 19, at P 56; and has entered into various contracts, combinations, and conspiracies to unreasonably restrain trade and commerce and substantially lessen competition in the State of Florida, all with the intent to injure the plaintiff and eliminate it as a competitor, **[**3]** *id*. at 20-21, P 58.

I. THE PARTIES' CONTENTIONS

The defendant contends that, pursuant to the "artful pleading" exception to the well-pleaded complaint rule, it is entitled to removal jurisdiction. In support of this allegation, the defendant alleges that the plaintiff's Florida Antitrust Act claims are really federal Sherman Act claims in disguise, since they seek to redress not just alleged restraints on commerce in Florida, but also alleged restraints on commerce occurring wholly in other states. The defendant alleges that this broad claim is nationwide in scope, and, therefore, the claim is a federal antitrust claim to which the federal courts have exclusive jurisdiction. *Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379-80, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985)*.

The plaintiff contends that the defendant has construed the artful pleading exception too broadly. The plaintiff alleges that there is no federal issue contained within the four corners of its Complaint nor are its causes of action dependent upon issues of federal law. Therefore, the plaintiff contends that the Court does not have subject matter jurisdiction and requests that the Court remand this case to state court. **[**4]** Lastly, the plaintiff requests costs and expenses as a result of the alleged improper removal.

II. REMOVAL AND THE WELL-PLEADED COMPLAINT RULE

HN1[] A defendant may remove to a federal court any civil action "founded on a claim or right arising under the . . . laws of the United States." *28 U.S.C. § 1441(b) (1988)*; *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)*. "There are two ways in which a case may, for removal purposes, 'arise under' federal law. First, the plaintiff's well-pleaded complaint simply may raise issues of federal law. Second, . . . the complaint may raise a select type of claim that has been singled out by Congress for federal preemption." *Pruitt v. Carpenters' Local Union No. 225, 893 F.2d 1216, 1218 (11th Cir. 1990)*.

Pursuant to the well-pleaded complaint rule, a court must look solely to the four corners of a complaint to determine whether or not a claim arises under federal law. *Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 103 L. Ed. 2d 924, 109 S. Ct. 1519, 1521 (1989)*; *Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987)* (federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint **[**5]** unaided by the answer or by the petition for removal). Removal jurisdiction does not exist simply because the plaintiff could have chosen a federal claim instead of, or in addition to, the state claim advanced. *Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809 n. 6, 92 L. Ed. 2d 650, 106 S. Ct.*

3229 (1986). Furthermore, a federal law defense will not support removal jurisdiction, even if the defense is anticipated in the complaint's allegations. *Oklahoma Tax Comm'n v. Graham, 109 S. Ct. at 1519*; *Caterpillar, Inc., 482 U.S. at 393* ("it is now settled that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint"). "The [well- pleaded complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc., 482 U.S. at 392*.

III. THE ARTFUL PLEADING EXCEPTION

HN2[] "In certain limited circumstances, a federal court may look behind the complaint to preclude a plaintiff from defeating federal question jurisdiction through 'artful pleading,' that is, by disguising a federal claim as **[**6]** a claim arising under state law." *Bowlus v. Alexander & Alexander Servs., Inc.,* ***[*504]*** *659 F. Supp. 914, 918 (S.D.N.Y. 1987)*. One such circumstance involves state-law claims which have been completely preempted by federal law. In *Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)*, the United States Supreme Court explained the preemption exception to the well-pleaded complaint rule:

> Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character.

Metropolitan Life, 107 S. Ct. at 1546 (citation omitted).

The defendant conceded at oral argument that this is not a case in which federal statutes preempt state regulation of the subject matter. ***HN3***[] State courts are not precluded by federal ***antitrust law*** from adjudicating claims arising under state ***antitrust law***.

The perimeter of **[**7]** the second circumstance in which courts have permitted removal in the absence of a federal question expressed on the face of the complaint constitutes the basis of the parties' dispute. It is the plaintiff's position that the second component of the artful pleading exception only arises when a plaintiff's choice of a state forum is motivated by the desire to evade the consequences of prior federal litigation. The defendant contends that the plaintiff's construction of this second circumstance is too narrow. Relying upon footnote two of *Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981)*, the defendant contends that courts are permitted to peek behind the four corners of the complaint to determine whether the nature of the complaint is really federal; there need not be a prior federal adjudication.

1. Federated Department Stores v. Moitie

To understand the United States Supreme Court's decision in *Moitie*, it is necessary to trace the procedural and factual history of the case. In 1976, retail purchasers filed seven separate class actions against the owners of various department stores. [1] *Id. at 395*. The purchasers alleged that the stores agreed to **[**8]** fix the retail price of women's clothing sold in Northern California in violation of the Sherman Act, *15 U.S.C. § 1*. *Id*. For reasons not relevant to this case, all of actions were dismissed. *Id*. While five of the class actions were appealed to the Ninth Circuit Court of Appeals, two actions were refiled in state court. *Id*. The refiled cases contained similar allegations to the previously dismissed federal action, yet raised only state-law claims. *Id*. The refiled cases were removed to federal court and were once again dismissed by the district court. *Id*. The district court held "that the complaints, though artfully couched in terms of state law, were 'in many respects identical' with the prior complaints, and were thus properly removed to federal court because they raised 'essentially federal law' claims." *Id*. However, this time

[1] Six of the actions were originally filed in federal court. The seventh action was filed in state court and was removed on the basis of diversity of citizenship and federal question jurisdiction. *Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 395, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981)*.

the cases were dismissed due to the doctrine of res judicata. *Id. at 396-97*. The Ninth Circuit created a new exception to the doctrine of res judicata and reversed the district court. *Id. at 397*.

[9]** The Court finds that the defendant reads *Moitie* too broadly. The opinion clearly stated that "the only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata," *id. at 395*, and concluded that "it is enough for our decision here that Brown I is res judicata as to **[*505]** respondents' federal-law claims." *Id. at 402*. Nowhere in the opinion does the Supreme Court state that it was establishing a new exception to the well-pleaded complaint doctrine.

Furthermore, the procedural and factual history of the case provides an interpretation of footnote two that is different from that of the defendant. Footnote two, in its entirety, states that:

> The Court of Appeals also affirmed the District Court's conclusion that Brown II was properly removed to federal court, reasoning that the claims presented were "federal in nature." We agree that at least some of the claims had a sufficient federal character to support removal. As one treatise puts it, courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and that] occasionally the removal court **[**10]** will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that *settled principle* to the facts of this case. After "an extensive review and analysis of the origins and substance of" the two Brown complaints, it found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state-law claims. We will not question here that factual finding.

Moitie, 452 U.S. at 397 n. 2 (emphasis added) (citations omitted). Thus, it is clear that the district court, the appellate court, and the Supreme Court were confronted with a factual situation in which the plaintiff was attempting to disguise his claims in state court to prevent the effect of the previous federal adjudication on the merits. *Moitie* was not a case in which the district court peeked behind the plaintiff's claims to determine that they were really federal in nature. Rather, the district court and the **[**11]** Supreme Court determined that the plaintiff's state-law claims were really federal in the context of the previously dismissed federal action. Lastly, were the Supreme Court establishing a new exception to the well-pleaded complaint rule, it would not have stated that the district court had applied the "settled principle" to the facts of this case. *Id*. Thus, the Supreme Court was merely affirming the district court's finding that the state-law claims were not unrelated to the previously dismissed federal claims, and did so by stating that it too agreed that "at least some of the claims had a sufficient federal character to support removal." *Id*.

Interpreted against this background the Court finds that *Moitie* does not stand for the proposition which the defendant contends; ***HN4***[] a prior federal adjudication is required before a court may peek behind the four corners of a plaintiff's complaint. [2] Furthermore, just two years later, the Supreme Court, in *Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)*, stated that the law of removal jurisdiction "has remained basically unchanged for the past century." *Franchise Tax Bd., 463 U.S. at 7*. *See* ***[**12]*** *also, Ethridge v. Harbor House Restaurant, 861 F.2d 1389 (9th Cir. 1988)*; *Department of Banking & Finance v. United States Trust Corp., 610 F. Supp. 919, 920 (S.D. Fla. 1985)*.

The Court finds that the other post-Moitie cases upon which the defendant relies either fit within the prior federal adjudication category of the artful pleading exception, [3] **[**13]** fit within the preemption category of **[*506]** the artful pleading exception, [4] or are factually distinguishable from the case *sub judice*. [5] **[**14]** , [6]

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[2] *See California v. Chevron Corp., 872 F.2d 1410, 1415 (9th Cir. 1989)*; *Travelers Indem. Co. v. Sarkisian, 794 F.2d 754* (2d Cir.), *cert. denied*, ***479 U.S. 885, 93 L. Ed. 2d 253, 107 S. Ct. 277 (1986)***; *Bowlus v. Alexander & Alexander Servs., Inc., 659 F. Supp. 914 (S.D.N.Y. 1987)*.

[3] *Villarreal v. Brown Express, Inc., 529 F.2d 1219, 1221 (5th Cir. 1976)* (following settlement of the federal action, the plaintiff repled in state court state-law claims which were essentially identical to the prior federal law); *Alabama v. Mills Family Bakery of*

IV. ATTORNEY'S FEES

HN5[] A federal district court may order a defendant to pay attorney fees and costs incurred by a plaintiff as a result of an improper removal. *28 U.S.C. § 1447(c) (1988)*. Such a decision is within the sound discretion of the trial court. In the instant case, the Court finds that the law interpreting the perimeters of the artful pleading doctrine is somewhat ambiguous. Consequently, the defendant's basis for removal and opposition to the plaintiff's motion to remand was colorable, and the Court will deny the plaintiff's request for attorney fees and costs.

V. CONCLUSION

In conclusion, neither of the components of the artful pleading exception apply to the facts of this case. Congress has not preempted state ***antitrust law*** nor is this a case like *Moitie* in which the plaintiff first filed a **[**15]** lawsuit containing federal claims, and then, after dismissal, sought to recast those claims under state law. Rather, the plaintiff in this case has consistently sought to litigate state claims in state court. *See United Jersey Banks v. Parell, 783 F.2d 360* (3rd Cir.), *cert. denied*, *476 U.S. 1170, 90 L. Ed. 2d 979, 106 S. Ct. 2892 (1986)*. Although the defendants allege that the action implicates federal ***antitrust law***, as well as the *Commerce Clause*, the Court finds that, even if this were so, this would only provide the defendants with a federal defense. [7] Under the well-pleaded

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Alabama, Inc., No. CV90-PT-0978-M, slip op. at 5 n.3 (N.D. Ala. May 22, 1990) (complaint "arguably resurrects the original FTC complaint which was clearly based on federal law").

[4] The Supreme Court in *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)*, addressed the artful pleading exception to the well-pleaded complaint rule in the context of preemption. *See* ***Aaron v. National Union Fire Ins. Co., 876 F.2d 1157 (5th Cir. 1989)***, *cert. denied*, ***493 U.S. 1074, 107 L. Ed. 2d 1028, 110 S. Ct. 1121 (1990)***; *Ethridge v. Harbor House Restaurant, 861 F.2d 1389 (9th Cir. 1988)*; *Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 217 n. 4 (1st Cir. 1987)*; *United Jersey Banks v. Parell, 783 F.2d 360, 366* (3rd Cir.), *cert. denied*, ***476 U.S. 1170, 90 L. Ed. 2d 979, 106 S. Ct. 2892 (1986)***; *Powers v. South Cent. United Food & Commercial Workers Unions, 719 F.2d 760 (5th Cir. 1983)*.

[5] *In re Carter, 618 F.2d 1093 (5th Cir. 1980)*, *cert. denied*, *450 U.S. 949, 67 L. Ed. 2d 378, 101 S. Ct. 1410 (1981)*, did not involve a motion to remand filed by the plaintiff. Rather, the plaintiff was arguing that he had relied upon federal law. It was the defendant, who, after removing the case and losing, alleged that the district court did not have subject matter jurisdiction. The court was not recharacterizing the plaintiff's complaint in a fashion contrary to the plaintiff's own position. Furthermore, in *Powers v. South Cent. United Food & Commercial Workers Unions, 719 F.2d 760, 766 (5th Cir. 1983)*, the Fifth Circuit stated that, in *Carter*, "the plaintiff's complaint necessarily presented a federal claim."

In *Buchanan v. Delaware Valley News, 571 F. Supp. 868, 872 (E.D. Penn. 1983)*, the Court held that, since Pennsylvania had no state antitrust statute, the plaintiff's state antitrust claim was actually a federal antitrust claim.

In *In re Wiring Device Antitrust Litigation, 498 F. Supp. 79, 81 (E.D.N.Y. 1980)*, it was conceded that there was diversity between the parties. Therefore, the Court's discussion regarding the federal question was mere dicta. Furthermore, there had previously been a federal antitrust indictment, as well as thirty federal antitrust cases with the same claims and defendants. *See Bowlus v. Alexander & Alexander Servs., 659 F. Supp. 914, 919 (S.D.N.Y. 1987)*.

Lastly, in *Three J Farms, Inc. v. Alton Box Board Co*., 1979-1 Trade Cas. (CCH) (D.S.C. 1978), paras. 62,423, 76,547, 76,550, *rev'd on other grounds*, *609 F.2d 112 (4th Cir. 1979)*, *cert. denied*, ***445 U.S. 911, 63 L. Ed. 2d 327, 100 S. Ct. 1090 (1980)***, the court held that, since plaintiff's complaint alleged interstate commerce and since the Supreme Court of South Carolina had previously ruled that any claim alleging interstate commerce must be federal antitrust claim, South Carolina had displaced state law from the field.

[6] The defendant also cites to *T.O.C., Inc. v. United Artists Theatre Circuit, 631 F. Supp. 832 (N.D. Cal. 1986)*. However, this case was recently disapproved of by the Ninth Circuit Court of Appeals in *Redwood Theatres, Inc. v. Festival Enterprises, Inc., 908 F.2d 477 (9th Cir. 1990)*.

complaint rule, a federal defense is insufficient to support removal. If, once back in state court, it is determined that the complaint does not state a claim under the Florida Antitrust Act, then the state court will simply dismiss the claim.

[16]** **[*507]** Therefore, the Court will grant the plaintiff's Motion to Remand, filed on May 18, 1990, and remand the case to the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida. However, the Court will deny the plaintiff's requests for costs and attorney's fees. The Court will deny the Defendant's Request, in the Alternative, for Stay and Certification of Order Granting Remand, filed on August 1, 1990. Lastly, the Court will deny the defendant's Motion to File Supplemental Authority in Connection with Plaintiff's Motion to Remand, filed on September 18, 1990.

Accordingly, it is

ORDERED:

1. That the plaintiff's Motion to Remand, filed on May 18, 1990, is granted; the case shall be remanded to the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida.

2. That the plaintiff's requests for costs and attorney's fees are denied.

3. That the Defendant's Request, in the Alternative, for Stay and Certification of Order Granting Remand, filed on August 1, 1990, is denied.

4. That the defendant's Motion to File Supplemental Authority in Connection with Plaintiff's Motion to Remand, filed on September 18, 1990, is denied.

DONE AND ORDERED at Jacksonville, **[**17]** Florida, this 22 day of October, 1990.

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[7] Thus, even if the defendant has correctly interpreted the reach of the *Healy v. Beer Institute, Inc., 491 U.S. 324, 105 L. Ed. 2d 275, 109 S. Ct. 2491, 2499 (1989)*, the Court notes that such an interpretation would simply constitute a federal defense to the plaintiff's state-law claims.

All-Tone Communications, Inc. v. American Information Technologies Corp.

United States District Court for the Northern District of Illinois, Eastern Division

October 26, 1990

No. 87 C 2186

Reporter

1990 U.S. Dist. LEXIS 18757 *

ALL-TONE COMMUNICATIONS, INC., Plaintiff, v. AMERICAN INFORMATION TECHNOLOGIES CORPORATION a/k/a AMERITECH and ILLINOIS BELL TELEPHONE COMPANY, Defendants

Subsequent History: [*1] Adopting Order of March 7, 1991, Reported at *1991 U.S. Dist. LEXIS 3109*.

Core Terms

rates, antitrust, usage, telephone, immunity, supplemental, anti-competitive, supervision, pay telephone, doctrine of immunity, regulation, partial summary judgment, proposed rate, state action, RECOMMENDATION, Carriers, parties

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN1[] **Sherman Act, Claims**

In order to satisfy the test for Sherman Act violations, the party seeking immunity must establish that (1) the challenged restraint is a state policy which is clearly articulated and affirmatively expressed, and (2) the state actively supervises any private anti-competitive conduct.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN2[] **Antitrust & Trade Law, Exemptions & Immunities**

Active supervision meant regulatory oversight of anti-competitive conduct. The active supervision prong of the test for immunity requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN3[] Utility Companies, Rates

Ill. Rev. Stat. ch. 111-2/3, para. 1-101.

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN4[] Utility Companies, Rates

Ill. Rev. Stat. ch. 111-2/3, para. 1-102 grants to the Illinois Commerce Commission broad supervisory powers over all telephone public utilities. One responsibility of the Commission is to approve or actually set rates for telephone services. Ill. Rev. Stat. ch. 111-2/3, para. 13-505. The Act provides that no proposed rate becomes effective unless and until the Commission approves it, either by taking no action for 45 days or by issuing an order after a public hearing. The Act also authorizes the Commission to establish rates. It states, that the Commission may, upon its own motion or upon complaint, investigate whether such proposed rate change is just and reasonable and if it finds that such changes are unjust or unreasonable the Commission shall have the power and duty to establish rates it finds to be just and reasonable.

Communications Law > ... > Regulated Entities > Telephone Services > Payphone Services

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN5[] Telephone Services, Payphone Services

There is no requirement that the Illinois Commerce Commission specifically review each proposed usage rate as it applies to each and every affected customer. It is enough that the Commission "exercises ultimate control over" the rate setting.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Federal Government > Claims By & Against

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

The implied immunity doctrine holds that the nature and extent of federal government regulation may justify exemption from federal anti-trust liability. The doctrine is based on the principle that where two pieces of federal legislation are inconsistent, the latter act impliedly repeals the prior act to the extent of the inconsistency.

Judges: Joan Humphrey Lefkow, United States Magistrate.

Opinion by: LEFKOW

Opinion

REPORT AND RECOMMENDATION

All-Tone Communications, Inc. ("All-Tone") sued American Information Technologies Corporation a/k/a Ameritech ("Ameritech") and Illinois Bell Telephone Company ("Illinois Bell") alleging violations of federal ***antitrust law*** and a pendent state claim of tortious interference with contractual relationships. Illinois Bell filed a motion for partial summary judgment contending that it is immune from antitrust claims as to usage rates (charges) set or approved by the state. Illinois Bell's motion is now before the court.

Procedural History

On March 3, 1987, All-Tone filed its complaint against Ameritech and Illinois Bell. On December 15, 1988, Illinois Bell moved for partial summary judgment as to paragraphs 20 through 25 of the complaint. [1] In these paragraphs, All-Tone alleges that the usage rates Illinois Bell charges All-Tone for calls made from All-Tone's pay telephones are "discriminatory and anti-competitive." Illinois Bell's Motion For Partial Summary Judgment, para. 2. All-Tone's response and Illinois Bell's reply **[*2]** were filed February 10 and February 24, 1989, respectively. Without leave of court, All-Tone filed two supplemental responses, on September 22 and March 20, 1990. Illinois Bell responded to each supplemental filing, vociferously objecting to the supplemental filings as well as responding to the merits of each.

[*3] Uncontested Facts

Illinois Bell is a local telephone utility operating in parts of Illinois and subject to the regulatory jurisdiction of the Illinois Commerce Commission ("the Commission") for its intrastate services. Ill.Rev.Stat. ch. 111-2/3, paras. 1-102, et seq. Illinois Bell owns and operates local exchange networks, the system of trunks, lines and switches which

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[1] The pertinent paragraphs are as follows:

20. Ameritech and Illinois Bell's latest discriminatory tactic will slash All-Tone's profits and will require All-Tone to charge its customers more for pay telephone service than Illinois Bell charges its own [pay telephone] customers for the same service.

21. Beginning on March 4, 1987, Ameritech and Illinois Bell will charge All-Tone a new, discriminatory rate for use of central office services and facilities. The new rate is sensitive to (a) the time of day the call is placed, (b) the distance the call travels, (c) the time length of the call, and (d) the volume of calls placed from the calling telephone number.

22. Prior to March 4, 1987, All-Tone paid Illinois Bell approximately 4.5 cents per call made on one of All-Tone's pay telephones to a location within the Chicago calling area. As a result, All-Tone was able to charge customers a flat rate of twenty-five cents for each local call. Under the new discriminatory tariff, the telephone call in Chicago will cost 4.5 [cents] could now cost All-Tone in excess of 25 [cents].

23. Under the new tariff, the charges All-Tone will pay to Illinois Bell will increase sharply. These increased charges will adversely affect All-Tone's ability to compete in the market. For example, if All-Tone keeps its charge to the customer at 25 [cents], its profit margin could disappear entirely; alternately, if All-Tone raises its charges to compensate for the increased rates, it cannot and will not be competitive with Illinois Bell telephones. In locations where both All-Tone and Illinois Bell have a pay telephone, an All-Tone customer will have to pay more for a call placed on the All-Tone pay telephone, an All-Tone customer will have to pay more for a call placed on the Illinois Bell pay telephone.

24. In addition, because of the new rates, All-Tone will be required to bear the cost of reprogramming all of its pay telephones in order to charge its customers according to the new rate schedule.

25. Illinois Bell's new tariff does not change the rate for Illinois Bell's pay telephones. As a result, users of Illinois Bell's pay telephones will continue to make calls within the Chicago calling area for a flat rate of twenty five (sic) cents.

carries telephone calls locally. Pertinent to this litigation, it also operates pay telephones throughout Market Service Area 1 ("MSA-1"), roughly Chicago and its suburbs.

All-Tone was incorporated in January, 1986 and began operations in June, 1986 as a provider of coin operated pay telephone services also throughout MSA-1. All-Tone competes with Illinois Bell in the pay telephone market, in the same geographic area. All-Tone's pay telephones are connected to Illinois Bell's telephone network, for which All-Tone pays Illinois Bell a usage rate. All-Tone is a reseller of telephone services. That is, it buys a service from Illinois Bell and, in turn, sells this service to other customers. Resellers are considered business customers and they pay Illinois Bell's business rates for services which are resold.

All-Tone **[*4]** complains of the revised usage rates for MSA-1. The revised rates are based on frequency, duration, distance, and time of day of the call. Illinois Bell proposed new rates as part of a system-wide effort to align its rates more closely with its true costs. Illinois Bell originally submitted the proposed rates in July, 1985. Nearly two dozen parties intervened in the process, and a total of sixteen days of hearings were held. On June 25, 1986, the Commission approved the negotiated MSA-1 rate restructure and ordered a phase-in implementation. The Commission's opinion does not discuss the impact of the new usage-based rates on competing pay telephone companies.

The Parties' Positions

All-Tone contends in paragraphs 20 through 25 of its complaint that the implementation of the new usage rates will adversely affect its business and that the new rates violate the federal antitrust laws. All-Tone attempts to defeat the motion for summary judgment by arguing that Illinois Bell's rates are tied to the facilities Illinois Bell is providing to All-Tone. It argues that a question of fact exists as to whether Illinois Bell is providing the facilities on reasonable and non-discriminatory terms **[*5]** and conditions.

Illinois Bell counters these allegations with an affirmative defense: that it is exempt from antitrust actions relating to usage rates due to the state action immunity doctrine. It relies on *Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307 (1943)*, which held state officials immune from anti-trust liability, and *Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 105 S.Ct. 1721 (1985)*, extending this protection to private parties when certain criteria are met (described below). Thus, Illinois Bell argues, even assuming everything All-Tone complains of in paragraphs 20 through 25 is true, Illinois Bell cannot be sued for its usage rates as a matter of law.

Discussion

The first order of business is to interject some order into the business of the briefing process in this case. The briefing schedule set by the court for the instant motion only allowed for a response and a reply. After the motion was fully briefed, All-Tone filed two supplemental responses. All-Tone did not ask leave to file either supplemental response: they were submitted without leave of court. The court finds All-Tone's **[*6]** actions inappropriate. The filing of memoranda not provided for by court order may only be accomplished with the court's indulgence, by means of an appropriate motion.

All-Tone submits that its supplemental filings supplied newly discovered information pertinent to the instant motion. The court does not agree. The only issue before the court is whether Illinois Bell is shielded from anti-trust liability by dint of the state action immunity doctrine. The supplemental motions did not address this issue, nor provide information relevant to its disposition. As such, the court will not consider All-Tone's two supplemental responses and, consequently, need not consider Illinois Bell's supplemental replies.

The State Immunity Doctrine

Illinois Bell grounds its motion for partial summary judgment on the state immunity doctrine. This doctrine was established by the United States Supreme Court in Parker. Parker was an action filed by a raisin producer against the California Director of Agriculture and other state officials, seeking to enjoin the enforcement of the State's Agricultural Prorate Act. That statute created a cartel of raisin producers in order to stabilize prices and prevent **[*7]** economic waste. *Id. at 346, 63 S.Ct. at 311*. The Court recognized that the statute was clearly anti-competitive, but nonetheless held that the state officials were immune from antitrust liability under the Sherman Antitrust Act. The Court found that the Sherman Act was not intended "to restrain a state or its officers or agents from activities directed by its legislature." *Id. at 350-51, 63 S.Ct. at 313*.

In Southern Motor Carriers, the Supreme Court expanded the state immunity doctrine to protect the conduct of private parties if certain criteria are met. Southern Motor Carriers dealt with the regulation of intrastate trucking rates in four southern states, North Carolina, Georgia, Mississippi and Tennessee. In each of the four states, trucking companies were required to submit proposed intrastate rates to the state's Public Service Commission. A proposed rate would become effective only if the state's commission approved the rate, either by taking no action for a specified period or by issuing an order after a public hearing. The defendants, private associations composed of competitors in the trucking business, submitted joint rate proposals on behalf of their members **[*8]** to the commissions of each of the four states. North Carolina, Georgia and Tennessee had statutes that did not compel, but expressly permitted common carriers to submit such joint rate proposals. Mississippi's statute made no reference to joint rate proposals, but simply authorized its commission to regulate common carriers and to set just and reasonable rates for their service within the states.

The Supreme Court held that the defendants were protected from allegations of price-fixing in violation of the Sherman Act, relying on a two-pronged test delineated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937 (1980)*. ***HN1***[] In order to satisfy the test, the party seeking immunity must establish that (1) the challenged restraint is a state policy which is clearly articulated and affirmatively expressed, and (2) the state actively supervises any private anti-competitive conduct. *Southern Motor Carriers, 471 U.S. at 57, 105 S.Ct. at 1727*.

The Court held that a state policy could be clearly articulated and affirmatively expressed where a state "expressly permits, [even though **[*9]** it] does not compel, anti-competitive conduct". *Id. at 61, 105 S.Ct. at 1729*. The statutes for North Carolina, Georgia and Tennessee satisfied the first prong of Midcal. However, Mississippi's statute made no reference to joint rate proposals. Nonetheless, the Court found in Mississippi's statute a clear intent for the intrastate rates to be set by the regulatory agency rather than the market place. The Court held that this satisfied the first requirement of Midcal. *Id. at 63-64, 105 S.Ct. at 1730*.

Regarding the second prong of the Midcal test, the Court indicated that ***HN2***[] active supervision meant regulatory oversight of anti-competitive conduct. *Id. at 57, 62 n.23, 105 S.Ct. at 1727, 1729 n. 23*. This requirement was discussed in more detail in *Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658 (1987)*. There the Court stated:

The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. **[*10]** Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Patrick at 101, 108 S.Ct. at 1663.

Illinois Bell's Rates Are Exempt

Illinois Bell has pointed to a clearly articulated policy of the state to regulate telephone companies, including usage rates. The Illinois Public Utilities Act (the "Act"), Ill. Rev. Stat. ch. 111-2/3, para. 1-101 et seq., states:

HN3[] [The General Assembly] declared [it] to be the policy of the State that public utilities shall continue to be regulated effectively and comprehensively.

Para. 1-102. *HN4*[] The Act grants to the Commission broad supervisory powers over all telephone public utilities, paras. 4-101, 13-101. [2] One responsibility of the Commission is to approve or actually set rates for telephone services. Para. 13-505. The Act provides that no proposed rate becomes effective unless and until the Commission approves it, either by taking no action for 45 days or by issuing an order after a public hearing.Paras. 9-201, 13-504, 13-505. The Act also authorizes the Commission to establish **[*11]** rates. It states, in pertinent part:

The Commission may, upon its own motion or upon complaint, investigate whether such proposed [rate] change is just and reasonable and if it finds . . . that such changes are unjust or unreasonable . . . the Commission shall have the power and duty to establish rates . . . it finds to be just and reasonable.

Para. 13-504. In the instant case, the "anti-competitive conduct" complained of by All-Tone is Illinois Bell's revised usage rates. The Act not only provides for state regulation of telephone companies generally; it also provides for state regulation of rate setting. The legislative mandate of the Act clearly satisfies the first prong of the Midcal test.

[*12] Illinois Bell has also demonstrated that the Commission actively supervises telephone companies, specifically, usage rates charged. A proposed usage rate must be filed with the Commission. Para. 13-501. As stated above, a proposed rate does not become effective until the Commission approves the rate.Paras. 9-201, 13-504, 13-505. Moreover, the Commission is not limited to merely accepting or rejecting the rates as proposed, it may determine what rates it finds to be just and reasonable. Para. 13-504. The Commission held nearly 16 days of hearings on the rates at issue in this case. Not only does the Commission have the power and authority to supervise the rate setting, there can be little question that the Commission exercised its authority over the rates proposed. The second part of the Midcal test is satisfied.

All-Tone argues that the Commission did not directly consider whether the rates charged to resellers were reasonable and non-discriminatory. It states that no mention is made of competing pay telephone companies in the two orders dated August 24, 1983 and July 17, 1983. In the Third Interim Order, the Commission concluded that it did "not have a sufficient record **[*13]** at this time on which to decide whether resale of COTS [Coin Operated Telephone Service] should be allowed." Third Interim Order, September 18, 1984, at 10. This is an incorrect understanding of what it meant by active state supervision. There need only be a "program of supervision". *Patrick, at 101, 108 S.Ct. at 1663*. *HN5*[] There is no requirement that the Commission specifically review each proposed usage rate as it applies to each and every affected customer. It is enough that the Commission "exercises ultimate control over" the rate setting. Id.

All-Tone urges us to disregard Illinois Bell's claim of immunity, citing *MCI Communications Corp. v. AT & T, 708 F.2d 1081 (7th Cir. 1983)*, and other similar cases. [3] However, these cases address the issue of implied immunity and not the state action immunity doctrine. *HN6*[] The implied immunity doctrine holds that the nature and extent of federal government regulation may justify exemption from federal anti-trust liability. The doctrine is based on the principle that where two pieces of federal legislation are inconsistent, the latter act impliedly repeals the prior act to the extent **[*14]** of the inconsistency. *United States v. National Association of Security Dealers, 422 U.S. 694, 719-20, 95 S.Ct. 2427, 2443 (1975)*; *Silver v. New York Stock Exchange, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257*

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[2] The resale of telephone services to customers such as All-Tone is an example of how the state regulates the telephone service industry. It is not controverted that Illinois Bell, in the past, provided telephone service only to end-users. That is, customers were not allowed to resell to others the service they received from Illinois Bell. About the time of the 1984 Bell Systems divestiture, the Commission decided to permit resale in Illinois. See ***United States v. Western Electric Co., Inc., 673 F.Supp. 525 (D.D.C. 1987)***; and Interim Order, Second Interim Order, and Third Interim Order, Docket 82-0292, August 24, 1983, June 27, 1984, and September 18, 1984, respectively.

[3] *Northeastern Telephone Company v. AT & T, 651 F.2d 76 (2d Cir. 1981)*; *U.S. Transmission Systems, Inc. v. AT & T, 564 F.Supp. 1020 (S.D. N.Y. 1983)*; ***United States v. AT & T, 461 F.Supp. 1314 (D.D.C. 1978)***.

(1963). For example, in MCI, the implied immunity issue was whether the Communications Act of 1934 granted AT & T immunity from the Sherman Antitrust Act. MCI, 708 F.2d at 1102.

By contrast, the state action immunity doctrine "represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." Southern Motor Carriers at 61, 105 S.Ct. at 1729. **[*15]** The "principles of federalism" addressed above, were explained as follows:

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker, 317 U.S. 350-51, 63 S.Ct. at 313. These tenets gave rise to the state action immunity doctrine, which, as previously described, evolved to encompass protection for private parties regulated by the state. All-Tone erroneously relies on cases which treat the issue of implied immunity.

Similarly, All-Tone's reliance on Mid-Texas Communication Systems Inc. v. AT & T, 615 F.2d 1372 (5th Cir. 1980) and Sound, Inc. v. AT & T, 631 F.2d 1324 (8th Cir. 1980) is not persuasive. These cases were decided prior to Southern Motor Carriers and have been implicitly overruled. See Health Care Equalization Committee v. Iowa Medical Society, 851 F.2d 1020, 1024 (8th Cir. 1988)(test applied in Sound, Inc. has been superseded by, inter **[*16]** alia, Midcal and Patrick). Inasmuch as Illinois Bell has satisfied the criteria for immunity from the antitrust laws, its motion for summary judgment should be granted.

RECOMMENDATION

Based on the foregoing, it is recommended that Illinois Bell's motion for partial summary judgment as to paragraphs 20 through 25 of the complaint be granted.

Written objection to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable Ann C. Williams within ten days after service of this Report and Recommendation. See Fed.R.Civ.P. 72(b). Failure to object will waive any such issue.

Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.

United States Court of Appeals for the Sixth Circuit

January 18, 1990, Argued ; October 29, 1990, Decided ; October 29, 1990, Filed

Nos. 87-3543, 87-3577, 87-3881, 87-3882, 88-3126, 88-3127, 88-3435, 88-3574, 88-3651

Reporter

917 F.2d 1413 *; 1990 U.S. App. LEXIS 19128 **; 1990-2 Trade Cas. (CCH) P69,230

ARTHUR S. LANGENDERFER, INC.; NORTHERN OHIO ASPHALT PAVING CO.; MacRITCHIE MATERIALS, INC.; M & B ASPHALT CO., INC. and G.M. SADER EXCAVATING & PAVING, INC., Plaintiffs-Appellees, Cross-Appellants, v. S.E. JOHNSON CO.; OHIO ENGINEERING CO.; PRICE BROTHERS, INC.; FRED CREAGER & SONS, INC.; MATCO ASPHALTIC CONCRETE PRODUCTS CO.; OAMCO; C.P. CALAWAY, INC.; MAUMEE STONE CO.; MICHIGAN STONE CO.; WOLCOTTVILLE SAND & GRAVEL CORP.; STONECO, INC.; SAXTON DEVELOPMENT CO. and J. T. KIRBY, Defendants-Appellants, Cross-Appellees

Subsequent History: As Amended November 8, 1990. Rehearing En Banc Denied January 23, 1991, Reported at: *1991 U.S. App. LEXIS 1016*.

Prior History: [1]** On Appeal from the United States District Court for the Northern District of Ohio; John W. Potter, Judge.

Core Terms

asphalt, defendants', quarry, stone, bidding, sand, prices, competitor, relevant market, monopolization, percent, paving, market share, limestone, damages, acquisitions, plaintiffs', anticompetitive conduct, thirteen-county, predatory, Sherman Act, antitrust, monopoly, district court, anticompetitive, contracts, plant, monopoly power, anti trust law, costs

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN1[] **Scope, Monopolization Offenses**

The Sherman Act, *15 U.S.C.S. § 2*, makes it unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire to monopolize any part of the trade or commerce among the several States. In construing a Sherman Act claim, the United States Supreme Court has held that a plaintiff must establish 1) the possession of monopoly power in the relevant market, and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Such prohibited power includes power to control prices or exclude competition.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Evidence > Weight & Sufficiency

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN2[] **Judgment as Matter of Law, Directed Verdicts**

In considering a motion for directed verdict, the trial court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. Sufficient evidence is such that, when viewed in the light of those inferences most favorable to the nonmovant, there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable men could differ. Appellate courts apply this same standard. This standard also applies to motions for judgment notwithstanding the verdict.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3[] **Jury Trials, Jury Instructions**

In considering a motion for directed verdict or a judgment notwithstanding the verdict, a court must interpret the entire record in the light most favorable to plaintiffs and give to them the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. Moreover, the court must assume that the jury followed the court's instructions.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN4[] Standards of Review, Clearly Erroneous Review

Once the jury has acted, a court sets aside its verdict and the trial court's refusal to grant a judgment notwithstanding the verdict motion only if the court is satisfied, upon a thorough review of the record, that error has been committed. Courts also give plaintiffs the benefit of reasonable and favorable inferences that may be drawn from the evidence. Courts may not pass upon credibility of witnesses in making this review. To the extent that the trial court drew or made legal conclusions based on the jury's responses to interrogatories, the court may review decisions of law de novo.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN5[] Actual Monopolization, Claims

The "dangerous probability" element of the attempted monopolization offense reflects the well-established notion that the Sherman Act, *15 U.S.C.S. § 2*, governs single-firm conduct only when it threatens actual monopolization. The Sherman Act protects competition, not competitors, and does not reach conduct that is only unfair, impolite, or unethical.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN6[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

As a general rule, there exists no duty to deal, so long as the determination is made unilaterally. Furthermore, even the use of unfair business practices as part of the termination may not invoke sanction under the antitrust laws. A monopolist, however, may be held to different standards. A refusal to deal practice should be condemned only if it is unreasonably anticompetitive. Even a refusal to deal designed to accomplish vertical integration, without more, should not be a basis for imposing liability upon a purported monopolist. Courts should examine business reasons for a refusal to deal, and must give them some leeway in making business decisions.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN7[] Regulated Practices, Market Definition

Market definition under *15 U.S.C.S. § 2* looks to the existence of competitors as evidence of countervailing power which would preclude monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN8[] **Monopolies & Monopolization, Attempts to Monopolize**

The ultimate inquiry in any attempted monopolization case is whether the defendant has or reasonably might come close to having the ability to control total market output and prices.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Tax Law > Federal Income Tax Computation > Tax Accounting > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Terminating or threatening to terminate deliveries to a purchaser who refuses to provide full payment is not predatory or unlawful anti-competitive conduct. The Sherman Act, *15 U.S.C.S. § 2*, does not give purchasers the exclusive right to dictate the terms on which they will deal, nor does it require a monopolist to accede to every demand of its competitors or customers.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Evidence > Burdens of Proof > General Overview

HN10[] **Monopolies & Monopolization, Attempts to Monopolize**

To prove its claim of attempted monopolization, a plaintiff has to prove that the defendant engaged in anticompetitive conduct with the specific intent to monopolize and that the attempt had a dangerous probability of success.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN11[] **Regulated Practices, Trade Practices & Unfair Competition**

Anticompetitive conduct is conduct designed to destroy competition, not just to eliminate a competitor. Lively legal competition will result in the efficient and shrewd businessman routing the inefficient and imprudent from the field. The antitrust laws must be administered in such a way that they do not restrain such vigorous competition in order to protect inefficient competitors. The successful competitor, having been urged to compete, must not be turned upon when he wins. Merely to attempt to succeed in business is not anticompetitive conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN12[] Monopolies & Monopolization, Attempts to Monopolize

The third element of attempted monopolization is a dangerous probability of success. The greater a firm's market power, the greater the probability of successful monopolization. In order to be found liable for attempted monopolization, a firm must possess market strength that approaches monopoly power--the ability to control prices and exclude competition. Market strength is often indicated by market share.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN13[] Scope, Monopolization Offenses

The offense of attempt to monopolize in violation of the Sherman Act, *15 U.S.C.S. § 2*, is composed of the following elements: 1) specific intent to monopolize; 2) anti-competitive conduct; and 3) a dangerous probability of success.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN14[] Monopolies & Monopolization, Actual Monopolization

Monopolization is the market power to control prices or exclude competition. Specific intent to monopolize may be inferred from evidence of anticompetitive conduct, but not from legitimate business practices aimed only at succeeding in competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN15[] Monopolies & Monopolization, Actual Monopolization

15 U.S.C.S. § 2 is directed to single firm conduct, whereas 15 U.S.C.S. § 1 deals with concerted action and proscribes unreasonable restraints through combinations or conspiracies. The conduct of a single firm is governed by 15 U.S.C.S § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to restrain trade unreasonably, for even a vigorous competitor may leave that impression. Concerted activity subject to 15 U.S.C.S § 1 is judged more sternly than unilateral activity under 15 U.S.C.S § 2.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN16[] Regulated Practices, Trade Practices & Unfair Competition

The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN17[] Actual Monopolization, Anticompetitive & Predatory Practices

The mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because cutting prices in order to increase business often is the very essence of competition; mistaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN18[] Regulated Practices, Trade Practices & Unfair Competition

Antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. Competition for increased market share is not activity forbidden by the antitrust laws. It is simply vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN19[] Standing, Clayton Act

In order to have standing to sue for treble damages under the Clayton Act, *15 U.S.C.S. § 15*, a person must be within the target area of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly, courts have drawn a line excluding those who have suffered economic damage by virtue of their relationships with targets or with participants in an alleged antitrust conspiracy, rather than being targets themselves. Courts, therefore, exclude as targets those who have suffered economic damages by virtue of their relationships with targets.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN20[] **Clayton Act, Claims**

Innumerable elements, including proximity and directness, constitute proper areas of inquiry in identifying a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act, *15 U.S.C.S.§ 15*. Examination of these factors facilitates identification of who is entitled to prosecute an action under § 4.

Antitrust & Trade Law > Sherman Act > General Overview

HN21[] **Antitrust & Trade Law, Sherman Act**

The jury is entitled to look at the whole picture with respect to allegations and evidence of Sherman Act, *15 U.S.C.S. § 2*, violations.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Trials > Closing Arguments > General Overview

HN22[] **Private Actions, Remedies**

An appellate court reviewing damages may adjust and/or correct the jury's award based on clear error in calculation and based on the actual claims submitted to the jury in closing argument.

Counsel: Attorneys for Appellee, James M. Porter [Cross-Appellant], Squire, Sanders & Dempsey, Cleveland, Ohio, Walter J. Rekstis, III, Virginia A. Seger, Thomas Zraik, Toledo, Ohio, M. Neal Rains, Paul H. Friedman, Irene C. Keyse-Walker, Arther & Hadden, Cleveland, Ohio, John M. Curphey, Jack Zouhary, Robison, Curphey & O'Connell, Toledo, Ohio, Paul H. Friedman, Arther & Hadden, Washington, District of Columbia, Thomas E. Kauper (S.E. Johnson, et al.), Ann Arbor, Michigan.

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Counsel for Amicus Curiae, Doreen C. Johnson, Columbus, Ohio.

Judges: Martin and Wellford, Circuit Judges; and Lively, Senior Circuit Judge.

Opinion by: WELLFORD

Opinion

[*1416] WELLFORD, Circuit Judge

The parties in this antitrust controversy are, or were at one time, involved in businesses related to **[**2]** road and highway construction in northwestern Ohio. Plaintiff Arthur S. Langenderfer, Inc. (Langenderfer) was an asphalt paving contractor that ceased operations in 1978, allegedly due to defendants' antitrust violations. Northern Ohio Asphalt Paving Co. (NOAP), a sister company of Langenderfer, is an asphalt producer. Langenderfer and NOAP were the original plaintiffs in a related case, *Langenderfer v. S.E. Johnson Co., 729 F.2d 1050* (6th Cir.), *cert. denied*, *469 U.S. 1036, 83 L. Ed. 2d 401, 105 S. Ct. 510 (1984)* (*Langenderfer I*), a case in which this court vacated judgment based on a verdict in favor of plaintiffs and remanded for a new trial.

I. GENERAL BACKGROUND

While the *Langenderfer* I appeal was pending, the original plaintiffs were joined by other plaintiffs in a companion case, and when *Langenderfer I* was decided and a remand effectuated, the separate actions were consolidated. One of the "new" plaintiffs is MacRitchie Materials, Inc. (MacRitchie), a limestone supplier and sister company of Langenderfer and NOAP that was denied leave to intervene in *Langenderfer I. See 729 F.2d at 1060*. The other new plaintiffs are M&B Asphalt Co., Inc. (M&B), an asphalt producer, paving contractor, **[**3]** and limestone quarry operator, and G.M. Sader Excavating & Paving Co., Inc. (Sader), an asphalt paving and excavating contractor. The defendant companies (which shall be referred to collectively as "Johnson") are commonly owned, and are involved in various aspects of the road construction business. Defendant John T. Kirkby is the president of Johnson and chief executive officer of the Johnson entities.

In the *Langenderfer I* trial, plaintiffs relied largely on evidence of alleged predatory pricing in bidding on public road projects. Plaintiff introduced no evidence to indicate that defendants' bids were less than defendants' total average costs, and we held that the trial court did not instruct the jury properly on the legal standard for a predatory pricing antitrust violation. Because the predatory pricing claim could not stand separately as a matter of law, and because it was unclear whether the jury verdict was based on predatory pricing or on other alleged anticompetitive behavior, we vacated the judgment in favor of plaintiffs in *Langenderfer I*, and remanded for a new trial. We noted that in order to prevail on a claim of monopolization or attempt to monopolize, plaintiff **[**4]** must "establish that Johnson engaged in some type of prohibited anticompetitive conduct." *729 F.2d at 1054-55*.

Plaintiffs in the current action allege that the defendants violated *§ 2* of the Sherman Act by monopolizing and attempting to monopolize "the production and supply of highway construction materials and in the bidding, construction and repair of asphalt highways" in a thirteen-county area of northwest Ohio. These highway projects were administered on a competitive bidding basis by the Ohio Department of Transportation (ODOT) and/or the Ohio Turnpike Commission (OTC). Defendants assert once again in defense of the charges that Johnson's success relative to the plaintiffs was the result of better foresight and management, which led to diversification, improved efficiency, and lower costs.

The allegations of plaintiff Sader differed significantly from those of the other plaintiffs, because Sader was not an actual competitor in ODOT/OTC work. Instead, Sader did mostly private paving work, but alleged that it relied on Johnson for raw materials, and that Johnson terminated Sader's credit in retaliation for the testimony of Sader's president, Gregory Sader, in *Langenderfer I*. **[**5]** Johnson maintained, on the other hand, that the credit cut-off was for legitimate business reasons. We shall deal with the claims of each of the plaintiffs independently.

[*1417] The jury made the following findings, after submission of special interrogatories:

1. As to all plaintiffs except Sader, relevant product markets included limestone, sand, and asphalt used in ODOT and OTC paving contracts, as well as the ODOT and OTC paving contracts themselves.

2. The relevant geographic market for *all* plaintiffs was the thirteen-county area.

3. Defendants possessed monopoly power, defined as "the power to control prices or exclude competition," in all of the relevant product markets, and that power was willfully acquired, maintained, or used through anticompetitive conduct. Asked to describe one or more types of anticompetitive conduct, the jury replied, "The acquisitions were all made to exclude and/or injure competition and increase Johnson's power which he succeeded in doing." [1]

[6]** 4. Defendants' monopolization caused injury to all of the plaintiffs (including Sader).

5. Defendants possessed the specific intent to achieve a monopoly in all of the relevant markets, engaged in anticompetitive conduct **[**7]** toward that end, and there was a dangerous probability that they would achieve a monopoly.

6. Defendants' attempt to monopolize caused injury to all of the plaintiffs (including Sader).

7. Damages (before trebling) were $ 1,675,000 for Langenderfer and NOAP; $ 200,000 for MacRitchie; $ 350,000 for M&B; and $ 250,000 for Sader.

The trial court entered judgment in accord with the verdict, trebling the damages found by the jury, and allowing payment of interest at the annual rate of 5.79 percent until paid.

On appeal, defendants contend that as a matter of law, no monopoly power may be found in the supply of sand, limestone, asphalt, or in bidding and performance of state and turnpike jobs.

In addition, defendants maintain that plaintiffs failed to support allegations of anticompetitive conduct, relying instead on evidence of Johnson's above-cost bids, contrary to the holding of *Langenderfer I*. In addition, Johnson asserts that the thirteen-county area cannot represent the relevant market for M&B, which performs most of its work in only two counties and has never actually worked in the majority of the thirteen counties found to be the relevant market. Johnson makes a similar contention as to Sader. As an affirmative defense, Johnson claims that MacRitchie lacks antitrust standing, and that Sader may not recover under *§ 2* of the Sherman Act based on Johnson's revocation of Sader's credit privileges.

The original Johnson Company was founded in 1929 by Sherman Johnson, who died in 1956. The company then owned **[**8]** three stone quarries and three hot-mix plants, and was the largest asphalt paving contractor in northwest Ohio. Following Mr. Johnson's death, defendant Kirkby became the principal operating officer in 1957. At that time, plaintiff Langenderfer was the second largest asphalt paver in the area. Beginning in 1961, Kirkby, as principal officer on behalf of defendants, embarked on a series of acquisitions, described by this court in *Langenderfer I. 729 F.2d at 1053-54*.

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[1] The jury instructions listed the following six alleged anticompetitive acts:

1. Monopolistic stone pricing;
2. Price or profit squeezing and cross-subsidization;
3. Leveraging its position in ODOT and OTC;
4. Tying the sale of stone and sand to the sale of asphalt;
5. Intimidating, discouraging, coercing and retaliating against competitors;
6. Refusal to sell stone to Sader.

Defendants assert that because the jury's above-reflected response to the interrogatory did not list any of these six alleged anticompetitive acts, its findings were not consistent with a violation of the antitrust laws. The trial court found, however, that the jury's response to this "one or more" question was not inconsistent with the general verdict.

We vacated and remanded the first judgment because the proper legal standards were not applied, particularly as to predatory pricing. We stated, however, that there was "substantial evidence indicating that Kirkby, both individually and **[*1418]** as chief officer of Johnson, intended to eliminate competition and dominate the market." *Langenderfer I at 1054*. Furthermore, in the first appeal, we noted that there was expert testimony by economists to the effect that Johnson's acquisitions created "significantly increased market concentration," and therefore had a tendency to create a "monopolistic market structure." *Id. at 1054*.

After remand by this court, plaintiffs amended their complaint asserting that Langenderfer was **[**9]** a general paving contractor until "forced out of business by the defendants [2] in 1978." NOAP asserted that it was in the business of purchasing sand and stone, mixing these at asphalt plants, and selling the resulting materials to Langenderfer, asphalt pavers, and others. These plaintiffs asserted that Johnson, Ohio Engineering, and Creager were competitors in constructing and repairing highways and roads in northwestern Ohio with Langenderfer, and that "business is generally performed . . . after competitive bidding by the governmental authorities." Langenderfer alleged that it "customarily carried on its procurement of materials through plaintiff NOAP." Plaintiffs averred that to minimize costs, "the paving contractor normally purchases highway construction materials for the quarry or asphalt plant located closest to the job site."

[10]** Defendants were charged with "unlawfully combining in restraint of interstate trade and conspiring to monopolize and attempt to monopolize . . . in the production and supply of highway construction materials and in the bidding, construction and repair of asphalt highways." In addition, plaintiffs charged that defendants quoted and charged them higher prices for stone, sand, or asphalt than those charged to defendant paving contractors. They also charged defendants with refusing to sell these materials, tying sales of stone and sand to asphalt, and other "predatory" practices, including forcing competitors out of the sand, stone, and asphalt business by these practices, all done with requisite anticompetitive intent.

Defendants denied the charges of unlawful anticompetitive conduct and averted that a corporate restructuring took place in 1986 leaving S.E. Jason Companies, Inc. as the only active Johnson entity with wholly owned subsidiaries Creager, Stoneco (formerly Oamco, Inc.), and Alloy Founders. [3]

[11]** A basic issue in the retrial of this case arose in defendants' motion to exclude evidence of alleged predatory bidding by reason of our holding in *Langenderfer I*. The district court agreed with plaintiffs and held bidding practices admissible because such practices may "portray the effects of defendants' long term monopolization of this market." [4] Even if some of the **[*1419]** evidentiary emphasis in the second trial was on the asserted predatory bidding practices of defendants, and this is a separate charge from monopolization or attempted monopolization, we find the ruling to permit such evidence not to be prejudicial error under all the circumstances. It is clear,

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[2] Defendants named were the Johnson companies, Ohio Engineering Co. (Ohio), Fred R. Creager & Sons, Inc. (Creager), Matco Asphaltic Concrete Producing Co. (Matco), OAMCO, Inc. (OAMCO), C.P. Calaway, Inc. (Calaway), Maumee Stone Co. (Maumee), Michigan Stone Co. (MSC), Wolcottville Sand & Gravel Corp. (WAS&G), Saxon Development Co. (Saxon), Stoneco, Inc. (Stoneco), and J.T. Kirkby.

[3] Defendants also responded that Ohio & Metro "no longer exist," and that Calaway "is currently an inactive corporation" (as of July 1986). Johnson answered that Maumee & MSC merged into it; that WAS&G "operated a sandpit in Indiana and became inactive and is now inactive, but that WAS&G's assets, after reactivation, were transferred into Stoneco." Defendants further answered that Saxon "is inactive and has no current business activities." Kirkby was alleged, in the answer, to have owned less than a five percent interest in Johnson at all relevant times.

[4] We do not endorse the reason given by the district court for this ruling. While we find no error in the holding that evidence of bidding practices may be relevant and admissible, we do not believe, as asserted, that its exclusion would be to "direct a verdict for defendants." We held in *Langenderfer I* that bidding "above the *total* average costs" of defendants was not an antitrust violation under the Sherman Act, and that the proper test for anticompetitive conduct in that regard was not whether defendants' bids were "above competitors' costs." *729 F.2d at 1055*. The effect of *Langenderfer I*, it should be observed, was to set aside the judgment based upon plaintiffs' asserted cause of action for predatory pricing, which was the thrust of the first trial and appeal. The district court, however, charged the jury to the above effect. Plaintiffs' experts emphasized what they perceived to be low bidding and "predatory pricing" conduct of defendants.

nonetheless, that a considerable portion of plaintiffs' proof was directed towards defendants' low bidding procedures, and plaintiffs, as well as their experts, relied heavily on this testimony throughout, despite defendants' objections.

[12]** *Section 2* ***HN1***[] of the Sherman Act makes it unlawful for any "person" to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States." In construing a *§ 2* claim, the Supreme Court has held that a plaintiff must establish "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. Such prohibited power includes "power to control prices or exclude competition." *Grinnell Corp., 384 U.S. at 571*; *United States v. E. I. duPont, 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*.

II. STANDARD OF REVIEW

Defendants' appeal is from the district court's denials of the motion for directed verdict and for judgment notwithstanding the verdict. ***HN2***[] In considering a motion for directed verdict, "the trial court 'must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury.'" *Milstead v. International Brh. of Teamsters, 580 F.2d 232, 235 (6th* ***[**13]*** *Cir. 1978)*, *quoting* *O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975)*. Sufficient evidence "is such that, when viewed in the light of those inferences most favorable to the nonmovant, there is either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable men could differ. *Appellate courts apply this same standard*." *Milstead, 580 F.2d at 235* (citations omitted) (emphasis added). This same standard applies to motions for judgment n.o.v. *Morelock v. NCR Corp., 586 F.2d 1096, 1104 (6th Cir. 1978)*, *cert denied*, *441 U.S. 906, 60 L. Ed. 2d 375, 99 S. Ct. 1995 (1979)*.

We therefore consider whether plaintiffs have carried their burden of showing monopoly power and anticompetitive conduct.

> ***HN3***[] As the case is presented to us, we must interpret the entire record in the light most favorable to [plaintiffs] and give to [them] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. . . .
>
> Moreover, we must assume that the jury followed the court's instructions.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985), citing *Continental Ore Co. v. Union Carbide & Carbon Corp.,* ***[**14]*** *370 U.S. 690, 696, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*.

In applying the *Aspen Skiing* standard to the facts submitted to the jury, it is worth noting that this is the second jury to find in favor of plaintiffs Langenderfer and NOAP with regard to elimination of competition and domination of the market claims.

HN4[] Once the jury has acted, we set aside its verdict and the district court's refusal to grant a j.n.o.v. motion only if we are satisfied, upon a thorough review of the record, that error has been committed. We also give plaintiffs the benefit of reasonable and favorable inferences that may be drawn from the evidence. We may not pass upon credibility of witnesses in making this review. To the extent, of course, that the district court drew or made legal conclusions based on the jury's responses to interrogatories, we may review decisions of law *de novo*.

III. M & B CLAIM

M & B has been in the asphalt paving business in several Ohio counties since about 1957. According to plaintiffs' exhibit **[*1420]** I and the record, it has a base of operations only in Seneca County, Ohio, where it has maintained one or two asphalt plants over the approximately twenty-five years of its existence prior to the filing of this **[**15]** antitrust action in December 1983 against defendants. Seneca County is located in the extreme southeast corner of the thirteen-county relevant market as determined by the jury at trial.

In its brief in this cause, M & B maintains that over the entire relevant time period, it has bid in six counties. Its chief financial officer and one of its two principal operators, Robert M. Chesebro, however, testified that during the twenty year period up to 1980, it did 95 percent of its work in Seneca County and in adjacent Sandusky County. [5] Throughout, its "base of operations" remained in these two counties.

[16]** M & B's plant and an available quarry at Bloomville are very near adjacent Huron and Crawford Counties, outside the thirteen-county area. M & B also bid and did work in Erie, Huron, and Crawford Counties, the latter adjacent to Seneca County to the south and east (Erie County is adjacent and east of Sandusky County). Chesebro testified he "very seldom" operated in Wyandot County. Plaintiffs' map identifying batch plants, stone quarries, and sandpits in the area in question in this litigation reflects that defendants have never had a single plant, quarry or sandpit located in Sandusky and Seneca Counties. It reflects, on the other hand, that during the relevant period there were two independent quarries located in Sandusky County, both available to M & B. There have been three quarries located in Seneca County, two of which were controlled by defendants' primary stone supply competitor, France Stone, and one belonging to Basic, which was the principal source for M & B until M & B acquired operating control of it in 1984. Chesebro conceded that the three largest quarries in the area of his operation were France, National Lime & Stone, and Sandusky Crushed Stone.

Plaintiffs also have **[**17]** a quarry at Rising Sun, very near both Sandusky and Seneca Counties, and there have been two other independent quarries located just south of the Seneca County line. There were no figures produced showing the sand production in these two counties of base operations of M & B. No sandpits in the two counties are reflected on plaintiffs' exhibit 1. Since early 1984 at least, M & B has had its own supply of stone and sand, and it sells sand and limestone to other contractors. There is simply no proof whatever that defendants control or have any monopoly power over the supply of stone and sand in the area in which M & B operated from 1980 to the date of trial. [6]

[18]** The district court, in its jury instructions, presented M & B's alternative contention as to a relevant geographic submarket to be Seneca, Sandusky, Ottowa, Wood, Hancock, and Wyandot Counties, apparently those six counties in which it had submitted bids. There was insufficient evidence in the record to establish defendants' monopoly or attempted monopoly status in such a submarket, or that M & B was a real and active competitor in this submarket or in a two-county submarket during the relevant period. Two examples: (1) defendants had no quarry or sand facility in Seneca, Sandusky, Hancock, and Wyandot Counties in the southeast portion of the thirteen-county alleged relevant market or submarket areas; France and other independents had **[*1421]** eleven quarries in these four counties; (2) plaintiffs and others operated six asphalt plants and defendants operated two in these four counties.

M & B claims that it was competing in a relatively free and open competitive market in its two-county area from 1966 to 1970. In those five years it earned, without control of any quarry or stone source, an average of less than $ 16,000 a year. During the years 1980 through 1986, for which it seeks damages **[**19]** for alleged anticompetitive conduct, it earned an average of *over* $ 16,000 in actual profits a year. Five of the six years after 1979 were profitable, and there was an increase in profit each year from 1982 through 1985. The loss year, 1981, when

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[5] In a deposition, Chesebro stated that this two county area remained "pretty constant." He also stated that "Seneca and Sandusky Counties account for *over* 90 percent of our work." (emphasis added) (referring to the entire relevant period). Defendants' credit officer Uhl testified, without contradiction, that M & B won bids on ODOT work in only three counties over twenty-plus years prior to trial. The amended complaint asserted that M & B "engaged in business as a general paving contractor principally in Seneca, Sandusky, and contiguous counties."

[6] M & B's Chesebro testified also that M & B bought very little stone from defendants' quarry at Portage, and only on occasion. M & B bought or obtained few materials from defendants and cannot fairly be characterized as anything but a minor and infrequent customer. Defendants' alleged high stone prices, bringing about an alleged profit squeeze, would therefore seem clearly not to bear on M & B's situation directly, if at all.

revenues were abnormally low, was due, in part, to the bankruptcy of a large contractor customer. In 1981, plaintiffs' exhibit 152AA reflects that M & B claimed damages of over $ 124,000 in 1981 because it suffered a loss instead of realizing the same 2.7 percent of pretax profit it realized on much lower revenues in the 1966-70 period. This loss is not explained in any fashion by M & B, and it defies reason and logic to assume that its entire 1981 loss, almost $ 77,000, plus another claimed amount of $ 47,000, was attributable somehow to defendants' low bidding practices in the southeast part of the thirteen-county area claimed by plaintiffs to be the relevant market.

The proof in this case demonstrates, moreover, that on several state asphalt paving jobs since 1980 in which M & B was the *only* bidder, it claims to have lost money. Chesebro also admitted that his company "always lost money on state work." It would seem illogical and **[**20]** unreasonable, then, to blame defendants for continuing losses on state turnpike work after 1980 under these circumstances, particularly in light of the fact that M & B has had, since 1984, its own source of stone and sand entirely independent of defendants' sources which are located outside of the area in which M & B does from 90 percent to 95 percent of its work and has its base of operations.

It does not carry the day on the issue of proving a relevant market within the thirteen-county area of northwest Ohio for M & B to argue that it is a "potential" competitor in the majority of the thirteen counties in which it has not operated at all for some thirty years of its existence at the time of the trial. M & B, as pointed out, has done work and has been an actual competitor with defendants, both before and after 1980, in basically only two counties. Contrary to M & B's assertions, we believe *City of Cleveland v. Cleveland Electric Illuminating Company, 734 F.2d 1157, 1166-67* (6th Cir.), *cert. denied*, *469 U.S. 884, 83 L. Ed. 2d 190, 105 S. Ct. 253 (1984)*, is of no comfort to M & B's contention about the proper relevant market in this case. The market selected must "both 'correspond to the *commercial realities*' **[**21]** of the industry and be *economically significant*." *Id. at 1167* (quoting from *Brown Shoe Co. v. United States, 370 U.S. 294, 336-37, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))* (emphasis added). The "commercial realities" here indicate strongly that M & B is neither an actual nor potential competitor in defendants' area of service and operation in and beyond the thirteen counties of northwest Ohio. Like the plaintiff in *City of Cleveland*, M & B presented no evidence that it planned to compete for business outside of Seneca and Sandusky Counties and areas immediately adjacent thereto.

The evidence is also undisputed that during the period from 1980 on there came about *increased* competition in the immediate area of concern to M & B in the form of additional, substantial competitors in the marketplace for asphalt paving. M & B had little actual competition with Price Construction Co. when its assets were acquired in 1969 by defendants. [7] The elimination of Price and defendants' acquisition of Ohio Engineering Co. were more than offset by the emergence of Miller and Gerken as serious competitors in the area. Erie **[*1422]** Blacktop, another asphalt paving contractor, concededly also came into the M & B "bailiwick" -- Seneca **[**22]** and Sandusky Counties -- after 1980 from time to time to bid on projects in which M & B was interested. After 1980, in jobs in which M & B and defendants bid, M & B was the successful bidder in four of six projects.

It is not controverted but that M & B's bids on a number of jobs during the relevant period exceeded the State Engineer's estimate for these jobs. It is also not controverted that M & B's proportion of success on bids submitted on ODOT and OTC work in its area of operations did not decrease after 1980 in comparison to earlier periods. There is also no substantial evidence that the number of bidders decreased from 1979 through the time of trial. This would clearly indicate that M & B was not foreclosed, nor were others, from bidding on the asphalt work which is the subject matter of this controversy. It may also indicate that M & B's costs, even after acquiring its own quarry source, **[**23]** are higher than other competitive bidders in the marketplace. This evidence (and other proof in the record) indicates a failure to prove dangerous probability of success of monopolization by defendants in the area in which M & B operated or that competitors were driven from the market even after acquisitions were made by defendants. It does reflect that the real basis of complaint by M & B was the low bids submitted by defendants which plaintiffs characterize as predatory bidding or pricing. It should also be noted that this practice of low and successful bidding by defendants has extended over twenty years in northwest Ohio -- some indication that it is not a short-range procedure designed to raise prices later, as indicated by plaintiffs' experts.

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[7] Price did not sell its sand business to defendants; instead, defendants agreed to continue buying sand from Price (and others).

With respect to M & B's claims, we deem it appropriate to note the recent comments of another court which dealt with *§ 2* antitrust claims:

> ***HN5***[] The "dangerous probability" element of the attempted monopolization offense reflects the well-established notion that *section 2* of the Sherman Act governs single-firm conduct only when it threatens actual monopolization. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 104 S. Ct. 2731, 2739,* ***[**24]*** *81 L. Ed. 2d 628 (1984)*. The Sherman Act protects competition, not competitors, and does not reach conduct that is only unfair, impolite, or unethical. *United States v. American Airlines, Inc., 743 F.2d 1114, 1119 (5th Cir. 1984)*, *cert. dismissed*, *474 U.S. 1001, 106 S. Ct. 420, 88 L. Ed. 2d 370 (1985)*. As we recently emphasized in *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986)*,
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> "competition is a ruthless process. A firm that reduces costs and expands sales injures rivals -- sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are by-products of vigorous competition, and the antitrust laws are not balm for rivals' wounds."
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> *Id. at 1338*.
>
> This is not to say that injury to rival firms cannot ever lead to injury to consumers and that *section 2* of the Sherman Act cannot be used to prevent such injury. But *section 2*
>
> "must be used with the greatest caution. Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with **[**25]** competition, and to deter aggressive conduct is to deter competition. Thus, the plaintiff faces a stiff burden in any *section 2* litigation. 'It is not enough that a single firm appears to restrain trade unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny **[*1423]** of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.'"
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> *Id.* (quoting *Copperweld Corp. v. Independence Tube Cob, 467 U.S. 752, 767-68, 104 S. Ct. 2731, 2739-40, 81 L. Ed. 2d 628 (1984))*.

Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413-14 (7th Cir. 1989) (footnotes **[**26]** omitted).

In summation, then, we conclude that M & B failed to prove that it was realistically an economically significant competitor or potential competitor in the thirteen-county area claimed to be a relevant market; nor did it establish any claimed submarket in which defendants were shown to be actual or potential monopolists. There was also a failure of proof as to unfair competition or attempted monopoly by defendants in the principal area of operation of M & B. The undisputed material facts do not show that defendants have had a dangerous likelihood of success in the elimination of competition in M & B's area of operations since 1980. On the contrary, M & B has acquired control of a quarry site and has enjoyed increasing profits over the last four years for which proof was available through 1986. M & B did not show that it ever depended upon defendants as a significant source of sand or asphalt stone or other asphalt components, or that defendants discriminated against it in pricing products or in not affording it competitive discounts. Defendants, indeed, had no quarry or sand source in the primary area of M & B's operations -- Seneca or Sandusky County. M & B cannot reasonably **[**27]** claim the benefit of the testimony of plaintiffs' experts that defendants' alleged "excessive profits on the stone level" worked a price squeeze on M & B. The primary evidence submitted by M & B, on the other hand, was the same type of predatory pricing evidence which was relied upon by Langenderfer in its original trial against defendants and found by this court to be insufficient in *Langenderfer I, 729 F.2d 1050*, to establish a cause of action as a matter of law under *§ 2* of the Sherman Act. M & B's attorney, in his closing statement to the jury, asked for "$ 339,000 in damages for profits lost." The jury awarded M & B $ 350,000 in damages.

Under these circumstances, we must REVERSE the award pursuant to the jury verdict rendered to M & B. It follows that the award of attorneys fees and costs, based upon the judgment for M & B as a prevailing party, must also be reversed and set aside. M & B, of course, is therefore entitled to no injunctive or equitable relief.

IV. SADER CLAIM

The jury found in favor of Sader but answered specific interrogatories to the effect that there was no relevant market proved as to this plaintiff consisting of limestone, sand, or asphalt **[**28]** used in ODOT and OTC asphalt paving contracts as in the case of the other plaintiffs. The jury also answered interrogatories indicating that there was no relevant market proved as to Sader consisting of either ODOT or OTC asphalt paving contracts. The jury responded, however, that there was "a relevant geographic market or submarket for Sader," and determined that market to be the thirteen counties located in northwest Ohio. The jury found that acquisitions made by defendants were "all made to exclude &/or injure competition and increase Johnson's power," and that anticompetitive conduct caused injury to Sader in the amount of $ 250,000. In his final closing argument, Sader's attorney asked the jury for damages in the amount of $ 224,500.

Defendants argue on appeal that "Sader is neither a consumer nor a competitor in the relevant markets alleged." Defendants' Brief at 45. Gregory M. Sader, principal owner and officer of Sader since 1962, testified that he operates a small paving and excavating business (9 employees) headquartered in Bowling Green, Wood County, Ohio, located in the north central part of the thirteen-county area in controversy. Sader is not ODOT "qualified," and cannot **[**29]** bid on ODOT or OTC asphalt paving **[*1424]** contracts, although Sader does subcontracting on ODOT work. Defendants further argue that Sader failed to prove monopoly or attempted monopoly in "the markets in which Sader competes."

The brief filed on Sader's behalf responds that the issue in the case was whether "defendants' refusal to deal with Sader was for 'valid business reasons' or whether it was unreasonable anticompetitive conduct as Sader contended." Sader argues that this was properly a jury issue. Sader concedes it owned no quarry nor any asphalt plant, but asserts it depended on defendants for "stone, sand and asphalt at Bowling Green." Contending that it is irrelevant that it did not compete in the ODOT/OTC markets against defendants, Sader suggests that it was a "potential ODOT, OTC competitor that was foreclosed."

A number of factors with respect to Sader, as in the case of plaintiff M & B, would weigh strongly against any suggestion that Sader was, in reality, a potential competitor in the ODOT/OTC market. At the time Sader filed the complaint against defendants, it had been in business in the Bowling Green area for more than twenty years; by the time of trial, more than twenty-five **[**30]** years. It had never seriously sought to compete in the ODOT/OTC market which was the basis of the original monopolization complaint in this case. Sader, moreover, never indicated that it intended to compete with defendants beyond nearby Wood County, and the district court instructed the jury that Sader claimed a relevant submarket of Bowling Green, Wood County, and southern Lucas County. [8] Sader testified that his operation grew during the 1960s despite defendant Johnson's acquisition of Wood County Stone Company, his principal quarry source, in 1961. (An independent operation, Urbana, had maintained a hot mix plant at this site from which Sader acquired asphalt "product" at the time.) [9] Stone was still made available to Sader at this nearby

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[8] Sader stated that in recent years 90 percent of his work was in Wood County and areas of nearby Lucas County. In earlier years he did work within and without the wider thirteen-county area, but again mostly in Wood County.

[9] Urbana moved this plant away at the expiration of its lease. Sader testified that its superintendent later was employed by defendants. Wood's plant and equipment were taken over by Portage in 1964 or 1965.

Portage quarry by defendants, but without the volume discount previously granted by Wood from and before 1960. (For a further discussion of Portage quarry costs and prices, see Part V, *infra*.) Sader testified that the "biggest majority" of his work was always in Wood and adjacent Lucas County (Toledo) with "emphasis" in Bowling Green. In the 1960s, defendants' OAMCO facility at Portage and their Maumee Stone site became Sader's chief suppliers, **[**31]** but not of sand. Like many other asphalt pavers, Sader trucked sand in from outside the thirteen-county area. Plaintiff MacRitchie Materials had a quarry at West Millgrove some 15 to 20 miles away from construction sites in and around Bowling Green. (Plaintiff also had a batch plant 15 miles away from Bowling Green at Waterville, and France had a quarry there and another about the same distance at Custor, the latter variously estimated at 15 to 17 miles from Bowling Green.) [10]

[32]** Sader testified that during the 1960s and 1970s, defendants began to exert pressures on him in bidding "in his area." Sader also trucked sand for the Creager Company, which was in financial difficulty when acquired by defendants in 1971. We attribute little significance to the Creager acquisition [11] **[**33]** insofar as it relates to Sader, who summarized his complaint about defendants generally by observing, "Johnson just blocked us basically from growing on a normal, healthy business way" during the late sixties and seventies. He also testified, **[*1425]** moreover, that the plaintiff experienced difficulty in scheduling delivery of materials from defendants. In 1977, Sader complained personally to Kirkby about scheduling problems: "Ted said he would look into it, and see if he could not get it straightened out" but the problem allegedly continued. [12] Sader also encountered difficulties in scheduling rental trucks at times.

Sader complained about defendants' hot asphalt prices and the fact that, as with stone, they would not give him discounts on this product. Sader also said that plans he had with others in his same situation to set up an asphalt plant were discouraged by a threat that defendants "would not be able to supply our stone needs." Sader said he "pursued the plan" but never carried it out. (Each of the four or five quarries located in or very near the boundaries of Wood County had an asphalt plant operating at the quarry -- this included the defendants' quarry at Portage.) Sader said that the planned source of stone was defendants' quarry at Maumee in Lucas County, more distant from Bowling Green than at least four other quarries which Sader characterized as not being "economically" located for his purposes. [13] He added that defendants' representatives in 1977 and 1978 were pressing for more asphalt business **[**34]** from him. He also claimed that defendants refused in 1977 or 1978 to allow him "to set up [a pugmill for a Perrysburg job] on the Lime City quarry site." Instead, he set it up at a nearby France quarry and he bought 25,000 tons of stone from France instead of defendants.

There is no doubt, however, that Sader's primary complaint, and the only one which we are persuaded has arguable merit, is its claim that it was cut off from buying materials because of cooperation with plaintiffs in pursuit of their claims at the first trial, Sader avers that at or about the time he agreed to give a deposition in that proceeding in 1979, defendants' credit representative called on him and told him he expected a check on Sader's account, and Sader agreed to pay it within a month. Sader asserts that he paid the bill of about $ 13,000, which he conceded was three months overdue. [14] Sader attributes to his 1980 testimony for plaintiffs a much lower than

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[10] In cross-examining defendants' expert, Dr. Myslinski, Sader's counsel referred to Pugh and West Millgrove quarries as being 12 to 15 miles away from Bowling Green.

[11] Apparently, defendants continued to operate Creager after acquisition as a non-union facility in contrast to its other facilities. Sader complained this gave an advantage to defendants, but this has nothing to do with anticompetitive conduct.

[12] Sader admitted that most other "smaller pavers that worked the area was [sic] having the same problems with scheduling." Sader was thus not singled out or treated discriminatorily in that regard.

[13] Sader conceded that he bought "very little" stone from Maumee.

[14] A monthly bill on August 31, 1979 (Exhibit 9M) revealed that Sader owed Maumee Stone Co. nearly $ 47,000, a considerable part of which was at least 30 days old, and that in early September, Sader paid some $ 11,000 on this bill; Sader satisfied this account the following month, mid-October. Early in 1980, Sader's account reflected over $ 26,000 past due (up to 90 days) and he was warned, per telephone, that the "account is in serious condition and because of the status credit privileges have been removed." (Exhibit BP.) In fact, credit limits of $ 10,000 were later imposed. In 1982, credit privileges were again suspended for

expected Johnson **[**35]** bid on a Bowling Green job which he subsequently lost. (He also claims that Johnson improperly used information he gave to them on this job to underbid him, Sader understanding at the time that Johnson would not bid on this job.)

[36]** Later, in 1980, Johnson "made special credit arrangements" for Sader, limiting his credit to $ 10,000 because Sader was persistently "slow pay." It was during this time that another dispute about credit arose between Sader and defendants. Sader also had been severely restricted in credit extended during 1982. Sader's version of a major dispute is that defendants furnished him defective asphalt for a large private driveway Sader installed and that the customer balked at paying him for the job. Defendants denied that the asphalt was defective and suggested testing the contested product. Sader held up any payment on his total account despite the fact that the driveway job in dispute involved only approximately $ 4,000. A lawsuit in an Ohio state court developed over this controversy, and Sader finally paid the $ 4,000 **[*1426]** pursuant to a court order. Indeed, defendants employed lawyers in three different locations to handle commercial disputes and collections with Sader since 1980.

There is abundant, uncontroverted evidence in written communications from defendants to Sader that his accounts were consistently overdue in the 1979 to 1983 period, and that from time to time credit privileges during **[**37]** this period were withdrawn by defendants. During the same period, evidence reflects that France also suspended credit privileges for Sader in 1980 after numerous warnings; that American Asphalt products in Sylvania, Ohio, turned the Sader account over to attorneys for collection (again, after numerous warnings concerning an account of $ 2,200 in 1983); that an insurance agency was forced to threaten suit against Sader in early 1984 to collect an insurance account exceeding $ 15,000 more than 120 days delinquent. Many other witnesses testified that Sader was slow or delinquent in payment of its accounts during the period, although their companies did not cut him off. There is also clear evidence that defendants, during the relevant period, placed other of its customers, whose credit or financial condition was doubtful, on a cash basis for sale of its products. In short, the record establishes that a number of other persons with a contractual relationship with Sader had serious problems with Sader's failure to pay its accounts and either threatened or litigated with Sader concerning a past due balance, and that defendants cut off credit to others in similar "slow pay" circumstances.

[38]** It appears clear in this case that the problems between Sader and defendant in the relevant period arose out of commercial and credit controversies and did not arise in an anti-trust context. That Sader may have been forced in some instances by credit restrictions to obtain asphalt materials from a source 15 to 17 miles further away than a defendant source is not a sufficient basis for this *§ 2* Sherman Act claim.

In overruling defendants' motion j.n.o.v. following the verdict for Sader, the district court cited *Byars v. Bluff City News Co., Inc., 609 F.2d 843 (6th Cir. 1979)*, as authority. *Byars* is pertinent only with respect to its discussion of refusal to deal by a monopolist. *Id. at 854*. It was uncontroverted in that case that defendant Bluff City refused to deal on any basis with Byars, a competitor in the concededly relevant Memphis area market, in "primary life" magazines and periodicals. *Byars* recognized ***HN6***[] the general rule -- "there exists no duty to deal, so long as the determination is made unilaterally." *Id.* Furthermore, "even the use of unfair business practices as part of the termination may not invoke sanction under the antitrust laws." *Id. at 855*. **[**39]** A monopolist, however, may be held to different standards, *Id. at 855*, citing *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 71 L. Ed. 684, 47 S. Ct. 400 (1927)*, where Kodak provided no "independent business reason for its refusal to deal" and "Kodak had monopoly power over the national wholesale market." In *Byars*, we concluded that a refusal to deal practice should be condemned only if it is "unreasonably anticompetitive." *609 F.2d at 860*. Even a "refusal to deal designed to accomplish vertical integration, without more, should not be a basis for imposing liability" upon a purported monopolist. *Id. at 861*. We observed further that courts should examine business reasons for a refusal to deal, and "must give them some leeway in making business decisions." *Id. at 862*.

Sader's brief not only cites *Eastman Kodak Co., supra*, and *Byars*, but also *Riverview Investments v. Ottawa Community Improvement Corp., 769 F.2d 324, 328* (6th Cir.) ("what matters is that freedom to compete is restrained"), *revised*, *774 F.2d 162 (6th Cir. 1985)*. We do not construe *Riverview Investments*, a combination or

delinquent accounts. In March of 1980, by notice, France also advised Sader that its "account is seriously overdue," and his credit privileges were apparently withdrawn at a France quarry.

security case, as pertinent to the refusal to deal aspect of this case. **[**40]** *Kerasotes Michigan Theatres v. National Amusements, Inc., 854 F.2d 135 (6th Cir. 1988)*, also cited by Sader, was principally concerned with "leveraging" or misuse of monopoly power in one market to exclude a competitor from another market. We deem *Kerasotes* to have minimal relevance to Sader's claims. *United States v. Griffith, 334 U.S. 100, 92 L. Ed. 1236, 68* ***[*1427]*** *S. Ct. 941 (1948)*, mentioned by Sader in a footnote, is also, like *Kerasotes*, a theater and film case concerned with defendants who pooled their powers to exclude others from obtaining films for exhibition. None of these authorities is helpful to Sader here.

We conclude from a careful examination of the record in this case that there is insufficient evidence to sustain Sader's charge that defendants began to press him on payment of his past due account only when he agreed to give a deposition in this case in 1979 to Langenderfer. [15] We conclude also that there is insufficient evidence to support an antitrust claim of tying defendants' imposition of limits and restraints upon Sader's credit during 1980 through 1983 to his part in Langenderfer's suit. Essentially, it seems clear that defendants and Sader were engaged in a series of commercial **[**41]** disputes concerning his accounts, scheduling of pick-ups at defendants' facilities, and whether or not defendants were carrying out alleged credit understandings with Sader. The claim of refusal to deal is inextricably bound with the commercial and contract disputes between the parties, and was not proven to be a practice related to antitrust conduct.

There was, moreover, similar to the M & B situation already considered, a failure by Sader to prove a relevant market in which Sader established the necessary essentials, including causation, under a *§ 2* Sherman Act claim. The physical location of alternative **[**42]** sources of stone and asphalt and other asphalt components to Sader's basic operations in Wood County and immediately adjacent areas might alone preclude any recovery of damages for antitrust injury in this case by Sader. There was also evidence of a number of competitors in the area. ***HN7***[] "The *§ 2* market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization." *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum, 579 F.2d 20, 27 n.11* (3rd Cir.), *cert. denied*, *439 U.S. 876, 58 L. Ed. 2d 190, 99 S. Ct. 214 (1978)*. This plaintiff has essentially relied upon contentions of predatory or unfair low bidding by defendants on jobs in which he was interested, a basis we determined in *Langenderfer I* to be insufficient to support a damages claim for antitrust injury absent a showing that defendants' bids were below their total average costs.

There is insufficient proof in this record to show that defendants had a monopoly position, attempted a monopoly and had a dangerous probability of success in this regard, in the limited non-OTC, non-ODOT market in which Sader was involved. The vast weight of proof submitted by plaintiffs, upon which their experts relied, **[**43]** bore upon defendants' OTC and ODOT market share in a thirteen-county area. Sader was not a party who realistically competed in that market.

We are not satisfied from the proof adduced, after careful examination of the record, even if we assume the jury found that defendants cut Sader off from supplies at Portage in 1983 when suit was filed, that Sader established that this action was effected by an actual monopolist or one that threatened a realistic danger in the area of Sader's business activity in a relevant market. [16]

> ***HN8***[] The ultimate inquiry in any attempted monopolization case remains whether the defendant has or reasonably might come close to having the ability to control total market output and prices.

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[15] Sader, upon cross examination, stated that he did not believe that his credit had been suspended in 1979 or 1980 when his deposition was taken and the first trial took place. He added that he would not have a problem if defendants "treated me like they treated everybody else" in credit matters. He conceded, however, that he had credit problems with defendants as early as 1978 and that this continued into 1983.

[16] Being "cut off" meant essentially that Sader was required to pay cash rather than rely on credit for certain periods of time. Sader was placed on a "permanent job basis" by defendants, after a number of revocations and reinstatements of credit, in August 1983.

Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989).

[44]** **[*1428]** Defendants may be held liable to Sader only if proven to have refused to deal with him for anticompetitive reasons as a monopolist or attempted monopolist in some established relevant market. Without objection by plaintiffs the district court instructed the jury that plaintiffs claimed the existence of three "appropriate relevant product markets" -- stone, sand, and asphalt -- "used on ODOT and OTC paving contracts" and "bidding on a performance of paving contracts awarded to prime contractors by ODOT and OTC." None of these claimed relevant markets were proved with respect to the defendants as to the limited geographic area in which Sader was operating, and certainly not so with respect to monopolization as to sand and stone. No reasonable jury could find, on the evidence presented, that Sader was "cut off" at Portage or that defendants refused to sell stone to Sader based on an attempted monopoly.

We observe similarities between this case and *Trace X Chemical v. Canadian Industries, 738 F.2d 261 (8th Cir. 1984)*, *cert. denied*, *469 U.S. 1160, 83 L. Ed. 2d 925, 105 S. Ct. 911 (1985)*. Plaintiff Trace X, like Sader, claimed that defendant had misused monopoly power to refuse to deal with it and had refused it **[**45]** credit.

> On the basis of the evidence presented, CIL's refusal to extend credit did not amount to unreasonable anti-competitive conduct, but rather constituted a valid exercise of business judgment. It is certainly not conduct that is "possible or effective only if taken by a firm that dominates its smaller rivals." *Berkey Photo* [*Co., Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)]* at 275.
>
> In support of its claim of anti-competitive conduct, Trace X argues that CIL threatened to discontinue supplying it with TNT unless Trace X paid for the $ 160,000 worth of TNT received but not paid for by Trace X. However, ***HN9***[] terminating or threatening to terminate deliveries to a purchaser who refuses to provide full payment is not predatory or unlawful anti-competitive conduct. *Fairdale Farms, Inc. v. Yankee Milk, Inc., 715 F.2d 30, 34 (2d Cir. 1983)*, *cert. denied*, *464 U.S. 1043, 104 S. Ct. 711, 79 L. Ed. 2d 174 (1984)*.
>
> This case does not involve a refusal to deal. CIL was willing to continue to supply Trace X with TNT; it merely refused to deal with Trace X on other than a cash basis. "*Section 2* of the Sherman Act does not give purchasers the exclusive right to dictate the terms **[**46]** on which they will deal," *Fairdale Farms, 715 F.2d at 34*, nor does it require a monopolist to accede to every demand of its competitors or customers. *Glen Eden Hospital v. Blue Cross & Blue Shield, 555 F. Supp. 337, 345 (E.D. Mich. 1983)*.

738 F.2d at 266-67 (footnote and citations omitted).

As did the defendant in *Trace X*, defendants here merely insisted on current payment and exercised "business judgment" and insisted on a "cash basis" method of doing business. As did the Eighth Circuit in *Trace X*, we likewise reverse the jury verdict rendered for Sader, and we note also that some evidence of anticompetitive conduct was present in *Trace X*.

For all these reasons then, (1) failure of proof concerning a relevant market and reasonably consequential damages; (2) failure to show defendants' monopoly position in asphalt, stone or sand in the principal area of Sader's operations during the period in question; (3) because the essential character of Sader's charges was related to ordinary commercial disputes rather than anticompetitive conduct; and (4) because a principal basis of Sader's proof of anticompetitive conduct was on predatory bid pricing, we must REVERSE **[**47]** and set aside the verdict for Sader. It again follows that the award of attorney fees and costs, based upon services rendered to Sader, must be reversed as well. Sader is entitled to no injunctive relief.

V. *MacRITCHIE MATERIALS, INC. CLAIM*

The plaintiffs' amended complaint sets out that MacRitchie has offices in West Millgrove where it operates a limestone quarry "which supplies stone and **[*1429]** sand to Langenderfer, NOAP and other asphalt producers." Members of the "MacRitchie family" are "principal shareholders" of Langenderfer, NOAP, and MacRitchie. Plaintiffs' exhibit 1 shows its quarry, and the adjacent asphalt plant operated by Langenderfer or NOAP. MacRitchie's claim was not considered in the first trial pursued by Langenderfer and NOAP. Defendants never bought stone or sand from MacRitchie, which claims injury and loss by reason of defendants' claimed monopolistic practices, which caused it to lose business and sales to related plaintiffs and others.

Defendants assert that they do not possess monopoly power in limestone as a matter of law because of their market share of stone in the thirteen-county market. They also respond to MacRitchie's claim by contending that it is a claim **[**48]** of "indirect and remote" injury not caused by its conduct, even if that conduct were deemed to be anticompetitive. Finally, defendants assert that MacRitchie's claim is speculative and "unsupported by the testimony."

We note at the outset that the MacRitchie quarry is situated nearer, or as near, to southeastern Wood County, to Seneca County, to Wyandot County, to eastern Hancock County, and to southern Sandusky County, than any of defendants' quarries. The entire southeast quarter of the thirteen-county area is better served by MacRitchie's quarry, or by independent stone producers including France, the largest limestone operation in the entire relevant market claimed by plaintiffs, than by defendants' quarries. Defendants' nearest operating quarry, at Portage, also in Wood County, was located about ten miles northwest of MacRitchie's West Millgrove quarry. From 1971 through 1975, Portage had the highest comparative quarry costs of all of defendants' quarries, and only defendants' Rocky Ridge quarry exceeded its costs in 1976. Portage's average cost of stone was the highest of defendants' quarries analyzed by plaintiffs from 1982 to 1985. [17] Consistently throughout the 1981 to 1985 **[**49]** period, Portage and Rocky Ridge, defendants' nearest quarries to MacRitchie's, had the lowest gross margins of profit of defendants' quarries analyzed by plaintiffs, measured by the difference between average price and cost per ton. Defendants suffered by far their lowest operating income (measured by percent of pretax income from their quarry operations) from 1980 through 1982. Defendants' after-tax return on net worth based on stone operations was considerably reduced from 1980 through 1983, but returned to more normal levels in 1984 and 1985. MacRitchie, then, had every opportunity to be competitive with defendants in its quarry and limestone operations.

It is evident from the analysis of this data that defendants' quarry at Portage, the one which serves as the nearest competitor to MacRitchie's quarry, has relatively high costs of **[**50]** production and is less profitable than other quarries operated by defendants. It is also evident that MacRitchie's geographic location is superior to that of any of defendants' quarries in much of the southeast quadrant of the relevant market area. There are a number of highway asphalt pavement competitors located within twenty or twenty-five miles of MacRitchie's quarry.

An examination of limestone production of defendants and others within the thirteen-county relevant market area, including MacRitchie, from 1979 to 1986 was made by plaintiffs (exhibit 21A) and indicates as follows (in millions of tons):

DEFENDANTS	**1979**	**1980**	**1981**	**1982**	**1983**	**1984**	**1985**	**TOTAL**
Defendants	2.116	2.310	1.592	1.384	.982	1.136	1.159	10.679
France	3.515	2.849	2.164	1.502	2.513	2.334	2.602	17.479
Nat'l Lime	1.033	.857	.734	.739	.719	.899	1.076	6.057
Basic	.349	.305	.156	.157	.063	--	--	1.030
MacRitchie	.187	.232	.103	.111	.159	.126	.172	1.090
Others	2.222	1.702	1.301	.836	1.647	1.094	1.205	9.007

[17] Rocky Ridge quarry, owned by defendants, slightly exceeded Portage's costs in 1983. Portage reflected no cost data in 1984, and its costs exceeded its average sales price in 1982.

DEFENDANTS	1979	1980	1981	1982	1983	1984	1985	TOTAL
13 County								
Total:	9.422	8.255	6.050	4.729	5.083	5.589	6.224	45.342
Mich. Stone	.815	.566	.295	.277	.448	.582	.362	3.345
TOTAL:	10.237	8.821	6.345	5.006	5.531	6.171	6.576	48.687

Plaintiffs' exhibit 21A.

[51]** **[*1430]** Michigan Stone is located outside the thirteen-county area in Michigan. Plaintiffs assert that because much of its production goes into the thirteen-county relevant market area, it should be considered as defendants' facility within the area. The percentage of road material furnished to the total market by defendants, by France, and by others (including MacRitchie) is reflected below. The figures in parentheses are arrived at by computing Michigan Stone's production into defendants' (and the market's) total:

YEAR:	DEFENDANTS:	FRANCE:	OTHERS*
1979	22.5% (28.6%)	37.3% (34.3%)	40.2%
1980	28.0% (32.6%)	34.5% (32.3%)	37.5%
1981	26.3% (29.7%)	35.8% (34.1%)	37.9%
1982	29.3% (33.2%)	31.8% (30.0%)	39.0%
1983	19.3% (25.9%)	49.4% (45.4%)	31.2%
1984	20.3% (27.8%)	41.8% (37.8%)	37.9%
1985	18.7% (23.1%)	41.9% (39.6%)	39.5%
Avg. 7 yrs.	23.6% (28.8%)	38.5% (35.9%)	38.0%

* Because all percentage figures have been rounded off to the nearest tenth, the figures across each row may not equal exactly 100 percent.

[52]** We doubt that it is proper for statistical purposes to include Michigan Stone's production/sales to the thirteen-county area, as is contended by plaintiffs. The more appropriate data would be the production of defendants' quarries in northwest Ohio, not including the Michigan facility. Including Michigan Stone's production, but excluding any other producers outside the thirteen-county area, skews the statistics in plaintiffs' favor.

The data reflects that after acquisition of all its quarries in the thirteen-county area, the last of which occurred in 1970, defendants from 1979 to 1985 (the period in which MacRitchie is involved as a plaintiff) controlled, on the average, 23.6 percent of the road material limestone in the relevant market alleged by plaintiffs. From 1983 through 1985, defendants controlled less than 20 percent. France, the largest factor in the road material limestone market, controlled, on the average, nearly 36 percent of the market between 1979 and 1985. In the last three years of that period, France controlled, on the average, 44.4 percent of the market. Even if we include the production of Michigan Stone with the defendants' Ohio quarries for purposes of calculating **[**53]** defendants' market share, we find that defendants averaged less than 29 percent of the applicable highway limestone during the 1979-1985 period while France averaged about 36 percent. It may be readily observed that during the latter part of the seven year period, reflected in the table, defendants' share of the total limestone market decreased, particularly in comparison to France's share.

[*1431] The limestone market share of defendants was, at most, around thirty percent and decreasing. Plaintiffs have cited no authority indicating that this meets Sherman Act *§ 2* requirements. There is no substantial evidence that defendants were capable of, much less achieved, the destruction of competition in limestone in any relevant market.

> *HN10*[] To prove its claim of attempted monopolization, [plaintiff] has to prove that [defendant] had engaged in anticompetitive conduct with the specific intent to monopolize and that the attempt had a dangerous probability of success. *United States v. Dairymen, Inc., 660 F.2d 192, 194 (6th Cir. 1981)*.
>
> *HN11*[] Anticompetitive conduct is conduct designed to destroy competition, not just to eliminate a competitor. Lively legal competition will result in the efficient and shrewd **[**54]** businessman routing the inefficient and imprudent from the field. The antitrust laws must be administered in such a way that they do not restrain such vigorous competition in order to protect inefficient competitors. As Judge Learned Hand has pointed out, "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Company of America, 148 F.2d 416, 430 (2d Cir. 1945)*. Merely to attempt to succeed in business is not anticompetitive conduct.

Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 823 (6th Cir. 1982).

In *Richter*, we considered market share and "dangerous probability of success" in attempted monopolization, observing:

> *HN12*[] The third element of attempted monopolization is a dangerous probability of success. The greater a firm's market power the greater the probability of successful monopolization. In order to be found liable for attempted monopolization, a firm must possess market strength that approaches monopoly power -- *the ability to control prices and exclude competition*.
>
> Market strength is often indicated by market share. During the relevant period, [defendant]'s market share declined **[**55]** from approximately 40% to approximately 30%. Given the facts of the case, such a share is not sufficient to establish [defendant]'s capacity to monopolize. *See* *United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976)*, *cert. denied*, *429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572 (1977)* (50% market share does not establish dangerous probability of success); *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 102 S. Ct. 1277, 71 L. Ed. 2d 461 (1982)* (30% market share is not enough). The fact that [defendant's] share of the market was declining also belies whatever inference of capacity to monopolize that may be drawn from the size of its market share. *Forro Precision, Inc. v. International Business Machines Corp., 673 F.2d 1045, 1058 (9th Cir. 1982)*; *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 271 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 102 S. Ct. 1277, 71 L. Ed. 2d 461 (1982)*; *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 841 (2d Cir. 1980)*.

691 F.2d at 826 (emphasis added).

"Dangerous probability of success" is but one of the elements of a Sherman Act *§ 2* claim that must be proved by **[**56]** MacRitchie in order to succeed:

> *HN13*[] The offense of attempt to monopolize (Sherman Act *§ 2*) is composed of the following elements:
> 1. Specific intent to monopolize;
> 2. Anti-competitive conduct;
> 3. A dangerous probability of success.
>
> *Lorain Journal Co. v. United States, 342 U.S. 143, 153, 72 S. Ct. 181, 186, 96 L. Ed. 162 (1951)*. *Accord,* *Richter Concrete Corp. v. Hilltop Concrete Corp., supra, 691 F.2d at 823*; *United States v. Dairymen, Inc., supra, 660 F.2d at 194*; *Northeastern Telephone Co. v. American Tel. & Tel., 651 F.2d 76, 85 (2d Cir. 1981)*. *HN14*[] Monopolization is the market power to control prices or exclude competition. *United States v. Griffith, 334 U.S. 100, 107, **[*1432]** 68 S. Ct. 941, 945, 92 L. Ed. 1236 (1948)*. Specific intent to monopolize may be inferred from evidence of anticompetitive conduct, *Lorain Journal, supra*, but not from legitimate business

> practices aimed only at succeeding in competition. *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 889, 97 L. Ed. 1277 (1953)*.

White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 506-07 (6th Cir. 1983).

We reversed as "untenable" the district court's holding in **[**57]** *White & White* that a 25 percent market share [18] coupled with a finding of "leverage" and "link" practices satisfied the "dangerous probability of success" requirement. *Id. at 508* (citing *Richter Concrete, supra*, and *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 102 S. Ct. 1277, 71 L. Ed. 2d 461 (1982))*.

Other courts have reached the same result as in *Richter* and *White & White* in situations where a defendant charged with a Sherman Act violation had market shares larger than defendants have in this case (with respect to limestone). In *United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976)*, *cert. denied*, *429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977)*, a 47 percent-50 percent share in LP gas in a relevant market was held to be insufficient. In *Lektro-Vend*, a 30 percent or more market share was found insufficient as a matter of law. In *Nifty Foods **[**58]** Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832 (2d Cir. 1980)*, a market share range of from 54.5 percent to 33 percent was determined to be insufficient. Similarly, in *Levitch v. Columbia Broadcasting System, 495 F. Supp. 649 (S.D.N.Y. 1980)*, a 33 percent maximum market share was held insufficient. Judgment for the defendant, which had a 34-38 percent market share, charged with anticompetitive conduct and antitrust violations, was affirmed because there was no dangerous probability of success of monopolization in *Shoppin' Bag of Pueblo v. Dillon Companies, 783 F.2d 159 (10th Cir. 1986)*. Even when plaintiff asserted that an alleged *§ 2* antitrust violator possessed a 65 percent market share, the court in *Hunt-Wesson Foods v. Ragu Foods, Inc., 627 F.2d 919, 926 (9th Cir. 1980)*, *cert. denied*, *450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981)*, found only that "this may provide a basis for inferring that Ragu possessed monopoly power . . . [and] sufficient to withstand a motion to dismiss."

We adhere to the views of Areeda & Hovenkamp, ***Antitrust Law***, § 519.3 (1989 Supp.) that it would be rare indeed to find that a firm with only 25 percent or 50 percent of the market could control price **[**59]** over any significant period. "The monopolization offense is concerned with single firm conduct maintaining or expanding the economic power of a firm that is already a monopolist." *Id.*

There was no allegation by plaintiffs, no contention made, that defendants conspired with France with respect to monopolizing or attempting to monopolize the limestone market. Nor could there have been, since the evidence was that these entities were in direct competition, and the record showed that France was acquiring a greater market share during the later years despite defendants' acquisitions of quarries in the 1960s.

Plaintiffs introduced evidence at trial that combined the market shares of defendants and France, ostensibly in order to demonstrate market structure. Plaintiffs cite no authority in support of their theory and contention that they may combine the larger independent competitor France's limestone market share with defendants' share in order to establish the dangerous probability of success requirement. The fact that the prices and discount practices of these two substantial competitors may be similar is not evidence that they acted in conspiracy or concert to exclude competition, **[**60]** to control prices, or to commit unlawful anticompetitive practices. The testimony of plaintiffs' experts about anticompetitive **[*1433]** conduct of defendants was mistakenly based upon their assumption that the shares of France and defendants should be taken as combined.

MacRitchie is faced with a perplexing dilemma in that its claim is somewhat at odds with the claims of its fellow plaintiffs. While the other plaintiffs complained of Johnson's low bids on paving jobs, they also complained that

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[18] Defendants in *White & White* were found to have a market share in various markets of as much as 45 percent and over 30 percent in others.

Johnson charged them supracompetitive prices for component materials. If this were the case, it would seem to accrue to MacRitchie's advantage as a limestone supplier, rather than to its detriment. Furthermore, as noted, evidence regarding the limestone market fails to demonstrate that Johnson possessed power over prices. Defendant quarries, for instance, granted prompt pay discounts, as did France, but plaintiffs' quarries, a profit resource, did not. MacRitchie bought nothing from defendants and apparently matched the limestone prices at Portage, except as to discount policies which differed. As to the number of limestone quarries for road and highway operators in the relevant area, Burton MacRitchie **[**61]** conceded in his testimony that there were twenty or more quarries and half that many competitors furnishing limestone for roads and highways in the relevant market area, including France and Martin Marietta Corporation. [19] According to Burton MacRitchie (principal officer of MacRitchie), "Portage and our quarry are quite similar in price."

As pointed out in *Indiana Grocery, Inc. v. Super Valu Stores, 864 F.2d 1409, 1413 (7th Cir. 1989)*, *§ 2* ***HN15***[] is directed to single firm conduct, whereas *§ 1* deals with concerted action and proscribes unreasonable restraints **[**62]** through combinations or conspiracies. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, for a discussion of the basic distinction between the two:

> The conduct of a single firm is governed by *§ 2* alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

Id. at 767-68 (footnotes omitted). "Concerted activity subject to *§ 1* is judged more **[**63]** sternly than unilateral activity under *§ 2*." *Id. at 758*.

> ***HN16***[] The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively.

Id. at 769. Nor can activities of and between defendant entities be deemed anything but unilateral conduct, not concerted conduct for purposes of the Sherman Act analysis.

It is not necessary for us to rule on whether MacRitchie's claim for indirect **[*1434]** damages gives it standing within the allowable parameters of *Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079 (6th Cir. 1983)*, or *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*. It is sufficient for us to note that it is doubtful that MacRitchie has such standing. We note further that during the relevant period, MacRitchie's market share in limestone increased rather than decreased in comparison to that of the defendants. We **[**64]** conclude

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[19] Martin Marietta was described in an antitrust suit by a sand and gravel operator which dealt in coarse gravel or stone used in construction of roads as "a large, diversified company with holdings in various fields including the production of sand and gravel (aggregates). It has aggregates holdings in fifteen states. . . ." *Chillicothe Sand & Gravel v. Martin Marietta Corp., 615 F.2d 427, 428 (7th Cir. 1980)*. France is owned by Koppers Corp., a large conglomerate.

that MacRitchie has failed to prove that defendants' limestone production share of the relevant market is sufficient, as a matter of law, to constitute a dangerous probability of monopolization. *See* *United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990)*.

In summary, we conclude that MacRitchie has failed to establish his claim against defendants under the Sherman Act. MacRitchie has stated in its brief that "defendants' control of stone, sand and asphalt gave them power over asphalt paving in all markets." MacRitchie has proven no control by defendants over sand in any market; it has proven no dangerous probability of success of monopoly by defendants in road limestone in any relevant market, and MacRitchie's claim of injury by reason of defendants' power over asphalt paving is an indirect claim at best, and must fall by reason of the failure to demonstrate requisite monopoly control by defendants over asphalt paving components. MacRitchie is a competitor of defendants only in limestone for roads and highways, and there is a failure of proof of defendants' monopoly power in this respect. There is no basis in law for attributing France's limestone market share **[**65]** and power to defendants.

For these reasons we must also REVERSE the award pursuant to the jury verdict rendered to MacRitchie. [20] It follows that the award of attorney fees and costs made on behalf of MacRitchie must also be set aside, and that MacRitchie is not entitled to equitable relief.

VI. NOAP CLAIM

In the amended complaint NOAP sets out that it is a separate Ohio corporation with offices in West Millgrove, Ohio, the same address of Langenderfer and MacRitchie. It was "engaged in the business of purchasing sand and stone . . . called 'highway construction materials,' mixing asphaltic concrete . . . and selling the materials and asphaltic concrete to plaintiff Langenderfer" and others. NOAP differs from MacRitchie in that it had no quarry but purchased stone, as well as sand, and resold them **[**66]** after mixing into "asphaltic" materials for road and highway construction. For reasons stated with respect to MacRitchie in part V, we reiterate that plaintiffs have failed to prove that defendants have monopolized or achieved a dangerous probability of success in attempting to monopolize the quarrying, stone, or sand markets in the relevant thirteen-county market area since 1979. For the same reasons stated in part V, NOAP has proved no claim since that date due to defendants' quarrying and sand operations. NOAP is thus entitled to no damages due to these operations for this period of time because of a failure to prove the requisites of a *§ 2* Sherman Act claim, due primarily to the lack of the required market share of defendants in the relevant market.

We conclude, in short, that defendants have not been shown to have the power at any relevant time to *control* prices or exclude competition in the sand and stone markets. *United States v. duPont, 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *Southaven Land Co. v. Malone & Hyde, 715 F.2d 1079, 1087 n.10 (6th Cir. 1983)*.

Through 1978, NOAP had four hot-mix plants in the relevant northwest Ohio area as noted in *Langenderfer I*, and we consider the claims **[**67]** of NOAP as an asphalt producer separately from the claims of monopoly or attempted monopoly in stone and sand production.

[*1435] Paragraph 18 of the amended complaint charges that defendants "overcharged [plaintiff] for highway production materials from 1980 through 1985" (when the amended complaint was filed), and will in the future. We conclude that the claim for overcharging for stone and sand must fail for the reasons stated. Stone prices of the defendants were generally consistent with the prices of the largest producer, France, and with plaintiff MacRitchie's prices at its quarry at West Millgrove.

Plaintiffs' exhibit No. 144 reflects the following data for the "concrete and road metal" market, 1974-1978, presumably including Michigan Stone's production:

[20] In closing argument, MacRitchie's attorney claimed basic damages of approximately $ 188,745 for MacRitchie; the jury awarded $ 200,000. As of March 31, 1985, MacRitchie had an accumulated deficit of $ 560,000.

YEAR:	DEFENDANTS:	FRANCE:	OTHERS:
1974	24%	24%	52%
1975	25%	22%	53%
1976	28%	32%	40%
1977	24%	32%	44%
1978	28%	29%	43%

(That same exhibit shows defendants' share **[**68]** of total quarry production for these years to be 17%, 18%, 19%, 18% and 19%, respectively).

It is clear from this data furnished by plaintiffs, even if Michigan Stone's production is included as applicable to the Ohio relevant market (which we conclude distorts the actual relevant market share allocations), that defendants come nowhere near as dominant a market position in stone prior to 1979 as in the years following 1979. This data indicates no dangerous probability of success for any attempted monopolization in this particular area of stone production. With respect to sand production for any pertinent year, plaintiffs have failed in their effort to establish a *§ 1* or *§ 2* claim against defendants. To the extent, then, that NOAP's claim of anticompetitive unlawful conduct is based upon monopolization or attempted monopolization of stone and sand, it must fall. There is, again, no basis for combining defendants' stone production or market share of "concrete and road metal" from their quarries with that of their principal competitor, France. Plaintiffs have alleged no conspiracy between defendants and France and merely point to a similarity of prices for quarries that are in the same **[**69]** general area. NOAP has always had available to it, moreover, the stone quarry at West Millgrove, which is nearer a three or four county area within the northwest Ohio relevant market claimed by plaintiffs than any quarry of defendants. [21]

Burton MacRitchie, chief operating officer of both NOAP and Langenderfer, testified that in 1976 he considered that there were eight major paving competitors in the relevant market area. [22] **[**71]** NOAP claimed that it occasionally received discounts on stone bought from quarries later acquired by defendants, but never received such discounts **[**70]** after defendants acquired them. However, MacRitchie conceded that "the prices did not make a drastic change" after the acquisitions. Neither France nor defendants allowed volume discounts but did give prompt pay discounts. Plaintiffs' discount policy was apparently just the opposite. When defendants acquired a sand facility, the same discount price policy applied. [23] **[*1436]** Plaintiffs contend that Union Quarries at Scott should be included in the thirteen-county relevant market area, although they are on the boundary line or just south of the line at the southeast edge. Production figures from this operation of defendants at Scott have been included in plaintiffs' statistical data. Ninety percent of stone purchased by NOAP and/or Langenderfer came from France or independents during the 1970s, and plaintiffs paid "board price" at France as well as at defendants' quarries.

In any event, accepting plaintiffs' proof (and some is distorted, as indicated), defendants' market share of stone before 1979 was insufficient to show a Sherman Act violation. In *Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*, the Supreme Court discussed a similar market share ratio possessed by Excel, a party in that proceeding:

> According to Monfort's expert witness, however, Excel's postmerger share of market capacity would be only 28.4%. . . . Thus Excel acting alone would clearly lack sufficient capacity after the merger to satisfy all or most

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[21] Burton MacRitchie testified that his company, NOAP, and/or other MacRitchie family enterprises, operated an asphalt batch plant at the West Millgrove quarry from 1960 to 1980. He purchased stone and manufactured sand from France. He testified that he only occasionally obtained sand from defendants. Mr. MacRitchie testified also that MATCO was to the S.E. Johnson Co. as NOAP was to Langenderfer, both producing asphalt utilized by their paving companies.

[22] Burton MacRitchie conceded that there were a number of independent sand producers in Wyandot County serving the south and east part of the relevant market area and others in Indiana and Michigan serving the western and northern portions.

[23] France apparently allowed discounts on stone prior to 1972. France's prices and those charged by independent quarries were different. Independent quarries sometimes gave a volume discount.

> of the demand . . . . With only a 28.4% share of market capacity and lacking a plan to collude, Excel would harm only itself by embarking on a sustained campaign of predatory pricing.

Id. at 120 n.15.

Cargill referred to a definition of predatory pricing set out in *Langenderfer I*, and made reference to Areeda & Turner, *Williamson* **[**72]** *on Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 1337, 1348 (1978), suggesting that even a 60 percent share would not be enough. *Cargill, 479 U.S. at 119 n.15*. The Court discussed predatory pricing allegations further:

> ***HN17***[] Claims of threatened injury from predatory pricing must, of course, be evaluated with care. As we discussed in *Matsushita Electric Industrial Co. v. Zenith Radio Corp., [475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)]*, the likelihood that predatory pricing will benefit the predator is "inherently uncertain: the short-run loss [from pricing below cost] is definite, but the long-run gain depends on successfully neutralizing the competition . . . [and] on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *475 U.S. at 589*. Although the commentators disagree as to whether it is ever rational for a firm to engage in such conduct, it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous. *See, e.g., id. at 588-593* (discussing obstacles to successful predatory pricing conspiracy); R. Bork, The Antitrust Paradox **[**73]** 144-159 (1978); McGee, Predatory Pricing Revisited, 23 J. Law & Econ., at 291-300; Posner, The Chicago School of Antitrust Analysis, 117 U. Pa. L. Rev. 925, 939-940 (1979). As we stated in *Matsushita* "predatory pricing schemes are rarely tried, and even more rarely successful." *475 U.S., at 589*. Moreover, the mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id., at 594*.

Id. at 121 n.17 (discussing § 16 of the Clayton Act).

In *Cargill*, the Court also discussed vigorous competition brought about by merger in a challenge by a smaller competitor:

> *Brunswick* holds that ***HN18***[] the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against **[*1437]** the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for **[**74]** increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co., 729 F.2d 1050, 1057* (CA6), *cert. denied*, *469 U.S. 1036, [83 L. Ed. 2d 401, 105 S. Ct. 510]* (1984).

Id. 479 U.S. at 116. The latter quotation was cited again with approval in *Atlantic Richfield Co. v. USA Petroleum Co., __ U.S. __, 109 L. Ed. 2d 333, 110 S. Ct. 1884, 1892-93 (1990)*. *See also* *United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990)*.

But for NOAP's relationship as a principal supplier to Langenderfer, we find that it has established no antitrust injury by reason of defendants' stone and sand activities and mergers during any relevant period. Plaintiffs' exhibits Nos.

27 and 32 indicate that over a ten-year period (1967-1976), it purchased two and **[**75]** a half times as many tons of sand and stone from France's nine locations as it did from all defendants and paid the same average price over this period of time. (Included in the purchases from defendants were sand and stone purchased from Michigan Stone.) That same exhibit reflects a total of only 10,000 tons of sand purchased by plaintiffs from Tri-State, acquired by defendants. The record also indicates that none of the plaintiffs were among the largest customers buying sand and/or gravel from Tri-State or defendants. NOAP's claim of approximately $ 73,000 based on variation in prices charged and alleged overcharges at defendants' quarries for stone (and/or sand) is clearly unallowable in any event. NOAP also has failed to establish that it was directly injured by defendants' sand and stone or quarry operations, even if deemed to be designed as anticompetitive in nature or motivation. We find no entry barrier to the market insofar as sand production is concerned.

May NOAP nevertheless recover for indirect damages, apart from the sand and stone aspects of this controversy, by reason of anticompetitive conduct of defendants, as paving contractors, directed toward and harming Langenderfer? **[**76]** We must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them" to answer this question. *Associated General Contractors v. Calif. Council of Carpenters, 459 U.S. 519, 535, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. This court has focused on the directness of the injury in a claim of this kind in *Volasco Products Co. v. Lloyd A. Fry Roofing, 308 F.2d 383 (6th Cir. 1962)*, *cert. denied*, *372 U.S. 907, 9 L. Ed. 2d 717, 83 S. Ct. 721 (1963)*. We have also looked to see whether the injury claimed is arguably within the zone of interests protected by the antitrust laws. *Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975)*. *See also* Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. Rev. 374 (1976). The inquiry resembles the "elusive" test of proximate cause in a given situation. *Associated General Contractors v. Carpenters, 459 U.S. at 535-36*.

A number of other factors may be controlling. In this case it is appropriate to focus on the nature of the plaintiff's alleged injury. As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting **[**77]** the economic freedom of participants in the relevant market. Last Term in *Blue Shield of Virginia v. McCready, supra* [457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540], we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under § 4 [of the Clayton Act]. McCready alleged that she was a consumer of psychotherapeutic **[*1438]** services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services. The Court stressed the fact that "McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." 457 U.S., at 483, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 487-489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. After noting that her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," 457 U.S., at 484, the Court concluded that such an injury "falls squarely within the area of congressional concern." *Ibid.* *Associated General Contractors v. Carpenters, 459 U.S. at 538*.

NOAP claims damages because of the alleged wrongful injuries to sister corporation Langenderfer, its principal customer, **[**78]** leading to the latter's demise as a direct paving contractor competitor of defendants. A factor to consider under these circumstances is "the directness or indirectness of the asserted injury" *by NOAP*. Langenderfer, as an "immediate victim," suffered direct injury, which will be discussed below. *See* *Associated General Contractors, 459 U.S. at 540-41*.

We must look, then, under *Associated General Contractors* principles, to "the chain of causation," and whether "the alleged effects" on NOAP also "may have been produced by independent factors," and whether or not its claim is merely "speculative" in nature. *Id. at 541, 542*. Courts have a legitimate interest in these cases of avoiding the "risk of duplicate recoveries on the one hand or the danger of complex apportionment of damages on the other." *Id. at 543-44*. *See also* *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, and *Kansas and Missouri, etc. v. Utilicorp United, Inc., U.S. , 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990)*.

We have cited, with approval, a rule adopted in the Second Circuit:

> The oft-cited decision of *Calderone Enterprises v. United Artists Theatre Circuit, 454 F.2d 1292 (2d Cir. 1971)* provides the following rule:
>
> "This **[**79]** court has committed itself to the principles that ***HN19***[] in order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly, we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than being 'targets' themselves."
>
> *Id. at 1295* (emphasis added). *Calderone*, therefore, excludes as targets those "who have suffered economic damages by virtue of their relationships with 'targets'." *Id. at 1295*.

Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1081 (6th Cir. 1983) (footnote omitted).

We discussed the relationship between direct injury, proximate cause, and standing in light of *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; *Blue Shield of Va. v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*; and *Associated General Contractors*, in *Southaven Land*. We concluded that

> ***HN20***[] innumerable elements, including proximity and directness, constitute proper **[**80]** areas of inquiry in identifying a "person" injured by reason of a violation of the antitrust laws within the meaning of § 4. Examination of these factors facilitates identification of "who is entitled to prosecute an action under § 4." *Associated General Contractors, supra.*

Id. at 1085 (footnote omitted). [24]

Although the issues are extremely close as to NOAP's antitrust claims of indirect **[*1439]** injury by reason of Langenderfer's direct injury, we conclude that NOAP may not claim damages in this indirect capacity. We recognize that NOAP may be encompassed by the broad language of the Sherman Act, but we are persuaded that the principles of *Associated General Contractors*, considered collectively, bar this claim. We reach this conclusion because (1) NOAP has no proven direct claim with regard to stone and sand; (2) its claim is essentially **[**81]** indirect and derivative of Langenderfer's; (3) NOAP was essentially only a minor consumer of defendants' products and had available independent and competitive resources; and (4) its indirect and separate claims are speculative and involve the serious risk of "duplicative recoveries." [25]

We, therefore, REVERSE the award of damages insofar as NOAP's claims are concerned and, consequently, we REVERSE any award of attorney fees based on a jury award to NOAP.

VII. ARTHUR S. LANGENDERFER CLAIM

For the second time a jury has examined the evidence adduced in this antitrust dispute between Langenderfer, a paving contractor, and defendants. At the first trial, the jury found "actual damages" of $ 982,117, which we set aside for a new trial. Upon the conclusion of the proof at the second trial, the jury returned a verdict of $ 1,675,000

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[24] *Southaven Land*, like *Associated General Contractors*, discusses § 4 of the Clayton Act but it is entirely relevant to discussion of the anti-trust claims in this case.

[25] *See* *Associated General Contractors, 459 U.S. at 544*.

(coupled with the NOAP claim) based upon its response to interrogatories to the following effect (as to Langenderfer, **[**82]** a separate corporation):

(1) There was a relevant market consisting of limestone, sand, and asphalt used in ODOT and OTC asphalt paving contracts and Langenderfer competed in this market.

(2) There was a relevant product market consisting of both ODOT and OTC asphalt paving contracts and Langenderfer competed in these markets.

(3) There was a relevant geographic market or submarket for Langenderfer (the 13 counties).

(4) Defendants had monopoly power in the relevant markets as to limestone, sand, and asphalt used in ODOT and OTC contracts.

(5) Defendants willfully acquired and used monopoly power in each of these relevant markets.

(6) Defendant engaged in anticompetitive conduct by making acquisitions "to exclude and/or injure competition and increase Johnson's power which he succeeded in doing."

(7) Defendants' monopolization caused injury to the business and property of Langenderfer.

(8) Defendants had a specific intent to achieve a monopoly on the relevant markets and engaged in anticompetitive conduct to achieve a monopoly.

(9) Langenderfer suffered injury to its business or property as a result of defendants' attempt to monopolize.

Defendants moved for a judgment **[**83]** notwithstanding the verdict, which was overruled viewing the evidence on behalf of Langenderfer (and other plaintiffs who also obtained a favorable jury verdict) "in the light most favorable to plaintiffs," with the district court's statement that the "judge's duty is essentially to see that there is no miscarriage of justice." We have heretofore indicated that the district court was in error in failing to direct a verdict, or in refusing to grant j.n.o.v. with respect to other plaintiffs. After full consideration of all of the evidence in the view suggested by the district court, and after reviewing the applicable law, we are persuaded that Langenderfer was entitled to effect a recovery for damages from defendants.

In *Langenderfer I*, as noted by the district court, we held that

> *Brunswick* [*429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690]* requires that Langenderfer's injury result either from a lessening of competition **[*1440]** due to the acquisitions or from "anticompetitive acts made possible" by the acquisitions. . . . The issue of whether Langenderfer's injuries resulted from "anticompetitive acts made possible" by the acquisitions was properly a jury question.

729 F.2d at 1058-59.

The jury responded to an interrogatory **[**84]** that defendants made acquisitions to affect competition adversely and, in effect, succeeded in doing so. Our function is to determine whether the jury acted without any substantial or sufficient basis on the evidence in the case, considered favorably from Langenderfer's standpoint, in rendering its substantial verdict. Contrary to plaintiffs' assertions in their brief, we note first that much of the evidence in the case did relate to defendants' bidding practices characterized by various of plaintiffs' witnesses as unrealistically or oppressively low so as, allegedly, to foreclose successful bidding on ODOT and/or OTC jobs by others. The district court did instruct the jury, however, that "defendants' profitable bidding does not constitute anticompetitive conduct as a matter of law, and you may not base a verdict on the fact that defendants were able to bid lower than competitors and still make a profit." We believe that the instruction cured improper inferences that might otherwise have been drawn by the jurors to the effect that defendants' asserted predatory pricing practices (bidding too low) were the real basis for Langenderfer's (and other plaintiffs') cause of action for anticompetitive **[**85]** conduct.

The district court's jury instructions advised the jury that plaintiffs contended first that defendants were engaged in "monopolistic stone pricing." As previously noted, we conclude that plaintiffs' proof in that respect failed as a matter of law. The district court properly included in its jury instructions the following:

> In deciding whether defendants' limestone market share suggests to you that defendants have monopoly power, you may not combine defendants' market share with France's market share.

There was simply *no adequate evidence* to establish that defendants were engaged in monopolistic stone pricing, or that defendants controlled or attempted to control stone or quarrying in any relevant market claimed by plaintiffs. Nor was there meaningful evidence to show that defendants tied "the sale of stone and sand to the sale of asphalt," as contended by plaintiffs at trial. There was no showing that defendants controlled the sources or supply of sand in any relevant market claimed. This was one basis for holding that NOAP failed to prove its claim.

The remaining contentions of Langenderfer (and other plaintiffs except Sader), as included in the district court's jury **[**86]** instructions, were

(1) "price or profit squeezing and cross subsidization;" [26]

(2) "leveraging its [Johnson's] position in ODOT and OTC;"

(3) "intimidating, discouraging, coercing and retaliating against competitors."

See also supra note 1.

Langenderfer's brief tracks its contentions after noting that defendants had stipulated the "ODOT/OTC asphalt **[**87]** paving market in the thirteen counties in the *Langenderfer I* appeal. *729 F.2d at 1052-1053*." We conclude that this thirteen-county ODOT/OTC asphalt paving market is established. Langenderfer then claims that defendants' alleged "monopoly over OTC/ODOT work extended to various submarkets and gave defendants anticompetitive leverage over asphalt paving work for counties, municipalities, townships, **[*1441]** etc." In light of our previous detailed discussion about defendants' sand and stone operations, the relevant product markets are ODOT and turnpike asphalt paving contracts and the supply of asphalt used therein, but not "the supply of approved construction materials," such as stone and sand, which Langenderfer essentially obtained from its own sources, its sister corporation NOAP, and others. Plaintiffs concede that the market for ODOT/OTC work "is distinct from that done for counties, townships, municipalities and private parties." Plaintiffs' Brief at 7; *see* Burton MacRitchie's testimony.

Because we are concerned with respect to Langenderfer, not with defendants' stone and sand operations (which the proof failed, as a matter of law, to show were either monopolies or involved any dangerous **[**88]** probability of becoming monopolies), we will consider the asphalt and asphalt paving aspects of the case as proved by Langenderfer.

We conclude that defendants may not be held liable for antitrust conduct to the extent that, as asphalt paving contractors, they acquired additional limestone and/or sand sources which added to their efficiency and ability to submit profitable low bids on public highway contracts. Burton MacRitchie testified that during the time defendants began to expand and integrate their operations, he, as part owner and a principal in Langenderfer, desired to do the same when opportunities presented themselves. Arthur Langenderfer, the majority stockholder, however, declined to take advantage of such business opportunities, and MacRitchie conceded this was a bad business decision. Defendants' low bidding, of course, in a real sense, inured to the benefit of the public and extended over many years in the relevant market. We have found previously no proven predatory pricing by defendants. There is no substantial evidence that defendants refused to deal with Langenderfer (or other plaintiffs) in respect to limestone or sand sources except on rare occasions where defendants **[**89]** themselves needed to utilize these materials in their asphalt production and paving with respect to successful bids. Defendants' stone prices were competitive with France, the largest producer in the relevant market, and were not substantially different from prices charged by plaintiffs themselves, although such prices varied from one geographic area to another.

The acquisitions by defendants proved by Langenderfer were set out in *Langenderfer I*. The first pertinent acquisition other than quarrying or asphalt paving contracting or asphalt, as such, was the 1961 acquisition of C.P.

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[26] The district court discussed in the jury instructions plaintiffs' contention about "price squeeze" or "profit squeeze" or "cross subsidizing." This contention was that "defendants have *used their monopoly power in stone* to gain an unfair advantage in paving." (emphasis added). As we have seen, however, defendants did not have sufficient market power or price control in limestone to constitute monopoly power. Plaintiffs' theory of "duopolization" through their expert witness, Dalton, simply had no legal basis of support in treating and combining the shares and practices of France with those of defendants to evidence alleged monopoly power and control.

Calaway, a bridge contractor. Nothing in this acquisition, however, would tend to show elimination of an asphalt paving contractor competitor, nor does it relate to control over asphalt supply or the "concrete and road metal" market, in our view. The acquisitions which might reasonably be deemed to bear upon asphalt paving competition began in 1969 with Price Companies. Mr. Price testified that his company was only a "very minor" competitor with defendants' one plant at Parkertown, near the eastern boundary of the relevant market area. Price sold one of his asphalt plants in the Toledo area to another **[**90]** party, and it was Price who contacted defendants to buy his asphalt paving business. Defendants met his asking price for the business in the eastern fringe of the thirteen-county area and required that he sign a noncompetition agreement. Defendants also agreed to buy sand from Price as a part of the package, with a right of first refusal in the event of a proposed sale of the sand operation. [27] It is difficult, under all the circumstances, to find the Price acquisition to be anticompetitive with respect to Langenderfer's operations located some considerable distance away. There is no indication that Price was ever in substantial competition with Langenderfer, and Price retained, and still operates, his sand production facilities.

[*1442] The first significant paving contractor acquisition by defendants **[**91]** was Ohio Engineering Co., which conducted about one-half of its operations in the thirteen-county area (the southeast portion) and one-half outside (Crawford, Hardin, Allen, and Marion Counties including Delaware). Ohio Engineering operated plants situated on National Lime & Stone's property in Findlay, Hancock County, when acquired by defendants in 1970, and one at Carey, Wyandot County. (Other Ohio Engineering Co. asphalt plants were situated south of the relevant market area but later moved within that area.) Ohio Engineering had been closely allied with National Lime & Stone Co., and it was a competitor of defendants "on rare occasions." Ohio Engineering Co. was purchased in 1970 and subsequently operated as a division of defendants.

In 1971, defendants acquired Creager, a competitor that was failing and ultimately was acquired by defendants for $ 1 plus the debt it owed for materials and supplies. No reason is shown why other parties, including plaintiffs, might not have acquired Creager for a nominal price in 1971 had any of them sought to do so. While this may be deemed to be acquisition of a failing competitor, a nonunion operator, it is of little practical or legal effect **[**92]** since it is clear that had no acquisition been made, Creager would have ceased to do business entirely. That competitor would simply have gone out of business in 1971. Creager, in other words, without dispute, was not a *viable* competitor in any sense when acquired in 1971.

With respect to Ohio Turnpike contracts awarded during the relevant period, plaintiffs' exhibit 69 reflects that Langenderfer bid successfully on one joint venture with Johnson from 1967 through 1969, during which time defendant Johnson won one other bid. In 1970 and 1971, Langenderfer was unsuccessful on one bid each year, whereas Johnson was successful on one bid each year. Johnson was the only successful OTC bidder on three jobs in 1972, Langenderfer unsuccessfully bidding on two. On the other hand, Langenderfer was successful on its one bid in 1973, Johnson on two of three; in 1974, there were no bids and in 1975, both Langenderfer and Johnson were successful in one of two bids. In 1976, Johnson was successful in its one ODOT bid, but lost to Langenderfer on the one competitive bid in 1977, apparently the last time Langenderfer bid on OTC projects. In sum, from 1973 through 1977 Langenderfer was successful **[**93]** on three of its five OTC bids and Johnson was successful on four of seven, but the latter won on the larger jobs. This evidence of plaintiffs, standing alone, is insufficient to establish monopolistic control of the OTC market by defendants from 1967 through 1977. During this same period, two other paving contractors bid successfully on OTC jobs, and there were a number of other bidders. This data of plaintiffs indicates, if anything, that Langenderfer became more active from 1973 through 1977 and was relatively more successful than it had been before that time on OTC bids.

According to plaintiffs' exhibit 70, defendants' share of the Ohio ODOT market decreased from 1966 through 1968 (down to 29 percent), but then increased dramatically in 1969 to 73 percent. During this period, Langenderfer's market share (approximately 3 percent of its own bids) remained relatively constant (up to 8 percent in 1968). In 1971, defendants' market share of the ODOT contracts dropped to 11.8 percent while Langenderfer's was 11.4 percent. Through 1971, then, there is clearly no statistical showing, as a matter of law, that defendants had

[27] Price's principal plant at Norwalk, Ohio, was *outside* the bounds of the thirteen-county area by a distance of approximately 15 miles, and he operated principally in Huron and Erie Counties, outside the relevant market area.

monopoly power or likelihood of monopoly power in the ODOT market. **[**94]** Plaintiffs' exhibit 71 reflects that Langenderfer's dollar amount bid successfully on contracts (ODOT and OTC) in 1971 was over $ 814,000, which was more than double the average of the comparable dollar amounts won from 1968-1970. Langenderfer's 1971 amount constituted a higher market share of ODOT and OTC contracts (8.7 percent) than it realized even in 1968 (6.4 percent), the year in which it realized its highest pretax net income. This would demonstrate no monopoly threat by defendants in 1971 even *after* the acquisitions of Price, Ohio Engineering and Creager. Excluding **[*1443]** the year 1969, which seems to be an anomaly, [28] defendants' average annual market share of the Ohio ODOT contract market from 1966 through 1971 was 34.6 percent, and there were numerous serious competitors, including Langenderfer, in that market. This is an entirely insufficient basis for a monopolization showing through 1971, especially since the defendants' share was decreasing in 1970 and 1971 with respect to ODOT asphalt paving business.

[95]** For the years following 1971 and until Langenderfer went out of business, plaintiffs' exhibit 70 reflected the following as to ODOT market share: [29]

1972	55% (65%)	5%
1973	52% (58%)	16%
1974	83% (83%)	7%
1975	38% (53%)	6%
1976	57% (63%)	10%
1977	75% (70%)	3%
1978	45% (51%)	-0-
Average (7 yrs.)	58% (63%)	7%

In contrast to the years through 1971, the above data, accompanied by the paving contractor and asphalt plant acquisitions made in 1970, 1971, and 1972, are sufficient to indicate that Langenderfer may reasonably have proved the cause of action alleged, coupled with the defendants' high percentage of ODOT winning bids from 1973 until Langenderfer's termination of business, and other circumstances of defendants' growing economic power. We reach this conclusion being mindful **[**96]** at the same time of this statement by a prominent authority in this respect: "There is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute monopoly power." Areeda & Hovenkamp, ***Antitrust Law***, § 518.3 (1988 Supp.).

Langenderfer charges not only monopolization but also attempted monopolization for the pertinent period preceding its going out of business. There is evidence, as previously noted in *Langenderfer I*, that defendants "intended to eliminate competition and dominate the market." *729 F.2d at 1054*. We recognized also in *Langenderfer I* that "Johnson attained economies of scale which enabled it to operate at a much lower cost per paving project than its competitors." *729 F.2d at 1058*. Langenderfer has, we believe, made a sufficient factual showing to support the essence of the jury's finding that Langenderfer suffered **[**97]** injury by reason of defendants' conduct and that such injury resulted in significant part from "a lessening of competition due to acquisitions or from 'anticompetitive acts made possible' by the acquisitions." *Langenderfer I at 1058*. We do not find that plaintiffs have made any required showing of "monopolistic pricing" in stone and sand, as noted, but acquisitions, elimination of competition,

[28] The 1969 pretax profit figure of $ 189,382 for Langenderfer is indeed difficult to accept as "normal." It is considerably more than the same pretax profit totals for 1966, 1967, 1968, and 1970 *combined*. Plaintiffs' exhibit 71 reflects also that in 1969 Langenderfer was awarded bids on three ODOT and OTC contracts totalling only $ 237,168. It is not possible, therefore, that Langenderfer's profits for 1969 came from ODOT and OTC work. (In 1968, the successful bid awards for Langenderfer were $ 380,063; thus, this data reflects that ODOT and OTC contracts could not have carried over as a substantial part of a profit source in 1969.) We are, therefore, inclined to regard this 1969 figure as a less-than-reliable basis for claiming average profits by Langenderfer. The basis for any substantial profit in 1969 must have been from non-ODOT/OTC work.

[29] The figures in parentheses reflect defendants' combined ODOT/OTC market share. Plaintiffs' exhibit 71; *Langenderfer I, 729 F.2d at 1054 n.6*.

and other anticompetitive conduct by defendants, referred to also in *Langenderfer I*, support an award for Langenderfer. We find also that an interstate commerce nexus has been established based on the proof submitted.

Although "monopolistic pricing" in stone and sand was not established, acquisitions by defendants of quarry sites coupled with the use of lengthy non-competition agreements and other circumstances did foreclose production and efficient use of such quarries and limestone by Langenderfer and others as competitors of defendants. Plaintiffs point also to the comparative size and economic power of defendants, particularly from and after 1970, to support their argument in this respect. ***HN21***[] The jury is entitled "to look at the whole picture" with **[*1444]** respect to allegations and evidence **[**98]** of Sherman Act *§ 2* violations. *American Tobacco Co. v. United States, 147 F.2d 93, 106 (6th Cir. 1944)*, *aff'd*, *328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*.

We conclude, although the issue is a very close one, that Langenderfer has presented sufficient proof for a reasonable jury to find defendants guilty of unlawful monopoly or attempted monopoly and anticompetitive acts in asphalt paving contracting in the northwest Ohio relevant market area in OTC and ODOT work during the 1973-1978 period.

Damages

Langenderfer was awarded damages by the jury of $ 1,675,000 (before trebling). This figure was arrived at using figures supplied by plaintiffs, and reflects injury for the years until 1978, the year Langenderfer went out of business, as well as for the years 1978-1987. This damage calculation includes damages for *both* Langenderfer and NOAP.

HN22[] An appellate court reviewing damages may adjust and/or correct the jury's award based on clear error in calculation and based on the actual claims submitted to the jury in closing argument. *H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1549-50 (8th Cir. 1989)*. We find such an adjustment appropriate for several reasons. First, as noted, the jury's **[**99]** award was for Langenderfer and NOAP, and we have concluded that NOAP is entitled to no recovery. Furthermore, we find that some of the dollar figures offered by plaintiffs and their experts simply fail to reflect economic reality, and we shall make adjustments accordingly, while continuing to give Langenderfer the benefit of all reasonable inferences.

Base damages

The first step in computing damages suffered by Langenderfer as a result of defendants' anticompetitive activities is to arrive at a reliable estimate of Langenderfer's average profits in representative years before it suffered antitrust injury. At trial, plaintiffs introduced evidence of Langenderfer's profits for the years 1966-1970, and arrived at an average annual profit of $ 81,758, including NOAP. When NOAP's profits are eliminated, the average annual profit for Langenderfer alone for 1966-1970 is $ 58,353. Plaintiffs' exhibit 150. We believe that this figure is not a reliable barometer for computing losses suffered by Langenderfer.

The "principal portion" of Langenderfer's work in the seventies was "state highway work . . . [because] by that time the bulk of the interstate system was completed." (B. MacRitchie). **[**100]** This winding up of interstate work in the early 1970s had an adverse effect on many highway paving contractors in northwest Ohio, [30] and "the majority of the [public] work was ODOT and turnpike" for Langenderfer during the relevant damages period before it terminated its asphalt paving operations in 1978. During the pertinent times, Langenderfer (or its sister corporations) remained in the limestone quarry business, generally a more profitable business. While Langenderfer was losing money on its state work in the 1970s, it continued to do private road contracting and paving work profitably even though competing with defendants. In 1971, for example, private work constituted about 75 percent of Langenderfer's volume. Although after 1971 Langenderfer did an increased volume of state work, this became increasingly unprofitable whereas the private work remained profitable.

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[30] Burton MacRitchie conceded than the amount of work available to paving contractors in northwest Ohio dropped by more than half during the early 1970s; it provided "fewer opportunities to bid." Langenderfer began losing money at the same time in 1971.

[101]** In the early 1970s, Langenderfer had a profit on the 75 percent of its paving business in the private (non-ODOT/OTC) area. Plaintiffs' exhibit 150, moreover, shows a precipitate drop in Langenderfer's "base period pretax profit" from 1968 to 1970-$ 85,047 and $ 24,812, respectively, in the last two years. This affords no legitimate basis for Langenderfer's claiming an "average" profit loss of $ 58,353 based on pretax profits during the years 1966-1970, when **[*1445]** interstate highway construction was at its peak, as Langenderfer has done here. Plaintiffs' exhibit 150.

We have indicated that there was insubstantial evidence that defendants had monopoly power in, or a dangerous probability of success at attempted monopolization in, the ODOT/OTC market through 1971 or 1972, and there is little hard evidence to justify using the 1966-1970 average annual pretax profits of $ 58,353 for Langenderfer as a basis for claiming "normal" profits to utilize as a comparison to the actual profits or losses from 1973 forward when defendants dominated the ODOT bidding. M & B's profits, as a realistic competitor, in comparison, reached its average 1966-1970 profits only once between 1980 and 1984. Defendants' **[**102]** average net profit expressed as a percentage of its consolidated asphalt and construction revenues was 4 percent between 1966 and 1970. Between 1979 and 1984, defendants' net profit percentage was only 2.3 percent. Plaintiffs' exhibit 119S. From 1978 through 1985, defendants' net income percentage, as reflected by the same exhibit, was less than 2.4 percent compared with the 1966-1970 figure of 4 percent. (Income from quarrying operations enjoyed a consistently higher ratio.)

An examination of plaintiffs' exhibit 71 reflects that for the years 1966-1970, plaintiffs successfully bid the following totals on ODOT/OTC contracts; the pretax profit and loss claimed during these years is also indicated (with losses indicated by parentheses):

YEAR	BID AMOUNT	LANGENDERFER PROFIT
1966	$ 314,755	$ 59,663
1967	349,812	67,140
1968	380,063	189,382
1969	237,168	85,047
1970	600,810	24,812

There is no correlation between the amount of profit reflected and the ODOT/OTC bidding and **[**103]** this important type of work done for these years claimed by plaintiffs to constitute the normal, non-monopoly base period. It would appear, however, that the less the amount of ODOT/OTC work done by Langenderfer, the greater was its profit. The profit realized from non-ODOT/OTC work is not relevant to Langenderfer's contention in this case that it is seeking damages from defendants because they illegally, through monopoly practices, deprived it of expected ODOT/OTC bids and work. We conclude, therefore, that a realistic allocation of ODOT/OTC profit for the base years would be at most one-half of the $ 58,353 annual profit for Langenderfer utilized by plaintiffs and their experts, or $ 29,177. This gives Langenderfer every reasonable favorable inference in a careful analysis of the proof.

Losses, 1973 through 1977

In the calculation of damages made by Langenderfer, three alternative calculations were offered by their accountant, Thomas Good, for the period until 1978 (the year Langenderfer went out of business), using the nearly $ 82,000 "base period profit" figure before taxes, which we have determined to be unreasonable, arbitrary and speculative, and thus not allowable.

[104]** Good's first method of calculating damages for Langenderfer through 1977 resulted in a claim of $ 818,085; the second $ 536,286, [31] **[**105]** and the third $ 664,261 (the so-called "yardstick method"). [32] This latter figure is not a reasonable estimation because it is based on a comparison of data not shown to be material to the relevant market. Nor can we accept, moreover, the first method utilized by Good. We do not consider it reasonable for Langenderfer to recover damages on jobs which it bid when it reasonably should have known it would realize a loss, taking into account its then known costs, direct, fixed, and variable. **[*1446]** Good's method one, in sum, included damages for losses which Langenderfer experienced on bids which were below costs. We conclude as a matter of law the taking of a loss under these circumstances is not justifiable. Langenderfer is held to the familiar principle of minimizing its damages. We, therefore, discard a recovery based on method one.

The highest basis for damages through 1977, then, would be Good's calculation of $ 536,286, utilizing Langenderfer's own calculations, and utilizing the second alternative method which excluded bids that exceeded "actual costs" (and based on the $ 81,758 annual pretax profit figure).

Because this $ 536,286 figure included NOAP and was based on an inflated annual base of $ 81,758, an adjustment is in order. The base figure arrived at above, $ 29,177, is 35.7 percent of the base figure used in plaintiffs' calculations. An appropriate award, then, for the years through 1977, is 35.7 percent of $ 536,286, or $ 191,454 (before trebling).

Losses, 1978-1987

As noted, Langenderfer sought and received a jury award including **[**106]** damages for the years 1978-1987 based on an annual profit figure that is not realistically supported by the evidence. Using the revised base figure arrived at above, $ 29,177, applied to the ten years in question, [33] Langenderfer may receive damages of $ 279,650 (before trebling) for the years 1978-1987.

Based on these figures, then, Langenderfer may receive damages in the amount of $ 191,454 for the years 1973-1977, and $ 279,650 for the years 1978-1987, for a total of $ 471,104 before trebling.

In sustaining an award for Langenderfer, we have given careful attention to defendants' market share, its comparative economic position, some evidence of anticompetitive acts, and other market factors in the asphalt paving aspect of the case as distinguished **[**107]** from claims of some other plaintiffs. The issues in the Langenderfer-Johnson dispute are fraught, however, with problems. Johnson chose to expand and to purchase assets and resources, some of which were, or might have been, available to Langenderfer, other plaintiffs, or to other parties. At a critical juncture, Langenderfer chose, as a matter of policy, to forego some expansion into limestone, quarrying, or sand sources within the relevant market. Langenderfer complains, nevertheless, because Johnson, and all defendants, made the choice to expand and to integrate operations -- asphalt paving and contracting, quarrying, sand production -- and to purchase additional strategic resources, and thus defendants became able to bid more efficiently. It is only by giving Langenderfer the full benefit of presumptions and inferences that may well have been made by the jury, to the extent not proscribed by other legal principles, that we are able to sustain an award of damages in this hotly contested controversy.

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[31] The second method, unlike the first, eliminated bids made by Langenderfer on jobs in which concededly Langenderfer did not recover its fixed costs.

[32] This third method involved calculation of Langenderfer's "revenues on ODOT and turnpike projects for the work it performed during the period 1973 through 1977" based on "an analysis of what it would have had on those bids had it been able to bid at the levels being bid in the remainder of the state." We consider this method to be unsupported by the proof and highly conjectural.

[33] For the last two years in question, 1986 and 1987, plaintiffs discounted their claimed damages by 17.03 percent annually. Plaintiffs' exhibit 150. We have applied the same discount to the newly calculated damage figure. For 1986, this comes to $ 24,931; for 1987, $ 21,303.

Entry barriers, or the lack thereof; existence of other competition, or lessening thereof; and the very fact that government bidding at low prices over a lengthy period was at the heart **[**108]** of this case, all have figured into our final resolution of this complex antitrust lawsuit.

We have also considered the unusual posture of the State of Ohio in its brief as *amicus curiae* urging affirmance of the judgment of the district court with respect to monopolization "of the highway paving market in northwest Ohio." Reference was made in the *amicus* brief that defendants had an average share of the paving market from 1972 to 1985 of 58 percent and that defendants "likewise controlled the dominant share of the materials markets." We find no citation to the record or the proof, however, in support of this latter assertion, and we have concluded to the contrary. Ohio's Brief at 8 also makes the concession, citing III Kintner, Federal ***Antitrust Law*** 357-58 (1980), that "monopoly power is more likely to be found where market shares exceed 75-80%." We are prone to agree with this observation, and **[*1447]** this market share data makes Langenderfer's case close and problematic. Ohio, in any event, takes the position that benefits of defendants' low bidding in Ohio paving contracts over many years are merely transitory and are "outweighed by the dangers of the elimination of a competitive **[**109]** market place." We note, however, that Ohio never sought to intervene in *Langenderfer I* or in these proceedings, and never has sought to enforce its own antitrust laws against defendants over the fifteen years and more of their low and successful bidding, which presumably would benefit the state and its citizenry.

Taking all these factors into account, we can affirm the lesser award to Langenderfer on the evidence submitted, viewing the evidence favorably from Langenderfer's perspective, and resolving reasonable questions of damages in Langenderfer's favor.

We have adjusted the damage award in this case in light of reversal as to several plaintiffs and in order to avoid delay in further remand and hearings concerning damages as to Langenderfer. (We discuss the basis for equitable relief in this case beyond a single award of damages, costs, and redetermination of a reasonable attorney's fee in a separate section of this opinion.)

We AFFIRM a damage award for Langenderfer, therefore, in the amount of $ 471,104 before trebling.

VIII. ATTORNEY FEES

Insofar as attorney fees have been allowed plaintiffs and assessed against defendants by the district court based on legal services **[**110]** rendered for M & B, Sader, MacRitchie, and NOAP, we must set these fees aside. *See* *Wooldridge v. Marlene Industries, 898 F.2d 1169 (6th Cir. 1990)*. Plaintiffs' attorneys may not be compensated for time spent in investigating, pursuing and litigating these claims. We must remand the case for a proper award based only on services rendered for Langenderfer with respect to a reduced judgment amount (before trebling) of $ 471,104 instead of $ 1,675,000 awarded by the jury for both Langenderfer and NOAP. We find no error in denial of the enhancement to the lodestar fee claimed by counsel for plaintiffs nor in the ten percent adjustment directed by the district court, nor in the years for which fees were found to be allowable. Neither do we find error in the setting of a lodestar rate by the district court.

IX. INTEREST

Upon a thorough consideration of the action of the district court with respect to disallowance of postjudgment interest claim by Langenderfer and NOAP on the original *Langenderfer I* award, we find no error in the district court's handling of this issue. The district court's decision not to allow interest on the judgment vacated in *Langenderfer I* is, we believe, **[**111]** clearly supported by the Supreme Court's recent decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno, __ U.S. __, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990)*. Upon remand, the district court may award postjudgment interest in a manner consistent with *Bonjorno*.

X. OTHER EQUITABLE RELIEF

Finally, we generally find no error in the terms of the injunctive relief granted by the district court. A five year term is well within the bounds of the discretion of the district judge, and we will not extend the time as requested by plaintiffs. With regard to the question of divestiture, we find no basis for invocation of that doctrine with respect to acquisitions by defendants of quarrying and limestone operations or leases, a bridge contractor, or sand pit operations. Nor do we find generally a basis for divestiture of quarries or sand pits that may have been operated by asphalt plant operators or asphalt paving competitors. As to possible divestiture of Ohio Engineering, Creager, Northwest Materials, Union Quarries (as to paving operations only) and Dailey Asphalt, we construe *California v. American Stores Co., __ U.S. __, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)* to indicate, even though it was an action brought by a state, **[**112]** not a private party such as Langenderfer, that this potential **[*1448]** § 16 Clayton Act remedy may apply contrary to our decision in *Langenderfer I*. [34] *American Stores, 110 S. Ct. at 1866* & n.28, citing 2 P. Areeda & D. Turner, ***Antitrust Law*** § 328b (1978), and *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 418-427 (1st Cir. 1985)*. *Cia. Caribe* found fault with *I.T.T. Corp. v. G.T.E. Corp., 518 F.2d 913 (9th Cir. 1975)*, a case we cited with approval in *Langenderfer I* for concluding that divestiture was not an "available remedy in a suit instituted by a private plaintiff." *729 F.2d at 1060*. *American Stores* also suggested that "equitable defenses such as laches . . . may protect consummated transactions. . . ." *110 S. Ct. at 1867*. In any event, we remand for further consideration the possibility of divestiture in the limited situations in which it may be available in this case subject to equitable defenses by defendants.

[113]** We find no error in the refusal of the district court to *restrict* competition as urged by Langenderfer -- to limit defendants from bidding "every other" (50 percent) contract invitation on ODOT, turnpike, and local government asphalt jobs in northwestern Ohio. Other competitors, not parties in this case, have emerged as bidders on these jobs during the relevant years, and some of them have grown in their particular markets. We find no error in the refusal to preclude defendants from future acquisitions of bridge contractors. We also find no error in the district court's decision not to enjoin defendants to charge the same prices for limestone and sand in the Toledo area as they charge for these materials in other areas of the relevant market.

Finally, we find no basis to disturb the district court's decision not to mandate that defendants charge themselves the same prices for sand, stone, and asphalt produced by their own facilities as they charge others for these materials. While defendants may not unfairly nor invidiously discriminate between customers in the same class or status, we find no error in the court's refusal to direct and control internal pricing policies among the several **[**114]** different entities comprising the defendants' group. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, and *Russ' Kwik Car Wash v. Marathon Petroleum Co., 772 F.2d 214 (6th Cir. 1985)*. We note that plaintiffs and other competing parties have employed their own quarries, sandpits, and asphalt plants as a basis for bidding competitively against others who may not have such resources, and there has been no proof one way or the other as to whether they have charged the same prices among subsidiary entities as they do with others. That NOAP has taken steps to reenter the business would indicate further such activity among plaintiff entities.

XI. SUMMARY

We REVERSE the judgments entered in this case for all plaintiffs except plaintiff Langenderfer. We REDUCE the amount of the judgment for Langenderfer (before trebling) to $ 471,104. We REMAND to the district court for a redetermination of reasonable attorney fees in light of our finding that the district court was not in error in its lodestar method of calculation and allowance of such fees. We find no error in denial of post-Langenderfer *I* interest.

We also REMAND to the district court **[**115]** for further consideration of possible divestiture as a part of the equitable remedy sought by Langenderfer, subject to equitable defenses presented by defendants. (We had previously determined in *Langenderfer I* that divestiture was not a proper remedy in a case brought by a private plaintiff and have reconsidered this view for the reasons indicated.)

The remands effected shall proceed in accordance with the principles herein expressed, but we entertain the hope that the parties themselves may reach agreement **[*1449]** after considering the import of our opinion in this lengthy and expensive litigation.

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[34] *Langenderfer I* held that the order of the district court which did not include divestiture, provided "no ground for assignment of error."

Cranfill v. Scott & Fetzer Co.

United States District Court for the Eastern District of Texas,

November 1, 1990, Decided

Civil Action No. S-82-0181-CA

Reporter

752 F. Supp. 732 *; 1990 U.S. Dist. LEXIS 16520 **

JERRY CRANFILL, ET AL. v. THE SCOTT & FETZER CO., ET AL.

Disposition: [1]** GRANTED.

Core Terms

consumers, antitrust, first amended complaint, summary judgment, anti trust law, parens patriae, parens, partial summary judgment, antitrust statute, distributors, Counts, defendants', memorandum, violations, summary judgment motion, amended complaint, conversion, alleges, savings

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is only appropriate where no genuine issue of material fact exists, and the moving party is entitled to summary judgment as a matter of law.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN2[] **Antitrust & Trade Law, Federal Trade Commission Act**

No implied private right of action exists under the Federal Trade Commission Act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] Public Enforcement, State Civil Actions

A parens patriae action is brought on behalf of the consumers of a state.

Governments > Legislation > Extension & Revival

Governments > Legislation > Interpretation

HN4[] Legislation, Extension & Revival

The Texas Code Construction Act applies to each code enacted by the 60th or a subsequent legislature as part of the state's continuing statutory revision program. *Tex. Gov't Code Ann. § 311.002*. The Texas Code Construction Act is properly applied to the Texas antitrust laws, triggering the savings provision of the Texas Code Construction Act. *Tex. Gov't Code Ann. § 311.031*.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN5[] Statute of Limitations, Time Limitations

The statute of limitations for fraud actions is two years. *Tex. Civ. Prac. & Rem. Code Ann. § 16.003*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Rem Actions > True In Rem Actions

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Conversion > Defenses

Governments > Legislation > Statute of Limitations > General Overview

HN6[] In Rem Actions, True In Rem Actions

The statute of limitations for a conversion action is two years. *Tex. Civ. Prac. & Rem. Code Ann. § 16.003*.

Counsel: Roger D. Sanders, Sherman, Texas.

John R. Henderson, Barry L. Springel, Jones, Day, Reavis & Pogue, Dallas, Texas.

Judges: Howell Cobb, United States District Judge.

Opinion by: COBB

Opinion

[*733] MEMORANDUM OPINION

HOWELL COBB, UNITED STATES DISTRICT JUDGE

The defendants, The Scott & Fetzer Co., and The Kirby Co. (Kirby), moved for partial summary judgment in this case on Counts I and II of the plaintiffs', Jerry and Miller Cranfill (The Cranfills) complaint. This motion for partial summary judgment (Kirby's first motion) was filed December 21, 1984. The Cranfills responded to Kirby's First Motion on December 31, 1984, filing their response to defendants' motion for partial summary judgment (The Cranfills' First Response).

[*734] On December 21, 1984, the same day Kirby's First Motion was filed, the Cranfills filed a First Amended Complaint, adding eight new counts. Kirby then filed its motion for judgment on the pleadings or partial summary judgment (Kirby's Second Motion) on January 4, 1985. In Kirby's Second Motion, Kirby sought judgment on all counts of the First Amended Complaint except Count IX. Additionally, Kirby filed a reply memorandum in support of defendants' motion for partial summary judgment (Kirby's First Memorandum).

For the next five years, **[**2]** as the case moved from judge to judge, the parties apparently did nothing. On October 5, 1989, the Cranfills filed plaintiffs' amended response to defendants' motion for judgment on the pleadings or partial summary judgment (The Cranfills' Second Response). This court reviewed all these documents, and decided a hearing was necessary.

On May 3, 1990, this court held a hearing on all pending motions. At that time, the court requested the parties file supplemental briefs on several specific issues. The Cranfills filed their supplemental brief in support of plaintiffs' amended response (The Cranfills' First Brief) on June 18, 1990, Kirby filed its supplemental memorandum in support of defendants' motion (Kirby's Second Memorandum) on June 22, 1990.

Apparently neither party was yet content with the quantity of paper filed in this case. On June 25, 1990, the Cranfills filed their response to defendant Kirby's supplemental memorandum (The Cranfills' Third Response). Kirby then filed its response to plaintiffs' supplemental brief (Kirby's First Response) on June 27, 1990. This court has now reviewed all of these materials.

Kirby's Second Motion effectively incorporates its First Motion, so **[**3]** this court will address only Kirby's Second Motion for judgment on the pleadings or for partial summary judgment. Obviously, this court has considered substantial documentation beyond the pleadings. Accordingly, this court treats Kirby's Second Motion as a motion for summary judgment under *FED. R. CIV. P. 56*.

HN1[] Summary judgment is only appropriate where no genuine issue of material fact exists, and the moving party is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Kirby seeks summary judgment on four basic categories of claims found in the first amended complaint: the private right of action under the Federal Trade Commission Act; the federal antitrust claims; the Texas State Antitrust claims; and the Texas state breach of contract, fraud, and conversion claims. The court will address each category in turn.

1. PRIVATE RIGHT OF ACTION UNDER THE FEDERAL TRADE COMMISSION ACT

The Cranfills seek to bring a private right of action under the Federal Trade Commission Act. *15 U.S.C. § 45*. The Cranfills allege in Count III of the First Amended Complaint that an implied cause of action exists under that statute.

It is well settled law **[**4]** that ***HN2***[] no such implied private right of action exists. *Fulton v. Hecht, 580 F.2d 1243 (5th Cir. 1978)*; *Alfred Dunhill, Ltd. v. Interstate Cigar Corp., 499 F.2d 232 (2d Cir. 1974)*; *Holloway v. Bristol-Myers Corp., 158 U.S. App. D.C. 207, 485 F.2d 986 (D.C. Cir. 1973)*; *Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973)*; *Atlanta Brick Co. v. O'Neal, 44 F. Supp. 39 (E.D. Tex. 1942)*. No material question of fact could exist on this claim. Kirby is entitled to summary judgment as a matter of law.

Accordingly, Kirby's motion for summary judgment is GRANTED as to Count III of the First Amended Complaint. Judgment will be entered by order of this same date.

2. FEDERAL ANTITRUST CLAIMS

The Cranfills bring Counts I, II, IV, V, and VI of the First Amended Complaint under the federal antitrust laws, specifically *15 U.S.C. § 4*. Kirby responds that the entry of final judgment in a *parens patriae* action brought against Kirby by the Attorney General of the State of Texas bars these claims. *The State of Texas as parens patriae v. The Scott & Fetzer Co.,* ***[*735]*** *et al*, Civil Action No. A-80-CA-415 (W.D. Tex. May 3, 1984) (*parens* action).

Judge Bunton's final judgment in the *parens* action contains **[**5]** an injunction prohibiting "plaintiff and those persons on whose behalf this action is brought" from bringing suit against these defendants based on "any alleged violation of the federal antitrust laws. . . ." *Id*. Kirby claims this injunctive provision applies to the Cranfills. Although there is no question that this is a suit based on federal antitrust laws, and that Kirby was a defendant in the *parens* action, Kirby completely misreads "those persons on whose behalf this [*parens*] action is brought. . . ."

States' attorneys general were authorized to bring *parens patriae* actions by the Hart-Scott-Rodino Antitrust Improvements Act of 1976. *15 U.S.C. § 15c*. The stated purpose of the Hart-Scott-Rodino amendment was to "provide the consumer an advocate in the enforcement process -- his state attorney general." H. R. Rep. No. 94-499, 94th Cong. 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 2572, 2574 (House Report). Such an advocate was necessary because "the economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services." *Id. at 2573*. The House Report makes it very clear that **[**6]** "those persons on whose behalf [a *parens* action] is brought . . ." are the consumers of the state, *as consumers*.

Other courts, when applying various elements of the Hart-Scott-Rodino amendment and the federal antitrust laws, have similarly interpreted the purpose of a *parens patriae* action. Judge Young of Maryland said, in interpreting a venue provision of the Hart-Scott-Rodino amendment, "This interpretation is in keeping with the purposes of the *parens patriae* amendments, which was to make it easier for consumers to recover damages for violations of the antitrust laws." *In re Mid-Atlantic Toyota Antitrust Litigation, 525 F. Supp. 1265, 1279 (D. Md. 1981)*, *aff'd sub nom. Commonwealth of Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc., 704 F.2d 125 (4th Cir. 1983)*.

Likewise, Judge Kaufman of the Second Circuit wrote, when reviewing a motion for disclosure of grand jury proceedings in a *parens* action, "Congress enacted the *parens patriae* provisions . . . to provide a meaningful remedy for small consumers injured by antitrust violations." *In Re: Grand Jury Investigation of Cuisinarts, Inc. 665 F.2d 24 (2d Cir. 1981)*, *cert. denied*, *460 U.S. 1068,* ***[**7]*** *75 L. Ed. 2d 945, 103 S. Ct. 1520 (1983)*.

Indeed, the Fifth Circuit has articulated the same purpose for *parens* actions. "As the legislative history makes apparent, the [Hart-Scott-Rodino] Act was aimed primarily at enlarging the potential for consumer recovery for antitrust violations. . . ." *State of Texas, as parens patriae, v. The Scott & Fetzer Co., et al, 709 F.2d 1024 (5th Cir. 1983)*. The same defendants were before the Fifth Circuit in *Scott & Fetzer* as are before this court now. In the seven years since *Scott & Fetzer* was decided, however, these defendants apparently have not learned anything. So once more, to ensure Kirby understands, ***HN3***[] a *parens patriae* action is brought on behalf of the *consumers* of a state.

This court finds the Cranfills were not consumers of Kirby's products. The Cranfills' allegations stem entirely from their dealings with Kirby as distributors of Kirby products. The Cranfills are not "those persons on whose behalf [the *parens* action] was brought." They are not enjoined from proceeding under the federal antitrust laws.

Accordingly, Kirby's motion for summary judgment is DENIED as to Counts I, II, IV, V, and VI of the First Amended Complaint. A pre-trial **[**8]** scheduling order will be issued with respect to those counts.

3. THE TEXAS STATE ANTITRUST CLAIMS

The Cranfills have alleged violations of both the Texas Antitrust statute existing prior to August 29, 1983, and the Texas antitrust statute existing subsequent to August 29, 1983. The court will address the application of each of these statutes.

[*736] A. THE TEXAS ANTITRUST STATUTE PRIOR TO AUGUST 29, 1983

Prior to August 29, 1983, Texas ***Antitrust law*** was controlled by "Trusts-Conspiracies Against Trade." TEX. REV. CIV. STAT. ANN. §§ 7426, *et seq*. (Vernon 1960) (The Old Texas Statute). Although it is difficult to determine from the face of the First Amended Complaint, apparently Count VII alleges a violation of The Old Texas Statute.

The Old Texas Statute was repealed effective August 29, 1983, with the implementation of the Texas Free Enterprise and Anti-Trust Act of 1983. *TEX. BUS. & COMM. CODE §§ 15.01 et seq*. (the New Texas Statute). Kirby argues that because the New Texas Statute contains no savings clause, Count VII fails as a matter of law.

The New Texas Statute does not, in fact, contain a savings clause. The Cranfills argue that no savings clause is needed; the **[**9]** action is preserved by the Texas Code Construction Act. *TEX. GOV'T CODE § 311.001, et seq.* This court agrees with the Cranfills.

HN4[] The Texas Code Construction Act applies to "each code enacted by the 60th or a subsequent legislature as part of the state's continuing statutory revision program. . . ." *TEX. GOV'T CODE § 311.002*. The new Texas Antitrust Code was enacted by the 68th Legislature. It effectively replaced the old Texas Antitrust statute. This court finds the Texas Code Construction Act is properly applied to the Texas antitrust laws, triggering the savings provision of the Texas Code Construction Act. *TEX. GOV'T CODE § 311.031*.

Both sides in this case cite *Knight v. International Harvester Credit Corporation, 627 S.W.2d 382 (Tex. 1982)*. The court finds this case inapposite, since the statute in question there, the Consumer Credit and Consumer Protection Act, was repealed without replacement. No Texas Code Section was enacted to cover the areas previously covered by the Consumer Credit and Consumer Protection Act. In contrast, the repealed Texas antitrust statute was replaced by a code provision specifically covering the areas previously covered by the statute.

Both parties **[**10]** have apparently inferred that Count VII of the amended complaint is brought under The Old Texas Statute, but neither has addressed the merits of the claim in the assorted documents filed. Because the savings provision of the Texas Code Construction Act control, the action survives. Any party who wishes to seek summary judgment on the merits of this claim may do so. Until that time, Kirby's motion for summary judgment on Count VII is DENIED. A pre-trial Scheduling Order will be issued on this count.

B. THE TEXAS ANTITRUST STATUTE SUBSEQUENT TO AUGUST 29, 1983

Count VIII of the Amended Complaint alleges violations of the new Texas Antitrust Statute. *TEX. BUS. & COMM. CODE § 15.01, et seq*. The Cranfills incorporate in Count VIII all the facts alleged in Count I, and charge that the acts complained of which occurred after August 29, 1983, are violations of the New Texas Statute.

It is clear that the effective date of the New Texas Statute is August 29, 1983. The only question is whether the Cranfills have actually alleged any acts occurring after that date. In opposition to Kirby's motion for summary judgment, the Cranfills argue, "the inescapable implication is that plaintiffs are **[**11]** alleging that defendants' wrongful conduct occurred past August 29, 1983, by virtue of defendants' failure to make proper distribution of funds under the various bonus plans initiated by defendant." The Cranfills' Second Response, p. 5.

The Cranfills agree the bonus plans mentioned were available to distributors of Kirby products. First Amended Complaint, Count I. The Cranfills' distributorship was terminated on December 13, 1979. After that date, they were no longer distributors of Kirby products. Kirby's alleged action of depriving them of earned bonus amounts had to occur while the Cranfills were distributors. Accordingly, none of the actions **[*737]** complained of could have occurred after December 13, 1979.

Summary judgment for Kirby is GRANTED as to Count VIII of the amended complaint. Judgment will be entered by order of this date.

4. THE TEXAS STATE BREACH OF CONTRACT, FRAUD AND CONVERSION CLAIMS

A. BREACH OF CONTRACT

Count X of the Amended Complaint alleges Kirby breached its contract with the Cranfills. Kirby argues this count is barred by the four-year statute of limitations on breach of contract actions. *TEX. CIV. PRAC. & REM. CODE § 16.004*.

The Cranfills entered their **[**12]** contract with Kirby in 1962. The alleged breach is Kirby's contracting for additional distributors in territory allegedly promised to the Cranfills. In Count V of the amended complaint, the Cranfills allege these breaches began in 1962. This suit was filed December 8, 1982, twenty years after the cause of action accrued.

This court finds the breach of contract action was not filed timely. Summary judgment for Kirby is GRANTED as to Count X. Judgment will be entered by order of this date.

B. FRAUD

Count XI alleges Kirby defrauded the Cranfills by allowing other distributors to make sales in what was allegedly the Cranfills' territory. Again, these allegations are based on acts beginning in 1962.

HN5[] The statute of limitations for fraud actions is two years. *TEX. CIV. PRAC. & REM. CODE § 16.003*. Again, this suit was filed in 1982, twenty years after the cause of action accrued. It is not timely.

Summary judgment for Kirby is GRANTED as to Count XI. Judgment will be entered by order of this date.

C. CONVERSION

Count XII alleges Kirby converted consideration given to Kirby by the Cranfills in exchange for the exclusive territory the Cranfills held. Kirby's contracting with other distributors **[**13]** in that territory, as discussed in Counts X and XI, led to that conversion. The money was paid to Kirby in 1962. It was allegedly converted in 1962.

HN6[] The statute of limitations for a conversion action is two years. *TEX. CIV. PRAC. & REM. CODE, § 16.003*.

This action was filed in 1982, twenty years after it accrued. It is not timely.

Summary judgment for Kirby is GRANTED as to Count XII. Judgment will be entered by order of this date.

SIGNED this 1st day of November, 1990.
