Date and Time: Thursday, December 14, 2023 11:53:00 AM CST

Job Number: 212633656

Documents (30)

1. Paterson Parchment Paper Co. v. Story Parchment Co., 37 F.2d 537

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

2. Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

3. Convertible Top Replacement Co. v. Aro Mfg. Co., 312 F.2d 52

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

4. International Shoe Machine Corp. v. United Shoe Machinery Corp., 315 F.2d 449

   Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

5. Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 808

   Client/Matter: -None-

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6. *Quinn v. Mobil Oil Co., 375 F.2d 273*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

7. *Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61*

Client/Matter: -None-

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8. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25*

Client/Matter: -None-

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9. *Dickstein v. Du Pont, 443 F.2d 783*

Client/Matter: -None-

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10. *Carroll v. Protection Maritime Ins. Co., 512 F.2d 4*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

11. *Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

12. *Engine Specialties, Inc. v. Bombardier, Ltd., 615 F.2d 575*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

13. *A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

14. *Allied Int'l v. International Longshoremen's Ass'n, 640 F.2d 1368*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

15. *B. C. Recreational Indus. v. First Nat'l Bank, 639 F.2d 828*

Client/Matter: -None-

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16. *Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36*

Client/Matter: -None-

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17. *Auburn News Co. v. Providence Journal Co., 659 F.2d 273*

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

18. *Gilbuilt Homes, Inc. v. Continental Homes of New England, etc., 667 F.2d 209*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > 1st Circuit Court of Appeals

19. *9 to 5 Organization for Women Office Workers v. Board of Governors of Federal Reserve System, 721 F.2d 1*

Client/Matter: -None-

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20. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 723 F.2d 155*

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21. [Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227]

Client/Matter: -None-

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22. [M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973]

Client/Matter: -None-

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23. [Kartell v. Blue Shield, 749 F.2d 922]

Client/Matter: -None-

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24. [Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404]

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25. [CVD, Inc. v. Raytheon Co., 769 F.2d 842]

Client/Matter: -None-

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26. [Turner v. Johnson & Johnson, 809 F.2d 90]

Client/Matter: -None-

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27. *Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9*

Client/Matter: -None-

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28. *Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478*

Client/Matter: -None-

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29. *Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21*

Client/Matter: -None-

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30. *Grappone, Inc. v. Subaru of New England, 858 F.2d 792*

Client/Matter: -None-

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Paterson Parchment Paper Co. v. Story Parchment Co.

Circuit Court of Appeals, First Circuit

January 23, 1930

No. 2372

Reporter

37 F.2d 537 *; 1930 U.S. App. LEXIS 2592 **

PATERSON PARCHMENT PAPER CO. et al. v. STORY PARCHMENT CO.

Prior History: **[**1]** Appeal from the District Court of the United States for the District of Massachusetts; Elisha H. Brewster, Judge.

Core Terms

prices, damages, plant, conspiracy, old company, unlawful act, competitor, fair and reasonable, profits, unlawful combination, Parchment, parchment paper, speculation, diminished, rates, loss of profits, Anti-Trust, conjecture, majority opinion, price-cutting, defendants', conditions, estimate, monopoly, Machine, obliged, prevail, cases

LexisNexis® Headnotes

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

Torts > Remedies > Damages > General Overview

HN1[] **Private Actions, Remedies**

Loss of profits, to form the basis of damages, must be made reasonably certain by proof, or be inferable from proven facts that can form the basis for a rational estimate of their amount and not depend upon uncertainties and mere speculation or conjecture.

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

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

Torts > Remedies > Damages > General Overview

HN2[] **Private Actions, Remedies**

While, if a wrong has been done, the law permits an award of damages, though not susceptible of accurate measurement, yet the rule still remains, and unimpaired, that they cannot be based on mere speculation. They must be made reasonably certain.

Opinion by: WILSON

Opinion

[*538] Before BINGHAM, ANDERSON, and WILSON, Circuit Judges.

WILSON, Circuit Judge. An action under section 7 of the Sherman Anti-Trust Act and *section 4* of the Clayton Act (*15 USCA § 15*) to recover damages resulting from an alleged violation by the defendants of *section 2* of the Sherman Anti-Trust Act (*15 USCA § 2*), prohibiting the monopolizing of, or a combination or conspiracy to monopolize, any part of the trade or commerce between the several states.

At the close of the case, the defendants' counsel asked that the court instruct the jury to bring in a verdict for the defendants upon several grounds, among which are the following:

"The evidence is insufficient to establish that the plaintiff has suffered damage by reason of the acts of the defendants and West Carrollton Parchment Company in pursuance of the combination and conspiracy."

"The evidence is insufficient to establish that the plaintiff has lost profits because of any acts of the defendants and West Carrollton Parchment Company in combination and conspiracy."

"The plaintiff **[**2]** is not entitled to a verdict unless it has established that it has been damaged by the combination, contract or conspiracy."

"The plaintiff has not established that the reductions in prices by the defendants were any more injurious to the plaintiff by reason of any contract, combination or conspiracy than they would have been without such."

"The evidence does not warrant a finding that the plaintiff would have sold any more goods under other circumstances than it did sell."

"The evidence does not warrant a finding that the plaintiff would have sold at higher prices under any other circumstances than those at which it did sell."

"The plaintiff is not entitled to a verdict unless it has been shown that damages in some amounts susceptible of expression in figures, resulted from the defendants' acts and these damages must be proved by facts from which their existence is logically and legally inferable and they cannot be supplied by conjecture."

The record disclosed that prior to 1927 the two defendants, the Paterson Parchment Paper Company of Passaic, N.J., and the Kalamazoo Vegetable Parchment Company of Kalamazoo, Mich., both of which companies transact business in Massachusetts, **[**3]** and are hereinafter referred to as the defendants, together with the West Carrollton Parchment Company of West Carrollton, Ohio, which, for lack of jurisdiction, is not joined in this action, and which will hereinafter be referred to as the Carrollton Company, were the only producers in this country of what is known to the trade as parchment paper, which is used as a protective wrapper for meats, butter, and other foodstuffs.

It also appears from the record that these three companies for many years prior to 1927 maintained an association for the discussion of questions affecting their mutual interests, holding meetings every two months, at which representatives of such company with their counsel attended and discussed the condition of the trade.

There is no question but that, prior to the organization of the plaintiff company, the three companies above named had maintained a uniform price for their product, and, while there was some parchment paper imported, enjoyed a practical monopoly of the trade in this country.

All this the plaintiff or those who organized it knew when it entered the field. It does not appear that the condition of the trade and the demand for the product held **[**4]** out any special inducement to a competitor by reason of a prospective increase in the demand, at least over the capacity of the three old companies to supply.

The only hope the plaintiff could have had of acquiring any considerable share of the trade was by either producing a superior quality of paper, by more efficient salesmanship, or by reducing prices over those charged by the three companies already in the field.

While the plaintiff claims it did produce a superior grade of paper, and at a less **[*539]** cost, through improved machinery, its first effort to obtain trade was to deal direct with the large packers and jobbers and offer a 5 per cent. discount on the prices then offered by the defendants and the Carrollton Company. Such a policy immediately resulted in a price-cutting war between the three old companies and the plaintiff. The defendants contend that to retain their trade they were forced to meet the prices of the plaintiff; that they had a right to do this to protect themselves; that they did not so act through a mutual understanding or agreement; and that a reduction of prices does not result in a restraint of trade, but, on the contrary, encourages it.

The **[**5]** plaintiff concedes, as we understand it, that, if either or both of the defendants, independent of each other, had reduced their prices in order to retain their own trade as against the new competitor, it would have had no ground for action.

What it complains of is that the three old companies, by concerted action and mutual understanding, not only met its prices, but in some instances reduced their prices below those of the plaintiff, in order to prevent the plaintiff from acquiring any part of the trade in parchment paper and for the purpose of maintaining the monopoly which they already had, and which, if not an absolute monopoly, was sufficiently complete, so that, if they conspired together to maintain it, it constituted a violation of *section 2* of the Sherman Anti-Trust Act (*15 USCA § 2*). *Buckeye Powder Co. v. E.I. Dupont de Nemours Powder Co. (C.C.A.) 223 F. 881, 888, 889*, affirmed in *248 U.S. 55, 64, 39 S. Ct. 38, 63 L. Ed. 123*; *United States v. E.C. Knight Co., 156 U.S. 16, 15 S. Ct. 249, 39 L. Ed. 325*; *Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 221, 237, 20 S. Ct. 96, 44 L. Ed. 136*; *Standard Oil Co. v. United States, 221 U.S. 1, 61, 31 S. Ct. 502, 55 L. Ed.* ***[**6]*** *619, 34 L.R.A. (N.S.) 834*, Ann. Cas. 1912D, 734.

In other words, the plaintiff does not ground its action on a conspiracy to restrain trade under section 1 of the Sherman AntiTrust Act (*15 USCA § 1*), though the indirect effect of a monopoly is to restrain trade, but on a conspiracy to maintain a monopoly under *section 2* (*15 USCA § 2*).

On this issue alone, we think there was no error in the refusal of the court to instruct the jury to bring in a verdict for the defendants. Without expressing any opinion as to the soundness of the jury's conclusion, there was sufficient evidence to go to the jury on the issue of a concerted action by the three old companies to fix their prices so as to prevent the plaintiff from acquiring any part of their trade. *Patterson v. United States (C.C.A.) 222 F. 599, 648, 649*; *Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249, 38 S. Ct. 65, 62 L. Ed. 260*, L.R.A. 1918C, 497, Ann. Cas. 1918B, 461.

But, assuming that the jury was warranted in finding for the plaintiff on this issue, it does not necessarily follow that the plaintiff suffered injury. It must be proven. We think the weakness of the plaintiff's case, and wherein it failed on this branch **[**7]** of the case to establish the burden the law imposed upon it, is in a lack of proof that, by reason of the alleged unlawful acts of the defendants, it has suffered damage through what is termed "loss of profits," which can be measured and expressed in figures that are not based on speculation and conjecture, or that the damages resulting from the alleged depreciation of its plant was in any measurable degree due to any unlawful acts of the defendants. *Keogh v. C. & N.W. Ry. Co., 260 U.S. 156, 165, 43 S. Ct. 47, 67 L. Ed. 183*; *Jack v. Armour Co. (C.C.A.) 291 F. 741, 745*. Upon the entire evidence, the jury should have been instructed to bring in a verdict for the defendants.

The use of the phrase "loss of profits" as the measure of one element of the plaintiff's damage is not a happy one. The plaintiff's declaration alleges, and its counsel in their brief contend, that the measure of damage on this phase of the case is not the loss of actual profits in its business, which it would have made if the defendants had not unlawfully combined to reduce prices, but the difference between the prices it was compelled to sell its products through the alleged unlawful combination, and the prices **[**8]** current in November, 1927, if fair and reasonable. It contends, as the plaintiff did in the case of *Straus et al. v. Victor Talking Machine Co. (C.C.A.) 297 F. 791*, that it is not obliged to sue for loss of profits in its business which are not always susceptible of proof. ***HN1***[] Loss of profits, to form the basis of damages, must be made reasonably certain by proof, or be inferable from proven facts that can form the basis for a rational estimate of their amount and not depend upon uncertainties and mere speculation or conjecture. *Central Coal & Coke Co. v. Hartman (C.C.A.) 111 F. 96*; *McCornick v. U.S. Mining Co. (C.C.A.) 185 F. 748, 751*; *American Sea Green Slate Co. v. O'Halloran (C.C.A.) 229 F. 77, 80*; *Keogh v.* ***[*540]*** *C. & N.W. Ry. Co., supra.* Obviously in the case at bar there could be no evidence on which to base an estimate of any actual loss of profits during the period the plaintiff operated, based on previous experience, since the plaintiff never operated under what it claims are fair and reasonable prices for a sufficient length of time to furnish a standard, as the plaintiff had in *Eastman Co. v. Southern Photo Co., 273 U.S. 359, 378, 379, 47 S. Ct. 400, 71 L. Ed. 684*, **[**9]** and the jury were so instructed.

The plaintiff contends, however, that it is entitled, under the rule laid down in *Straus et al. v. Victor Talking Machine Co., supra*, and *Thomsen v. Cayser, 243 U.S. 66, 88, 37 S. Ct. 353, 61 L. Ed. 597*, Ann. Cas. 1917D, 322, to recover as damages, and regardless of whether it could prove any actual loss of profits in its business, the difference between the prices at which it was obliged to sell its products by reason of the alleged unlawful combination of the three old companies, and the prices current in November, 1927; and that the prices then current were fair and reasonable, at least, that it does not lie in the mouth of the defendants to contend otherwise, they having established them.

The error in the plaintiff's contention is the assumption that, but for the alleged unlawful conspiracy of the defendants with the Carrollton Company, the prices current in November, 1927, would have continued to prevail, assuming them to be fair and reasonable. The plaintiff by shifting its claim for damages from a loss of profits to the difference between the prices at which it would have sold its goods if no unlawful combination had existed, and the price **[**10]** at which it was compelled to sell its goods, cannot escape the rule that damages cannot be based on conjecture. ***HN2***[] While, if a wrong has been done, the law permits an award of damages, though not susceptible of accurate measurement, yet the rule still remains, and unimpaired, that they cannot be based on mere speculation. They must be made reasonably certain.

Individuals may in competition lawfully reduce prices below a fair and reasonable level. While the elimination of an unlawful combination may in a broad market reduce excessive prices to a reasonable level, it may not restore subnormal prices to a reasonable level, or keep them there. The artificial pressure removed, free competition between individuals to gain trade may always reduce or keep prices below what is fair and reasonable. The plaintiff had no vested interest in the prices of November, 1927, or any right to complain if lawful competition reduced them below a fair and reasonable level.

There is, we think, this difference in applying the rule invoked by the plaintiff in the Victor Talking Machine Case and in the case at bar. In that case, the Victor Company, by agreement with others, designated as distributors, refused **[**11]** to supply machines to any dealer unless he first agreed to enter into a certain license agreement with the Victor Company, which the plaintiffs refused to do. As a result they were obliged to go out and pay excessive prices for Victor goods to supply the demand of their trade. Here the seller complains of prices unlawfully reduced. The jury in the Victor Talking Machine Case found that the plaintiffs otherwise could have bought in the open market the goods they sold during the period covered by the writ at the prices at which the Victor Company distributors sold to other dealers, and therefore the court held its damages were reasonably certain of computation. In the case at bar, the question of at what prices the plaintiff's product would have been sold, if there had been open competition, no unlawful combination, was not presented to the jury; on the contrary, the jury must have understood from the instructions given that, if they found that the November prices were fair and reasonable and would have been maintained but for the alleged unlawful acts of the defendants, the measure of damages would be $20,000, the difference between the November prices and the prices at which the **[**12]** goods were sold. In this respect we think the charge was defective and must have misled the jury as to the measure of damages on this phase of the case.

Obviously, without an agreement between the three old companies, there is no certainty that the prices of parchment paper in November, 1927, would have remained stable under the conditions the plaintiff would have had to meet. With only three competitors besides the plaintiff, and each free to fix any price it saw fit to retain its trade, and with a limited market, there is no ground on which it can be reasonably inferred that the plaintiff, during the few months it was able to continue in business, would have sold any definite amount of paper, or, if it did, that, following the initial concession by the plaintiff of 5 per cent. to the large buyers of parchment paper, the prices of November, or any prices above those actually received, **[*541]** would have prevailed. On the contrary, it is, we think, a moral certainty that, according to nature's first law, each of the three old companies, if no combination had existed, in order to hold their trade, would at least have met every reduction in price made by the plaintiff to gain **[**13]** trade, if they did not openly reduce their prices below the prices fixed by the plaintiff, as independently they lawfully could do. That the defendants would, independently of each other, act upon this rule of self-preservation, is not mere conjecture, but a rule of action of which the courts often take cognizance.

Juries may, it is true, upon sufficient evidence, determine what fair and reasonable prices will be in open competition in a broad market; but the plaintiff, even if there had been no unlawful combination by the defendants, did not have a broad, open market in which to dispose of its product. Without any such unlawful interference, it would have been compelled to dispose of its product in the same restricted market which the old companies were already fully supplying, and to meet any prices the old companies individually saw fit to make. Nothing could be more certain than that each of the old companies would in any event use every lawful means to retain their own trade as against the new competitor; and nothing more conjectural than the result.

That, under such conditions, the November prices would have been maintained, and the plaintiff would have sold the same amount **[**14]** of its product at those prices, or that it would have sold any more goods than it did sell or at any higher prices, is pure speculation, with all the reasonable probabilities to the contrary.

As to the element of damages from the depreciation of its plant, it appears from the record that, when the plaintiff company organized, it had a paid-in capital of $204,000, and later obtained a credit at the local bank of $75,000, or, in other words, it had in available cash $279,000 to establish a business in a field which it knew was already pre-empted by well-established companies.

Its plant alone before its product could be put on the market cost $235,000, or approximately $30,000 more than its paid-in capital. It appears from the testimony of its treasurer that on June 1, 1928, two months before it was obliged to close down, it had not paid for its land, plant, and equipment by approximately $25,000; and two months later, after it had been in actual operation less than eight months, five of which it was running at about half capacity, it owed the local bank $70,000 and the company which supplied it with paper $65,000. Unless its stock on hand of about $8,000 and its bills receivable **[**15]** largely exceeded its bills payable, other than those above mentioned, which is not a reasonable inference from the testimony, its assets in eight months of operation had shrunk more than $100,000.

It is obvious that the plaintiff did not have sufficient capital to meet the situation it faced, even if there had been no conspiring together by its competitors and there had been open competition; and that its failure was inevitable either from lack of capital or inefficient management or both. Even $20,000 more in receipts, which is the plaintiff's own estimate of the maximum amount it would have received if the November prices had prevailed over what it did receive, could not have enabled it to meet its obligations and prevent the attachment and closing of its plant by its creditors; but the plaintiff has not shown that it actually suffered any loss of receipts from the sale of its goods, by reason of any unlawful interference by the defendants.

The plaintiff has not, therefore, sustained the burden of proving that it has suffered any measurable damage from the reduced prices at which it was compelled to sell its product by reason of the alleged unlawful conspiracy of the defendants, **[**16]** or that the subsequent depreciation of its plant was due in any measureable degree to any violation of *section 2* of the Sherman Anti-Trust Act (*15 USCA § 2*) by the defendants. *Buckeye Powder Co. v. E.I. Dupont de Nemours Powder Co., supra*; *Noyes v. Parsons (C.C.A.) 245 F. 689, 696*; *Locker v. American Tobacco Co. (C.C.A.) 218 F. 447*; *Jack v. Armour Co. (C.C.A.) 291 F. 741, 745*.

Upon the first assignment of error, viz. that the judge below refused to direct a verdict for the defendants, the judgment of the District Court is vacated, and judgment is entered for the defendants, with costs in both courts.

The judgment of the District Court is vacated, and the case is remanded to that court, with directions to enter judgment for the defendants, with costs in both courts.

Dissent by: ANDERSON

Dissent

ANDERSON, Circuit Judge (dissenting). Clearly the majority opinion is correct in its holding that "there was sufficient evidence to go to the jury on the issue of a concerted action by the three old companies to fix their **[*542]** prices so as to prevent the plaintiff from acquiring any part of their trade."

I think it equally clear that the opinion is wrong in holding the question of damages **[**17]** not also for the jury.

The evidence warranted the jury in finding that Levin, the chief factor in the plaintiff's enterprise, was experienced in that line of business; that he reasonably believed that he had equipped the plaintiff's plant with a more efficient parchmentizing machine, enabling it to produce the product more efficiently and cheaply; that the three old concerns had, since 1914, been relying mainly on their association and agreement to fix prices, and therefore had become unprogressive in equipping and operating their plants. Consequently, the evidence warranted the jury in finding that the plaintiff had reasonable expectations of successfully competing against the three old concerns by its new and more efficient plant and by better methods, both of producing and of marketing the parchmentized paper. The evidence also showed clearly that these concerns, as early as November, 1927, combined, by a price-cutting campaign, to kill the new competitor, and in seven or eight months succeeded. In a word, we have here, indisputably, a combination to kill a competitor followed by the speedy death of that competitor.

The majority opinion holds that this death was due to natural **[**18]** causes, and not to the illegal combination for price-cutting, carried on from November, 1927, through the succeeding winter and spring. This seems to me to be an utterly untenable position.

The trial court's instructions on damages were plain and correct, and disclose pretty fully the situation as to damages, as follows:

"The second proposition, or the second question in issue, is whether the acts of the defendants resulted in injury to the plaintiff. It is necessary, in a suit of this kind, for a party to go farther than the Government would have to go if it were proceeding under the ***antitrust law***. The Government would prevail by showing only an unlawful combination; but an individual, when he seeks to invoke the statute in question, has to add one step more -- he has to satisfy the jury that the losses which the plaintiff sustained were the direct result of the unlawful acts of the defendants. I take it that the unlawful acts, if they are found to be unlawful at all, were the acts of reducing prices. Nothing else seems to have been done that could work an injury, or that could possibly work an injury to the plaintiff. So that you have to decide whether the plight in which **[**19]** the plaintiff company found itself at the time that it brought its suit was primarily and directly attributable to the price reduction. If you find that it was attributable to want of capital, to lack of experience, to inefficiency, or to the adoption of an unwise policy, and especially if you find that it adopted a policy of underselling old-established companies, why, then the defendants cannot be held responsible for that loss, because the loss cannot be attributed to the unlawful acts of the defendants.

"There is evidence here, of course, as to the situation in which the parchment paper industry was at the time when the plaintiff organized its corporation and undertook to enter into the trade. In a somewhat similar case to this, the court had occasion to charge a jury, and its charge has been held, I think, by the highest court in the land to have been proper, and I am going to paraphrase one paragraph of it, because I think that it is applicable to our situation."

"As to the profits on sales actually made, which Mr. Whipple has pointed out to you appear to have been around $20,000, assuming that it could have sold at the prices prevailing when the plaintiff entered the trade, **[**20]** namely, a basic price of 16 cents a pound for a 40-lb. paper, if you are satisfied that this price would have been maintained, would not have changed by reason of any economic condition, if it would have been maintained except for the unlawful acts of the defendants, if you find they did commit unlawful acts, and you satisfy yourselves from the evidence before you that the plaintiff would have sold $229,000 -- would have sold the same quantity of parchment -- I will not give the figures -- at the price of 16 cents, as a basic price of 16 cents a pound, during that period, or during the period, and that the plaintiff was compelled by the unlawful acts of the defendants to reduce its prices -- if all of those conditions are found by you to have existed, then I think that you may consider as an element of damage the difference between the amount that the plaintiff actually received for the goods and what it would have received if the defendants had not indulged in the unlawful conspiracy to keep the plaintiff out of the field.

"The statute says that the plaintiff may recover for injury to business or property. What have you before you which will enable you to determine to what extent **[**21]** the value of the plaintiff's property has been diminished **[*543]** by the unlawful acts of the defendants? Well, we have the cost of the plant. The plant is still there. The only evidence as to its present value is that of Mr. Goldmann, who is not an expert and who was an interested witness. We have no evidence from those who ought to know what the present value of that plant is, other than that of Mr. Goldmann. Now, I am not going to say to you that the difference between Mr. Goldmann's valuation and the cost is an accurate index of the loss or the extent to which the value of the property has been diminished, but I am going to let you gentlemen decide whether it was diminished at all, and, if so, to what extent, if you are able to do it. If you are not able, on the evidence, to determine to what extent the value of the property was diminished, then the plaintiff has not sustained its full burden, because it is up to the plaintiff to satisfy you what the extent of that diminution was. If you think that Mr. Goldmann's testimony is to be relied upon in that respect -- or I will not say that he gave any testimony that he did not himself believe in -- but I mean to say, if you **[**22]** believe that that is to be taken as a good basis for your conclusion as to the extent of the diminution, why, the difference between the cost and the present value would be $160,000. Of these two elements, the loss of profits on the goods sold, if you find that all the conditions existed that I have enumerated, and that the plaintiff can recover, that loss would be $20,000, and whatever you may find, if anything, will fairly and reasonably represent the extent to which the value of the property is diminished. I think that it must be so that there has been a diminution; I think that it must be said that the property has diminished. It is worth less with the company out of business than it would be with the company in business. If upon the evidence you are able to say how much, that, of course, would be an element of damage. It is quite likely that the business, even though it had gone only six months or more, might have a potential value, but I have to say to you that there is no evidence here which affords a basis upon which you can determine what that potential value is. For that reason I think that the only thing that you can consider in estimating the damages to be awarded **[**23]** the plaintiff in this suit is the loss in profits on the goods actually sold, and the loss sustained in the damage to its property."

This shows that only two items of damage were claimed. The first, an item of $20,000, inaccurately but conveniently described as "profits," was in fact merely the difference between the price at which the plaintiff would have sold and the actual price received as the result of the price-cutting campaign put into operation by the defendants in November, 1927. The court on this item instructed the jury (not quoted above) that, in order to allow this item, "they must also find that that price of sixteen cents was a reasonable price." This presented a plain question of fact for the jury. It was for them to say, in the light of all the fully disclosed business conditions, what amount the plaintiff would have been able to sell, and whether it would have gotten this larger price, aggregating $20,000, except for the defendants' unlawful combination for price-cutting.

These damages were no more speculative in their nature than they are in every case of land taking, copyright, trade-mark, many patent cases, unfair competition, valuation for rate-making purposes, **[**24]** and personal injury. How is the question of whether a rate is confiscatory to be determined except by extimating future as well as past profits? What is a negligently lost arm or a leg worth, considering the uncertainty of human life, how long the victim might have used that useful member if he had not lost it by wrongful act? The ruling now made would make the assessment of damages impossible in a great majority of the cases in which only damages are a remedy for a wrong done.

But, apart from the minor item of diminished revenue (miscalled profits) in the record, the evidence showed beyond dispute that a plant costing about $235,000 had been put out of business; that of this $235,000 approximately $90,000 had been expended in equipping the plant with this special parchmentizing machine. There is absolutely no answer to the court's observation that there must have been damage when, as the result of the defendants' illegal acts, the plaintiff was compelled to close this plant down. The treasurer testified that he estimated the market value of the plant thus put out of business to be $75,000. The jury's verdict of only $65,000 indicated that it probably disregarded the $20,000 **[**25]** item, and cut very substantially the loss due to the closing down of this plant. But it is matter of common knowledge that the abandonment of such a plant thus equipped would do very substantial damage; the amount of that damage was plainly for the jury.

The statements in the majority opinion that the plaintiff went out of business for lack of sufficient capital, "and that its failure was inevitable, either from lack of capital or **[*544]** inefficient management or both," amount to usurping the function of the jury. Indeed, the opinion on damages does not read at all like the opinion of an appellate court, dealing only with questions of law; it deals largely with facts solely for the jury.

There is no discussion of the soundness of the trial court's instructions on damages. By necessary implication, they are conceded to be correct. The conclusion is (to repeat) that, without the defendants' conspiracy to put the plaintiff out of business, it would have died anyway.The logic is, in that regard, hardly distinguishable from setting up the mortality of all human beings as a defense to an indictment for manslaughter or murder. The undeniable facts are that the defendants conspired **[**26]** to kill the plaintiff, and the plaintiff died. The majority opinion is to the effect that the conspiracy was unnecessary; that the plaintiff would have died anyway. I do not assent to such reasoning or to its results.

None of the cases cited supports the rulings made on damages. The main reliance seems to be on *Keogh v. C. & N. Ry., 260 U.S. 156, 43 S. Ct. 47, 49, 67 L. Ed. 183*. This was an action brought by Keogh as a shipper against eight railroads and twelve individuals, claiming, in substance, that he was entitled to the benefit of competition in railroad ratemaking, although, after extensive hearings, in which Keogh participated, the rates of which he complained were approved by the Interstate Commerce Commission. The court held that, under these circumstances, he was not entitled to rates made in competition, saying:

"The instrument by which Keogh was alleged to have been damaged are rates approved by the Commission. * * * All the rates fixed were reasonable and nondiscriminatory. * * * What rates are legal is determined by the Act to Regulate Commerce [49 USCA § 1 et seq.]. * * * If the conspiracy here complained of had resulted in rates which the Commission found **[**27]** to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings."

It is true that the case dealt with the alleged damages as being purely speculative. But the reasons given make this ruling entirely inapplicable to the instant case, for the court said:

"Here the instrument by which the damage is alleged to have been inflicted is the legal rate, which, while in effect, had to be collected from all shippers. Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. Every competitor was entitled to be put -- and we must presume would have been put -- on a parity with him. And for every article competing with excelsior and tow, like adjustment of the rate must have been made. Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer."

This amounts to saying that Keogh (and all shippers) could **[**28]** not have damages assessed on an illegal or nonlegal theory of rate-making; that the law imposed parity of rates on all shippers; and that therefore damages alleged from a nonexistent, illegal theory of rate-making were purely speculative.

But that reasoning has no application to these defendants, who were separate, independent manufacturers, not required to make uniformity of prices, and not permitted to make such prices by concerted action, for the purpose of destroying a competitor. The doctrine of the Keogh Case has no bearing on the instant case.

In *Straus v. Victor Talking Machine, 297 F. 791, 800, 802*, and cases cited, the Court of Appeals for the Second Circuit laid down the general rule that:

"The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery."

The same doctrine was stated by this court in *Linen Thread Co. v. Shaw, 9 F.(2d) 17, 19*, as follows:

"The rule that damages, if uncertain, cannot be recovered, applies to their nature, and not to their extent. If the damage is certain, the fact that its extent is uncertain does not prevent **[**29]** a recovery."

In spite of this firmly established rule, this court now holds this plaintiff, a victim of duly established wrongdoing, to be remediless.

See *Hetzel v. Baltimore & Ohio R.R., 169 U.S. 26, 38, 18 S. Ct. 255, 42 L. Ed. 648*, citing with approval applicable language from *Baker v. Drake, 53 N.Y. 211, 220, 13 Am. Rep. 507*. See, also, *Hamilton-Brown Shoe Co. v. Wolf, 240 U.S. 251, 259*, et seq., *36 S. Ct. 269,* ***[*545]*** *60 L. Ed. 629*, a trade-mark case; *Randall v. Peerless Motor Co., 212 Mass. 352, 379*, et seq., *99 N.E. 221*, and cases cited; *Barrett v. Panther Rubber Co. (C.C.A.) 24 F.(2d) 329, 337*; *Gagnon v. Sperry & Hutchinson Co., 206 Mass. 547, 555, 92 N.E. 761*; *Hetherington & Sons v. Firth Co., 210 Mass. 8, 21, 95 N.E. 961*.

The overwhelming weight of authority is against the holding of the majority opinion.

Union Leader Corp. v. Newspapers of New England, Inc.

United States Court of Appeals for the First Circuit

September 22, 1960, Heard ; December 2, 1960, Decided

Nos. 5619, 5620

Reporter

284 F.2d 582 *; 1960 U.S. App. LEXIS 3144 **; 1960 Trade Cas. (CCH) P69,862

UNION LEADER CORPORATION, Appellant, v. NEWSPAPERS OF NEW ENGLAND INC., et al., Appellees. HAVERHILL GAZETTE COMPANY, Appellant, v. UNION LEADER CORPORATION, Appellee

Core Terms

advertising, shareholders, monopoly, competitor, merchants, newspapers, monopolize, violations, daily newspaper, unfair practice, unfair

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

Intending the natural consequences of acts which are in all respects lawful, does not constitute the exclusionary intent that is a prerequisite for finding a violation of § 2 of the Sherman Act, 15 U.S.C.S. § 2. In other words, a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it. In either event, there must be some affirmative showing of conduct from which a wrongful intent can be inferred.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN2[] **Regulated Practices, Trade Practices & Unfair Competition**

A plaintiff's own antitrust violations do not bar its successful maintenance of a private anti-trust action. Nor can the use of unfair methods by a competitor automatically justify adopting comparable unfair methods. However, it does not necessarily follow that a competitor's violations cannot constitute a circumstance to be considered in determining whether the defendant's conduct was in fact a violation. To the extent that a party has merely sought to offset the other's illegal acts it has not acted with a wrongful intention, nor should its conduct result in public injury.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3[] **Regulated Practices, Trade Practices & Unfair Competition**

The fact that competition is in a natural monopoly climate cannot limit a defendant's right to defend itself. Entry into a monopoly market without more does not taint otherwise legal conduct; the existence of such a market cannot circumscribe conduct which might otherwise be justified as defensive. Essentially, the court refuses to permit the inevitable monopoly to give either competitor a fortuitous advantage.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN4[] **Regulated Practices, Trade Practices & Unfair Competition**

To establish this defense, that a defendant has merely sought to offset the other's illegal acts, a defendant must demonstrate that its prima facie violations do not extend to a degree where they affirmatively indicate an attempt to create a monopoly.

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Robert H. Goldman, Lowell, Mass., with whom Frank Goldman, Lowell, Mass., Joseph F. Bacigalupo, Lawrence, Mass., and John J. Ryan, Jr., Haverhill, Mass., were on brief, for Haverhill Gazette Co. and others.

John F. Groden, Charles C. Worth, and Withington, Cross, Park & McCann, Boston, Mass., on brief submitted by Phillip S. Weld and Essex County Newspapers, Inc.

Judges: Before GOODRICH, HARTIGAN and ALDRICH, Circuit Judges.

Opinion by: ALDRICH

Opinion

[*583] In this private antitrust action the plaintiff, Union Leader Corporation, alleged violations of *sections 1* and *2* of the Sherman Act, *15 U.S.C.A. §§ 1* and *2*, by defendants Newspapers of New England, Inc. (NNE), NNE's component members and The Haverhill Gazette Company, and violations of *section 7* of the Clayton Act, *15 U.S.C.A. § 18*, by NNE. (In the course of the opinion we shall refer simply to *section 1*, *section 2*, or *section 7*.) In a counterclaim the Gazette alleged violations of *sections 1* and *2* by Union Leader. Except for its claim against the Gazette **[**2]** the plaintiff was unsuccessful in all respects. It appeals, as does Gazette. Both here and below the parties, not surprisingly, have had their difficulties in taking courses which avoid both Scylla and Charybdis. [1.] Although we have reviewed all claimed errors, we will say at the outset that we find no reason to pause over any attack, consistent or inconsistent, upon the court's findings or rulings except in so far as they concern three areas of conduct -- certain joint activity of Union Leader and the printers' union; actions by Gazette claimed by it to be purely defensive; and the formation of NNE and its purchase of the Gazette.

In November 1957 the Gazette published the only daily newspaper in Haverhill, Massachusetts. Similarly, in Manchester, New Hampshire, some 28 miles from Haverhill, the single daily newspaper was published by the Union Leader, operated by one Loeb. On November 20, 1957, a strike was called by the Gazette's printers. The paper was out of publication for three days, when operation was resumed with nonunion printers. The district court found that there was strong union sentiment in the city of Haverhill, and that during the strike circulation and advertising **[**3]** fell off by fifty per cent. On November 30, 1957, six Haverhill merchants (subsequently increased to eight, and hereinafter referred to as the merchants), visited Loeb in Manchester to urge him to publish a Haverhill shopper [2.] in which they could place Christmas advertising without giving offense to the union. Loeb acceded.

[1.] The orders to the helmsman were clear enough. 'The Court should avoid creating by implication inharmony between different parts of the same opinion which are capable of reconciliation.' (Union Leader's brief in No. 5620.)

Publication of the Haverhill Journal followed on December 5 and December 12. Encouraged by the favorable reception, Loeb announced in the second issue that he would publish as a regular daily, and commenced doing so on December 16. Active competition between the Journal and the Gazette has occurred ever since in what was described by the court as a 'life-and-death struggle.'

The court found that by nature of circumstances Haverhill is a one-paper **[*584]** area. Prior to the events leading to this case both the Gazette and the Union Leader enjoyed what might be termed 'natural' monopolies, as cities of the size in which they operate cannot support two good daily newspapers under present-day conditions. [3.] **[**22]** The court found that each paper came by its monopoly position in a lawful fashion, and correctly ruled that neither had 'monopolized' in violation of **[**4]** *section 2*. A monopolist does not violate the act if the monopoly is 'thrust upon it.' *United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F.2d 416, 429*. 'A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand.' *Id. at page 430*. See *United States v. E. I. du Pont de Nemours & Co., 1956, 351 U.S. 377, 391-393, 76 S.Ct. 994, 100 L.Ed. 1264*. No change, of course, was effected by Union Leader's publication of the Journal. It was a foregone conclusion that if successful the Journal would eventually drive the Gazette out of business, and, naturally, Union Leader proposed to succeed. ***HN1***[] But intending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' that is a prerequisite for finding a violation of *section 2*. In other words, a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively **[**5]** acquires it. [4.] In either event, there must be some affirmative showing of conduct from which a wrongful intent can be inferred. See *United States v. Griffith, 1948, 334 U.S. 100, 105-108, 68 S.Ct. 941, 92 L.Ed. 1236*; *United States v. United Shoe Machinery Corp., D.C.D.Mass.1953, 110 F.Supp. 295, 297, 341*, affirmed *347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910*. [5.] **[**23]** The court found that such an affirmative showing had been made with respect to both Union Leader and Gazette.

Commencing chronologically, it was admitted that Loeb hired some of the Gazette's striking printers to distribute the shopper. The court found that this was done to inform the public that the shopper had the union's support. More serious is its finding that union representatives accompanied the shopper's advertising solicitors and 'asked merchants not to advertise in the Gazette, and simultaneously advertising solicitors of ULC asked these merchants to advertise in the *Journal.' (180 F.Supp. 133*) [6.] Union **[*585]** Leader contends that the court's ruling that this

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[2.] A shopper, also known as a throwaway, is a newspaper containing principally advertising which is distributed free, and without request, at doorways.

[3.] In Massachusetts, Boston and Lynn are the only cities with more than one paper (excluding morning and evening by the same publisher). This phenomenon, of course, is not restricted to Massachusetts. See *Times-Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 602-603* and note 13, *73 S.Ct. 872, 97 L.Ed. 1277*.

[4.] An interesting speculation might be whether the antitrust laws were intended to protect one natural monopolist against another, in view of the fact that there was no competition before the battle began and there would be none afterwards. Both parties flirt with this thought when the purpose serves. Since these laws are concerned primarily with the public interest, *Associated Press v. United States, 1945, 326 U.S. 1, 17*, note 16, *65 S.Ct. 1416, 89 L.Ed. 2013*, rehearing denied ***326 U.S. 802, 66 S.Ct. 6, 90 L.Ed. 489***; *International Shoe Co. v. F.T.C., 1930, 280 U.S. 291, 298, 50 S.Ct. 89, 74 L.Ed. 431*, it may be that they would not be involved if, for instance, the product provided by either party would be the same. However, we cannot say that it could not be in the public interest to have one newspaper rather than another. Where there is no identity of performance we will not say that the public does not have an interest in competition even though that competition be an elimination bout.

[5.] We agree with the court that the use of financial resources alone was not such an exercise of the Manchester 'monopoly power' in Haverhill as would imply an intent by Union Leader Wrongfully to exclude its competitor. Cf. *United States v. Griffith, supra, 334 U.S. at pages 107-109, 68 S.Ct. at pages 945-946*. By the same token Union Leader's criticism of NNE's financial strength is ill-founded.

[6.] It is true that after the Journal became a daily these practices were discontinued. But it must have already become apparent that the Journal was in the union's picket line. Union Leader's present position may be illustrated by its argument that the shopper which was absorbing Gazette's advertising 'was not in the same market with the Gazette.' Almost as strained are its produced a group boycott (a per se violation of *section 1*, *Klor's, Inc. v. Broadway-Hele Stores, Inc., 1959, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741*), **[**6]** as distinguished from a mere appeal or attempt to create one, was without adequate findings, and that the only economic boycott possible was by advertisers and not the union [7.] or Union Leader. This question is academic because, whether or not the advertisers responded with a boycott, we agree with the court's conclusion that Union Leader's part in the appeal demonstrated an intent to exclude competition unlawfully in violation of *section 2*. [8.] **[**24]**

On December 8 the merchants met again with Loeb, and for some time three meetings were held each week. At the date of trial these meetings were being held weekly. The court found that there was a general understanding not only that the concerns which these merchants represented would not advertise in the Gazette, but that they would seek to induce others to advertise exclusively in the Journal. It further found that when the strike was settled the 'interest' of these merchants slackened, and that Loeb thereafter paid each of them $ 50 a week (subsequently increased by promises, contingent upon the Journal becoming the only newspaper in Haverhill, of 'massive' payments totaling $ 150,000 apiece over a period of years, plus an overriding **[**7]** bonus). The existence of these payments and promises were kept secret. Accordingly, it was not known to other advertisers and prospective advertisers, who thought the merchants were bona fide gratuitous endorsers of the Journal and opponents of the Gazette. The court held that this was a group beycott and, thus, a per se violation of *section 1*, and an unfair practice, not honestly industrial, and, thus, conclusive evidence of the exclusionary intent proving a violation of *section 2*.

We confess an inability to understand the basis of the Union Leader's appeal on this question. [9.] See *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra*; *Lorain Journal Co. v. United States, 1951, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162*.

Substantial competition immediately developed between the Journal and the **[*586]** Gazette with respect to advertising rates. The court found that the Journal resorted to 'private concessions,' that is to say, secret discriminatory rates. It held this to be an unfair practice evincing an exclusionary intent. In the light of other demonstrations of Union Leader's wrongful intent, no discussion of this finding is needed. Cf. *United States v. Griffith, supra, 334 U.S. at page 109, 68 S.Ct. at page 946*. **[**8]** This disposes of Union Leader's appeal from the judgment against it on the counterclaim. The balance of this opinion will deal with the complaint.

As a result of the strike and the Journal's competition, the Gazette incurred serious and continuous losses. [10.] The settling of the strike by no means put an end to this, and by the fall of 1958 it found itself in danger of insolvency. It

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contentions based on testimony that it is economically justifiable to advertise in only one of two competing papers. This testimony fell far short of suggesting the reverse, that it was economically unjustifiable to advertise in both.

[7.] We expressly disclaim any approval of the court's citation of *Allen Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers, 1945, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939*, rehearing denied *326 U.S. 803, 66 S.Ct. 11, 90 L.Ed. 489*. We are not required to decide whether the union violated the ***antitrust law***, and so need not consider the very difficult problem of where labor's immunity to antitrust prosecution ceases.

[8.] The court expressly found that Union Leader did not come into Haverhill originally at the union's request. Therefore, it might be questionable whether the joint appearance of union and Union Leader representatives put any pressure on an advertiser to use only the Journal beyond that which already existed from the mere coincidental facts that the Gazette was being struck and the Journal provided alternative newspaper advertising on a roughly equivalent basis. But even if in fact it added no pressure, this would not undermine the court's finding that such pressure was wrongfully intended.

[9.] Union Leader describes these merchants as 'honor-bound to support it,' and states that it was 'prudent * * * to engage outside help' and that obtaining 'local advice * * * is so normal and much practiced in so many businesses that it has become a standard business technique.' Seemingly, the contention is that the court's finding that Loeb was paying for something more than proper advice was plainly wrong. We have no inclination to agree.

[10.] The case comes before us after trial on all issues except damages. The court accordingly made no finding as to what portion of this loss would have resulted simply from the strike without the competition to which this opinion is addressed. We have no doubt that both contributed.

adopted various means to combat the Journal's competition. One of these was secret rate discrimination. Believing this indistinguishable from what it had held concerning Union Leader's similar discriminations, the court ruled [11.] that this was a violation of section 2. The Gazette contended that its conduct was purely defensive, and was, at most, only evidence of a wrongful intent. The court rejected this claim, for a reason we believe to be unsound. After stating that price discrimination is 'not to be excused because comparable practices were indulged in by plaintiff,' it said,

'Nor, on the ground that the motive was to retaliate or defend against ULC's illegal conduct, can the practice be regarded as merely a restraint of trade of doubtful validity rather than as an attempt to monopolize. This **[**9]** distinction is unacceptable because having about fifty per cent of the market, and knowing that the market would not permit two contestants to survive, Gazette's resort to any unfair practice, and its failure to confine itself to exercise of skill, foresight, and industry, compels a conclusion that Gazette had an exclusionary intent and had attempted to monopolize the market in violation of § 2 of the Sherman Act.'

In calling this an 'unfair practice' the court assumed the point. For, as we conceive the issue, the practice was 'unfair' if conducted with an intent to monopolize, but it was fair if it was intended only to resist deterioration of its own position brought about by Union Leader's unlawful activities.

It is now clear that ***HN2***[] a plaintiff's own antitrust violations do not bar its successful maintenance of a private anti-trust action. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 1951, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219, rehearing denied *340 U.S. 939, 71 S.Ct. 487, 95 L.Ed. 678*; Moore v. Mead Service Co., 10 Cir., 1951, 190 F.2d 540, **[**10]** certiorari denied *342 U.S. 902, 72 S.Ct. 290, 96 L.Ed. 675*. [12.] **[**25]** Nor can the use of unfair methods by a competitor automatically justify adopting comparable unfair methods. F.T.C. v. A. E. Staley Mfg. Co., 1945, 324 U.S. 746, 753, 65 S.Ct. 971, 89 L.Ed. 1338. However, it does not necessarily follow that a competitor's violations cannot constitute a circumstance to be considered in determining whether the defendant's conduct was in fact a violation. To the extent that a party has merely sought to offset the other's illegal acts it has not **[*587]** acted with a wrongful intention, nor should its conduct result in public injury. In such a case there would be no reason to encourage recovery by the original offender, and every reason not to. In the Moore case, supra, Judge Phillips, specially concurring, stated that the defendant should be permitted to prove that its discriminatory price cutting was only intended to meet the unlawful boycott instituted by the plaintiff and so to retain its market position. 190 F.2d 540, 542. [13.] The Supreme Court reflected the same reasoning in Times-Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 623, 73 S.Ct. 872, 888, 97 L.Ed. 1277, **[**11]** when it said, 'An unlawful trade practice may not be justified as an emulation of another's illegal plan. * * * But that factor is certainly relevant to illuminate ambiguous intent, particularly when planned injury to that other competitor is the crux of the charge.' We do not think ***HN3***[] the fact that competition is in a natural monopoly climate can limit a defendant's right to defend itself. We have already pointed out that Union Leader was not restricted by this circumstance. What is sauce for the goose is sauce for the gander, and, while there may be two different flavors, the stock is the same. In the one situation we have recognized that entry into a monopoly market without more does not taint otherwise legal conduct; now we are saying that the existence of such a market cannot circumscribe conduct which might otherwise be justified as defensive. Essentially, we refuse to permit the inevitable monopoly to give either competitor a fortuitous advantage. However, contrary to this, the court ruled, in effect, that a company which resorts to unfair practices in its attempt to win a natural monopoly **[**12]** area will be less open to repulse than one which enters a normal competitive field.

[11.] We have examined the court's opinion in the light of the conflicting analyses made by the parties and agree with Gazette that the word 'compels' as used by the court indicated a ruling of law and not a finding or conclusion of fact.

[12.] On remand for trial, held, for plaintiff, D.C.D.N.Mex. (unreported), reversed Mead's Fine Bread Co. v. Moore, 10 Cir., 1954, 208 F.2d 777, reversed and district court affirmed 1954, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145, rehearing denied ***348 U.S. 932, 75 S.Ct. 334, 99 L.Ed. 731***.

[13.] Nothing in the subsequent history of the Moore case, see note 12 supra, suggests Supreme Court disapproval of this.

In his concurrence in the Moore case, Judge Phillips cautioned that ***HN4***[] to establish this defense a defendant must demonstrate that its prima facie violations [14.] do not extend to a degree where they affirmatively indicate an attempt to create a monopoly. *190 F.2d at page 542*. This does not mean that a defendant will be held to nice calculations as to just how much resistance is called for, cf. *Brown v. United States, 1921, 256 U.S. 335, 343, 41 S.Ct. 501, 65 L.Ed. 961*; *United States v. Jasper, 4 Cir., 1955, 222 F.2d 632, 633*; *Dupre v. Maryland Management Corp., 1954, 283 App.Div. 701, 127 N.Y.S.2d 615*; *Klein v. John Stuart, Inc., Sup. 1954, 136 N.Y.S.2d 830*, but nonetheless there may be a question of fact. In setting aside a decision in favor of Union Leader because of an erroneous ruling, we would normally remand to permit the court to determine this issue. However, we think it has been resolved by the subsidiary findings which the court **[**13]** has already made. In the course of ruling that this method of defending itself was foreclosed, the court stated that 'in giving these discriminatory benefits, HG Co. was acting only after it had been put in peril of insolvency in the equity sense as a result of ULC's attempt to monopolize. [15.] * * * Admittedly the provocation to retaliate was great, the total number of discriminations was not shown to be large, (and) the period of the discrimination was short * * * (*180 F.Supp. 142*).' We cannot read the opinion without concluding that but for its belief that it was precluded from doing so the court would have found in favor of Gazette. Indeed, we believe any other finding would have been clearly erroneous. [16.] **[**26]**

[*588] One issue remains. Within a few months of establishing the Journal, Loeb commenced overtures looking to the purchase of the Gazette. By the fall of 1958 that paper was in such circumstances that its stockholders felt unable to continue. Not unnaturally, they were not eager to sell to Loeb. The Gazette was a member of a non-profit trade association whose members included about 80 of some 98 daily newspapers published throughout New England. Loeb **[**14]** was a former member. One of the purposes of the association was to give assistance (other than financial) to members in case of strikes. Many members were indignant with Loeb for taking advantage of and adding to the Gazette's difficulties, and considered his conduct both unethical and unlawful. At first some offered loans, but these were declined. When it was learned that the owners might have to sell, a number of the members jointly agreed to match Loeb's current offer. Their offer was accepted. As a result Newspapers of New England, Inc., was formed, and the Gazette stock was acquired in December 1958. NNE's principal shareholders were the local papers or individual publishers in Lowell, Lawrence, and Burlington, Vermont (in whose area Loeb published a competing paper), the balance being other small daily newspapers in various cities or the publishers of such. The court found that 'every' shareholder acted in part because he believed that 'the investment was commercially justified'; that ' many' acted in part because they did not approve of Loeb's tactics; that 'some' acted in part because they sympathized with the owners of the Gazette and feared that they 'might at some **[**15]** time be victims of distress similar,' and "if Loeb succeeded in Haverhill * * * then he * * * might * * * come into their territories." (Omissions are the court's.) The court added that there was 'no basis for concluding that (a noninvestment) motive was primary in any shareholder's decision.' [17.] It further found that there was no commitment, 'express or implied, * * * legal or * * * moral,' that any shareholder would come to the aid of any other shareholder in the future if some similar occurrence threatened him. On the basis of this last finding it held that there was no combination or conspiracy to act other than in Haverhill. In addition, it held that there was no unlawful conduct in Haverhill itself.

[14.] The case for Gazette here seems in some respects stronger than the one considered by Judge Phillips. There the defendant was called upon to justify conduct which the statute expressly prohibited. *15 U.S.C.A. 13*. In the present case the defendant merely has to rebut an inference of a wrongful intention drawn from particular actions.

[15.] Or, as Union Leader itself states in its brief with reference to this period, 'Gazette's financial condition was such that it could not continue much longer.'

[16.] The practical necessity of Gazette's adjusting rates in order to maintain its position is made plain by Loeb's own testimony. He stated that 'this matter of the rates * * * goes to the very heart of any newspaper's survival.' Elsewhere he testified that a serious consequence of secret discriminatory advertising practices -- once it is known that they are indulged in -- is that it enables an unscrupulous advertiser to play one paper against the other. A merchant who has not been offered a special rate-cut by one paper can nonetheless tell the other that he has been, and that other, knowing the first paper does do such things, fears to disbelieve him, and must match the price in order not to lose the customer.

[17.] It is not clear whether the purpose of this finding was to bring NNE within the investment exception of *section 7*, infra note 18, but we think the previously quoted finding would preclude this.

Examination of the record does not persuade us that the findings of fact are plainly wrong. However, we believe the legal issues are somewhat more complex than the court regarded them.

Union Leader's attack on NNE is in two parts, the first being the effect on competition in Haverhill, or what it terms the 'narrow' market. As we noted at the beginning, *section 7* of the Clayton Act, [18.] as well as *sections 1* and *2* of the Sherman Act, are involved here. Union **[*589]** Leader **[**16]** complains that it would have succeeded in purchasing the Gazette, or otherwise have successfully culminated its competition, but the NNE's appearance; that 'the fact that the stockholders of the Gazette were forced to sell out establishes that the appellant possessed the * * * requisites for effective competition and victory,' and that 'a battle in which there are over thirty newspaper owners on one side against the appellant standing alone * * * hardly suggests a fair fight.' However euphonious this melody, Union Leader's attempted treble does not harmonize with its base accompaniment. A party who pursues an unlawful course of conduct from the moment it appears on the scene is in a poor position to complain of an unfair fight. The more particularly is that so in this case in that NNE, apart from being there at all, was guilty of no unlawful competitive practices.

We readily agree with the district court with respect to the 'narrow' market. *Section 1* creates no impediment simply because NNE was comprised of a number of individual newspapers. Combinations are not unlawful per se. Union Leader's real objection is to the superior financial resources of the group. But we have never **[**17]** heard of a principle that a corporation having affluent shareholders could not compete. In reality, Union Leader is attempting to relight the ignis fatuus over competition in a monopoly area. If Union Leader could enter and was not prevented from using its funds acquired in a monopoly market, supplemented, as it developed, by outside loans, we see no reason why its potential rivals should be subject to greater restrictions. Nor does the fact that an acquisition was involved automatically lead to a *section 7* violation. If competition is doomed by market conditions, it cannot be 'lessened' by a change of ownership.

A different question arises under *sections 2* and *7* with respect to the second part of Union Leader's complaint, regarding what it calls the 'wider market.' [19.] It contends that any area in which individual papers who became shareholders of NNE are now doing business is a market of entry, and that the acquisition of Gazette's stock for the purpose of defeating Union Leader's Haverhill venture was for the purpose of protecting those areas from similar encroachments. An ounce of prevention is worth a pound of cure. See *American Tobacco Co. v. United States, 1946, 328 U.S. 781, 797, 66 S.Ct. 1125, 90 L.Ed. 1575*; **[**18]** cf. *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 1 Cir., 1952, 194 F.2d 484, 488*, certiorari denied *344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636*. We cannot agree with the district court that there could be no proscribed activity here because there was nothing but a number of narrow markets in each of which a shareholder was 'king,' and hence no 'combined * * * market power.' (*180 F.Supp. at page 144*.) Cf. *United States v. Bethlehem Steel Corp., D.C.S.C.N.Y.1958, 168 F.Supp. 576, 600*. On the contrary, in whatever measure any shareholder was concerned in protecting its own narrow market, it was aided by others similarly situated. To this degree we see a wider market and the possibility of an illegal transaction.

It is clear, as the court found, that some shareholders were interested in Loeb's getting his 'comeuppance.' The court's observation here that 'the law allows other joys in business life beside making money,' obviously must be limited to personal satisfactions less tangible than the elimination of competition. If one of NNE's motives was an intent to monopolize in the home areas of its stockholders, *section 2* has **[**19]** been violated; or, if there was, as a probable result of teaching Loeb a lesson, a substantial depressant upon competition in such areas, *section 7* has been violated. In either case NNE's purchase of the Gazette would have to be regarded as unlawful.

[18.] '* * * No corporation shall acquire, directly or indirectly, the whole or any part of the stock * * * of one or more corporations engaged in commerce, where in any line of commerce in any section of the county, the effect of such acquisition * * * may be substantially to lessen competition, or to tend to create a monopoly. This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, he substantial lessening of competition. * * *' *15 U.S.C.A. § 18*.

[19.] We do not reconsider *section 1* here as it falls if the others do.

Giving fullest play o the evidence and the court's opinion, we cannot find that opposition to Loeb was anything more **[*590]** than opposition to his methods. Union Leader produced no evidence that the shareholders feared competition as such, or had any reason to. As one witness put it, competition 'is not economically possible, * * * the likelihood of anyone's trying to do it is remote.' In twenty years only two newspapers had been started in New England. The one other than the Journal had failed immediately. We will not hold that a desire to prevent unlawful competition is evidence of an improper or monopolistic intent. Conversely, approaching the transaction from the standpoint of a potential competitor, we feel equally that there is no evidence of a tendency 'substantially to lessen (lawful) competition' under *section 7*. The court dealt with the possible effect on any future competition by pointing out that there was no agreement **[**20]** between the shareholders, express or implied, that they would act again in any future situation. We agree with Union Leader that this is not determinative. Arguably, a potential competitor, though knowing that in Haverhill NNE was formed to meet an unfair competitor, might be dissuaded by a fear that mutual self-interest would bring into play the same kind of joint resistence no matter how lawfully he acted. But we cannot invent such a competitor and assume he would so think. Cf. *United States v. Columbia Steel Co., 1948, 334 U.S. 495, 528, 68 S.Ct. 1107, 92 L.Ed. 1533*, rehearing denied *334 U.S. 862, 68 S.Ct. 1525, 92 L.Ed. 1781*. Union Leader must show a 'reasonable probability' that an adverse effect on competition is 'likely' to result. See *United States v. E. I. du Pont de Nemours & Co., 1957, 353 U.S. 586, 589, 77 S.Ct. 872, 1 L.Ed.2d 1057*. It has shown even a reasonable possibility that competition is likely to exist, much less that such competition would be adversely affected. We cannot disagree with the court's conclusion that none of the component newspapers had appreciably increased its power to control prices and production **[**21]** as a result of participating in the NNE purchase of the Gazette. Consequently, we hold that the court did not err in rejecting Union Leader's contentions that NNE had violated *sections 1*, *2*, and *7*.

Judgment will be entered striking paragraphs 2, 6 and 8 from the partial final decree, as amended December 30, 1959, of the district court, and amending paragraph 10 thereof so that the phrase 'paragraphs 6 and 7' therein shall read 'paragraph 7,' and otherwise affirming said decree.

Convertible Top Replacement Co. v. Aro Mfg. Co.

United States Court of Appeals for the First Circuit

December 13, 1962

Nos. 5991, 5993

Reporter

312 F.2d 52 *; 1962 U.S. App. LEXIS 3327 **; 136 U.S.P.Q. (BNA) 9 ***; 6 Fed. R. Serv. 2d (Callaghan) 995

CONVERTIBLE TOP REPLACEMENT CO., Inc., Plaintiff, Appellant, v. ARO MANUFACTURING CO., Inc., et al., Defendants, Appellees. ARO MANUFACTURING CO., Inc., et al., Defendants, Appellants, v. CONVERTIBLE TOP REPLACEMENT CO., Inc., Plaintiff, Appellee

Core Terms

infringement, patent, tops, replacement, fabric, patent misuse, unlicensed, repair, reconstruction, counterclaim, manufacture, contributory, allegations, convertible, misuse, appendix, licensed, anti trust law, unpatented

LexisNexis® Headnotes

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN1[] **Infringement Actions, Infringing Acts**

Reconstruction of a patented entity, comprised of unpatented elements, is limited to such a true reconstruction of the entity as to in fact make a new article, after the entity, viewed as a whole, has become spent. In order to call the monopoly, conferred by the patent grant, into play for a second time, it must, indeed, be a second creation of the patented entity. Mere replacement of individual unpatented parts, one at a time, whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Civil Procedure > Judgments > Relief From Judgments > General Overview

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

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

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN2[] Misuse of Rights, Patent Misuse Defense

Fed. R. Civ. P. 54(c) provides that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. The rule should be liberally construed to grant a prevailing party substantial justice. But it is not to be so liberally construed as to conflict with the requirement of Fed. R. Civ. P. 8(a) that a pleading which sets forth a claim for relief, whether on original claim or a counterclaim, shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

Patent Law > Infringement Actions > Infringing Acts > General Overview

Patent Law > ... > Utility Patents > Product Patents > Machines

HN3[] Infringing Acts, Indirect Infringement

35 U.S.C.S. § 271(c) provides that whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article, or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.

Counsel: [1]** Elliott I. Pollock, Washington, D.C., with whom Paul V. Power, Boston, Mass., was on brief, for Convertible Top Replacement Co., Inc.

Charles Hieken, Boston, Mass., with whom David Wolf and Ezekiel Wolf, Wolf & Greenfield, Boston, Mass., were on brief, for Aro Mfg. Co., Inc., et al.

Judges: Before WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges.

Opinion by: WOODBURY

Opinion

[*10] [*53]** Upon receipt of the mandate of the Supreme Court in Aro Mfg. Co., Inc. v. Convertible Top Replacement Co., Inc., 365 U.S. 336, 81 S.Ct. 599, 5 L.Ed.2d 592 (1961), the court below after hearings entered a judgment which, as amended, ordered, adjudged and decreed: (1) that by virtue of a territorial grant the plaintiff, Convertible Top Replacement Co., Inc., was possessed of the right, title and interest in the Mackie-Duluk patent No. 2,569,724 in the Commonwealth of Massachusetts, (2) that neither the corporate defendant, Aro Manufacturing Co., Inc., nor the individual defendants, either individually or as co-partners doing business as Aro Top Sales Company, had infringed claims 3, 4, 5, 7, 8, 9 and 10 of the above patent, (3) that the plaintiff's amended complaint be **[**2]** dismissed with costs to the defendant of $ 3,841.77 and (4) that the defendants' counterclaim for a declaratory judgment be dismissed without prejudice and without costs. In No. 5991 the plaintiff below as appellant here contends that this judgment is erroneous in that it fails to make any distinction between replacements of the fabric portions of convertible automobile tops for General Motors cars, which were licensed under the patent, and those for Ford cars, which were not, and in that it fails to order, adjudge and decree that the Mackie-Duluk patent is valid. In No. 5993 the defendants below as appellants here contend that the judgment is erroneous because it fails to award them such damages as they may be able to establish in future proceedings, plus attorney's fees, trebled, for ***antitrust law*** violation by the plaintiff. We shall consider the appeals in numerical order but to dispose of the respective contentions of the parties it will be helpful to review the judicial proceedings in this tortuous litigation.

It began in April, 1956, with a complaint, later amended, by Convertible Top Replacement Co., Inc., C.T.R. hereinafter, which charged the defendant, Aro Manufacturing **[**3]** Co., Inc., and its principal officers, hereinafter collectively Aro, with infringement and contributing to the infringement of U.S. Patent No. 2,569,724 issued on October 2, 1951, to Harry A. Mackie and Stanley Duluk for 'Convertible Folding Top with Automatic Seal at Rear Quarter' by making, selling and installing specially cut fabric tops for use in the patented structure. The defendants answered denying the basic allegations in the complaint, alleging patent misuse and specifically asserting that the patent is invalid and if valid not infringed. The defendants also filed a counterclaim for a declaratory judgment that the patent had been misused, that it was invalid and if valid not infringed. A defendant's motion for summary judgment based on affidavits and answers to interrogatories was denied and the case went to trial by the court sitting without a jury.

The district court after full hearing found that the plaintiff as assignee was entitled, by virtue of a territorial grant, to sue on the patent in Massachusetts, that the defendants had 'clearly not made out' their claim that the plaintiff had misused its patent and that the defendants **[*54]** had not established their **[**4]** basic defense of invalidity. [1] **[**17]**

The court then turned to the question of infringement which it said had two aspects. Referring to the established fact that General Motors Corp. was licensed under the Mackie-Duluk patent while Ford Motor Co. was not, the court said: 'As to the former, defendants are protected if their fabrics are to be regarded as mere repair, and not reconstruction. As to the latter, defendants have no protection against a claim for contributory infringement under 271(c) if they made a material part, with knowledge that it was to be used in a patented structure, which was not a staple article of commerce suitable for substantial non-infringing use.' The court summarily disposed of the issue of infringement insofar as unlicensed Ford Motor Co. cars were concerned by finding that there was no substantial non-infringing use for fabric tops specially made by the defendants for the cars of that manufacturer having the Mackie-Duluk top structure, which fabrics, it said, '* * * are admittedly purposely designed for, and advertised for, Mackie-Duluk tops.' The court gave more extended consideration to the question dispositive of the issue with respect to infringement by **[**5]** replacing the fabric part of convertible tops on licensed General Motors Corp. cars, i.e. whether such **[***11]** replacement constituted mere repair or major reconstruction.

Finding that replacing the fabric tops on cars of that manufacturer was 'not permissive repair' the court entered an interlocutory judgment that the Mackie-Duluk patent was good and valid in law as to its claims 3, 4, 5, 7, 8, 9 and 10, that the defendants had infringed or contributorily infringed those claims with respect to both Ford and General Motors cars, that the defendants be enjoined from further infringement and that the question of the plaintiff's damages be referred to a master, with costs to the plaintiff.

On appeal this court affirmed, *270 F.2d 200* (1 Cir., 1959).

We took the validity of the Mackie-Duluk patent for granted for the reason that the issue of its validity had hardly been argued at all and because we were not even sure that all the evidence on that issue had been included in the parties' joint record appendix. Our attention at that time was directed primarily to the basic question argued before us by the appellants, that is, to the question whether replacing the fabric portion of **[**6]** the patented tops for convertible automobiles constituted a permissible repair of the patented structure or an impermissible reconstruction of it, upon the answer to which the issue of contributory infringement with respect to licensed General Motors cars depended. We did not specifically consider infringement with respect to unlicensed Ford Motor Co. cars for that question was not greatly stressed and we were convinced from the evidence that the court below was clearly correct in its conclusion that the defendants' custom made tops specifically designed and

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[1] It found: 'Mackie-Duluk was a substantial and enlightened step, filling a long-felt want, in a field in which defendants have produced, with one exception (i.e. a patent to one Ackermans discussed at length and distinguished) only paper patents, the most emphasized being foreign, which did not even purport to do what Mackie-Duluk accomplished.'

advertised for those cars constituted 'a material part of the invention' and were not 'a staple article of commerce suitable for substantial noninfringing use' within the meaning of *35 U.S.C. § 271(c)*. Nor did we specifically consider any question of possible patent misuse by the plaintiff-appellee, for, although the defendants-appellants argued patent misuse orally and in their brief, their statement of the questions involved pursuant to Rule 24(3)(b) of this court quoted in the margin [2] did not set forth or necessarily suggest any such question. **[*55]** Moreover, no issue of patent misuse was presented **[**7]** by the pleadings insofar as printed in the parties' joint record appendix on that appeal. Allegations of misuse in the defendants' answer, and an allegation of misuse in their counterclaim were omitted from their answer and counterclaim as printed in the joint record appendix then before this court. Only now has Aro's counsel supplied those omitted allegations. He has included the heretofore omitted allegations of patent misuse as made in his answer in his record appendix as counsel for the appellees in No. 5991 and his allegation of misuse in his counterclaim in his record appendix as counsel for the appellants in No. 5993.

The Supreme Court granted certiorari allowing the United States to file a brief as amicus curiae in support of the petition, *362 U.S. 902, 80 S.Ct. 609, 4 L.Ed.2d 553 (1960)*. It denied a motion of the American Patent Law Association for leave to file a brief as amicus curiae, *364 U.S. 806, 81 S.Ct. 40 (1960)*, and reversed, *Aro Manufacturing Co., Inc., et al. v. Convertible Top Replacement Co., Inc., 365 U.S. 336, 81 S.Ct. 599, 5 L.Ed.2d 592 (1961)*, petition for rehearing or alternative motion for amendment or clarification **[**8]** of opinion denied, *365 U.S. 890, 81 S.Ct. 1024, 6 L.Ed.2d 201 (1961)*, and remanded the case to the court below for further proceedings in conformity with its opinion. The judgment from which the present appeals have been taken was entered in an attempt to carry out that mandate. To see whether it has succeeded we turn to the Supreme Court's opinion.

The opinion of the Court written by Mr. Justice Whittaker, after summarizing the facts, notes *at page 338 of 365 U.S., at page 601 of 81 S.Ct., 5 L.Ed.2d 592* that the validity of the patent was not challenged. The opinion then continues:

'The principal, and we think the determinative, question presented here is whether the owner of a combination patent, comprised entirely of unpatented elements, has a patent monopoly on the manufacture, sale or use of the several unpatented components of the patented combination. More specifically, and limited to the particular case here, does the car owner infringe (and the patent supplier contributorily infringe) the combination patent when he replaces the spent fabric without the patentee's consent?'

The Court then went on to point out, *365 U.S. at page 339, 81 S.Ct. at p. 601, 5 L.Ed.2d 592* **[**9]** that the fabric portion of the tops was an unpatented **[***12]** element of the combination patent because: 'The patent makes no claim to invention based on the fabric or on its shape, pattern or design.' Wherefore the Court said it was immaterial whether the shape of the fabric might have been patentable. From the foregoing the Court on the next page of its opinion said: 'It follows that petitioners' (Aro's) manufacture and sale of the fabric is not a direct infringement under *35 U.S.C. § 271(a)*,' but that the question remained whether such manufacture and sale constituted 'a contributory infringement of the patent under *35 U.S.C. § 271(c)*.' Whether it did or not the Court said *on page 341 of 365 U.S., on page 602 of 81 S.Ct., 5 L.Ed.2d 592* depended upon whether 'replacement by the purchaser himself would in itself constitute a direct infringement under *§ 271(a)*, for it is settled that if there is no direct infringement of a patent there can be no contributory infringement.' Then on page 342 of 365 U.S., on page 602 of 81 S.Ct., 5 L.Ed.2d 592, saying that *§ 271(a)* 'left intact the entire **[**10]** body of case law on direct infringement.' the Court posed the ultimate question before it as follows:

'The determinative question, therefore, comes down to whether the car owner would infringe the combination patent by replacing the worn-out fabric element of the patented convertible top on his car, or **[*56]** even more specifically, whether such a replacement by the car owner is infringing 'reconstruction' or permissible 'repair.''

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[2] 'The brief of the appellant or petitioner shall contain the following matter * * *

'(b) A statement of the questions involved, setting forth each question separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind. Ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved.'

The Court summarized its answer to this question on page 346 of 365 U.S., on page 604 of 81 S.Ct., 5 L.Ed.2d 592 in the following words:

'The decisions of this Court require the conclusion that **HN1**[] reconstruction of a patented entity, comprised of unpatented elements, is limited to such a true reconstruction of the entity as to 'in fact make a new article,' United States v. Aluminum Co. of America, supra, (148 F.2d) at 425, after the entity, viewed as a whole, has become spent. In order to call the monopoly, conferred by the patent grant, into play for a second time, it must, indeed, be a second creation of the patented entity, as, for example, in Cotton-Tie Co. v. Simmons, supra (106 U.S. 89, 1 S.Ct. 52, 54, 27 L.Ed. 79). **[**11]** Mere replacement of individual unpatented parts, one at a time, whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property. Measured by this test, the replacement of the fabric involved in this case must be characterized as permissible 'repair,' not 'reconstruction.''

It is clear from the foregoing quotations from the opinion of the Court that the attention of the four justices who joined in that opinion was focused on the question of reconstruction versus repair which underlies the question of contributory infringement with respect to replacement tops for licensed General Motors cars but not for unlicensed Ford cars. And the same may be said of the opinions of the concurring and dissenting justices. The only suggestion that other considerations underlie the question of infringement by replacing the fabric portions of tops on unlicensed Ford cars is to be found in the final sentence of Mr. Justice Brennan's concurring opinion (365 U.S. at p. 368, 81 S.Ct. at p. 616, 5 L.Ed.2d 592) which reads: 'I, therefore, think that the judgment of the Court of Appeals must be reversed, except, however, **[**12]** as to the relief granted respondent in respect of the replacements made on Ford cars before July 21, 1955.' [3]

The puzzling question is whether the Supreme Court in reversing this court intended to reverse in toto or only to reverse insofar as replacement tops for General Motors cars were concerned.

What the Court said in its opinion gives us little help. What it did not say, however, seems to us to indicate that it was not deciding the question of contributory infringement with respect to unlicensed Ford cars.

In the first place this would seem to be the interpretation placed upon the Court's opinion by Mr. Justice Brennan. Otherwise he would not have concurred generally but would have concurred only in part and dissented in part. We think he must have meant to suggest only that the Court be more specific.

In the second place, neither in the opinion of the Court nor in the opinions of the concurring justices is any mention made of the basic rule established in many cases which, the Court said, was 'left intact' by § 271(a), that not only is the manufacturer of an infringing article an infringer but so also is a user of an infringing structure or device, for the monopoly conveyed **[**13]** by a patent covers the right to make, sell and use. [4] **[**18]** Therefore, a purchaser of an **[***13]** infringing **[*57]** Ford car is himself an infringer and as an infringer he cannot legally replace any part of his top, for by the purchase of his car he obtained no license to use the patented structure, even less to repair it. [5] And

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[3] The date mentioned is the date of a release and license granted to Ford Motor Co. by C.T.R.'s assignor. It may be that under that document the critical date is December 31, 1955.

[4] See Birdsell v. Shaliol, 112 U.S. 485, 5 S.Ct. 244, 28 L.Ed. 768 (1884); Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 50 S.Ct. 9, 74 L.Ed. 147 (1929) (infringement by both the manufacturer (Dent Hardware Co.) and user (Sanitary Refrigerator Co.) of the patented product); and see General Talking Pictures Corp. v. Western Electric Co., 305 U.S. 124, 127, 59 S.Ct. 116, 117, 83 L.Ed. 81 (1938), where it is said: 'Pictures Corporation * * * is in no better position than if it had manufactured the amplifiers itself without a license. It is liable because it has used the invention without license to do so.'

[5] On the necessity for an implied license to repair, see Thomson-Houston Electric Co. v. Ohio Brass Co., 80 F. 712, 723 (C.A.6, 1897); Union Special Machine Co. v. Maimin, 161 F. 748, 750 (C.C.Pa., 1908), affirmed 165 F. 440 (C.A.3); National Brake & Electric Co. v. Christensen, 38 F.2d 721, 723 (C.A.7, 1970); Remington Rand Business Service, Inc. v. Acme Card System Co., 71 F.2d 628, 630 (C.A.4, 1934); Electric Auto-lite Co. v. P. & D. Mfg. Co., 109 F.2d 566, 567 (C.A.2, 1940); and Ruth v. Stearns-Roger Mfg. Co., 13 F.Supp. 697, 712-713 (D.Colo.1935); Cf. Deller's Ed. of Walker on Patents, Sec. 379, at pp. 1486-1487.

one who supplies the infringing purchaser-user-repairer with a component of the patented top constituting a material part of the invention (certainly the fabric portion of the top cut or shaped in the only way it could possibly function in the combination is a material part of the Mackie-Duluk invention) knowing the same to be especially made or especially adapted for use in an infringement (Aro admittedly designed, made and advertised replacement tops for unlicensed Ford cars) and not, as the District Court originally found and this court agreed, a staple article suitable for a substantial non-infringing use, is a contributory infringer under Title *35 U.S.C. § 271(c)* quoted in the margin. [6]

Since none of the foregoing matters relevant to replacement tops for unlicensed Ford cars was mentioned or, except for Mr. Justice Brennan, even suggested, **[**14]** we can hardly assume any decision with respect to them. [7] **[**19]** The Court's silence seems significant. We cannot lightly assume that the Court would sub silentio overrule a very substantial body of authority on direct infringement, which it specifically said remained 'intact,' and then construe *§ 271(c)* in such a way as practically to leave it a dead letter. We therefore conclude that our previous decision in this case was not reversed insofar as unlicensed Ford cars are concerned. To carry out the Supreme Court's mandate we think the court below should enter a judgment that the Mackie-Duluk patent is valid as to the claims enumerated and contributorily infringed with respect to replacement tops for unlicensed Ford cars.

[*58] We come now to Aro's contention as appellant **[***14]** in No. 5993 that it is entitled to a decree that the plaintiff below, C.T.R., violated the antitrust laws and thereby rendered itself liable to three times the damages, including counsel fees, which Aro may be able to establish in further proceedings. The short answer to this contention is that Aro has never pleaded a cause of action under the antitrust laws.

It alleged patent misuse in its answer to the complaint. **[**15]** But it did not print those allegations in the joint record appendix before us on the previous appeal nor, in its brief on that appeal, did it mention patent misuse in its statement of the questions involved. Patent misuse as a defense was clearly abandoned. [8] Now counsel for Aro as appellant in No. 5993 seeks not only to revive that abandoned defense but also by some subtle legal alchemy to transform it into a positive claim for triple damages and counsel fees under the antitrust laws. We are not aware of any basis or authority for such a metamorphosis. So much for the allegations of patent misuse in the defendants' answer.

But in addition to the allegations in its answer, Aro alleged in its counterclaim: 'That this court find and enter a decree herein that said Patent No. 2,569,724 has been misused.' And this its counsel argues is a sufficient allegation of a cause of action under the antitrust laws because, he says, the record shows that Aro is entitled to damages for violation of those laws, and ***HN2***[] *Rule 54(c) of the Federal Rules of Civil Procedure* provides: '* * *

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[6] '***HN3***[] (c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article, or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.'

[7] In further support of the view that the attention of the members of the Court was concentrated on the situation with respect to licensed General Motors cars, we note that apart from Mr. Justice Brennan's express reference to a distinction between Ford and General Motors top replacements there are indications in the opinion of the Court that the licensed-unlicensed distinction was recognized and only the licensed situation considered. Among these 'clues' in Mr. Justice Whittaker's opinion are his statement *365 U.S. at p. 344, 81 S.Ct. at p. 603, 5 L.Ed.2d 592* that the patent licensee's, C.T.R.'s, contention would involve a 'new license' and 'another royalty' and his conclusion *365 U.S. at p. 345, 81 S.Ct. at p. 604, 5 L.Ed.2d 592* 'that a license to use a patented combination includes the right' to repair. In his concurring opinion, Mr. Justice Black must have had the licensed situation in mind in asserting, at *365 U.S. at p. 360, 81 S.Ct. at p. 612, 5 L.Ed.2d 592*, that 'one royalty to one patentee for one sale is enough * * *.' And Mr. Justice Harlan, in his dissenting opinion, states *365 U.S. at p. 369, 81 S.Ct. at p. 616, 5 L.Ed.2d 592*, 'The underlying rationale of the rule is of course that the owner's license to use the device carries with it an implied license to keep it fit for the use for which it was intended.'

[8] The Supreme Court in a footnote 365 U.S. at page 344, *81 S.Ct. at p. 603, 5 L.Ed.2d 592* of its opinion said that the doctrine of patent misuse was 'not an issue in this case.'

every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even **[**16]** if the party has not demanded such relief in his pleadings.'

Even if we assume that the allegation of patent misuse in Aro's counterclaim has somehow survived to this stage of the litigation, the Rule quoted from above does not authorize a grant of the relief requested. That Rule should be liberally construed to grant a prevailing party substantial justice. But it is not to be so liberally construed as to conflict with the requirement of *Rule 8(a)* that a pleading which sets forth a claim for relief, whether on original claim or a counterclaim, shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled. There is no merit whatever in this appeal.

A judgment will be entered vacating the judgment of the District Court and remanding the case to that Court for entry of a judgment in conformity with the views expressed in this opinion.

International Shoe Machine Corp. v. United Shoe Machinery Corp.

United States Court of Appeals for the First Circuit

March 11, 1963

No. 6043

Reporter

315 F.2d 449 *; 1963 U.S. App. LEXIS 5908 **; 1963 Trade Cas. (CCH) P70,699

INTERNATIONAL SHOE MACHINE CORPORATION, Plaintiff, Appellant, v. UNITED SHOE MACHINERY CORPORATION, Defendant, Appellee

Core Terms

decree, estoppel, trial court, shoe machinery, monopolization, district court, limitations period, lasting, close of evidence, antitrust, machines, prima facie evidence, final decree, time period, prior judgment, principles, commerce, toe, preponderance of evidence, final judgment, Clayton Act, evidentiary, limitations, machinery, questions, pretrial, leases

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN1[] **Antitrust & Trade Law, Clayton Act**

Section 5 of the Clayton Act, 15 U.S.C.S. § 16, permits private plaintiffs to utilize a final judgment or decree as prima facie evidence of all matters respecting which the judgment or decree would be an estoppel as between the defendants and the Government.

Antitrust & Trade Law > Clayton Act > 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

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN2[] **Antitrust & Trade Law, Clayton Act**

Recourse should be had to the principles of collateral estoppel in ascertaining the issues on which the prior judgment is evidence. In effect, under traditional principles, the evidentiary impact of § 5 of the Clayton Act, *15 U.S.C.S. § 16*, should be limited to those issues which were actually litigated and determined by the judgment or decree in the prior case.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN3[] **Antitrust & Trade Law, Clayton Act**

For a private litigant to derive the benefits of § 5 of the Clayton Act, *15 U.S.C.S. § 16*, from a prior Government judgment, he must not only meet the estoppel requirements of the section but must also show that the former decree or judgment is relevant to his own cause of action. This is to say that it is not enough for a plaintiff to demonstrate that a defendant has violated the antitrust laws generally. Rather, he must show that his claimed injury stemmed directly and proximately from the same type of practice condemned in the prior Government action. In short, before a plaintiff can invoke the mantle of Section 5 he must successfully meet both the statutory requirements of estoppel as well as the generic evidentiary test of admissibility -- relevancy.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Evidence > Relevance > Relevant Evidence

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN4[] **Estoppel, Collateral Estoppel**

The passage of time may evoke change of circumstances which preclude the creation of an estoppel. Matters adjudged as to one time period are not necessarily an estoppel as to other time periods. A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN5[] **Antitrust & Trade Law, Clayton Act**

Under § 5 of the Clayton Act, *15 U.S.C.S. § 16*, the prior decree is prima facie evidence only of a conspiracy covering the same area and existing during the same time as that involved in the case on trial.

Evidence > Relevance > Relevant Evidence

HN6[] **Relevance, Relevant Evidence**

Findings are not drawn, like nitrogen, out of the air. Rather, they can only have been quarried from the evidence adduced at the trial, upon which they must be bottomed and from which they cannot be severed without mutilating their significance.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN7[] **Estoppel, Judicial Estoppel**

However long may be required for the trial judge to weigh the evidence, find the facts, decide the issues and formulate the decree, the ultimate judgment relates only to the period embraced by the evidence adduced at the trial.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN8[] **Antitrust & Trade Law, Clayton Act**

The statutory requirement under § 5 of the Clayton Act, *15 U.S.C.S. § 16*, that the judgment or decree be final before it may be admitted into evidence in a subsequent proceeding contemplates a final disposition of the case, i.e., a final judgment by reason of failure to appeal within the statutory period, or a final judgment by reason of an affirmance of the appeal by the court of last resort.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN9[] **Antitrust & Trade Law, Clayton Act**

Until there has been a terminus to the litigation, the judgment or decree is not final and may not be utilized as prima facie evidence under § 5 of the Clayton Act, *15 U.S.C.S. § 16*.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Governments > Legislation > Statute of Limitations > Time Limitations

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN10[] **Antitrust & Trade Law, Clayton Act**

The date of the closing of the evidence may have a relevance and a significance in providing the chronological guidelines and fixing the time period limitations as to what questions were distinctly put in issue and directly determined.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN11[] **Antitrust & Trade Law, Clayton Act**

Under § 5 of the Clayton Act, *15 U.S.C.S. § 16*, relevancy does not become material until a plaintiff has cleared the statutory hurdle of estoppel.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN12[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Courts traditionally must weigh the probative value of the evidence sought to be admitted against the capacity for prejudice which the evidence might engender. Where the prejudice quotient is high, this fact will frequently render inadmissible evidence which -- from a purely logical standpoint -- may have a significant probative thrust. If certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN13[] **Conduct Evidence, Prior Acts, Crimes & Wrongs**

Evidence that a defendant had, in the past, committed illegal acts is not admissible to show that he has a proclivity towards similar wrongs in a subsequent proceeding.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN14[] **Antitrust & Trade Law, Clayton Act**

Where a plaintiff does not meet the statutory requirements of § 5 of the Clayton Act, *15 U.S.C.S. § 16*, if he does not have the independent evidence, he should be able to use the prior judgment as a crutch in the attempt to supply the essential elements of his action.

Counsel: **[**1]** Breck P. McAllister, New York City, with whom Morton Myerson, Boston, Mass., Roger J. Hawke, Frank G. Dawson, New York City, Malloy, Sullivan & Myerson, Boston, Mass., and Donovan, Leisure, Newton & Irvine, New York City, were on brief, for appellant.

Ralph M. Carson, New York City, with whom Robert Proctor, Boston, Mass., Theodore Kiendl, New York City, Robert D. Salinger, John B. Reigeluth, Boston, Mass., and Louis L. Stanton, Jr., New York City, were on brief, for appellee.

Judges: Before WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit judges.

Opinion by: HARTIGAN

Opinion

[*451] This is an appeal from a judgment of the United States District Court for the District of Massachusetts dismissing the complaint entered upon a special verdict of the jury in an action brought by plaintiff-appellant, International Shoe Machine Corporation, against defendant-appellee, United Shoe Machinery Corporation, under Sections 4 and 5 of the Clayton Act (Act of October 15, 1914, c. 323, §§ 4 and 5, 38 Stat. 731, *15 U.S.C. §§ 15* and *16*) to recover treble damages for violation of *Section 2* of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, *15 U.S.C. § 2*).

[2]** Plaintiff is a Massachusetts corporation which manufactures machinery for use in the 'lasting operation' of shoe construction. Defendant, a New Jersey corporation, manufactures machinery for use in all phases of shoe construction, including that used in the lasting operation.

The complaint, which was filed on December 14, 1956, alleged that beginning some time prior to 1938 [1] and continuing to the date of the filing of the complaint, defendant had monopolized trade and commerce in the shoe machinery industry and the parts thereof in violation of *Section 2* of the Sherman Act and had thus prevented plaintiff from obtaining a fair competitive share of the market in such industry. The complaint alleged a substantial loss of profits to plaintiff owing to the alleged monopolization and prayed judgment for three times the damages sustained.

The complaint further alleged that on February 18, 1953, in the case of *United States v. United Shoe Machinery Corp., D.C., 110 F.Supp. 295* (aff'd per curiam *347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954))*, a final decree was entered in the United States District Court for the District of Massachusetts finding that appellee **[**3]** had violated the antitrust laws and further stated that 'Pursuant to Section 5 of the Clayton Act, plaintiff intends to use said final decree against defendant as prima facie evidence as to all matters respecting which the said final decree would be an estoppel between the parties thereto.'

The defendant answered and relying upon the 1955 amendments to the Clayton Act (69 Stat. 283, *15 U.S.C. § 15(b)*), moved under Rule 56(b), 28 U.S.C., for partial summary judgment insofar as the plaintiff's complaint purported to assert any cause of action arising more than four years prior to the filing of the complaint, that if prior to December 14, 1952. The district court denied this motion and defendant appealed.

[*452] In our opinion reversing the district court, *United Shoe Mach. Corp. v. International Shoe Mach. Corp., 275 F.2d 459* (1st Cir., 1960), we agreed with defendant that the statute of limitations precluded plaintiff from asserting any cause of action which might have accrued prior to December 14, 1952. The thrust of this ruling was to require plaintiff to demonstrate injury resulting from antitrust violations in the four year period **[**4]** immediately prior to the filing of the complaint -- December 14, 1952 through December 14, 1956 -- if it was to be successful in the instant action.

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[1] 1938 was the year of plaintiff's incorporation.

At a pre-trial conference on August 21, 1961 plaintiff requested an order permitting introduction, at any time during the trial, of the final decree, parts of the findings of fact and the opinion in the so-called 'Government case,' [2] stating that said decree and findings should constitute prima facie evidence. Plaintiff also requested an order permitting introduction into evidence of the parties' background and competitive activities since 1938, and of customers' reasons for refusing to deal with plaintiff.

On October 24, 1961 the district court issued a pre-trial order which included the following:

'4. Decision on the admissibility of the decree, findings, or any portion whatever of the proceedings before Wyzanski, D.J. in the case of *United States v. United Shoe Machinery Corporation, 110 F.Supp. 295*, is deferred until the close of plaintiff's other evidence at the trial, at which time decision can be made in the light of this fully developed evidence. Until the Court decides what, if any, of said material is **[**5]** admissible, no reference to any aspect of the case of *United States v. United Shoe Machinery Corporation, supra*, shall be made in the hearing of the jury by the parties in either the opening or at any other time prior to said ruling.

'5. Either party may introduce relevant evidence as to the background of the parties and of the shoe machinery industry at any time since the founding of plaintiff corporation in 1938, provided that nothing in this clause shall in any way modify or affect the provisions regarding order of proof or exclusion of evidence established by any other clause of this pretrial order.'

At the close of plaintiff's evidence on monopolization and injury, the admissibility of the decree and findings in the Government case was again argued. On April 2, 1962 the court again held these to be inadmissible and amended the pretrial order as follows:

'1. No part of the decree, findings of fact, or conclusion of law from *United States v. United Shoe Machinery Corporation, supra*, will be admitted in evidence as evidence of violation of the Antitrust laws of the United States; * * *.'

Defendant moved for a directed verdict at the close of plaintiff's **[**6]** case and again upon the completion of the whole case. The court reserved decision, and submitted to the jury the following five special questions posed pursuant to the provisions of *Fed.Rules Civ.Proc.Rule 49*, 28 U.S.C., to which neither party objected:

'Question 1. Do you find by a preponderance of the evidence that during the period from December 14, 1952 to December 14, 1956, the defendant United Shoe Machinery Corporation committed acts of monopolization so as to control and dominate interstate trade and commerce in the distribution of shoe machinery (other than Dry Thread Sewing Machines) in the United States, to such an extent as to exclude actual and potential competitors from that field of interstate commerce? Answer yes or no.

[*453] 'Question 2. Do you find upon a preponderance of the evidence that during the period from December 14, 1952 to December 14, 1956, defendant United Shoe Machinery Corporation committed acts of monopolization so as to control and dominate interstate commerce in side and toe lasting machines to such an extent as to exclude actual and potential competitors from interstate commerce in side an toe lasting machines? Answer yes or no.

'Question **[**7]** No. 3:

'Do you find upon a preponderance of the evidence that such acts of monopolization during that period were the proximate cause of injury to the business or property of the plaintiff? Answer yes or no.

'Question No. 4:

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[2] This terminology has been consistently utilized throughout the instant proceedings in referring to *United States v. United Shoe Machinery Corp., supra*, and we shall adopt it herein.

'Do you find upon a preponderance of the evidence that such injury as you have found to the business or property of the plaintiff in the period December 14, 1952 to December 14, 1956, did proximately cause monetary damage in the form of lost profits to the plaintiff in the period beginning December 14, 1952 and ending December 31, 1959, which are capable of reasonable calculation and determination?

'Question No. 5: What is the amount, if any, measured in dollars, which you find from the preponderance of the evidence that the plaintiff was damaged? State such amount or 'none' in the following blank space to indicate your finding.'

The jury answered the first question -- relating to defendant's monopolization in the distribution of shoe machinery generally -- in the affirmative. However, it answered question 2 -- relative to defendant's monopolization in the special area of side and toe lasting machinery -- in the negative. The jury also answered **[**8]** 'no' to question 3 concerning putative injury to plaintiff by defendant during the limitations period. Thereupon, it was unnecessary for the jury to answer questions 4 and 5. Judgment for the defendant was entered upon this verdict on May 14, 1962.

Plaintiff moved to vacate judgment and for a new trial on the grounds, inter alia, that the jury's answers to questions 1 and 2 were inconsistent and against the weight of the evidence, and that the decree and findings in the Government case should have been allowed in evidence. The trial court denied this motion. *International Shoe Mach. Corp. v. United Shoe Mach. Corp., 206 F.Supp. 949 (D.C.Mass.1962)*.

Plaintiff's argument on this appeal rests principally on the asserted error of the trial judge in excluding the final decree and certain findings of fact and conclusions in *United States v. United Shoe Machinery Corporation, supra*, (hereinafter the 'Government case'). It is plaintiff's contention that the decree, findings and conclusions were admissible under Section 5 of the Clayton Act and were 'relevant' both to plaintiff's proof of monopolization during the limitations period from December 14, 1952 to **[**9]** December 14, 1956 [3.] and to plaintiff's alleged damages.

The legislative history is clear that Congress enacted Section 5 of the Clayton Act to encourage treble damage suits by lessening the plaintiff's required proof and litigation expenses in the usually complex, time consuming and expensive area of antitrust litigation. See H.R.Rep. No. 627, 63 Cong.2d Sess. 14; S.Rep.No. 698, 63 Cong.2d Sess. 45; 51 Cong.Rec. 9270, 9490, 13851; see also Hamilton & Till, Antitrust In Action 83 (T N E C Monograph 14, 1940). The this end, Congress embodied as Section 5 a provision allowing treble damage plaintiffs to make use of judgments obtained by the Government in a prior action. ***HN1***[] **[*454]** This provision permits private plaintiffs to utilize 'A final judgment or decree' as prima facie evidence of 'all matters respecting which (the) judgment or decree would be an estoppel as between the' defendants and the Government. [4.] **[**33]**

The question here, as before the trial court, is the proper evidentiary effect to be accorded the prior Government decree. In *Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534 (1951)*, **[**10]** the Court in defining the relevant principles as to the scope of Section 5 stated that the prima facie effect of a prior judgment '* * * extends only to questions 'distinctly put in issue and directly determined' in the (prior proceeding) * * * (and that) plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based.' *340 U.S. at 569, 71 S.Ct. at 414*.

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3. Plaintiff also contends that these matters are relevant as essential 'background' evidence of conditions within the shoe industry prior to the commencement of the limitations period.

4. Section 5 states in pertinent part:

'(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.'

Emich, consequently, indicated that *HN2*[] recourse should be had to the principles of collateral estoppel in ascertaining the issues on which the prior judgment is evidence. See also, *Fifth and Walnut, Inc. v. Loew's Incorporated, 176 F.2d 587, 593* (2nd Cir., 1949), cert. denied *339 U.S. 894, 70 S.Ct. 242, 94 L.Ed. 549*. In effect, under traditional principles, the evidentiary impact of Section 5 should be limited to those issues which were 'actually litigated and determined' by the judgment or decree in the prior case. See Restatement, Judgments, § 68(1) (1942). [5.]

Moreover, **[**11]** *HN3*[] for a private litigant to derive the benefits of Section 5 from a prior Government judgment, he must not only meet the estoppel requirements of the section but must also show that the former decree or judgment is relevant to his own cause of action. This is to say that it is not enough for a plaintiff to demonstrate that a defendant has violated the antitrust laws generally. Rather, he must show that his claimed injury stemmed directly and proximately from the same type of practice condemned in the prior Government action. *Monticello Tobacco Co. v. American Tobacco Co., 197 F.2d 629, 631* (2nd Cir., 1952), cert. denied, *344 U.S. 875, 73 S.Ct. 168, 97 L.Ed. 678*. See, *Eagle Lion Studios, Inc. v. Loew's, Inc., 248 F.2d 438, 444, 445* (2nd Cir., 1957), aff'd per curiam by an equally divided *Court, 358 U.S. 100, 79 S.Ct. 218, 3 L.Ed.2d 147 (1958)*; *Shotkin v. General Electric Co., 171 F.2d 236, 238* (10th Cir., 1948). In short, before a plaintiff can invoke the mantle of Section 5 he must successfully meet both the statutory requirements of estoppel as well as the generic **[**12]** evidentiary test of admissibility -- relevancy.

In excluding the prior decree, findings and conclusions, the trial court predicated its decision on the ground that:

'In the Government case Judge Wyzanski closed the taking of evidence as of a date in June of 1951, some 18 months prior to the period which is open to the plaintiff in the instant case, namely, the period December 14, 1952 to December 14, 1956.

'I do not read Judge Wyzanski's findings of fact as reflecting that any conduct of defendant which occurred **[*455]** between December 14, 1952 and December 14, 1956 was put in issue or litigated in the Government case.'

In sum, taking the closing of the evidence in the Government case -- June 1951 -- as the determinative date, the trial court rested its decision on a difference in the time periods involved in the two actions.

In plaintiff's view, focusing on the date of 'the close of the evidence' was the trial court's basic error. According to plaintiff, the date on which the evidence closes has no significance in terms of Section 5 since the statute speaks in terms of a 'final judgment or decree' which 'shall be prima facie evidence.' Consequently, according to **[**13]** plaintiff, in assaying a putative difference in the time periods of the actions under scrutiny, the determinative reference is to the date of the final decree.

Briefly stated, the chronology of the terminal stage of the Government case is as follows:

(1) Date of the close of evidence -- June, 1951;

(2) Decree, findings of fact and conclusions of law entered by District Court -- February 18, 1953;

(3) Affirmance by Supreme Court -- May 17, 1954;

(4) Approval by District Court of a final plan for terminating the proscribed practices -- June 1, 1955.

Upon examination of the foregoing chronology it is apparent, as pointed out by the district court, that the date of the close of the evidence antedates the limitations period open to plaintiff by some eighteen months. On the other hand, the other cited dates are within the limitations period -- December 14, 1952 to December 14, 1956.

[5.] For a comprehensive review of collateral estoppel, see Developments in the Law -- Res Judicata, 65 Harv.L.Rev. 818, 840-50 (1952).

Selection of the determinative date has significant consequences. If the identical anti-competitive practices proscribed by the Government proceedings occurred during the same time period as that involved in the subsequent private action, there is little question that the estoppel requirements **[**14]** of Section 5 would be satisfied since the subject matter of the private suit could be regarded as but a contemporaneous manifestation of the activities condemned in the Government case. It would appear that this is the classical situation contemplated by Section 5. In such a case, with the estoppel requirements of Section 5 satisfied, relevancy could be assumed. However, if the pertinent practices involved in the Government case were adjudicated against the background of a time period different from that involved in the subsequent private proceeding, then, under traditional principles, Section 5's estoppel requirements seemingly would not be satisfied and a relevancy question would not arise. [6.]

'Traditional' principles which would apparently render inapplicable invocation of collateral estoppel considerations include the rule that ***HN4***[] the passage of time may evoke change of circumstances which preclude the creation of an estoppel. See, e.g., *City of Shreveport v. Shreveport Ry. Co., 38 F.2d 945, 69 A.L.R. 340* (5th Cir., 1930), cert. denied, *281 U.S. 763, 50 S.Ct. 462, 74 L.Ed. 1172*, **[**15]** and the principle that matters adjudged as to one time period are not necessarily an estoppel as to other time periods. Cf., *Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 6*. S.Ct. 715, *92 L.Ed. 898 (1948)*. As was stated in *Third National Bank of Louisville v. Stone, Auditor, 174 U.S. 432, 434, 19 S.Ct. 759, 760, 43 L.Ed. 1035 (1899)*: 'A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen.'

In many instances courts have noted a difference in the time periods involved in the Government and subsequent private actions in rendering the prior judgment inadmissible under Section 5. *Park Neponset Corporation v. Smith, 258 F.2d* ***[*456]*** *452* (1st Cir., 1958); *Eagle Lion Studios Inc., v. Loew's Inc., supra*; *Paramount Film Distributing Corp. v. Village Theatre, 228 F.2d 721* (10th Cir., 1955); *Robbinsdale Amusement Corp. v. Warner Bros. Pictures Distributing Corp., 141 F.Supp. 134 (D.C.Minn. 1955)*. Cf. *Shotkin v. General Electric Co., supra*; *Wolfe v. National Lead Co., 16 F.R.D. 61 (N.D.Cal.1953)*, aff'd, **[**16]** *225 F.2d 427* (9th Cir., 1955), cert. denied, *350 U.S. 883, 76 S.Ct. 135, 100 L.Ed. 778 (1955)*. As was stated in *Orbo Theatre Corporation v. Loew's, Incorporated, 156 F.Supp. 770, 777 (D.C.D.C.1957)*, aff'd, *104 U.S.App.D.C. 262, 261 F.2d 380 (1958)*, cert. denied, *359 U.S. 943, 79 S.Ct. 725, 3 L.Ed.2d 677 (1959)*, 'It should be emphasized that ***HN5***[] under the above quoted statute (Section 5) the (prior) decree is prima facie evidence only of a conspiracy covering the same area and existing during the same time as that involved in the case on trial.' (Emphasis supplied.)

In *Park Neponset, supra* -- a treble damage suit -- we approved the action of the district court in completely excluding from evidence the findings, conclusions and decree entered in a prior Government case. There we pointed out that while the excluded findings related to the competitive situation of 1945, the plaintiff's theatre did not commerce operation until 1947. Consonant with the principles evoked in the above cited cases, the district **[**17]** judge in the instant case excluded the Government decree on the ground that the activities found illegal in the prior proceeding did not, in the language of *Orbo Theatre Corp., supra*, exist 'during the same time as that involved in the case on trial,' but, at least, some eighteen months prior thereto.

Plaintiff, while apparently conceding the correctness of the result in a case such as *Park Neponset, supra*, attempts to distinguish it on the basis that in that case the findings were 'expressly stated' to show the situation in 1945 while the plaintiff did not commence operation, as noted above, until 1947. Here, plaintiff continues, 'the relevant findings in the Government case upon which appellant relies are not limited to any specific date.' Plaintiff then seeks to buttress this distinction by noting that the findings of the district judge in the Government case 'speak in the present tense throughout' and, consequently, 'all of the * * * findings are made as of the date of their making on February 18, 1953 by the very words that are used.' The net of this argument, of course, would be to move the Government action within the 'same time period' as that **[**18]** open to plaintiff and obviate the obstacles to the Section 5 estoppel considerations canvassed above.

We are unwilling to accept plaintiff's contentions because they not only emphasize form over substance but ask us to close our eyes to the realities of what occurred in the Government case. It is undisputed that the last item of

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6. Unless this question became pertinent on the question of admitting the prior decree as 'background' evidence. See infra.

evidence which the district judge received in the Government case and upon which he rested his decision was admitted as of a date in June, 1951. There is no contention that any evidence touching on the environmental and competitive context of the shoe industry came to the court's attention in the interim period between the close of evidence and the announcement of findings. Perforce, quite apart from whether or not the findings of the trial judge 'were expressly stated to show the situation' as of the date in June, 1951, when the evidence closed, they plainly could not reflect a competitive situation subsequent to that date, else they would be grounded on speculation and not evidence. *HN6*[] Findings, to use Justice Frankfurter's phrase in another context, are 'not drawn, **[**19]** like nitrogen, out of the air.' [7.] Rather, they can only have been quarried from the evidence adduced at the trial, upon which they must be bottomed and from which they cannot be severed without mutilating their significance. In the Government case, the development of the evidential complex terminated in June, 1951 **[*457]** and so far as the findings and the decree are concerned, they can speak no later than this date.

The Government case, to use the district court's own words, involved 'a trial of prodigious length.' Some five years elapsed between the filing of the complaint on December 15, 1947 and the close of the evidence in June, 1951. Thousands of exhibits, interrogatories, depositions and a wealth of testimony had to be sifted and evaluated by the district judge in making his findings and formulating an appropriate decree. [8.] Appraisal and evaluation of the plethora of evidence required thoughtful consideration and this, in turn, required time, without which there could be neither the reflection nor the deliberation essential to a knowledgeable judgment. In the Government case this period extended for some eighteen months. In view of the scope and complexity of the **[**20]** issues there involved, the elapse of this time is not surprising. The point is that *HN7*[] however long may be required for the trial judge to weigh the evidence, find the facts, decide the issues and formulate the decree, the ultimate judgment relates only to the period embraced by the evidence adduced at the trial. Cf., *United States v. Waskowski, 158 F.2d 962* (7th Cir., 1947); *Johnson v. Flemming, 264 F.2d 322* (10th Cir., 1959). Thus, evidentially speaking, though the decree was handed down in 1953 it spoke -- so far as the determinative time period for our purposes is concerned -- as of June, 1951.

Nor can we attach significance to plaintiff's argument that the trial judge's language was cast 'in the present tense.' We do not believe that considerations of estoppel should turn on the happenstance of style or syntax when the record clearly indicates that the language, though speaking in the present tense, related to a date at least eighteen months in the past.

It is of course true that Section 5 speaks in terms of 'a final judgment' which 'shall be prima facie. **[**21]** ' However, notwithstanding that fact, we believe that plaintiff reads too much into this language when it argues that the 'trial court erred in giving any significance to the date of the close of the evidence (since) that date has no significance under the statutory language.'

HN8[] The statutory requirement that the judgment or decree be final before it may be admitted into evidence in a subsequent proceeding contemplates a 'final disposition of the case, i.e., a final judgment by reason of failure to appeal within the statutory period, or a final judgment by reason of an affirmance of the appeal by the court of last resort.' *Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366, 36*. (D.C.Minn.1939), aff'd, *119 F.2d 747* (8th Cir., 1941), cert. denied, *314 U.S. 644, 62 S.Ct. 84, 86 L.Ed. 516 (1941)*. See, *Fifth and Walnut, Inc., v. Loew's Incorporated, 176 F.2d 587, 592-594* (2nd Cir., 1949); *Duluth Theatre Corporation v. Paramount Pictures, 72 F.Supp. 625 (D.C.Minn.1947)*.

These cases recognize the principle that **[**22]** *HN9*[] until there has been a terminus to the litigation, the judgment or decree is not final and may not be utilized as prima facie evidence. Needless to say, if there remains

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7. Frankfurter, Reflections on Reading Statutes, The Record of the Association (of the Bar of the City of New York), Vol. 2, pp. 213, 235 (1947).

8. 'The complaint (in the Government case) charge(d) the defendant with monopolizing and attempting to monopolize interstate trade and commerce in the shoe machinery industry from the year 1912 until the filing of the complaint on December 15, 1947. That span of years covers most of the corporate life of a company engaged in a specialized, skilled and technical trade.' McAllister, The Big Case: Procedural Problems In Antitrust Litigation, 64 Harv.L.Rev. 27, 39 (1950).

the possibility that the result dictated by the action of an inferior court may be reversed by a higher tribunal, the evidentiary impact of the judgment will be delusively imprecise. To obviate such a contingency, the statute imports the salutary principle of finality of judgment. However, to say that a judgment must be final before a plaintiff may introduce it under Section 5 is not to imply that in assaying the **[*458]** estoppel requirements of this same action, a court must close its eyes or 'attach no significance' to the date of the close of the evidence. We believe that ***HN10***[] this date may, as in this case, have a relevance and a significance in providing the chronological guidelines and fixing the time period limitations as to what 'questions (were) 'distinctly put in issue and directly determined' (in the prior proceeding).' *Emich Motors Corp., supra, 340 U.S. at 569, 71 S.Ct. at 414*. **[**23]**

In the Government case the court found the defendant's leasing activity to be violative of the Sherman Act on the ground that certain provisions of the leases were inimical to the development of competition 'in the context of the present shoe machinery market'. Plaintiff has placed great reliance on the fact that the record in the instant case indicates that the same leases involved in the Government case were utilized by the defendant during the limitations period of the present case. And, in plaintiff's words, this fact makes the decree, findings and conclusions in the Government case 'relevant prima facie evidence to which appellant is entitled under Section 5.' Again, we believe that plaintiff confuses relevancy with the estoppel requirements of Section 5. As noted above, ***HN11***[] under Section 5, relevancy does not become material until a plaintiff has cleared the statutory hurdle of estoppel and, in this case, we do not believe that plaintiff has done so.

We do not read the trial court's ruling in the Government case as holding that leases of the kind utilized by the defendant are pre se **[**24]** violations of the antitrust laws. Cf., *International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947)*. Rather, in the language of the trial court: 'In short, the leases themselves are not forbidden; only when they are used as an instrument for seeking (or maintaining) market control is the lessor to be charged with (restraint of trade or monopolizing).' *United States v. United Shoe Machinery Corp., supra, 110 F.Supp. at 346*.

Again, the violation in the Government case was found in the 'context' of the shoe machinery field during the time period there under scrutiny; a period which, in our view, could be of a date no later than June, 1951 and, from many of the trial judge's specific references, was essentially bottomed on the defendant's competitive posture in the 1947-49 market.

In at least one significant facet, this was not the same 'context' which existed in the shoe machinery industry -- and specifically in the specialized market of side and toe lasting machinery at issue here -- during the instant limitations period. Two of plaintiff's three major pieces of equipment were commercially introduced into the market after **[**25]** the close of the evidence in the Government case. One of these machines apparently embodied a technological break-through which produced spectacular commercial success for plaintiff; with a demand which far outstripped supply and which strained plaintiff's productive capacity to the utmost. This machine was apparently a highly coveted item in many segments of the industry and its availability was a competitive factor which was missing from the 'context' of the side and toe lasting market in the Government case.

It cannot be gainsaid that in any meaningful appraisal of the adverse or anti-competitive effects of devices alleged to restrict the freedom of buyers to purchase from competing suppliers, the extent to which there is a diminution of competition in the relevant market, will depend upon the degree of need for the controlled product and the availability of adequate and desirable substitutes. The machines which plaintiff introduced into the post-1951 market were assuredly pertinent factors in any assessment of the context of the competitive environment and structure within the relevant market for side and toe lasting machinery. Failure to accord due emphasis to changed competitive **[**26]** conditions, such as those cited above, would amount to a judgment on the sum of the many market **[*459]** relationships called competition which had scarcely more validity than 'a guess in the dark.' Standard Oil Co. v. United States, 337 U.S. i93, 322, *69 S.Ct. 1051, 93 L.Ed. 1371 (1949)* (dissenting opinion).

For the foregoing reasons we believe that the trial court was correct in holding inadmissible under Section 5 the decree, findings and opinion in the Government case.

The next question concerns the plaintiff's argument that these items should have been admitted as 'background' evidence. In the words of plaintiff: 'Even if we are incorrect in urging that the operative date under Section 5 is the effective date of the final decree on June 1, 1955, the decree and the findings and conclusions are still relevant and material as essential background to appellant's other proof of monopolization of lasting machines and of injury to its business or property in the limitations period itself.'

Again we are unwilling to accept plaintiff's contention. While plaintiff continually stresses the relevancy of these matters, relevancy is not the only factor to be considered **[**27]** by a court in determining the admissibility of evidence of this character. ***HN12***[] Courts traditionally must weigh the probative value of the evidence sought to be admitted against the capacity for prejudice which the evidence might engender. Where the prejudice quotient is high, this fact will frequently render inadmissible evidence which -- from a purely logical standpoint -- may have a significant probative thrust. See generally, McCormick, Evidence, 315-21 (1954). As was stated in *Loew's, Inc. v. Cole, 185 F.2d 641, 661* (9th Cir., 1950), cert. denied, *340 U.S. 954, 71 S.Ct. 570, 95 L.Ed. 688 (1951)*: "If certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, * * * there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose." (Quoting Wigmore on Evidence.)

We believe this principle is particularly apposite in the present proceeding. Whether admitted purely as 'background' evidence or not, evidence **[**28]** of a judicial determination of prior illegal conduct on the part of the defendant cannot help but have a great emotive impact on a jury. As Wigmore states: 'The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught is a tendency which cannot fail to operate with any jury, in or but of court.' 1 Wigmore, Evidence, § 57 (3d ed. 1940).

It is of course well settled that ***HN13***[] evidence that a defendant had, in the past, committed illegal acts is not admissible to show that he has a proclivity towards similar wrongs in a subsequent proceeding. See generally, Stone, The Rule of Exclusion of Similar Fact Evidence: England, 46 Harv.L.Rev. 954 (1933); Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv.L.Rev. 988 (1938). 1 Wigmore, Evidence, § 64 (3d ed. 1940).

Moreover, it is clear that if common law rules of admissibility were applied, a plaintiff would be unable to derive evidentiary benefit from the prior Government judgment. *Buckeye Powder Co. v. E. I. DuPont de Nemours Powder Co., 248 U.S. 55, 63, 39 S.Ct. 38, 63 L.Ed. 123 (1918)*. **[**29]** Until the advent of Section 5, these judgments were unavailable to a private plaintiff. In making this change, Congress delimited use of the prior judgment to those precisely defined situations meeting the requirements of Section 5. Where, as here, a plaintiff does not meet the statutory requirements of Section 5, we believe that it would be unwarranted to allow it to attempt to do indirectly what it is foreclosed from doing directly. Absent the mantle of Section 5, if a plaintiff has the independent evidence to demonstrate antitrust violation and injury during the appropriate limitations period, then it would seem that he would not have to resort to a judgment obtained in a prior proceeding as 'background.' ***HN14***[] If he **[*460]** does not have the independent evidence, we do not believe that he should be able to use the prior judgment as a crutch in the attempt to supply the essential elements of his action. It would be subversive of the purpose of Section 5 to permit the introduction of a prior decree or judgment 'merely for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing. **[**30]** " *Monticello Tobacco Co. v. American Tobacco Co., 197 F.2d 629, 632* (2nd Cir., 1952), cert. denied, *344 U.S. 875, 73 S.Ct. 168, 97 L.Ed. 678*.

Finally, plaintiff argues at length that the trial court committed prejudicial error in limiting its development of the evidence in the pre-limitations period. Plaintiff urges that the trial court erroneously regarded the limitations period as controlling the admissibility of evidence.

It is of course true that the statute of limitations does not govern the admissibility of evidence and that this question is controlled by rules independent of a limitations question. *Klein v. American Luggage Works, Inc., 206 F.Supp. 924, 936 (D.C.Del.1962)*. Cf., *Continental Ore Co. v. Union Carbide, & Carbon Corp., 370 U.S. 690, 709, 710, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962)*. However, in the Continental case, supra, the Supreme Court made clear that: 'We do not mean that a trial court may not place reasonable limits upon such evidence or set a reasonable cut-off date, evidence before which point is to be considered too remote to have sufficient probative value to justify burdening the record with it. **[**31]** ' *Id., at 710, 82 S.Ct. at 1416*.

A careful examination of the record convinces us that the trial court understood and correctly applied both of the foregoing principles.

Thus, in his pretrial order of October 24, 1961, at the very outset of the trial, the court expressly stated: 'Either party may introduce relevant evidence as to the background of the parties and of the shoe machinery industry at any time since the founding of plaintiff corporation in 1938, * * *,' while, simultaneously indicating that the allowance of such evidence would be subject to its prior ruling against reference to the Government case. We believe that the court's rulings throughout the course of the trial were characterized by the desire to accommodate these competing considerations while delimiting the blanket of evidence -- much of it repetitious and rambling -- to manageable proportions. In this we believe it was successful.

In short, we believe that the trial court did not unduly restrict the presentation of the plaintiff's case. Moreover, even if it be conceded that the trial court may have been severe in certain of its rulings on plaintiff's proof, we believe that any error in **[**32]** this regard was cured by the jury's affirmative answer to question 1, supra.

We have considered the other points raised by plaintiff and believe that they do not require discussion in this opinion.

A judgment will be entered affirming the judgment of the district court.

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Haverhill Gazette Co. v. Union Leader Corp.

United States Court of Appeals for the First Circuit

July 6, 1964

Nos. 6175, 6191

Reporter
333 F.2d 808 *; 1964 U.S. App. LEXIS 4815 **; 1964 Trade Cas. (CCH) P71,161

The HAVERHILL GAZETTE COMPANY, Appellant, v. UNION LEADER CORPORATION, Appellee. UNION LEADER CORPORATION, Appellant, v. The HAVERHILL GAZETTE COMPANY, Appellee

Core Terms

district court, inappropriate, allegations, proceedings, hostility, newspaper, orderly, wasted

Counsel: **[**1]** Robert H. Goldman, Lowell, Mass., with whom Frank Goldman, Lowell, Mass., Joseph F. Bacigalupo, Lawrence, Mass., and Goldman, Goldman & Curtis, Lowell, Mass., were on brief, for The Haverhill Gazette Company.

James M. Malloy and Ralph Warren Sullivan, with whom Malloy, Sullivan & Sullivan, Boston, Mass., was on brief, for Union Leader Corporation.

Judges: Before HARTIGAN and ALDRICH, Circuit Judges, and GIGNOUX, District judge.

Opinion by: PER CURIAM

Opinion

[*809] Union Leader's unusual procedure in moving this court to recall the mandate after its motion for stay had been denied and the mandate had issued, and the unusual allegations made in its motion, call for brief comment. In the first place it is to be noted that the mandate will not result in a final judgment, and does not call for execution to issue, with respect to Gazette's claim against Union Leader, but means only that the hearings will resume with respect to the determination of damages, which, in Union Leader's opinion, means needless expense. If our decision was in error, and should be reversed by the Supreme Court, it is true that this would constitute wasted effort. A potentiality of wasted effort exists **[**2]** every time a court refuses to stay proceedings and accept an interlocutory appeal. Nonetheless, it is basic to the orderly rendering of justice that litigation proceed without unnecessary interruptions even at such risk. There must be here, as there, a weighing of competing considerations.

In this particular case the district court recited in its original decision that Haverhill was a one newspaper area, and that ultimately only one newspaper can survive. This finding has never been vacated, or even attacked. In one manner or another, and we intend no criticism, this litigation has been in active progress since January 1959, during which period the competition has uninterruptedly continued. The finding of substantial violations of the Sherman Act by Union Leader still stands, and is, in our opinion, presently final. Under these circumstances we do not believe that orderly procedure requires at this stage a suspension of all proceedings.

With regard to the identity of the new special master appointed by the district court, that matter is not before us even if, if it is Union Leader's suggestion, he is an inappropriate selection. We do not, by this, mean to intimate that he **[**3]** is inappropriate, and perhaps we even err in thinking that this may be what Union Leader is suggesting.

Finally, Union Leader contends that its filing of an affidavit of prejudice, *Matter of Union Leader Corporation, 1 Cir., 292 F.2d 381*, and the actions of this court, have created an atmosphere of **[*810]** hostility which entitles it to a change of venue. We are not presently aware of any such hostility, but will naturally not make any final determination of that matter until the time is ripe. We do say, however, that its present allegations in this respect do not warrant a recall of mandate.

The motion is denied.

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Quinn v. Mobil Oil Co.

United States Court of Appeals for the First Circuit

March 31, 1967, Decided

No. 6737

Reporter

375 F.2d 273 *; 1967 U.S. App. LEXIS 6904 **; 1967 Trade Cas. (CCH) P72,052

Robert A. Quinn, Plaintiff, v. Mobil Oil Co., Defendant

Disposition: [1]** Affirmed.

Core Terms

dealer, manufacturer, retailers, supplier, prices, lease, maximum price, gasoline, Sherman Act, resale price, retail price, competitors, conspiracy, vertical, horizontal, maximum, consignment, fixing, minimum price, insistence, proscribe, terminate, station, renew

LexisNexis® Headnotes

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 > Vertical Restraints > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

Resale pricing agreements that unreasonably restrain trade or commerce, whether they fix minimum or maximum prices, are proscribed by *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. In order to set forth a cause of action under this section it is essential that a contract, combination or conspiracy, express or implied, be alleged.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

To be actionable under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, pressure to achieve retail price maintenance that exceeds a mere refusal to deal must occur in a contemporaneous framework of the combination, conspiracy, or agreement forbidden by the statute.

Judges: Aldrich, Chief Judge, McEntee and Coffin, Circuit Judges. Coffin, Circuit Judge (concurring). Aldrich, Chief Judge (dissenting).

Opinion by: McENTEE

Opinion

[*273] McENTEE, Circuit Judge:

In this action plaintiff, a gasoline station operator, charges the defendant oil company, his former lessor and supplier, with violations of the federal antitrust laws as a result of which he suffered great damage. The district court dismissed the suit for failure of the amended complaint to allege a federal ***antitrust law*** violation.

Viewing this ambiguous complaint in the light most favorable to the plaintiff, **[*274]** the following facts will be taken as true. In November 1962 plaintiff leased a Mobil gasoline station from defendant for a period of one year -- and entered into a contemporaneous retail dealer contract agreeing to purchase certain minimum quantities of defendant's petroleum products. The contract also provided for the purchase of tires, batteries and other accessories. This venture became fairly successful in the very first year of operation. In late 1963 when the lease and contract came up for renewal, defendant orally informed plaintiff that unless **[**2]** he reduced the retail price of gasoline by one cent a gallon his rent under the new lease would be substantially increased. Plaintiff flatly refused to reduce his price and vehemently protested the threatened rent increase. Apparently he won out -- at least temporarily -- because shortly thereafter the parties executed new agreements substantially the same as the old ones except for a slight increase in the rent. [1]

A few months later defendant began exerting various pressures on plaintiff to force him either to reduce his price of gasoline [2] or terminate his lease. It delayed payments due him at a time when it knew he needed the money; attempted to unload a consignment of tires, batteries and accessories on him [3] and apply the money owed in payment for this unwanted merchandise. After plaintiff refused to accept this consignment, defendant entered upon a campaign of harassment **[**3]** against him by delaying its deliveries of gasoline to his service station. Finally, when these pressures and harassments failed to bring about the desired results, defendant notified plaintiff in July, 1964 that it was terminating the lease as of the end of its current term (November, 1964). This, despite the fact that the receipts from the station had increased substantially in the relatively brief period he had operated it. Shortly thereafter, plaintiff was required to vacate the gasoline station premises and as a consequence suffered great damage -- all because of his refusal to comply with defendant's request that he reduce the retail price of its gasoline.

From these facts it is clear that the only provision of the federal antitrust laws that **[**4]** need be considered here is *Section 1* of the Sherman Act, and I shall confine my discussion to defendant's alleged violation of that section. [4] **[**5]** ***HN1***[] Resale pricing agreements that unreasonably restrain trade or commerce, whether they fix minimum or maximum prices, are proscribed by *Section 1* of the *Sherman Act. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*. [5] It should be pointed out, however, that in order to set

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[1] These agreements ran automatically from year to year but were subject to termination in any year on notice of either party.

[2] There is no allegation that defendant renewed its request for this price increase at this or any later time.

[3] That he did not order; that defendant did not require his competitors to take and which under his contract plaintiff was not obliged to accept.

[4] Plaintiff contends that defendant's above stated tactics also violated the Clayton Act as amended by the Robinson-Patman Price Discrimination Act, *15 U.S.C. § 13(a)(b)(f)* but this act is inapplicable under any view of the facts and for that reason we shall not consider this contention.

[5] In this case the Court stated that both minimum and maximum price fixing agreements "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

forth a cause of action under this section [6] it is essential that a "contract, combination or conspiracy", express or implied, be alleged. *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*.

[*275] Beginning with *United States v. E.C. Knight Co., 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895)*, the first case decided under the Sherman Act, and continuing down through *United States v. General Motors, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*, I have found no case where the Supreme Court has allowed recovery under this section absent a showing of at least one of these elements. Nowhere in his amended complaint has this plaintiff alleged the existence of any contract, combination or conspiracy between the defendant and others fixing the resale price of its gasoline nor does he **[**6]** allege any facts from which any such agreement, policy, scheme or conspiracy may be implied. Thus, I think the absence of such allegations renders the amended complaint fatally defective. Accord, *House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 870 (2d Cir. 1962)*.

The allegation that defendant pressured plaintiff to reduce his retail price at best amounts to a unilateral attempt to coerce plaintiff into making such an agreement. [7] Therefore the immediate question is whether this is actionable under *Section 1* of the Sherman Act. I think not. If Congress intended to make attempts actionable under this section undoubtedly it would have done so expressly as it did in the very next section of the Act (*15 U.S.C. § 2*) dealing with monopolies. It certainly is not within our province to read into this section interstitially a proscription which Congress clearly did not intend.

[7]** There are three cases which it is argued tend to support the contrary view. I think these cases are distinguishable. The first is *United States v. Parke, Davis & Co., supra.* There the Court held that a manufacturer's conduct which went beyond a mere announcement of its price policy and a simple refusal to deal, violated *Section 1* of the Sherman Act. In that case the manufacturer took steps to pressure certain unwilling retailers into adhering to its resale price policy through the cooperation of its dealers and some of its retailers. The Court found that this joint action to maintain resale prices constituted a combination or conspiracy in restraint of trade. Although defendant's conduct in the case before us may have been more than a simple refusal to deal, our case is clearly distinguishable from *Parke, Davis* in that no combination or conspiracy is alleged nor can any be implied.

The facts in the other two cases, *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* and *Broussard v. Socony Mobil Oil Co., 350 F.2d 346 (5th Cir. 1965)*, are practically identical. In both, a resale price agreement was entered **[**8]** into between supplier and dealer. Subsequently the dealer reneged and the supplier terminated the lease. Unlike the present case, in *Simpson* there was evidence of a large scale price maintenance program maintained through written consignment agreements under which the supplier fixed the retail price of gasoline. The dealer would not abide by the price fixed thereunder and for that reason the supplier refused to renew the dealer's lease. The Court held that resale price maintenance through this coercive type of consignment *agreement* violated *Section 1* of the Sherman Act. The case turned on the existence of an agreement for resale price maintenance. *Simpson, supra at 24*. In the instant case there is no such agreement.

Broussard, supra involved a situation where the dealer reduced his retail price of gasoline only after repeated insistence by the supplier. Finding that he could not make a living at the reduced price, the dealer raised it to its former level. The supplier again insisted upon a reduction in price and when the dealer refused, the supplier declined to renew the lease. The record in that case is much stronger for the dealer than **[**9]** in the **[*276]** instant one. In *Broussard* there was clear evidence that the supplier's insistence that the retail price be reduced was part of a "marketing program"; also that at least one other dealer had reduced his retail price due to this insistence. When the dealer in *Broussard* reduced his price an agreement to control the retail price came into existence. I think this was a determinative factor in that case, even though shortly thereafter the dealer refused to abide by it. [8] The

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[6] *Section 1* reads in relevant 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. . . ." 26 Stat. 209, *15 U.S.C. § 1 (1964 ed.)*.

[7] A simple refusal to deal, standing alone, is not a vertical agreement; in fact the refusal indicates there has been a failure to obtain agreement. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 686 (1962).

evidence above mentioned also supplied the basis upon which a combination or conspiracy in restraint of trade could be implied.

Plaintiff Quinn never having complied with defendant Mobil's request to reduce his price, **[**10]** no agreement to control the resale price of gasoline ever came into existence between them. This, plus the absence of any allegation that Mobil's request was part of a general price maintenance scheme or policy or that any other dealer reduced his retail price as a result of defendant's insistence, clearly distinguishes our case from *Broussard*. ***HN2***[] To be actionable under *Section 1* of the Sherman Act pressure to achieve retail price maintenance that exceeds a mere refusal to deal must occur "in a contemporaneous framework of the combination, conspiracy, or agreement forbidden by the statute." *Dart Drug Corporation v. Parke, Davis & Company, 120 U.S. App. D.C. 79, 344 F.2d 173, 186 (1965)*. Clearly, in the instant case there is no such "framework."

The allegation that defendant terminated the lease, despite the fact that plaintiff's business had increased substantially, perhaps comes close to raising an inference that defendant was policing a general scheme to fix prices for the area. But this court should not be required to so speculate. Nor is it too much to require this plaintiff, absent the showing of an agreement, to allege enough facts to indicate that the acts **[**11]** complained of took place within the larger framework of a pricing program, policy or conspiracy -- if this is the real basis of his complaint. He has not done so here.

Affirmed.

Concur by: COFFIN

Concur

COFFIN, Circuit Judge (concurring):

I agree with Judge McEntee's conclusion that the absence of allegation of contract, combination, or conspiracy is a fatal defect in the complaint. But I would go further and say that even had plaintiff alleged either a completed agreement between himself and defendant or pressure on him to conform to a general maximum pricing policy of defendant, the complaint would not have stated a cause of action under *section 1* of the Sherman Act.

My reasoning lies in the difference I see -- admittedly without the benefit of authority -- between the anti-competitive effects of minimum price fixing and of maximum price fixing, as practiced by a single manufacturer or supplier. [1] When a single manufacturer establishes and seeks to police a minimum resale price policy, he in effect is acting as the convenient instrumentality for his retailers. For the motive to maintain floors to prices is theirs, not his. It must be immaterial to the manufacturer **[*277]** **[**12]** what profit his retailers receive so long as they pay his price and sales are satisfactory. Therefore, what appears to be unilateral and vertical action by a manufacturer aimed toward retailers, may in reality amount to a horizontal agreement among retailer-competitors. The essence of combination is present although the mechanics may be obscure.

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[8] We do not subscribe to the view that an agreement broken shortly after it was made is in effect no agreement at all. See *Guidry v. Continental Oil Company, 350 F.2d 342, 344 (5th Cir. 1965)*, where the same court, on the same day it decided Broussard, strongly emphasized this point.

[1] To be sure, *United States v. Socony-Vacuum Oil Co., 1940, 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811*, contains the classic statement, often repeated, that "a combination formed 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*." But this was made in the context of industry-wide policies. As I shall hope to demonstrate, while maximum price fixing among manufacturers is more than likely to restrain price competition, the same cannot be said of maximum price fixing by one manufacturer acting truly independently.

But in the case **[**13]** of a single manufacturer's policy to set ceilings above which resale prices shall not rise, the motive and the pressure must be, in the great generality of cases, the manufacturer's desire to maximize his profits. While it is of prime concern to a retailer that his competitor not undercut him, it is generally of no concern to him that his competitor cannot charge higher prices. It is, of course, important to him that he cannot raise his prices and increase his margin of profit. Whether, therefore, the retailer has his eye on his competitor or on himself, it is difficult to conceive of a situation in which retailers would pressure a supplier to put into effect a maximum price. In other words, unilateral maximum price pressure against retailers is not the equivalent of a horizontal combination, but rather of a series of vertical agreements for the manufacturer's benefit.

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 1951, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259, which condemned agreement between two liquor manufacturers to fix maximum resale prices, gives indirect support to this proposition in two ways. First, its specific holding was that "an agreement among **[**14]** competitors, to fix maximum resale prices . . . violates the Sherman Act." *340 U.S. at 213*. Second, it rejected the argument that the two defendants, because of common ownership and control, were "mere instrumentalities of a single manufacturing-merchandising unit" and therefore could not conspire. The Court noted not only the separateness of the corporate entities but that they held themselves out as competitors. *340 U.S. at 215*. The strong implication, I think, is that the same actions, if taken by a bona fide single unit, would not be proscribed by the Sherman Act.

Because of this reasoning, I do not agree with *Broussard v. Socony Mobil Oil Co., 5 Cir., 1965, 350 F.2d 346*. In that case a dealer's lease was not renewed, allegedly because of his refusal to acquiesce in his supplier's request to reduce prices (i.e., to observe a maximum price ceiling). There was evidence of one other dealer's reducing his price, a "marketing program", and "suggestions of prices to [supplier's] dealers". The "program" was Socony Mobil's response to meet competition from a new gasoline in the area. While this evidence of pressure on more than one dealer, **[**15]** as Judge McEntee's opinion points out, distinguishes *Broussard* from the present case, it does not aid in reconciling the approach in *Broussard* to that which I find persuasive. For *Broussard* presented precisely the case of the "single manufacturing-merchandising unit" which *Kiefer-Stewart* took pains to distinguish. The court in *Broussard* cited the language of *Kiefer-Stewart* to the effect that "such agreements [among competitors to set maximum prices] no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *350 F.2d at 349*. But it ignored the fact that the referent of "such agreements" in that context was agreements *among competitors*. By so doing, I believe, it construed *section 1* of the Sherman Act to elevate individual decision-making above competitiveness as a prime policy objective. *Kiefer-Stewart*, in my view, said only that interference with individualism achieved through an agreement among competitors to fix maximum prices was violative of the Sherman Act.

I readily accept the proposition that an agreement between two manufacturers **[**16]** to impose maximum prices on their dealers constitutes a combination in restraint of competition since (a) an identical or parallel system of maximum prices between two competing sets of **[*278]** dealers is likely to become a system of minimum prices and (b) the motive of each manufacturer is likely to be something other than maximizing his own return. I am also in sympathy with the principle of unfettered decision-making by the retailer, but I do not think the Sherman Act goes any further than to proscribe shackles on such decision-making which are the result of (1) a combination which (2) restricts competition.

It is now pertinent to ask whether the above analysis is still valid in the light of *Simpson v. Union Oil Co., 1964, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051*. It is possible to read *Simpson* as proscribing a price fixing agreement between a single supplier and a single retailer. In that case the oil company and a dealer had entered into a consignment agreement (coupled with a lease) under which the company set the retail price of gasoline. The dealer violated the agreement, selling below the authorized price to meet competition. Because of this, **[**17]** the oil company refused to renew plaintiff's lease. The Court held that resale price maintenance through such a consignment agreement was illegal. I would make two observations about *Simpson*. First, the Court faced the particular agreement between the parties against the background of use of the same lease-consignment device with some 3000 retailers in a "vast gasoline distribution system" in eight states. The Court characterized the arrangement as one which would "impose noncompetitive prices on thousands of persons whose prices might otherwise be competitive." *377 U.S. at 21*. And, second, the agreement was one which set a specific authorized price, which prevented dealers from meeting competitive prices. Even if the data concerning the widespread use of the device could be considered irrelevant to the decision, I would not readily read *Simpson* as prohibiting a single-supplier -- single-dealer maximum resale price agreement. This is because of the differences of critical significance between fixing a maximum and fixing a minimum, or, worse, a specific price. A minimum price agreement between one supplier and one dealer not only prevents him from meeting **[**18]** prices below that minimum but also is most unlikely to exist, absent pressure from other dealers to produce the end result of a horizontal combination. A maximum price agreement between one supplier and one dealer, on the other hand, not only leaves the dealer free to meet competitive prices but also is completely explicable in terms of the supplier's desire to maximize his return, without reference to any interest on the part of the dealer's or the supplier's competitors.

If, therefore, an agreement between a single manufacturer and a single dealer on a maximum price is not illegal, a frustrated effort to achieve such an agreement is not actionable, under the Sherman Act. Were such a completed agreement illegal, we would then confront a troublesome dilemma in dealing with unsuccessful efforts to obtain such an agreement. If we were to hold such conduct actionable, we would, as Judge McEntee notes, be adding judicially to *section 1* the same kind of "attempt" provision which Congress has spelled out in *section 2* dealing with monopoly. If we were to refrain from such judicial enlargement, we would create the anomalous situation of giving a treble damage remedy to a plaintiff, as **[**19]** in *Simpson*, who entered and then withdrew from an agreement, and denying such a remedy to a plaintiff who steadfastly resisted pressure to enter such an agreement in the first place. In my view, , we embrace neither horn.

Dissent by: ALDRICH

Dissent

ALDRICH, Chief Judge (dissenting):

Both of the opinions of my brothers discuss the case of *Broussard v. Socony Mobil Oil Co., 5 Cir., 1965, 350 F.2d 346*, in which the court held that a claim that Mobil -- also defendant here -- attempted to set maximum prices for its retailers stated a claim of violation of *section 1* of the Sherman Act. Judge McEntee finds the case distinguishable, while Judge Coffin finds it possibly in point, but **[*279]** wrongly decided. Regretfully, I disagree with both.

I.

In *Broussard*, as in the present case, Mobil suggested to the plaintiff, who was its lessee and at the same time one of its retailers, a maximum retail price for gasoline. Subsequently, when plaintiff refused to accept this maximum, Mobil exercised its contract right to terminate his lease. It is true that in *Broussard* there had been a price agreement with which the plaintiff at first complied, and that in the case **[**20]** at bar there was none. Broussard lost his lease because he refused to continue his undertaking; Quinn lost his because he refused to enter into one. The injury of which Broussard complained, however, did not arise out of the agreement, but out of the cancellation of his lease. I do not believe that if his cancellation was an act "forbidden in the antitrust laws," *15 U.S.C. § 15*, Quinn's was not. In other words, I see no difference in substance between pressure to induce the making of an unlawful agreement and pressure to reinstate one that has been broken. To the extent that it be suggested that the rejected agreement in *Broussard* is what brought the case within the act, this would not only be an unfortunate distinction, since any future "Quinn" could establish rights for himself simply by making the requested agreement one day and breaking it the next, but also, it seems to me, an illogical one.

If, on the other hand, a distinction is to be sought in the fact that in *Broussard* there was an allegation that Mobil was engaging in a "marketing program" covering many dealers, [1] then I find myself in accord with Judge Coffin that such a program is not **[**21]** a horizontal conspiracy (as it might be in a minimum price situation) but a series of separate vertical agreements that are not in any collective interest of the retailers. There could be an implied

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[1] Cf. *Guidry v. Continental Oil Co., 5 Cir., 1965, 350 F.2d 342, 344*.

horizontal combination where a manufacturer is enforcing minimum pricing, but no dealer wishes possible competitors to keep their prices down. Consequently I do not find in Mobil's general marketing program alleged in *Broussard* [2] any support for the allegation, if such be necessary, of an "agreement or combination."

II.

Turning to Judge Coffin's views on *Broussard*, he asserts, first, that he does not find it to have been dictated by *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 1951, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259*. In that case the Court held that a combination of two **[**22]** manufacturers to force a dealer to accept maximum resale prices violated *section 1*, and that the dealer could recover treble damages. The reasoning that led to this result seems important. The court of appeals had reversed the district court and denied recovery because it viewed *section 1* as aimed at promoting competition and concluded, "Competition . . . does not rest upon the ability to charge a higher price than a competitor but upon the ability to meet the price or undersell that fixed by the competitor." *182 F.2d 228, 235*. In reversing, the Supreme Court held that the Sherman Act is concerned not merely with competition in this limited, classical sense, but with the freedom and independence of the individual entrepreneur: "[Maximum price agreements] cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *340 U.S. at 213* [3]

[23]** **[*280]** It is true, as my brethren point out, that in *Kiefer-Stewart* the Court found a horizontal agreement between manufacturers to compel dealers to accept the stipulated maximum prices, while in the present case only a single manufacturer is involved. Since *Kiefer-Stewart* was decided, however, principles have developed that seem to me to make the presence of only one manufacturer and the absence of any consummated agreement, irrelevant. In *Simpson v. Union Oil Co., 1964, 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051*, plaintiff, a gasoline retailer, alleged that Union cancelled his lease for refusal to abide by an agreement to adhere to prices stipulated by Union. The Court held that he had stated a claim, noting again (see *Kiefer-Stewart, supra*) that the lease and agreement were allegedly being used "to injure interstate commerce by depriving independent dealers of the exercise of free judgment" in setting prices. *Simpson* thus seems to me to hold that a coercively extracted vertical agreement depriving a retailer of pricing discretion violates the act, and hence that where the requisite coercion to procure the vertical agreement **[**24]** is shown, a horizontal conspiracy such as that alleged in *Kiefer-Stewart* is unnecessary.

Nor does this result seem offensive. A free and independent dealer, as in *United States v. Colgate & Co., 1918, 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465*, may not be actionably wronged if a single manufacturer says to him, "Accept my conditions or I will not deal with you." Such a dealer is free to turn to other manufacturers, and may rely for his protection on competition among those manufacturers for his trade. A retailer who, like Quinn and Simpson, is also a lessee, is in a distinctly different position. The manufacturer's power as a landowner gives it leverage with which to interfere with the price discretion of others. [4]

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[2] I agree with my brethren that no such allegation can be found or inferred in Quinn's complaint, or should be supplied.

[3] Cf. the language of Learned Hand, writing for the Second Circuit in *United States v. Aluminum Co. of America, 1945, 148 F.2d 416, 427*. "[In outlawing monopolies, Congress] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes." Compare *Klor's, Inc. v. Broadway-Hale Stores, 1959, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705*.

[4] An interestingly comparable case is *Northern Pacific Ry. v. United States, 1958, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514*. There the Court held that a vertical agreement between a railroad-landowner and a shipper-land purchaser, in which the purchaser agreed, in partial consideration for the sale of land, to "prefer" Northern Pacific over other carriers, violated *section 1*. Northern Pacific could not, the Court said, use one resource it possessed (land) to coerce its own customers in another market (shipping) in order to obtain an advantage over the railroad's own competitors. Here it is alleged that Mobil is using its land ownership to deprive one of its customers of price discretion, in order to gain an advantage over Mobil's own competitors

[25]** Judge Coffin suggests, in response, a rather different interpretation of *Simpson*. He points out that *Simpson* involved the dictation of specific, rather than maximum prices, to numerous dealers rather than to one. He suggests that the unlawful "agreement" in *Simpson* was therefore not the vertical agreement between plaintiff and defendant but a horizontal combination of retailers with Union acting, apparently, as the hub of an illicit wheel. My difficulty with this is that it seems to run counter to what the opinion says. [5] The Court uses the word "agreement" invariably to refer to the vertical agreement between Simpson and Union. It refers to no other agreement, combination, or conspiracy except for similar vertical agreements with other dealers, and these are mentioned only for the purpose of showing that Union is **[*281]** in interstate commerce, and in order to refute the contention that the vertical agreements should be treated as lawful consignment agreements rather than unlawful price maintenance.

[26]** While I am not 100% certain, I do believe that *Kiefer-Stewart* and *Simpson*, taken together, proscribe coercively extracted vertical contracts to fix maximum prices, and that no distinction should be drawn between temporarily successful, as in *Broussard*, and totally unsuccessful coercive measures, as here, and accordingly I dissent.

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through low dealer margins. The agreements in *Northern Pacific* affected discretion to choose shippers rather than discretion to set prices, but the analogous structure of the two arrangements is suggestive.

[5] See generally Note, "Combinations" in Restraint of Trade: A New Approach to *Section 1* of the Sherman Act, 1966 Utah L. Rev. 75, 78-89. The note argues that *Simpson* does not fit within the traditional definition of conspiracy, and suggests that what happened in *Simpson* should be described, and proscribed, as a vertical combination (but not conspiracy) in restraint of trade.

Farmington Dowel Prods. Co. v. Forster Mfg. Co.

United States Court of Appeals for the First Circuit

December 10, 1969

Nos. 7324, 7334

Reporter

421 F.2d 61 *; 1969 U.S. App. LEXIS 9745 **; 1970 Trade Cas. (CCH) P72,994; 10 A.L.R. Fed. 266

Farmington Dowel Products Co. Plaintiff v. Forster Mfg. Co., Inc. Defendant

Subsequent History: **[**1]** Supplemental Order of February 12, 1970. Reported at: *421 F.2d 61 at 91*.

Supplemental opinion at *Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 1970 U.S. App. LEXIS 10730, 1970 Trade Cas. (CCH) P73075, 10 A.L.R. Fed. 266 (1st Cir. Me., 1970)*

Appeal after remand at *Farmington Dowel Products Co. v. Forster Mfg. Co., 436 F.2d 699, 1970 U.S. App. LEXIS 5745 (1st Cir. Me., 1970)*

Prior History: *Farmington Dowel Products Co. v. Forster Mfg. Co., 297 F. Supp. 924, 1969 U.S. Dist. LEXIS 13033 (D. Me., 1969)*
Farmington Dowel Products Co. v. Forster Mfg. Co., 299 F. Supp. 1043, 1967 U.S. Dist. LEXIS 11113 (D. Me., 1967)
Farmington Dowel Products Co. v. Forster Mfg. Co., 299 F. Supp. 1048, 1967 U.S. Dist. LEXIS 11220 (D. Me., 1967)

Core Terms

district court, damages, reasonable attorney's fees, prima facie evidence, profits, decree, skewer, Clayton Act, fee arrangement, Shoe, final judgment, antitrust, estimate, trebled, orders, purposes, sales, prima facie, award fees, factors, Ethics, lost profits, violators, parties, cases, words, private litigant, monopolization, evidentiary, proceedings

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Penalties

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] **Clayton Act, Penalties**

Clayton Act § 5(a), *15 U.S.C.S. § 16 (a)* provides in part: a final judgment or decree rendered in any civil or criminal proceeding brought by the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > General Overview

Antitrust & Trade Law > Clayton Act > Penalties

HN2[] **US Federal Trade Commission Actions, Investigations**

A Federal Trade Commission proceeding is a civil or criminal proceeding brought by the United States for purposes of section 5 of the Clayton Act, *15 U.S.C.S. § 16(a)*.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN3[] **US Federal Trade Commission Actions, Remedial Powers**

The Finality Act of 1959, 15 U.S.C.S. §21made a Federal Trade Commission order final and enforceable as such unless appealed to a court of appeals within 60 days. An unappealed Commission order can serve as the unimpeachable basis for a Justice Department suit for violation of such order, resulting in substantial fines.

Administrative Law > Judicial Review > Administrative Record > Disclosure & Discovery

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

Administrative Law > Agency Adjudication > Prehearing Activity

HN4[] **Administrative Record, Disclosure & Discovery**

The Federal Trade Commission's Rules of Practice while not so extensive as the Federal Rules of Civil Procedure, provide for litigants a substantial body of rights and privileges. They address themselves to all stages of a proceeding: pleadings, prehearing procedures, discovery and compulsory process, hearings, decision and appeal, and reopening. *16 C.F.R. §§ 3.1*.

Administrative Law > Agency Adjudication > General Overview

HN5[] **Administrative Law, Agency Adjudication**

As a general rule an internal separation of functions is consistent with the demands of due process.

Administrative Law > Agency Adjudication > Presiding Officers > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

HN6[] **Agency Adjudication, Presiding Officers**

16 C.F.R. § 3.42(f) provides: in the performance of their adjudicative functions, hearing examiners shall not be responsible to or subject to the supervision or directive of any officer, employee, or agent engaged in the performance of the investigative or prosecuting functions for the Federal Trade Commission, and all direction by the Commission to hearing examiners concerning any adjudicative proceeding shall appear in and be made a part of the record.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN7[] **US Federal Trade Commission Actions, Remedial Powers**

Congress has provided that a final Federal Trade Commission order can be the unimpeachable basis of a Justice Department suit against a defendant for violation of such order, with fines up to $ 5000 for each violation. *15 U.S.C.S. § 21(l)*.

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

HN8[] **Pleading & Practice, Motion Practice**

Fed. R. App. P. 4(a) expressly provides that the 30-day time for appeal shall commence anew following the entry of an order concerning any timely motion under *Rule 59(e)*.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Antitrust & Trade Law > Clayton Act > 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

HN9[] **Decisions, Collateral Estoppel**

After concluding that the evidentiary use of prior judgments under section 5(a) of the Clayton Act, *15 U.S.C.S. § 16(a)* is to be determined by reference to the general doctrine of collateral estoppel, the Supreme Court stated that a prior judgment constitutes prima facie evidence of all matters of fact and law necessarily decided by an earlier adjudication. Subsequently, the Supreme Court concluded that the general doctrine of collateral estoppel only operates to estop a party on ultimate facts in the subsequent proceeding.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN10[] **Estoppel, Collateral Estoppel**

The doctrine of collateral estoppel makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN11[] **Estoppel, Collateral Estoppel**

A judgment may be an estoppel the estoppel extends only to facts decided and necessary to the decision.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN12[] **Estoppel, Collateral Estoppel**

The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or mediate facts are concerned, the doctrine of collateral estoppel is inoperative. *Restatement of Judgments § 68, comment p*.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN13[] **Estoppel, Collateral Estoppel**

If by reference to the findings, opinion and decree it is determined that an issue was actually litigated in an antitrust suit brought by the Government the private plaintiff can treat the outcome of the Government's case as prima facie evidence on that issue.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN14[] **Robinson-Patman Act, Claims**

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C.S. § 13 (a)*, provides: it shall be unlawful for any person engaged in commerce, to discriminate in price between different purchasers of commodities where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

Torts > Remedies > Damages > General Overview

HN15[] **Remedies, Damages**

There is a clear distinction between the measure of proof necessary to establish the fact that a petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount.

Torts > Remedies > Damages > General Overview

HN16[] **Remedies, Damages**

While the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN17[] **Costs & Attorney Fees, Clayton Act**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15* provides: 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.

Legal Ethics > Client Relations > Attorney Fees > General Overview

HN18[] **Client Relations, Attorney Fees**

Canons of Professional Ethics, Canon 13 provides that a contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

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Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Legal Ethics > Client Relations > Attorney Fees > General Overview

HN19[] **Costs & Attorney Fees, Clayton Act**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15* provides that any person who shall be injured may sue and shall recover threefold the damages by him sustained and a reasonable attorney's fee.

Judges: Aldrich, Chief Judge, McEntee and Coffin, Circuit Judges.

Opinion by: COFFIN

Opinion

[*65] COFFIN, Circuit Judge:

This case comes to us on cross-appeals from a final judgment in which the district court, on the basis of a special jury verdict, held that defendants Forster Mfg. Co. and Theodore R. Hodgkins [1] violated section 2 of the Sherman Act and section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by their use of various discriminatory pricing practices. The jury also found that these violations injured Farmington Dowel, a competing manufacturer of wooden skewers, in the amount of $109,100, which amount was trebled by the district court and awarded to Farmington. The district court refused, however, because of the particular fee arrangement which Farmington had with its counsel, to award the $85,000 found by the court to be a "reasonable attorney's fee" in this case.

[2]** During the trial in the district court, Farmington sought to introduce into evidence various opinions and orders [2] of the Federal Trade Commission against Forster which had finally culminated in a finding that Forster had violated section 2(a) of the Clayton Act, as amended, by its discriminatory pricing practices. [3] **[**4]** **[*66]** After thoughtful consideration, the district court concluded that the part of the final Commission order which related to wooden skewers could properly be admitted as prima facie evidence against Forster pursuant to section 5(a) of the Clayton Act. [4] Forster brings this appeal to contest the propriety of that ruling by the district court. Thus, we find ourselves confronted with the difficult question specifically left open by the Supreme Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965)*: whether a final Commission order can be admitted as prima facie evidence pursuant to section 5(a) of the Clayton Act. Farmington also challenges the court's decision as to the order, claiming that Commission findings on a variety of additional points should also have been **[**3]** admitted. Other issues are presented by Farmington's objections to the court's rulings excluding proffered evidence of damages; Forster's attack on the sufficiency of evidence as to damages; and Farmington's objections to the court's refusal to award counsel fees.

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[1] Theodore R. Hodgkins was the president of Forster Mfg. Co. at all times relevant to this litigation. These two individually-named defendants will be treated as one and referred to as Forster throughout this opinion.

[2] *See* n. 40, *infra*.

[3] The Federal Trade Commission first issued a complaint against Forster on July 23, 1958. The Commission hearing examiner found that Forster had violated section 2(a) of the Clayton Act by its use of discriminatory pricing practices, which finding was affirmed by the Commission. Subsequently, we remanded the case for further proceedings before the Commission. *Forster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964)*, cert. denied, ***380 U.S. 906, 13 L. Ed. 2d 794, 85 S. Ct. 887 (1965)***. However, the new order of the Commission, again finding that Forster had violated section 2(a) of the Clayton Act, was affirmed by us. *Forster Mfg. Co. v. FTC, 361 F.2d 340 (1st Cir. 1966)*, cert. denied, ***385 U.S. 1003, 17 L. Ed. 2d 542, 87 S. Ct. 706 (1967)***, reh'g denied, ***387 U.S. 938, 18 L. Ed. 2d 1007, 87 S. Ct. 2047 (1967)***.

[4] ***HN1***[] Clayton Act § 5(a), 38 Stat. 731 (1914), as amended, *15 U.S.C. § 16 (a) (1964)*, in relevant part:

> "(a) A final judgment or decree . . . rendered in any civil or criminal proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . . ."

Admissibility of a Final Commission Order

The Clayton Act's section 5 twins (a) and (b) [5] **[**6]** -- now determined by the Supreme Court in *3M* to be fraternal, not identical -- were enacted over a half century ago as part of a Congressional effort to enable the private antitrust litigant to contribute significantly to the antitrust enforcement efforts of the Justice Department while at the same time recovering the damages inflicted on him by the antitrust violator. **[**5]** *3M, supra at 318-319*. The treble damage recovery was offered in the Clayton Act as a major inducement to the private litigant to accomplish these dual objectives. *Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-752, 91 L. Ed. 1219, 67 S. Ct. 1015 (1947)*. As a further step against antitrust violators, the very same session of Congress created a new administrative agency -- the Federal Trade Commission -- to act as the third major arm of antitrust enforcement. [6] Yet a question never clearly resolved by either Congress or the Supreme Court was the extent to which these two new agents of antitrust enforcement would **[*67]** work together to accomplish their common purpose. The prevailing view for many years was that, despite their common heritage and purpose, the private litigant could get no evidentiary assistance from the Commission pursuant to section 5(a).

The gospel was written in 1923 in *Proper v. John Bene & Sons, Inc., 295 F. 729* (E.D.N.Y.), wherein the district court concluded, for many reasons, [7] **[**8]** that a Commission order could not be admitted pursuant to section 5(a). This holding was religiously followed in the few subsequent cases concerning the admissibility of a Commission order in this context. *See* n. 8, *infra*. Only the Second Circuit -- paradoxically, *John Bene's* circuit -- in *Brunswick-Balke-Collendar v. American Bowling & Billiard Co., 150 F.2d 69 (2d Cir. 1945)*, rev'd in part on rehearing, *150 F.2d at 74*, cert. denied, *326 U.S. 757, 66 S. Ct. 99, 90 L. Ed. 455 (1945)*, in a divided opinion, strayed from the fold by concluding that a final Commission order fell within section 5(a), which decision necessarily rejected all of the objections of the district court in *John Bene* **[**7]** . Having discovered on rehearing, however, that amendatory legislation giving finality to certain Commission orders did not apply to the case at bar, Judge Frank was compelled to withdraw this portion of his initial opinion -- solely because of a lack of the finality which section 5(a) requires. Notwithstanding this single objection to admissibility raised by the Second Circuit, which has traditionally commanded an attentive audience, most judges and commentators continued to rely on the earlier district court

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[5] Section 5(a), reproduced in part in n. 4, *supra*, provides the private litigant with prima facie evidentiary assistance in certain circumstances. Section 5(b), reproduced in part below, tolls the statute of limitations for private litigants:

> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . ."

[6] Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, *15 U.S.C. § 41 et seq. (1964)*. *See* Henderson, The Federal Trade Commission, pp. 16-28 (1924).

[7] The court set forth six reasons why the Federal Trade Commission order before it could not be admitted pursuant to section 5(a). *First*, the Commission's order lacked finality: "The result of the proceedings before the Commission is an order which has no effect in itself, unless made operative by the Circuit Court of Appeals, which has power of review." *John Bene, supra at 730*. *Secondly*, a Commission proceeding was not a "proceeding in equity" as the statute then required. *Thirdly*, a Commission proceeding was not brought by or on behalf of the United States. *Fourthly*, the Commission order in that case was apparently that the defendant had violated the Federal Trade Commission Act, which has never been considered an "***antitrust law***" as that term is used in section 5(a). Thus, the order was not "under the antitrust laws". *Fifthly*, for the same reason, there was thus no finding "to the effect" that the defendant had violated an "***antitrust law***". *Finally*, the order itself was only against John Bene & Sons, Inc., but the plaintiff wanted to offer it against several additional defendants in the subsequent suit.

It should be noted at this point that while these six prerequisites to admissibility still exist with minor changes of wording, only the first three are relevant to our case. Here, the Commission order was "to the effect" that Forster had violated section 2(a) of the Clayton Act (rather than the Federal Trade Commission Act as in *John Bene*) which is clearly an "***antitrust law***". *15 U.S.C. §§ 12* and *44 (1964)*; *Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 2 L. Ed. 2d 340, 78 S. Ct. 352 (1958)*. Moreover, Farmington seeks to introduce the order only against those defendants named in the order.

decision in *John Bene*, with its multiple objections, for the proposition that neither section 5(a) nor section 5(b) applied to Commission proceedings and orders. [8]

It was against this background that the Supreme Court decided *3M* in 1965. The **[*68]** issue presented to the Court was whether the institution of a Commission proceeding satisfied **[**9]** section 5(b) of the Clayton Act, which section tolls the statute of limitations for private litigants "whenever any civil or criminal proceeding is instituted by the United States." The district court held that those words did include a Commission proceeding, suggesting that section 5(a) and section 5(b) did not have an identical reach. [9] **[**10]** The Third Circuit upheld the application of section 5(b) to Commission proceedings, but in something between a dictum and an alternative ground concluded that section 5(b) and section 5(a) operated on common subject matter: the kind of proceeding that could toll the limitations period under section 5(b) could result in a "final judgment" that would be prima facie evidence under section 5(a). [10] The Supreme Court, on this posture of the case, [11] explicitly refrained from deciding whether a final Commission order satisfied section 5(a); it did affirm the holdings of the court below that a Commission proceeding tolled the statute of limitations for purposes of section 5(b).

[11]** In so doing, the Court understandably attached "crucial significance" to the words "final judgment or decree" in section 5(a), *3M, supra at 316*, for a consent order entered before the taking of testimony such as the one before the Court in *3M* could not be equated with a "final judgment or decree" by the very terms of section 5(a). [12] Accordingly, it was necessary for the Court to stress that:

> "§ 5(b) tolls the statute of limitations set out in § 4B from the time suit is instituted by the United States *regardless of whether a final judgment or decree is ultimately entered*. Its applicability in no way turns on the success of the Government in prosecuting its case." *3M, supra at 316*.

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[8] *International Tag & Salesbook Co. v. American Salesbook Co., 6 F.R.D. 45, 48 (S.D.N.Y. 1943)*; *United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 356 (D. Mass. 1950)*; Wendel Shoes, Inc. v. Shoenterprise Corp., 1958 TRADE CASES para. 69,132 (N.Y. Sup. Ct.); *Highland Supply Corp. v. Reynolds Metals Co., 221 F. Supp. 15, 17 (E.D. Mo. 1963)*, rev'd on other grounds but aff'd on issue at bar, *327 F.2d 725 (8th Cir. 1964)*, on remand, *245 F. Supp. 510 (E.D. Mo. 1965)*; *Volasco Products Co. v. Fry Roofing Co., 223 F. Supp. 712 (E.D. Tenn. 1963)*; *Farmington Dowel Products Co. v. Forster Mfg. Co., 223 F. Supp. 967 (D. Me. 1963)*.

Bronstein & Miller, Regulation of Trade: A Case and Textbook, 1106 (1953). Beer, Federal Trade Law and Practice, 429, n. 53 (1942); 2 Toulmin's Anti-Trust Laws, 118 (1949).

[9] *New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co., 216 F. Supp. 507 (D.N.J. 1963)*.

[10] *New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing Co., 332 F.2d 346 (3rd Cir. 1964)*.

[11] In argument before the Supreme Court, the positions of the parties and amici varied. The petitioner (defendant in the district court), while conceding in its brief that section 5(a) was not "directly involved", nevertheless endeavored to tie the two sections together as the product of one dominant Congressional intent -- to deal with proceedings in court. The respondent on certiorari (plaintiff in the district court) never conceded that the two clauses were interdependent or in *pari materia*. Almost one fourth of its brief on the issue of tolling was devoted to arguing that the two were not coextensive. It then proceeded, arguendo, to contend that section 5(a) applied to Commission orders. The United States, as amicus, devoted a major part of its brief in support of the Third Circuit decision to asserting the irrelevancy of section 5(a) in deciding the applicability of section 5(b). It also conceded for the purposes of the case that section 5(a) did not apply to Commission orders. Private amici, contending with each other in the Eighth Circuit, predictably took opposite tacks; one devoted 64 pages to trying to demonstrate equivalence between sections 5(a) and (b), while the other asserted a lack of interdependence.

[12] The section 5(a) proviso specifically excepts "consent judgments or decrees entered before any testimony has been taken." The Third Circuit opinion in *3 M, 332 F.2d 346, 349*, indicates that the Commission order against *3M* was such an order.

It seems clear that what the Court recognized here was that the Commission consent order against *3M* was not a final judgment; it was not saying that an order terminating a fully litigated case could not be.

[12]** The Court did observe that Congress' purpose in adopting section 5(b) was broader than its purpose behind section 5(a), *3M, supra at 317*, but despite the greater delicacy of section 5(a) -- which we acknowledge -- it seems clear that the same ultimate purpose underlies both sections. Because the assistance to the private litigant may even be greater under section 5(a), we would think that only a strong countervailing **[*69]** policy should limit the application of section 5(a).

Having suggested these differences in the wording and policy of the two subsections, the Court developed a threefold rationale to explain its conclusion regarding section 5(b). It construed the early Congressional debate as supplying no "substantial evidence" that Commission action was specifically excluded from the operation of section 5(b) as a ground for tolling, *3M, supra at 320*; it gave greater weight to the "one element of congressional intention which is plain on the record -- the clearly expressed desire that private parties be permitted the benefits of prior government actions", *3M, supra at 320*; and, in minor key, it rejected an approach which "would make enjoyment of these intended **[**13]** benefits turn on the arbitrary allocation of enforcement responsibility between the Department [of Justice] and the Commission." *3M, supra at 320*. Accordingly, the Court equated Commission proceedings and Justice Department actions so far as section 5(b) is concerned.

The latter two points apply as fully to our case as to *3M*; concerning the first point, we conclude below that the 1914 Congressional debates erect no greater obstacle to applying section 5(a) to Commission proceedings. Yet we do not understand the reasoning of *3M* to compel or to prevent the application of section 5(a) to final Commission orders. We focus instead on the prerequisites to admissibility to see what has been resolved and what has not. Section 5(a), in relevant part, reads:

> "A final judgment or decree . . . in any civil or criminal proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant . . . ."

First of all, we do believe that *3M* necessarily held that ***HN2***[] a Commission proceeding is a "civil or criminal proceeding brought by the United States" for purposes **[**14]** of section 5. We agree with the district court that it is inconceivable that these very same words in the immediately preceding section 5(a) could have a different meaning than they were declared by *3M* to have in section 5(b), at least in the absence of compelling legislative history to the contrary, of which there is none here. Moreover, since the Commission order against Forster in this case was pursuant to section 2(a) of the Clayton Act, it was clearly "under the antitrust laws to the effect that a defendant has violated said laws". Thus, the only remaining problem under section 5(a) is whether the Commission order was a "final judgment or decree".

We believe that this question requires a brief review of the evolution of the Commission's responsibilities, powers, and activities since its creation in 1914. [13] In 1938, the Wheeler-Lea amendments to the Federal Trade Commission Act made Commission orders concerning violations of that Act final and enforceable without an implementing decree from the courts of appeals. [14] Subsequently, Congress gave the Commission power to formulate substantive rules governing practice in certain industries. [15] In 1950, Congress amended **[**15]** section 7 of the Clayton Act regarding asset acquisitions and mergers, [16] **[**16]** thereby, *inter alia*, "explicitly enlarg[ing] the

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[13] Indeed, such evolution was within the contemplation of the Congress which had created it. *See* remarks of Cong. Covington, Chairman of the House Interstate and Foreign Commerce Committee, 51 Cong. Rec. 8849 (1914).

[14] 52 Stat. 111 (1938), *15 U.S.C. § 45(g-l) (1964)*.

[15] e.g., 54 Stat. 1128 (1940), *15 U.S.C. § 68d (1964)* (wool products); 65 Stat. 175 (1951), *15 U.S.C. § 69f (1964)* (fur products); 67 Stat. 111 (1953), *15 U.S.C. § 1194 (1964)* (flammable fabrics).

[16] Celler-Kefauver Antimerger Act, 64 Stat. 1125 (1950), *15 U.S.C. § 18 (1964)*.

FTC's jurisdiction" over such matters. [17] Moreover, by 1962, it had **[*70]** become clear that the Justice Department had generally deferred to the Commission for the enforcement of the Robinson-Patman Act. [18] Finally, the past fifty years has evidenced a widespread expansion of the adjudicative functions of federal administrative agencies, [19] including the Federal Trade Commission. [20]

Yet perhaps the most significant indication of the Commission's maturation was the Congressional enactment of the Finality Act of 1959. [21] Up to that time the Commission was held to the rules of baseball: it had to make three pitches to strike out a batter. [22] The first violation of the antitrust laws could lead to a Commission cease and desist order; a second violation was required for a circuit court order of enforcement; still a third violation was necessary to trigger a contempt proceeding. The apparent justification in 1914 for such a redundant **[**17]** procedure was a healthy uncertainty about the quality of Commission adjudications and thus a desire to inject the courts into Commission adjudication as often as possible.

But as Congressional reliance on the Commission increased through the years, the justification for this cumbersome procedure disappeared. ***HN3***[] The Finality Act of 1959 thus made a Commission order final and enforceable as such unless appealed to a court of appeals within 60 days. Implicit in the thinking behind this change was a belief that the Commission had come of age: its orders now have legal significance without the necessity of court affirmance. For example, an unappealed Commission order can serve as the unimpeachable basis for a Justice Department suit for violation of such order, resulting in substantial fines. [23]

[18]** We understand the Finality Act to be significant to our issue for two reasons. First, we believe that that Act, when read in conjunction with *3M*, fully discredited all of the case authority against the Commission order admissibility under section 5(a). *John Bene* and its progeny had relied on three objections to admissibility which are relevant to a Commission order under the Clayton Act. [24] *3M* dispelled two of those objections by holding that a Commission proceeding was a "civil or criminal proceeding" which is "brought by the United States". The Finality Act of 1959 eliminated the remaining objection in *John Bene* -- no finality -- and also supplied the sole ingredient found lacking in the *Brunswick* decision on rehearing.

Secondly, we see the Finality Act as making final the Commission order which was admitted by the district court below. [25] Thus, the specific statutory **[*71]** question remaining -- and what Forster in argument properly called

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[17] *United States v. Philadelphia National Bank, 374 U.S. 321, 348, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*.

[18] Report of the ABA Commission to Study the Federal Trade Commission, (September 15, 1969), pp. 6, 64; Rockefeller and Wald, "Antitrust Enforcement by the Federal Trade Commission and the Department of Justice: A Primer for Small Business", 62 Dick, L. Rev. 251, 254 (1962).

[19] Davis, Administrative Law Treatise, Vol. I, § 1.02 (1958 ed.).

[20] Annual Reports of the Federal Trade Commission, 1966, 1967, 1968.

[21] 73 Stat. 243 (1959), *15 U.S.C. § 21(g-l) (1964)*.

[22] *See* H.R. Rep. No. 580, 86th Cong., 1st Sess. (1959).

[23] *15 U.S.C. § 21*(*l*) (1964).

[24] *See* nn. 7-8, *infra*.

[25] *15 U.S.C. § 21(g)(3)* -- the present codification of the Finality Act -- so provides. In a footnote, however, Forster contends that in light of *FTC v. Jantzen, 386 U.S. 228, 18 L. Ed. 2d 11, 87 S. Ct. 998 (1967)*, the Finality Act of 1959 would not apply to the Commission order of July 23, 1965 which was admitted below, simply because the Commission proceeding was instituted prior to the enactment of the Finality Act. We cannot agree.

Jantzen involved a Commission order entered *prior* to the enactment of the Finality Act, not afterwards as in our case. The entire thrust of the Court's opinion is directed at pre-1959 orders. The Court seemed to rely essentially on two reasons for its "the **[**19]** crux" of this case -- is whether a final Commission order is a "judgment or decree". Underlying that specific question, we sense a broader question: is it fair to give prima facie evidentiary effect to a final Commission order against a defendant?

[20]** Were we to proceed semantically, we would have to acknowledge that these words "judgment or decree" historically have referred only, or chiefly, to courts. But as the Supreme Court recognized in *3M*, a question concerning the meaning of section 5 probes more deeply than an exercise in etymology.

We begin with the 1914 debates. They are exhaustive, if not exhausting. An index of the discursiveness is that the House of Representatives allowed sixteen hours of general debate for the Clayton bill. 51 Cong. Rec. 9068 (1914).[26] The Clayton bill and the bill which resulted in the creation of the Federal Trade Commission occupied a large part of the spring and summer of 1914.

It is undoubtedly true that most of the participants in these debates who thought at all about the source **[**21]** of the judgments to be used in subsequent proceedings thought of court proceedings. A court of record was their common experience. Yet our attention has not been directed to a single instance during which the exact nature of the first proceeding was directly before the legislators as the subject of their attention. Instead, the "day in court" terminology which appears frequently simply evolved into the most common shorthand means of referring to the first proceeding. The "day in court" references, when put into context, are thus not overly helpful.[27]

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holding that the Act did not apply to pre-1959 orders. First, because of the heavy penalties which can be visited on the violator of a final Commission order, Congress felt it unfair to use the Finality Act retroactively so as to finalize pre-existing Commission orders. *386 U.S. at 233-34*. Yet no such unfairness results by applying the Finality Act prospectively to finalize orders entered after July 1959. *See* Sperry Rand Corp. v. FTC, 110 U.S. App. D.C. 1, 288 F.2d 403 (1961), cited with approval in *Jantzen*, for an excellent discussion of this point.

Secondly -- and apparently more importantly -- the Court recognized that a failure to apply the old enforcement procedures to pre-1959 orders would mean that such orders could not be enforced at all. *386 U.S. at 234*. As a result, some 400 violators would have been absolved from Commission orders and the Commission would have to begin anew against all 400. Yet no such unsatisfactory result occurs by applying the Finality Act to orders entered after its passage. On the contrary, to apply the old procedures to all Commission proceedings begun before July 1959, would significantly postpone the operation of the Act. For example, in our case, the Commission would be required to use the "laborious, time consuming, and very expensive" 3-step enforcement procedure rejected by Congress in 1959, S. Rep. No. 83, 86th Cong., 1st Sess., 2 (1959), to enforce an order entered a full six years after the new procedures were enacted. Such a result is wholly inconsistent with the legislative purpose of expediting the enforcement of Commission orders. The only sensible construction of the Act would be to apply it as soon as the fairness consideration mentioned above would allow. S. Rep. No. 83, *supra*. Accordingly, we conclude that both the holding in *Jantzen* and its rationale were necessarily confined to pre-1959 orders, and that the legislative purpose demands that the Finality Act be applied to post-1959 orders such as the one admitted below. We believe that the *Sperry Rand* decision mentioned above fully supports our conclusion. We find no cases suggesting the contrary.

[26] The Congressional Record indicates at 9068 that the proponent of the original bill was allotted eight hours for general debate. It is our understanding from the Congressional Record that the opponents also consumed eight hours.

[27] We note two instances where material quoted to us has a different meaning when viewed in fuller context. First, emphasis has been placed by Forster in its brief on an exchange between Senators Sutherland and Crawford concerning an amendment to the Federal Trade Commission Act:

> "Mr. Sutherland. . . . So far as the findings of the commission are concerned, I do not think they ought to be evidence anywhere.
>
> "Mr. Crawford: I do not either.
>
> "Mr. Sutherland. I doubt very much whether we could make them evidence." 51 Cong. Rec. 12789-90 (1914).

Yet this brief exchange is less persuasive when placed in context. The amendment, proposed by Senator Cummins of Iowa and accepted by Senator Newlands for the Interstate and Foreign Commerce Committee, provided:

> "That no order or finding of the court or commission in the enforcement of this section shall be admissible as evidence in any suit, civil or criminal, brought under the antitrust laws." 51 Cong. Rec. 12726 (1914).

[22] [*72]** Much discussion, for example, concerned the House proposal to make final judgments conclusive evidence. This proposal came under inquiry, particularly when it became apparent that judgments in favor of defendants might bar subsequent plaintiffs. At times, the discussion focused on the propriety of foreclosing plaintiffs who had never filed a paper, much less had a "day in court". 51 Cong. Rec. 9169, 9200, 13900 (1914). There was fear of being foreclosed by an incompetent, weak, or corrupt Attorney General who might, by participating in collusive judgments, effectively deny future plaintiffs their "day in court". 51 Cong. Rec. 9492, 9489 (1914). That aspect of the bill was soon eliminated.

At other times the "day in court" reference appeared in the discussions about whether the effect under section 5(a) should be conclusive or prima facie against defendants, e.g., 51 Cong. Rec. 13853 (1914), which was resolved in favor of prima facie effect. Finally, the phrase was used in the discussions that a defendant should have a "day in court" before section 5(a) is used against him in a subsequent proceeding. This "day in court" concern found its way into the statute in **[**23]** the words "final judgment or decree".

Yet it seems reasonably clear from the focus and the context of these discussions that the Congressmen in 1914 were not thinking in terms of the particular institutions which would satisfy their "day in court" assurance for defendants. We have found very few specific references in the legislative history of section 5(a) to either the federal district courts or the Federal Trade Commission or any other particular institution. [28] Rather **[*73]** than attributing to the 63rd Congress an intention to forever circumscribe the effect of orders of the new institution it was creating, we are drawn to the conclusion that Congress was using the "day in court" terminology more in the generic sense of a full opportunity to be heard and have one's case determined with finality in a proceeding in which fairness is assured.

[24]** Moreover, unlike Forster, we do not understand our function to be simply to speculate what Congress would have done had it squarely addressed this issue in 1914. Rather, we deem particularly pertinent Llewellyn's observation concerning the interpretation of statutes long on the books:

The reason for the amendment was not that an order of the Commission was not of the dignity of that of a court but that

> "The order of the court or the commission . . . would be simply that the defendant had been guilty of unfair competition. . . . It is the purpose of this amendment to prevent the judgment in one case becoming res adjudicata in the other case". 51 Cong. Rec. 12787 (1914) (remarks of Sen. Cummins).

This amendment passed the Senate by a vote of 40 to 13. 51 Cong. Rec. 12804 (1914). Although it did not find its way into the final bill in that form, the Senate had equated orders of the Commission with those of a court. Moreover, the underlying assumption must have been that orders of the Commission, unless specifically banned, could be evidence in subsequent civil or criminal proceedings.

Secondly, our attention has been directed to the following remark by Senator Walsh, the spokesman for the Judiciary Committee, which appears at 51 Cong. Rec. 13856-13857:

> "I want to say just a word with reference to the authorities to which the attention of the Senate has been invited. . . . Nobody questions them. They all lay down the rule that in an action brought against an individual who has never theretofore had his day in court you can not make a certificate or a recital or an order of an administrative board or anything of that kind conclusive evidence against him."

However, in his very next sentence Senator Walsh states that "You may make it prima facie evidence." Thus, even in 1914, it was recognized that a Commission order could be given prima facie effect.

Of course the statute as eventually enacted contained the prima facie evidentiary effect which Senator Walsh had said could properly be given to administrative orders. One can only conjecture why Senator Walsh did not later point out that the bill as changed could include administrative orders as well as court orders.

[28] A few isolated references to juries have been brought to our attention -- e.g., 51 Cong. Rec. 13900, 13901 (1914) -- but since it has long been accepted that a judgment in a non-jury trial is admissible under section 5(a) -- e.g., *Hanover Shoe v. United Shoe Machinery, 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)* -- those few references cannot be said to limit the reach of section 5(a).

> "Here the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation." [29]

Accordingly, we conclude that the critical question is whether the procedural safeguards of the Commission are substantial enough to assure the defendant the "day in court" which the authors of section 5(a) intended for him before that section was applied against him.

[25]** ***HN4***[]

The Commission's Rules of Practice today, while not so extensive as the Federal Rules of Civil Procedure, provide for litigants a substantial body of rights and privileges. Having been substantially revised in 1961 and partly revised in 1967, they address themselves to all stages of a proceeding: pleadings, prehearing procedures, discovery and compulsory process, hearings, decision and appeal, and reopening. *16 C.F.R. §§ 3.1 et seq.*

More specifically, they require a clear factual statement in the complaint and provide for motions for more definite statement, a public notice and a public hearing, with interventions allowed where proper; any party may request admissions, depositions, and subpoenas; [30] objections to access to files, depositions, and subpoenas may be preserved and, where cause is shown, prosecuted by interlocutory appeal; all parties have the right to appear with counsel, cross-examine, present evidence, make objections, motions, argument and are assured of "all other rights essential to a fair hearing", § 3.41(c); and review of the hearing examiner's decision by the Commission is of right. In addition, of course, any defendant who loses before the Commission **[**26]** has the right to have the Commission's order reviewed by a Court of Appeals, wherein he will receive a full review of the relevant law and a review of the factual record for "substantial evidence". Only after all this will he be confronted with prima facie evidence against him pursuant to section 5(a).

In this regard, Forster's principal objection seems to be to the fact that the Commission's more liberal rules of evidence allow the inclusion of hearsay. The key provision relating to reception of evidence is section 3.43(b), which **[*74]** states: "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded." That this provision does not exclude hearsay evidence is obvious. But that this implies such a major departure from procedure in the courts as to be the basis for different treatment for those two arms of the enforcement system envisaged by the Clayton **[**27]** Act is not obvious. We think that at most any difference of policy or practice between the courts and the Commission regarding hearsay is one of degree and unlikely to be dispositive. In *United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 355 (D. Mass. 1950)*, Judge Wyzanski stated:

> "In a civil anti-trust suit in which the Government can secure against a defendant at most an injunction and order without monetary damages, . . . the trial judge is not required to exclude every type of hearsay evidence which would be excluded in other types of cases. . . . So far as this Court is aware, the Supreme Court has never either reversed or criticized a trial court for admitting hearsay evidence in a civil antitrust case tried without a jury." [31]

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[29] K. Llewellyn, The Common Law Tradition -- Deciding Appeals, 374 (1960). Professor Llewellyn continues:

> "Broad purposes can indeed reach far beyond details known or knowable at the time of drafting. A 'dangerous weapon' statute of 1840 can include Tommy guns, tear gas, or atomic bombs. 'Vehicle,' in a statute of 1840, can properly be read, when sense so suggests, to include an automobile, or a hydroplane that lacks wheels. But for all that, the sound quest does not run primarily in terms of historical intent. It runs in terms of what the words can be made to bear, in making sense in the new light of what was originally unforeseen." *See also* *Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 395-396, 95 L. Ed. 1035, 71 S. Ct. 745 (1951)* (Jackson, J., concurring).

[30] *See* Antitrust Developments 1955-1968, pp. 248-251 (1968).

[31] *Accord*: *United States v. E. I. DuPont de Nemours & Co., 11 F.R.D. 132, 135 (D. Del. 1951)*; *United States v. Minnesota Mining & Manufacturing Co., 92 F. Supp. 947, 958-959 (D. Mass. 1950)*.

Professor Davis has remarked favorably both on this decision and on the trend away from the rigidity of exclusionary rules and toward the discretionary inclusion of reliable evidence. [32] It is also worthy of note that the final judgment entered by Judge Wyzanski in the aforementioned case was the judgment which was given prima facie effect under section 5(a) in the Supreme Court's recent decision in *Hanover Shoe Co. v. United Shoe Machinery, 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, **[**28]** indicating that liberalized rules of evidence do not impede the operation of section 5(a).

Forster, in passing, notes that there is not a complete separation of the decision-making and prosecutorial functions within the Commission. We recognize that the Commission has an internal separation of functions rather than the complete separation characteristic of the NLRB. [33] However, the Interstate Commerce Commission, whose reparation orders are prima facie evidence in subsequent suits by private litigants, 49 U.S.C. § 16(2) (1964), has the same type of internal separation as the Federal Trade Commission. Moreover, there are specific provisions requiring a careful separation of Commission hearing examiners **[**29]** from other Commission employees. [34] If such internal separation does not comport with due process, we fail to see how a defendant can properly be fined for violating a final Commission order. *15 U.S.C. § 21*(*l*) (1964). We conclude that ***HN5***[] as a general rule an internal separation of functions is consistent with the demands of due process. [35]

[30] [*75]** The Commission, we recognize, has been a consistent target of criticism. The recent report of a study group of the American Bar Association on the Federal Trade Commission expressed the hope that "it should be the last of the long series of committees and groups which earnestly insisted that drastic changes were essential to recreate the F.T.C. in its intended image." Report of the ABA Commission to Study the Federal Trade Commission, p. 3 (1969). But it is significant to note that in this generally critical report -- aimed primarily at too little action rather than overzealous action -- the Association's study group singled out as one aspect of Commission operations in which there had been improvement its efforts to improve its rules of practice and procedures. ABA Report, pp. 34-35. We do not mean to suggest that further improvement is not desirable. All we say is that the difference in ground rules facing defendants in court and Commission proceedings is not so significant as to warrant the exclusion of final decisions in the latter from the prima facie evidentiary effect of section 5(a).

Concerning the broader question of the fairness of our result, we think **[**31]** the answer was provided over a half century ago. Speaking with regard to a statute which makes a reparation order of the Interstate Commerce Commission admissible as prima facie evidence in a subsequent private action for damages by a shipper against the offending carrier, [36] the Supreme Court in *Meeker & Co. v. Lehigh Valley R.R., 236 U.S. 412, 430, 59 L. Ed. 644, 35 S. Ct. 328 (1915)*, stated:

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[32] Davis, Administrative Law Treatise, Vol. 2, § 14.01 (1958).

[33] Davis, Administrative Law Treatise, Vol. 2, § 13.05 (1958 ed.).

[34] E.g., ***HN6***[] *16 C.F.R. § 3.42(f)*, which provides:

> "In the performance of their adjudicative functions, hearing examiners shall not be responsible to or subject to the supervision or directive of any officer, employee, or agent engaged in the performance of the investigative or prosecuting functions for the Commission, and all direction by the Commission to hearing examiners concerning any adjudicative proceeding shall appear in and be made a part of the record."

[35] Davis, Administrative Law Treatise, Vol. 2, § 13.02 (1958 ed.) and 1965 Pocket Part. *Cf. Pangburn v. CAB, 311 F.2d 349 (1st Cir. 1962)*.

Forster also attaches some significance to the fact that one does not have the benefit of Article III judges when one is before the Commission. Yet we know of no cases saying that due process can only be dispensed by Article III judges. On the contrary, it seems clear that procedural due process is accorded defendants before the Federal Trade Commission. We note also that the Supreme Court has accorded the Commissioners an element of protection from the political process once they are in office. *Humphrey's Executor v. United States, 295 U.S. 602, 79 L. Ed. 1611, 55 S. Ct. 869 (1935)*.

[36] 25 Stat. 859 (1889), as amended, 49 U.S.C. § 16(2) (1964).

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any way work a denial of due process of law. . . . Such statutes have been generally sustained, . . . as have many other state and Federal enactments establishing other rebuttable presumptions."

[32]** Moreover, it seems clear that Congress has expressed its conclusion that a Commission proceeding is sufficiently comparable to a "day in court" that a final Commission order can be used against a defendant in a subsequent proceeding. As we mentioned above, ***HN7***[] Congress has provided that a final Commission order can be the unimpeachable basis of a Justice Department suit against a defendant for violation of such order, with fines up to $5000 for each violation. *15 U.S.C. § 21* (*l*) (1964). Our interpretation of section 5(a) only makes a final Commission order the impeachable basis of a suit by a private litigant.

Thus, for the reasons stated above and in accordance with the now prevailing trend of authority, [37] **[**33]** we conclude **[*76]** that the legislative concern that the defendant get a "day in court" before section 5(a) operates against him is fully satisfied by a Federal Trade Commission proceeding. [38]

Looking at the other side of the ledger concerning the fairness of our result, we note that substantial -- and surely unintended **[**34]** -- unfairness to injured plaintiffs would result from a holding *excluding* final Commission orders from section 5(a). The Supreme Court in *3M* noted the unfairness which results from any differentiation between the Justice Department and the Commission for purposes of section 5, given the arbitrary allocation of enforcement efforts between them. This unfairness is intensified by the fact that the Justice Department has generally deferred to the Commission for the enforcement of the Robinson-Patman Act. Thus, if Commission orders do not qualify under section 5(a), violators of the Robinson-Patman Act would enjoy a greater practical immunity from private litigation than violators of other antitrust laws, a distinction insufficiently supported by reason, fairness, or legislative history.

As for the contention that Forster's right to trial by jury has been violated by admission of the Commission order as prima facie evidence, it would -- if sound -- as well apply to a court judgment secured by the government in a suit for an injunction. No one has seriously, to our knowledge, taken such a position. Indeed, as the Supreme Court stated in the above quoted portion of *Lehigh Valley* **[**35]** , giving prima facie effect in a subsequent jury trial to a prior administrative order "does not abridge the right of trial by jury or take away any of its incidents." Moreover, the Supreme Court has not considered the use of rationally-based rebuttable presumptions in criminal trials as a denial of jury trial. *See* *Leary v. United States, 395 U.S. 6, 32-36, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969)*; *United States v.*

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[37] *Y & Y Popcorn Supply Co. v. ABC Vending Corp., 263 F. Supp. 709 (E.D. Pa. 1967)*; Carpenter v. Central Arkansas Milk Producers Ass'n, 1966 CCH TRADE CASES para. 71,817 (W.D. Ark. 1966); *Farmington Dowel v. Forster Mfg. Co., 299 F. Supp. 1043 (D. Me. 1967)*; Contra: *Highland Supply Corp. v. Reynolds Metals Co., 245 F. Supp. 510 (E.D. Mo. 1965)*.

Matteoni, "An Antitrust Argument: Whether a Federal Trade Commission Order Is Within the Ambit of the Clayton Act's Section 5", 40 Notre Dame Law. 158 (1964); 78 Harv. L. Rev. 469 (1964); 53 Georgetown L.J. 481 (1965); 64 Mich. L. Rev. 1156 (1966); Wilson, "Federal Trade Commission Orders and The Clayton Act § 5: A Reexamination", 12 Antitrust Bulletin 27 (Spring 1967); Shores, "Treble Damage Antitrust Suits: Admissibility of Prior Judgments Under Section 5 of the Clayton Act", 54 Iowa L. Rev. 434 (1968); *but see* Rockefeller, "The Supreme Court and the Private Antitrust Litigant", 7 B.C. Ind. & Comm. L. Rev. 279 (1966).

[38] Our holding is in accord with those cases holding that the determination of an issue by the Federal Trade Commission is *res judicata* of that matter insofar as other branches of the United States government is concerned. E.g., *United States v. Willard Tablet Co., 141 F.2d 141, 142-143 (7th Cir. 1944)*; *152 A.L.R. 1194*; *United States v. Piuma, 40 F. Supp. 119, 122 (S.D. Cal. 1941)*, aff'd, *Piuma v. United States, 126 F.2d 601 (9th Cir. 1942)*, cert. denied, ***317 U.S. 637, 87 L. Ed. 513, 63 S. Ct. 28 (1942)***; *United States v. Five Cases of Capon Springs Water, 62 F. Supp. 736, 738-739 (S.D.N.Y. 1945)*, rev'd on other grounds, *156 F.2d 493, 495 (2d Cir. 1946)*; *United States v. Hindman, 179 F. Supp. 926, 927 (D.N.J. 1960)*.

Necessarily implicit in these decisions is the proposition that a final Commission order is qualitatively comparable to a court judgment.

Gainey, 380 U.S. 63, 13 L. Ed. 2d 658, 85 S. Ct. 754 (1965); and Tot v. United States, 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241 (1943).

Extent of Admissibility of Order

Having concluded that a final Commission order can be admitted as prima facie evidence pursuant to section 5(a), we are confronted with Farmington's contention that the district court admitted less of the Commission's decision than the law prescribes. [39]

[36] [*77]** The district court, after admitting the final order as it related to wooden skewers, then instructed the jury that it should give prima facie evidentiary effect to two findings by the Commission: first, that Forster had discriminated in sales of wooden skewers by charging prices to three customers which were lower than the prices charged to other customers; and second, that the effect of these price discriminations may have been substantially to lessen competition or to tend to create a monopoly in that line of commerce. Farmington insists that the law required the district court to give prima facie effect to more of the findings. [40]

[37]** The Supreme Court's decision in Emich Motors v. General Motors, 340 U.S. 558, 95 L. Ed. 534, 71 S. Ct. 408 (1951), constitutes the accepted cornerstone of the law regarding the extent of admissibility under section 5(a). ***HN9***[] After concluding that the evidentiary use of prior judgments under section 5(a) is to be determined by reference to the general doctrine of collateral estoppel, the Court stated that a prior judgment constitutes prima facie evidence of "all matters of fact and law necessarily decided" by an earlier adjudication. Emich Motors, supra at 568-569. [41] **[**39]** Subsequently, the Supreme **[*78]** Court concluded in Yates v. United States, 354 U.S. 298,

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[39] Forster, ill-advisedly in our view, urges that this issue was not open to Farmington, since Farmington's notice of appeal was more than 30 days from the date of final judgment.

Final judgment was entered on March 11, 1969; Forster noticed its appeal on March 17. On March 18, Farmington filed a timely motion under Rule 59(e), Fed. R. Civ. P., to amend the judgment insofar as it refused to award reasonable attorney fees, which motion was denied on March 26. On April 25 -- 45 days after final judgment, but only 30 days after denial of the Rule 59(e) motion -- Farmington noticed its appeal.

HN8[] ***Rule 4(a), Fed. R. App. P.***, expressly provides that the 30-day time for appeal shall commence anew following the entry of an order concerning any timely motion under, *inter alia*, Rule 59(e). Indeed, there was no artful way for Farmington to file a general appeal before March 26, for any such general appeal might have placed the district court in the awkward position of having lost jurisdiction while still being asked by the same party to make a specific alteration of the judgment. March 26 was the logical time to start the 30-day period and ***Rule 4(a)*** so provides. We do not understand ***Rule 4(a)*** to attach any significance to the fact that the appeal of April 25 raised more objections to the judgment than had the Rule 59(e) motion.

[40] Specifically, Farmington requested admission pursuant to section 5(a) of the following documents:

1. Examiner's Initial Decision, dated February 2, 1962, as it relates to skewers;
2. Opinion of the Commission, dated January 3, 1963, as it relates to skewers;
3. Final Order, dated March 18, 1963, as it relates to skewers;
4. Opinion on Remand, dated July 23, 1965, as it relates to skewers, and
5. Final Order, dated July 23, 1965, as it relates to skewers.

In addition Farmington compiled the findings made therein and presented its compilation as Plaintiff's Exhibit IB(iv), which included the following categories: formal identification of defendant (items 1 and 2); the shares of the six skewer manufacturers in the U.S. market (item 3); the early history of Farmington (items 4-6); the development of animosity between Farmington and Forster, cancellation of orders from Farmington by Forster, Farmington's efforts to seek other customers, various threats and general price cuts by Forster (items 7-17); discriminatory price cuts given to four customers by Forster (items 18-25); causal relation between the discriminatory price cuts and Farmington's failure and lessening of competition in the skewer industry generally, tending to create a monopoly in the skewer industry, absence of justifiable reason (items 26-33); conclusions that Forster was "not merely meeting competition, but . . . beating it", that "this is not a close case" concerning good faith meeting of competition, that Forster was motivated by predatory intent (items 34-38).

338, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957), that the general doctrine of collateral estoppel only operates to estop a party on ultimate facts in the subsequent proceeding. [42] Accordingly, the district court below admitted as prima facie evidence only those findings by the Federal Trade Commission which it believed "were necessary to the Commission's decision and which established ultimate facts in issue in this action as evidenced by the present posture of the pleadings." Farmington Dowel v. Forster Mfg. Co., 299 F. Supp. 1048, 1053 (D. Me. 1967). **[**38]**

[40]** Farmington contends, however, that the Supreme Court's decision in Hanover Shoe v. United Shoe Machinery, 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968) -- decided after the district court's initial ruling on admissibility of the Commission findings -- so changed the law under section 5(a) that the Court's ruling constitutes reversible error. We cannot agree.

The district court in the *Hanover Shoe* case had allowed Hanover Shoe to introduce the findings, opinion, and decree of an earlier federal court proceeding (110 F. Supp. 295 (1953)) as prima facie evidence that United Shoe's "lease only" system was an instrument of monopolization. United Shoe appealed on the ground that that earlier adjudication had not actually condemned their "lease only" practice. The Supreme Court, in upholding the district court's determination, states at 485-486 that:

> ***HN13***[] "If by reference to the findings, opinion and decree it is determined that an issue was actually litigated in an antitrust suit brought by the Government the private plaintiff can treat the outcome of the

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[41] Additional authorities suggest that the "necessarily decided" limitation is rather firmly embedded in the law of collateral estoppel. In Yates v. United States, 354 U.S. 298, 336, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957), the Supreme Court asserted:

> " . . ***HN10***[] . the doctrine of collateral estoppel . . . makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were *essential* to the decision. . . . Commissioner v. Sunnen, 333 U.S. 591, 601-602, 92 L. Ed. 898, 68 S. Ct. 715; Tait v. Western Maryland R. Co., 289 U.S. 620, 77 L. Ed. 1405, 53 S. Ct. 706; The Evergreens v. Nunan, 141 F.2d 927, 928."

Years earlier, Judge Learned Hand had occasion to confront this problem:

> "***HN11***[] A judgment . . . may be an estoppel . . . the estoppel extends only to facts decided and necessary to the decision. All this is very old law." Irving National Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926).

See also Restatement, Judgments § 68(1) and comment o; 1B Moore's Federal Practice, 2d Ed., para. 0.441[2], p. 3777.

[42] At 338, the Court stated:

> "***HN12***[] The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative. The Evergreens v. Nunan, 141 F.2d 927; *Restatement, Judgments § 68, comment p*."

But see Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 225-226 (9th Cir. 1964), cert. denied, ***379 U.S. 880, 13 L. Ed. 2d 87, 85 S. Ct. 143 (1964)***. This case is cited appropriately by Farmington for the proposition that all matters decided in a prior proceeding which are "relevant" to a subsequent one are admissible under section 5(a). We find the case enigmatic, for its referenced authority in *Emich*, but its formulation of principle overlooked the "necessarily decided" limitation expressed in *Emich*. It may well be that the findings held to be admissible qualified under *Emich*. But we cannot take the brief and possibly unconsidered reference to a standard of mere relevancy in *Twentieth Century Fox* as definitive. See our opinion in International Shoe Machinery Corp. v. United Shoe Machinery Corp., 315 F.2d 449, 453-454, 459 (1st Cir. 1963), for a discussion of our view of how "relevancy" bears on the operation of section 5(a).

> Government's case as prima facie evidence on that issue. See *Emich Motors v. General Motors, 340 U.S. 558, 566-569 95 L. Ed. 534, 71 S. Ct. 408 (1951)*. **[**41]**
> "Section 5 of the decree would have been a justifiable remedy even if the practice it banned had not been instrumental in the monopolization of the market. . . . These portions of the court's opinion are well supported by its findings of fact, which also estop United as against the Government and which therefore constitute prima facie evidence in this case."

Thus, on the surface it does appear that the well-established standard of "necessarily decided" may have been somewhat diluted by the decision in *Hanover Shoe*. Farmington contends that this constitutes an open sesame to admit any finding which is "relevant" to a subsequent proceeding. Several observations give us pause.

In the first place there is the reference without gloss to *Emich*. It strikes us that the Court would not so casually effect a major departure in collateral **[*79]** estoppel doctrine without rationale. Secondly, the argument between the majority and the dissent was directed solely to the question whether the district court had actually made a finding on "lease only", not whether such finding was necessary to its decision.

Thirdly, the Court made it clear in *Hanover Shoe* that "the **[**42]** Government's case involved condemnation of the lease only system as such." *Hanover Shoe, supra at 485*. We understand this to mean that "lease only", whether logically "necessary" to the decree or not, was a major factor, broader than all the specific parts of the lease. Its magnitude of importance assured that intense focus of counsel and court which underlies and justifies the law's willingness to be content with only one litigation of a significant issue.

Finally, the particular situation before the Court in *Hanover Shoe* seems to us to be one in which a departure from the requirement of necessity is justified and recognized as an exception to the "necessarily decided" rule. *Hanover Shoe* involved a prior adjudication in which many practices of United Shoe had been condemned as instruments of monopolization. Thus, in all probability, it was not "necessary" to the final decree that any one particular practice be condemned, for the other condemned practices would still be enough to sustain the decree. Yet if the "necessarily decided" standard were strictly applied to that adjudication, no estoppel would have arisen and the multiple offender would have avoided **[**43]** the prima facie effects of section 5(a).

Farmington recognizes this problem in its brief:

> "For example, the Government may prove several overt acts in a conspiracy charge. If specific findings are made that such acts were committed in furtherance of the conspiracy, how is the trial judge in a subsequent private action to determine that one act was *necessary* to the decision while another was not?"

Appellant draws from the impossibility of determining which of four legs holds up a chair the conclusion that all relevant decided facts should come in. But this is too great a leap. The recognized exception to strict essentiality is more limited. As Moore states it:

> "It is clear, however, that the mere existence of another possible ground for a judgment, even though it abrogates the strict necessity of an adjudication upon a material issue, does not deprive the judgment of conclusive effect upon that issue if it was in fact determined." 1B Moore's Federal Practice, 2d Ed., para. 0.443[5], pp. 3920-21 and cases cited in nn. 9-10.

For these reasons, we do not understand *Hanover Shoe* to have substantially altered the general rule that collateral **[**44]** estoppel only applies to those matters "necessarily decided" by the prior adjudication. We understand this rule to mean in common language something like this: when two adversaries concentrate in attempting to resolve an issue importantly involved in a litigation, there is no unfairness in considering that issue settled for all time between the parties and those in their shoes. But since parties can be expected to exert their full effort only on what seems essential at the time, it is unfair to close the door to issues which have not been on stage center, for there is no knowing what the white light of controversy would have revealed. *See The Riverside Press, Inc. v. NLRB, 415 F.2d 281, 284 (5th Cir. 1969)*.

Accepting this standard, we ask what findings were necessarily made by the Commission. It seems clear to us that the Commission was required, if a cease and desist order were to issue under section 2(a) of the Clayton Act, to find that Forster engaged in discriminatory price cuts which tended to lessen competition or to create a monopoly in **[*80]** the skewer industry. [43] These were the issues "necessarily decided". These were the foci of controversy. **[**45]** And they were admitted. The bulk of the other items, while putting flesh on the bones and color on the flesh, could not be said to be essential to the Commission's decision. [44] Nor do any of them come within the exception to strict necessity which we have noted in our discussion of *Hanover Shoe*.

[46]** However, we do believe that the district court erred with regard to one finding. Forster raised the section 2(b) "meeting competition" defense, which thus required the Commission to find that Forster's price discriminations were not "made in good faith to meet an equally low price of a competitor", *15 U.S.C. § 13(b) (1964)*, as that phrase was interpreted in *Federal Trade Commission v. A.E. Staley Mfg. Co., 324 U.S. 746, 759-760, 89 L. Ed. 1338, 65 S. Ct. 971 (1945)*. Since the defense was raised, the matter was "necessarily decided" and thus the finding should have been admitted as prima facie evidence below.

Yet we do not believe that its exclusion was reversible error. Farmington was able to get in other evidence which tended to show a lack of good faith in Forster's actions. Moreover, the jury found for Farmington on all questions of liability which were submitted to it. We recognize, of course, that a jury may find itself penalizing a very bad man more than just a bad one. But though this is within a jury's power, it is not within a plaintiff's rights. We can only conclude that no prejudice arose from this one improper exclusion which **[**47]** necessitates a new trial.

Finally, even if we have misconceived the proper standard for admissibility, we fail to see how the district court's exclusion of the Commission's opinions or the many evidentiary findings so prejudiced Farmington that it is entitled to a new trial. As we said, the jury found in favor of Farmington and against Forster on every question of Forster's liability which was submitted to it. However, Farmington contends that but for the court's exclusions, they would have been able to prove monopolization by Forster as well as the attempted monopolization which the jury did find. Even assuming that this highly speculative contention is true, we fail to see how such a finding would have increased the jury's award of damages to Farmington. The jury found that as a result of Forster's actions Farmington had been deprived of $29,100 in profits up to February 28, 1958, the day which Farmington went out of business. Moreover, the jury found that Farmington's "going concern" value on that day was $80,000. It was that total of $109,100 which was trebled by the court in awarding damages to Farmington. We fail to see how a jury finding of monopolization by Forster **[**48]** would have increased the damage inflicted on Farmington. Were Caesar to be run through thrice, he would not be thrice dead.

Exclusion of Proffered Evidence

Farmington also objects to various rulings by the district court excluding evidence of damages proffered by Farmington. While Farmington is less than clear about what rulings were erroneous and why, we understand it to be raising essentially four objections.

[*81] First, Farmington insists that it should have been allowed by the district court to prove lost profits from 1956 to November 1968, the date of trial, plus its "going concern" value in November 1968. [45] The district court --

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[43] ***HN14***[] Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13 (a)*, provides in relevant part:

> "It shall be unlawful for any person engaged in commerce, . . . to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ."

[44] Of course nothing we say herein concerning collateral estoppel is intended to detract from the general rule, which has our unqualified support, that the Commission should set forth its findings of fact, reasoning and conclusions of law as fully and carefully as possible.

[45] We understand Forster to misunderstand Farmington's argument on this point. Forster argues that Farmington cannot get lost profits from 1956 to November 1968 in addition to its "going concern" value as of February 1958. We of course agree. *See* discussion in text, *infra*. Yet we understand Farmington, at least initially, to be seeking its "going concern" value as of November

correctly, we believe -- confined Farmington to lost profits from 1956 to February 28, 1958, the date when Farmington went out of business, plus the "going concern" value of Farmington on that date. These items were subject to a rationally-based quantification, although the latter determination obviously involved an element of speculation. Moreover, this method seems an adequate basis for giving full relief to the injured plaintiff Farmington: its lost profits to the time of cessation of business and the value which the business would **[**49]** have had at that time but for Forster's illegal actions.

On the other hand, the method urged by Farmington would have required an estimate of profits for a period of some ten years during which the company neither existed nor made profits, plus an estimate of the "going concern" value in 1968 of a company which had ceased being a going concern over ten years before, which estimate would have involved a further estimate of profits for a more remote future period. While we recognize, **[**50]** as did the district court, that the private antitrust litigant is not required to prove the amount of his damages with any certainty -- e.g., *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-265, 90 L. Ed. 652, 66 S. Ct. 574 (1946)*; *Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 561-562, 75 L. Ed. 544, 51 S. Ct. 248 (1931)* -- the method urged by Farmington, at least as applied to this case, relies too heavily on speculation and conjecture, particularly concerning the determination of "going concern" value so long after the company ceased to be a going concern. We think it noteworthy that Farmington has not directed our attention to a single case in which its method was used. [46] **[**51]** Nor has Farmington **[*82]** offered us a single case in which a company's "going concern" value was determined for a date well after the day that that company had ceased to be a going concern. Accordingly, we conclude that the district court was correct in allowing Farmington to prove its "going concern" value as of February 28, 1958, the last day it was a going concern, rather than as of November 1968. [47]

Given this holding by us, we do not understand Farmington to contend that it should also be awarded lost profits for the period after February 1958 up to November 1968. Moreover, it seems crystal clear to us that lost profits for that period could not be properly awarded in addition to "going concern" value on February 28, 1958. To do so would result in a clear duplication: Farmington would get its present value as a going concern plus its future profits, but the latter figure would be a major element in determining the former figure. The Clayton Act gives treble damages, **[**52]** but it does not contemplate that damages will be sextupled.

1968 (Trial Record, Vol. 5, pp. 169, 190; Brief, p. 43), rather than as of February 1958 as Forster's argument suggests. (Reply Brief, pp. 18-19)

[46] Farmington seems to draw the greatest comfort from *Twentieth Century-Fox Corp. v. Brookside Theatre Corp., 194 F.2d 846 (8th Cir. 1952)*, cert. denied, *343 U.S. 942, 96 L. Ed. 1348, 72 S. Ct. 1035 (1952)*. That case did take account of lost profits for a period after the time that the plaintiff had been driven out of business. However, critical distinctions exist. First, unlike our case, the business in that case was continued in essentially the same form by one of the defendants, thereby producing *actual* profits over the period in question which could be estimated with some degree of certainty. Secondly, that court did not make an award for future lost profits *in addition to* an award for "going concern" value, which is what Farmington seeks here. Finally, to the extent that the court may have awarded what could be called the "going concern" value of the plaintiff there, it was figured as of the day that the plaintiff had been forced out of business.

Farmington relies also on *Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959)*, cert. denied, *363 U.S. 843, 4 L. Ed. 2d 1727, 80 S. Ct. 1608 (1960)*, which decision upheld an award of lost profits and diminished asset value. Yet the method used by the district court in our case awards both aspects of damages. The basic dispute between the district court and Farmington seems to us to concern the date for which "going concern" value should be determined. The *Atlas Building* case gives no indication of the date for which "diminished asset" value was determined in that case. Since that business continued up to the time of trial, there is little speculation involved in estimating "diminished asset" value as of the time of trial, assuming arguendo that the court did so. Yet in our case, when the business ends on a given date, it seems far too speculative to give "going concern" value for a date ten years after it had ceased to be a going concern.

[47] E. Timberlake, "The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws", 30 Geo. Wash. L. Rev. 231, 280 (1961). We note that the district court stated its reason in terms of "duplication". On analysis, we see no duplication in estimating ten years' profits, followed by an estimate of the going concern value at the end of those ten years -- which involves putative profits for subsequent years. But, for reasons stated, we agree with the district court's ruling.

As a second objection, Farmington contends that one Professor Chances should have been allowed to testify regarding some or all of his damage theories. The district court, after demonstrating an awareness of the standard of certainty of damages set forth in *Bigelow, supra*, and *Story Parchment, supra*, concluded that none of Professor Chances' damage theories would provide the jury with a reasonable basis upon which it could determine Farmington's "going concern" value on February 28, 1958, without resort to surmise, conjecture, and guesswork. We believe that the district court was well within its discretion in so holding.

Two of the methods proposed by Professor Chances relied on Forster's sales record from 1951 to 1968 to indicate Farmington's sales for that period, but the district court concluded that the two businesses were not sufficiently comparable to justify such reliance. We believe the important differences pointed up by the district court are sufficient to justify that exercise of discretion. [48]

[53]** A third method proposed by Professor Chances relied on the average annual increase in the gross national product for the United States for the period 1951-1968; a fourth method relied on the average annual increase in sales for all manufacturing companies for the same area and years. Yet Farmington offered no evidence that its wooden skewer business was in any way comparable to either determination. **[*83]** Thus, there can be no abuse of discretion in excluding such figures.

A fifth and final approach of Professor Chances was to attempt to arrive at a going concern value solely by capitalizing Farmington's expected profits. He chose as a period for projection the six years following 1958 "because generally speaking it is five to seven years ahead that projections are made and this was a mean." He projected Farmington's sales from 1953-1956 data, assuming a decreased rate of growth for a period of years, finally levelling off in 1961. He arrived at profit projections after 1956 by assuming, on the basis of the 1953-1956 experience of Farmington, a steady increment of 35 dollars for each hundred dollars of increased sales. No consideration was given the future state of the **[**54]** skewer market, or to future costs of labor, executive salaries, supplies or equipment. The district court based its exclusion of this testimony of Professor Chances on the unreliability of the arbitrary period selected for capitalizing future profits and on the method of deriving figures for expected sales and profits. We hold that this ruling was within the discretion of the court. We would add that, after reviewing 281 pages of testimony on this fifth approach at valuation, there was adequate reason to fear that the jury would be either confused or mesmerized by the profusion of computations. *See Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 912-913 (2d Cir. 1962)*, cert. denied, *369 U.S. 865, 8 L. Ed. 2d 85, 82 S. Ct. 1031 (1962)*.

Farmington's third objection is directed at the court's rulings which excluded the opinion testimony of Richard Norton, a part-owner of Farmington and its manager from 1954 to 1958, concerning his estimate of lost profits and going concern value as of February 28, 1958. The basis of the court's exclusion seems to have been that Farmington had not qualified Norton as one competent to offer an opinion **[**55]** on these matters. We cannot say that a business manager is sufficiently qualified *as a matter of law* to offer his opinion on such matters, and we have found no case which suggests otherwise. [49] **[**56]** When Norton's competence was challenged, Farmington merely

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[48] The district court noted at least four reasons why the two businesses were not sufficiently comparable. First, while Farmington's production was limited almost entirely to wooden skewers, Forster manufactured some 24 woodenware products in addition to skewers, which comprised a relatively small proportion of its total business. Second, Farmington had no sales or distribution organization which was remotely comparable to the extensive sales and distribution organization which Forster maintained throughout the United States. Third, Farmington was minimally capitalized, while Forster was adequately capitalized. Finally, Forster would be an inappropriate yardstick of comparison after 1956 simply because Forster's sales and profits after that time reflected the illegal monopolization and discriminatory sales which Farmington had to show in order to be entitled to any damages. Clearly Farmington was no more entitled to the monopoly profit than Forster was.

The only countervailing evidence offered by Farmington was Professor Chances' own testimony that Farmington and Forster were selling a similarly-made product to the same general group of customers.

noted an objection and moved on. Subsequently, an offer of proof was made which did not go to qualifying Norton to give his opinion but was simply that Norton would have given profit estimates for the two years prior to closing down, estimates for the seven following years, and a going concern value which would be seven times the average projected profits. This testimony had all the vulnerabilities of Professor Chances' testimony, without the latter's qualifications or a proper application of the discounting principle. [50]

Finally, concerning Farmington's ambiguous allegation that the district court "imposed on plaintiff an impossible and inapplicable burden of damage proof", we can only respond with an observation that the district court seemed well aware of the standard of certainty enunciated in *Bigelow, supra*, and *Story Parchment, supra.* We believe the court applied the appropriate standard well within the bounds of its discretion. To the extent it was an impossible burden, which we doubt in light of the jury's award, it was so only because Farmington chose to rely **[*84]** almost entirely on one expert witness and one lay witness for its proof **[**57]** of damages. Any inadequacy which may have resulted should be attributed to Farmington's own presentation of its case rather than to the law or the court's application of it here.

Farmington's "Going Concern" Value

As we have mentioned above, the jury awarded Farmington $29,100 for its lost profits between May 1956 and February 1958, and $80,000 as its "going concern" value on February 28, 1958. Neither party has appealed the $29,100 award. However, Forster contends that there is insufficient evidence to support the jury's award of $80,000.

The Supreme Court has made it clear that

> " . . . ***HN15***[] there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment, supra at 562*.

We understand Forster to concede that, given our holding with regard to the admission of Federal Trade Commission findings, Farmington has carried its burden with regard to the fact of damage. In other words, Forster is not here appealing the jury's finding that Forster drove Farmington out of business. Instead, having **[**58]** conceded that, it argues that Farmington has not carried the lesser burden of giving the jury evidence on which it can fix the amount of damages.

Concerning this burden, the Supreme Court in *Story Parchment, supra at 563*, explained that

> "In such case, ***HN16***[] while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."

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[49] We recognize that a witness somewhat similar to Richard Norton was allowed to testify in both *Story Parchment, supra at 567*, and in *William H. Rankin v. Associated Bill Posters of United States and Canada, 42 F.2d 152, 155 (2d Cir. 1930)*. However, we find nothing in either case to suggest that such a witness *must* be allowed to testify.

[50] Arriving at value through capitalization of projected earnings involves evaluating "the present worth of each part of the stream of future receipts" and adding "these separate present discounted values." Samuelson, Economics: An Introductory Analysis, 6th ed., p. 587. Capitalized market value is *not* arrived at simply by multiplying average earnings and an appropriate number of years, the method apparently used by Norton.

Accordingly, the question here presented is whether there was so little evidence of Farmington's "going concern" value on February 28, 1958 that the jury's estimate of $80,000 must have been based on speculation or guesswork rather than a just and reasonable inference from the evidence.

The evidence on damages that was allowed to sift through to the jury was, as revealed by our discussion above, a remnant of that offered. Forster summarizes this evidence as only Farmington's profit and loss statements for the years 1953 to 1956, showing average yearly net profits of less than $3,000; earnings for the eight month period ending on May 31, 1956 of $13,103, which Farmington's expert **[**59]** witness extrapolated to a yearly total of $14,500; [51] **[**60]** and the fact that Farmington purchased its business in October 1952, for $80,000. Forster insists that expert testimony should have been offered of the "but for" value of Farmington in February 1958, when it went out of business; of a capitalization factor appropriate in the skewer industry; and of the "but for" profits in 1957 and 1958. While we also would have liked to have such evidence in the record, we are mindful of the problems which faced Farmington in getting witnesses **[*85]** qualified to give this kind of testimony. The skewer industry in the 1950's had only six participants, two of whom were the parties, the remaining four being considerably smaller. [52] Such a predicament, however, cannot turn an insufficiency into a sufficiency.

In fact, however, the evidence before the jury was broader than that recited by Forster. The evidence marshalled, as the jury had a right to view it, showed a company which had entered the skewer market in 1947, subsequently becoming the second largest U.S. supplier with sales in every state and in England, and which had thus been purchased in 1952 for almost twice what it had cost the seller ten years earlier. Farmington had added approximately $17,000 in improvements and equipment since 1952. When Farmington purchased the business, Forster accounted for about 70 per cent of its sales; four years later Farmington had so diversified that other customers accounted for 70 per cent. In absolute terms, annual sales to Forster had dropped $86,000 between fiscal year 1953 and 1956, while annual sales to others had risen by $93,000. Thus, by mid-1956, Farmington was selling more skewers to more purchasers than it had **[**61]** in 1952.

Although Farmington's profits in 1955 were low (*but see* n. 51), Farmington was confronted with considerable pressure from Forster. In 1954 Forster insisted upon reducing the prices it paid for several kinds of Farmington's skewers, with the avowed purpose, not then carried out, of reducing its prices to meet competition. In 1955 Forster precipitously cancelled projected orders for $3,000 boxes of skewers, at a time when Farmington's inventory was high. [53] Even so, Farmington was able to find other customers and come within $16,000 of its previous record sales year. This conduct by Forster is not part of this case in the sense of being actionable; but the jury would have been justified in concluding that there were abnormal aggravations which concealed Farmington's basic potential.

[62]** Finally, there was the testimony of Professor Chances that Farmington's 1956 profits "but for" Forster's price discrimination would have been $14,500, its highest ever. Based on this and other evidence, the jury found that Farmington would have made $29,100 in profits over less than two years between May 1956 and February 1958 but for Forster's actions, which jury finding has not been appealed. That finding clearly indicates the jury's belief that the improving business status of Farmington would have continued but for Forster's actions.

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[51] This figure is claimed by Forster to be impeached by the testimony of its expert that the $13,103 figure was inflated by at least $10,000, apparently by reason of an understated beginning inventory. Yet this writedown was not conclusively established, and the jury apparently accepted the $14,500 figure for the purpose of arriving at its award of $29,100 for lost profits between May 1956 and February 1958, which award was not appealed. Even if there had been such an alleged writedown, the effect would would have been to make 1955 more profitable and the first 8 months of 1956 less so -- not, on balance, a critically different posture for Farmington. While Forster could have better argued a downward dip, Farmington could have pointed to a more impressive showing prior to the intense period of pressure from Forster.

[52] It seems to have been assumed by all parties that Forster was the most similar to Farmington although not comparable enough to be used as a yardstick. *See* n. 48, *supra*.

[53] The value of orders cancelled ($28,950) amounted to 20% of the projected yearly purchases by Forster, and 12% (or one and a half months) of Farmington's total sales. While the case contents and unit price to arrive at these figures were in evidence, we do not suppose that the jury made this precise a calculation. But it would have been justified in concluding that the cancellation posed a substantial problem.

We conclude that these facts provided the jury with a rational basis for estimating Farmington's "going concern" value as of February 28, 1958 at such a figure as $80,000. While the date of purchase was some five years earlier, Farmington's ability to diversify and to show some profits under difficult conditions, its position in the skewer industry, and its prospects for the future -- as the jury could have seen them -- gave a basis for concluding that the business was worth at least as much in 1958 as in 1952. The defendant caught red-handed must bear the risk in such circumstances, particularly when the jury's verdict is reasonable, if not **[**63]** conservative.

Accordingly, we have no occasion to confront Forster's contention that the "raw data" of profit and loss statements standing alone is, as a matter of law, an inadequate basis for determining going **[*86]** concern value. Regarding that contention, however, Forster would apparently have us hold that "raw data" is never enough for a jury to estimate "going concern" value, but that "raw data" plus one witness might be. Yet the one witness in the part of the *Story Parchment* case concerned with market value of a defunct business was described by the Supreme Court as "the treasurer [of the business] . . . an interested witness . . . not an expert" *Story Parchment, supra at 567*. Nevertheless, the Court said it was for the jury to give the treasurer's testimony its appropriate weight -- presumably it could have given such interested, inexpert testimony no weight at all -- and thus the Court upheld the jury's award. If such witnesses can be disregarded, surely they are not indispensable to the validity of the jury's determination.

" Reasonable Attorney's Fees"

We arrive at the final objection raised on appeal, this time by Farmington. The **[**64]** district court adopted the jury's finding of $109,100 in damages, trebled it, and awarded $327,300 to Farmington. It then heard from the parties on what they considered a "reasonable attorney's fee" for Farmington's attorneys to be awarded pursuant to *section 4* of the Clayton Act. [54] Farmington asked for $109,100; Forster contended that $50,000 was the proper amount. At this point the district court learned, on Forster's request, of the fee arrangement between Farmington and its attorneys. Briefly stated, the contract provided that the attorneys would get one third of the trebled damages, plus all of the amount awarded as a "reasonable attorney's fee" pursuant to *section 4*. [55]

[65]** The district court concluded that $85,000 would be a reasonable attorney's fee for Farmington's counsel in this case. *Farmington Dowel Products Co. v. Forster Mfg. Co., 297 F. Supp. 924, 925-928 (D. Me. 1969)*. However, the court then noted that if it were to award this $85,000 to Farmington's counsel, the fee arrangement would yield $194,100 for counsel and leave $218,200 of the recovery to the client Farmington. When confronted with these facts, the district court ruled that any award of a "reasonable attorney's fee" under *section 4* of the Clayton Act would be both excessive and contrary to the language and purposes of that section, even though the court recognized that its ruling would give Forster an undeserved "windfall" of $85,000. *Farmington Dowel Products, supra at 928-930*. Accordingly, the court awarded no fees pursuant to *section 4*. [56] **[**66]** Predictably, Farmington appeals. [57]

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[54] ***HN17***[] ***Section 4*** of the Clayton Act, *15 U.S.C. § 15 (1964)*, provides:

> "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."

[55] It should be noted that Farmington had three different law firms working on this case at various times. The fee arrangement in question provides that the chief counsel will get two thirds of the fee and that the two local counsel will share one third.

[56] A second aspect of Farmington's appeal of the court's ruling under ***section 4*** of the Clayton Act concerned the court's refusal to award Farmington some $6,920.77 as its "cost of suit". Having carefully read the district court's treatment of this issue at 930 of the above-noted opinion and the cases cited therein, we are satisfied that Farmington's claim was properly denied.

[57] At the outset, Forster contends that Farmington is without "standing" on this issue and is not "the real party in interest" since, under Farmington's fee arrangement, any recovery would go to Farmington's attorneys. This argument is without merit. As we note below, the statutory provision authorizing the recovery of counsel fees was intended to benefit antitrust plaintiffs by enabling them to retain the bulk of their trebled damages. It is clearly the plaintiff's statutory right; it was not intended to confer a statutory

[67]** **[*87]** The court in effect made two decisions. Acting pursuant to *section 4*, it determined that $85,000 was a "reasonable attorney's fee", to be added to the damages to be paid by defendant. We deem that determination well within the discretion of the court -- which lived through this long and complex litigation -- for the reasons expressed in its thoughtful analysis of the facts in this case and the law in this area. *Farmington Dowel Products, supra at 925-928*, and Appendices I & II.

Second, acting with knowledge of the private fee arrangement and apparently under its generic power to confine the cost of legal services to a reasonable amount, it ruled that any amount in excess of $109,100 would be excessive. [58] This second determination gives rise to the question of the court's power to concern itself with counsel fees actually to be received and of the standards governing the exercise of such power.

[68]** We think that Farmington would have to concede that the courts generally are not without power to modify excessive fee arrangements. [59] There is no evidence that *section 4* was intended to inhibit this power. The fact that *section 4* is concerned with awarding a fee which is reasonable for defendant to pay plaintiff does not preclude the court from concerning itself with what is excessive for plaintiff to pay his attorney. Farmington would have us hold that the court had no power to modify an excessive fee in the very circumstance where a court's award under *section 4* might render an otherwise reasonable fee excessive. It seems to us that in such a case a court has a particular interest in assuring itself that it is not an unwitting accessory to an excessive fee. Moreover, it seems clear that the court's power to prevent excessive fees must be operative regardless of the arrangement by which the fee is obtained. We therefore conclude that the district court acted within its power in attempting to satisfy itself that the plaintiff's counsel would not obtain an excessive fee. We are not saying that a court should inquire *sua sponte* into actual counsel fees in every **[*88]** **[**69]** case which comes before it, but only that a court may in its discretion inquire into such issue, particularly when it is brought to the court's attention as here. [60]

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right on plaintiff's counsel and no one to our knowledge has ever seriously suggested that attorneys have standing under ***section 4***. Since the provision conferred a right on plaintiffs, they must have standing to assert it. The fact that Farmington may be contractually obligated with regard to the recovery does not affect its statutory right or its standing to assert it.

Invoking the "real party in interest" rule adds nothing to Forster's argument, since the real party in interest need not be the party beneficially interested in a particular case, but only the party who under the substantive law has the right sought to be enforced. 3A Moore's Federal Practice, para. 17.07.

[58] The court, not desiring to interfere with that part of the fee agreement calling for one third of the treble damages, was willing to tolerate a margin of difference between its ***section 4*** decision and the amount actually to be paid counsel. It noted that one third of treble damages was "already nearly 30% more than it has concluded is reasonable." *297 F. Supp. at 929*. It then looked at the total amount which the fee agreement would produce, and noted that this would be twice what it found reasonable, 175% of single damages, 58% of trebled damages, and would result in hourly rates of compensation for senior and junior partners and associates beyond those realized from the ***section 4*** fee allowances in the cases listed in Appendices of its opinion. As a final reason, the court noted that counsel for plaintiff had sought only $109,100 as the amount of the "attorney's fee" award under ***section 4***.

[59] ***HN18***[] Canons of Professional Ethics, Canon 13:

> "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, *but should always be subject to the supervision of a court*, as to its reasonableness."

See also Canon 12.

E.g., *Fitzgerald v. Freeman, 409 F.2d 427 (7th Cir. 1969)*, cert. denied, ***396 U.S. 875, 90 S. Ct. 151, 24 L. Ed. 2d 134, 38 U.S.L.W. 3139 (1969)***; *Gair v. Peck, 6 N.Y. 2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43 (1959)*, cert. denied, ***361 U.S. 374, 4 L. Ed. 2d 380, 80 S. Ct. 401 (1960)***; *Taylor v. Bemiss, 110 U.S. 42, 45-46, 28 L. Ed. 64, 3 S. Ct. 441 (1884)*; *McCreary v. Joel, 186 So. 2d 4, 6 (1966)*; *see* F. MacKinnon, Contingent Fees for Legal Services, p. 66 (1964).

[60] We can think of at least three reasons why a court might be more inclined to inquire into successful plaintiff's actual counsel fees in an antitrust case. Clients may feel some distrust or disrespect for the legal profession when they are called on to honor fee arrangements which yield fees out of proportion to what the court declared to be a reasonable fee for purposes of ***section 4***.

[70]** In arriving at its conclusion that it would make no award pursuant to *section 4*, the district court relied in part on its interpretation of the language and purpose of *section 4*. We understand the court to be saying, at 929, that *any* fee arrangement between plaintiff and his counsel by which the "reasonable attorney's fee" awarded by the court goes directly to counsel is contrary to the language and purposes of *section 4*. We disagree.

HN19[] *Section 4* provides that "any person who shall be injured . . . may sue . . . and shall recover threefold the damages by him sustained and . . . a reasonable attorney's fee." The district court urges that a "fees awarded" arrangement -- i.e., an arrangement whereby counsel is paid whatever the court awards as "reasonable attorney's fee" -- is contrary to the language of *section 4* because the "statutory language makes clear the intent of Congress that the attorney's fee is to be part of the recovery by the plaintiff" and that to award reasonable attorney fees under such arrangement "would not reimburse plaintiff in any sense, since it would accrue entirely to counsel." *Farmington Dowel Products, supra at 929*.

That argument **[**71]** proves far too much. It would say that treble damages could not be properly awarded if counsel has a contingent fee arrangement -- say, one third -- because one third of such damages "would not reimburse plaintiff in any sense, since it would accrue entirely to counsel." Carried one step further, it would say that any part of the award under *section 4* will not be awarded if the plaintiff is bound to pay his attorney out of it. We cannot accept that conclusion, which would leave private antitrust enforcement to the independently wealthy. It seems clear to us that in the "fees awarded" arrangement, the contingent fee arrangement, and any other fee arrangement the court's award goes first to the plaintiff as part of his recovery in accordance with the language of *section 4*. If he chooses to pass that money on to his attorneys, that is his business. Thus, we do not understand the language of *section 4* to preclude a "fees awarded" arrangement.

Moreover, the apparent purpose behind this part of *section 4* was to award the successful plaintiff a reasonable attorney's fee so that his treble damage recovery would not be unduly diminished by the payment to his attorneys. The surest way **[**72]** to obtain this result is by a "fees awarded" arrangement, for by such an arrangement, the counsel gets a reasonable fee and the client gets the full **[*89]** trebled damages. [61] So we are not troubled by the fact that counsel might have a "fees awarded" arrangement, nor even by the fact that counsel in this case had an arrangement that embraced both a "contingent fee" aspect and a "fees awarded" aspect. Neither the language nor the purpose of *section 4* precludes such an arrangement.

Moreover, since the court is already immersed in the counsel fee inquiry under ***section 4***, it is not a great step further to measure the actual counsel fee against the Canons of Ethics. Finally, to the extent that ***section 4*** was intended to prevent a substantial diminution of the plaintiff's treble damage recovery, that purpose is frustrated when the attorney is allowed, without justification, to siphon off a substantial part of that award in addition to other compensation.

On the other hand, in addition to all of the considerations which invariably tend to restrain a *sua sponte* intervention by the court, it seems unfortunate to single out the antitrust bar for such scrutiny. We have no reason to believe that any abuses exist in this area which would justify its being treated differently from any other field of litigation. Moreover, we are aware that an actual counsel fee inquiry in every antitrust case might tend to impair the ability of private litigants to acquire effective counsel to assist them in their efforts as private attorneys general. A balancing of these considerations can be struck only by the district courts acting in their sound discretion.

[61] While this may have been the neat division contemplated by ***section 4***, we do not suggest that ***section 4*** corseted either courts or attorneys and clients too tightly. ***Section 4*** obliged a court to fix an amount which was reasonable in light of the terrain it had crossed with counsel, which amount was to be added to the damages the defendant should pay both as a penalty and as a method of enabling the plaintiff to emerge with something approaching three times his proven loss. On the other hand, clients and lawyers were left to make their own arrangements. We recognize that in some difficult cases a fee arrangement entirely consistent with the Canons of Ethics could result in a substantial diminution of the plaintiff's treble damage recovery without offending ***section 4***. Accordingly, the actual fee arrangement between lawyer and client should have no bearing on what the court awards under ***section 4***. *Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 570 (7th Cir. 1951)*, cert. denied, ***342 U.S. 909, 72 S. Ct. 302, 96 L. Ed. 680 (1952)***; *Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 166 F. Supp. 163, 169 (E.D. Pa. 1958)*, aff'd, *273 F.2d 218 (3rd Cir. 1959)*, rev'd on other grounds, *365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; *Webster Motor Car Co. v. Packard Motor Car Co., 166 F. Supp. 865, 866 (D.D.C. 1955)*, cross appeal dismissed as moot, *100 U.S. App. D.C. 161, 243 F.2d 418 (D.C. Cir. 1957)*, cert. denied, ***355 U.S. 822, 78 S. Ct. 29, 2 L. Ed. 2d 38 (1957)***.

[73]** The court also concluded that the fee arrangement in this case yielded an excessive fee. While we agree that this is a proper inquiry, *see supra*, our problem with the court's decision stems from the weight given by the court, as a basis for comparison, to the "reasonable" fee award it had made under *section 4*, to such awards in other cases, and to counsel's request for an award in this case. (*See* n. 58 *supra*) We are also concerned that it does not *appear* -- although this may only be a problem of articulation -- that the court gave sufficient consideration to other factors bearing on a decision as to the maximum ethically permissible fee.

We would agree that those factors listed in the court's opinion, at 926, are appropriate ones for a determination of reasonableness pursuant to *section 4*, although these are not necessarily the only appropriate factors. Moreover, the factors mentioned in Canon 12 -- and listed in the court's footnote 1 -- are among the appropriate factors for a determination of reasonableness for purposes of the Canons of Ethics. While the factors overlap to a considerable extent, we believe there are some important differences between a determination **[**74]** of reasonableness for purposes of *section 4* as opposed to the Canons of Ethics which are not clearly reflected in the district court's opinion.

First, *section 4* contemplates an estimate of reasonableness from the perspective of one looking back over the litigation. This seems implicit in most if not all of the factors noted in the district court's opinion and the cases cited therein. However, for purposes of the Canons, we believe that the fee arrangement should be viewed to some extent according to the circumstances in which it was made. For example, a defunct company, such as was Farmington, might reasonably expect to agree to pay counsel a larger share of any recovery than an ongoing and liquid enterprise. We do not say that an arrangement reasonable when made is thereby insulated from all attack even though it yields a fee out of proportion to the extent or the benefit of services rendered. We simply say that "reasonableness when made" is one factor, which should be taken into account for purposes of the Canons, even though it would be totally irrelevant to the determination under *section 4*.

[*90] Secondly, we believe that the fact that a fee arrangement is contingent **[**75]** upon success is a factor for the determination under the Canons, Canon 12(5), although it would not be for *section 4*. Obviously, the fact that the attorney is willing to take an all-or-nothing arrangement might justify a fee which is higher than the going hourly rate in the community. Again, this is just one factor but it is a factor which is irrelevant to the *section 4* determination.

Finally, there is a difference in over all complexity between the court's role in awarding a fee under *section 4* and in exercising its supervisory power over the bar. The first is commonly exercised; the second is reserved for exceptional circumstances. The first requires the court to arrive at a figure it considers reasonable; the second requires it to arrive at a figure which it considers the outer limit of reasonableness. The first determination is made without reference to any prior agreement between the parties; the second must take account of the fact that an agreement, if freely made, is not lightly set aside. [62] A *section 4* award has only economic impact; a supervisory decision is an ethical judgment. For all these reasons, particularly when the two kinds of decisions arise in the same **[**76]** case, the setting of the maximum fee which can ethically be accepted requires its own deliberate articulation of rationale.

In short, what troubles us is the fact that the district court seemed to rely too heavily on what was reasonable for *section 4* in making its determination of what was excessive for purposes of the Canons. The amounts reflected in Appendices I & II relate exclusively to the question of reasonableness for *section 4*; in none of those cases does it appear what plaintiff's counsel actually received and in none of those cases was that even in issue. Moreover, the fact that counsel were going to receive more than thirty per cent of what was deemed reasonable for *section 4* is not dispositive but only one relevant factor. Finally, the fact **[**77]** that Farmington asked for $109,100 as a "reasonable attorney's fee" under *section 4* cannot properly be used against it. It did not believe the *section 4* determination of reasonableness to bear directly on the propriety of the fee arrangement.

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[62] That a client, as here, remains willing to abide by his fee contract is relevant but not controlling, for the object of the court's concern is not only a particular party but the conformance of the legal profession to its own high standards of fairness.

It may well be that, viewed in the light of the factors indicated by the Canons and our foregoing discussion, any thing more than $109,100 should be considered excessive. We simply are not certain from the court's opinion that the court appreciated the differences between *section 4* and the Canons which we have discussed above. Recognizing this to be a delicate area, we feel compelled to remand this issue to the district court for a determination consistent with this opinion. We do not mean to intimate that any further evidence or argument is necessary; it may well be that the court is sufficiently informed of all pertinent considerations.

However, regardless of how the district court resolves the remanded issue, we believe that the court should award Farmington $327,300 as trebled damages and the $85,000 found to be a "reasonable attorney's fee" under *section 4* in this case. We believe that *section 4* not only contemplates recovery of a **[**78]** reasonable attorney's fee by a successful plaintiff but also payment of that fee by a losing defendant as a part of his penalty for having violated the antitrust laws. We cannot believe that the imposition of this penalty was meant to turn in any way on the nature or amount of the plaintiff's fee arrangement, a fortuity wholly unrelated to defendant's illegal conduct.

[*91] If the district court decides on remand that the $194,000 fee resulting from the arrangement in this case is excessive, the proper resolution would be simply to indicate the maximum fee which Farmington's counsel can accept consistent with the Canons of Ethics. By awarding trebled damages and a "reasonable attorney's fee" to Farmington and making a finding of the maximum reasonable fee which can properly be accepted, we believe both the demands of *section 4* and the Canons of Ethics will be satisfied.

The case is remanded to the District Court with instructions to modify its prior order to include an award of $85,000 "reasonable attorney's fee" to plaintiff, and to resolve the issue of the maximum ethically allowable fee in a manner consistent with our opinion.

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.

United States Court of Appeals for the First Circuit

March 25, 1970, Decided

No. 7381

Reporter

424 F.2d 25 *; 1970 U.S. App. LEXIS 10138 **; 1970 Trade Cas. (CCH) P73,121; 12 A.L.R. Fed. 309

George R. Whitten, Jr., Inc., d/b/a Whitten Corp., Plaintiff, Appellant v. Paddock Pool Builders, Inc., et al., Defendants, Appellees

Core Terms

specifications, bidding, summary judgment, public official, Sherman Act, exemption, immunity, antitrust, products, anti trust law, public body, gutter, pool, swimming pool, manufacturer, customers, Parker, allegations, conspiracy, contracts, dealings, patented, competitive bidding, government action, school board, recirculation, accessories, persuade, motives, selling

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review

HN1[] **Appeals, Standards of Review**

In reviewing a grant of summary judgment and dismissal of plaintiff's complaint, the court's standard is whether, viewing the evidence favorably to plaintiff, there is any fact in dispute which could be material to resolution of the legal issue.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

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

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

While the two doctrines are often treated as one, an unsuccessful attempt to influence government action may fall within the Noerr-Pennington immunity, but not the Parker immunity. Conversely, a state regulatory agency may decide to restrain competition without prompting; the beneficiaries, not having solicited government action, would enjoy a Parker immunity but not one based on Noerr-Pennington. Moreover, because of its First Amendment overtones, the Noerr-Pennington immunity is arguably broader than the Parker exemption.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

It is not the form of the combination or the particular means chosen but the result to be achieved that the Sherman Act, 15 U.S.C.S. § 1 et al., condemns.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN4[] Parker State Action Doctrine, Local Governments & Private Parties

Valid government action confers antitrust immunity only when government determines that competition is not the summum bonum in a particular field and deliberately attempts to provide an alternate form of public regulation.

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

HN5[] Exemptions & Immunities, Noerr-Pennington Doctrine

Joint efforts to influence public officials in the passage or enforcement of laws are beyond the scope of the antitrust laws.

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

Constitutional Law > ... > Freedom of Speech > Commercial Speech > General Overview

HN6[] Exemptions & Immunities, Noerr-Pennington Doctrine

The immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.

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 > Materiality of Facts

HN7[] Entitlement as Matter of Law, Appropriateness

Summary judgment should be granted only when the truth is clear, when no material fact remains for trial, and when the moving party is entitled to judgment as a matter of law.

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

HN8[] Summary Judgment, Entitlement as Matter of Law

A court has discretion to deny an otherwise justified motion for summary judgment if the arguments of the parties have failed to clarify the underlying facts, or if the motion is tainted with procedural unfairness.

Judges: [1]** Aldrich, Chief Judge, McEntee and Coffin, Circuit Judges.

Opinion by: COFFIN

Opinion

[*26] COFFIN, Circuit Judge.

This is an appeal from a summary judgment dismissing plaintiff appellant's civil antitrust complaint. Appellant, George R. Whitten, Jr., Inc. [Whitten] is in the business of designing and manufacturing swimming pool gutters and accessory equipment and of serving as general contractor for the construction of entire swimming pool facilities. Appellees are three affiliated corporations **[*27]** [hereinafter, singly Paddock] [1] which engage in the same business. Both Whitten and Paddock specialize in the manufacture of prefabricated "pipeless" pool gutters, which include recirculation equipment as an integral part of the gutter assembly and thus eliminate the need for pipe buried around the perimeter of the pool. Paddock's product, the "Integral Flow Recirculation System", is patented; Whitten's basically similar product, the "Uniflow System", apparently is not.

[2]** The case arises out of the effort of both parties to sell their products to public bodies acting under competitive bidding procedures. Whitten's complaint charges that Paddock's selling efforts have violated *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2* and *§ 3* of the Clayton Act, *15 U.S.C. § 14*. Specifically, counts I through III of the complaint allege that Paddock and its various dealers and representatives violated *§ 1* of the Sherman Act by conspiring to require the use of its own specifications in the public swimming pool industry, with the intent to exclude all others, accompanying this effort with misrepresentations regarding Whitten, and threats of litigation and harassment directed to Whitten and its present or prospective customers. Counts III-VI describe roughly the same acts as attempts to monopolize in violation of *§ 2* of the Sherman Act. Count VII alleges that Paddock has violated the Clayton Act by representing to public customers that they must use Paddock accessories whenever they use Paddock's patented gutter system.

During the process of taking depositions, Paddock moved for summary judgment, conceding **[**3]** for the purpose of the issue raised by the motion that it had combined with dealers and others to effect the use of its specifications in the public swimming pool industry, that its specifications were so drawn that only it could comply, and that its purpose was to eliminate competition. It further conceded that these propositions "substantially embody" all of Whitten's Sherman Act allegations. The court granted the motion for summary judgment, without opinion, but in the context of briefs and arguments directed to the proposition that *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* immunizes from ***antitrust law*** liability all efforts to induce governmental bodies to take action, notwithstanding the motives of the inducers. The case comes to us on the basis of the pleadings, answers to interrogatories, depositions, and an affidavit.

HN1[] Our standard, of course, is whether, viewing the evidence favorably to Whitten, there is any fact in dispute which could be material to resolution of the legal issue. *Rogen v. Ilikon Corp., 361 F.2d 260, 266 (1st Cir. 1966)*. **[**4]** Paddock, using a perfectly proper tactic to bring sudden death to litigation which could be protracted, has conceded far more concerning its motives and techniques than any subsequent proof might establish. We judge it therefore by the following artificially stark set of facts.

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[1] Paddock of California, Inc. franchises dealers with the right to use its trade names, trademarks, and patents. Paddock Pool Equipment Co., Inc. manufactures water circulation and filtration systems and other accessories for swimming pools. Paddock Pool Builders, Inc. constructs and installs swimming pools in the northeastern part of the United States, using products of Paddock Pool Equipment Co.

The market for pipeless swimming pools is both relatively new and quickly expanding. Thus far, however, the greater initial expense of such pools has limited sales almost exclusively to public bodies or private bodies using public funds and subject to public bidding procedures. Although the number of firms supplying equipment for pipeless pools is unclear, Paddock is apparently the largest by far, doing business to some extent in all states, having at least 45 dealers, and making 20 times the installations as Whitten.

The public and quasi-public agencies who form the primary market for both **[*28]** Whitten and Paddock operate under a multiplicity of state and local bidding procedures, a factor which poses considerable difficulty in disposing of this case on summary judgment. [2] Nevertheless, the following skeleton procedure seems to be common. When a public body -- for example, a school board -- has **[**5]** received the authorization to construct a pool, it retains an architect or engineer to supervise the job. He then determines what products are available and prepares the technical specifications on which bids will be based. These specifications are then submitted to local authorities for clearance under health and building codes and finally to the school board. The school board, usually placing heavy reliance on the judgment of the architect, approves the specifications and invites bids. At this point, manufacturers may seek to have their products approved as equals to, or acceptable substitutes for, the equipment described in the specifications, but time is extremely short and the protests of rival suppliers are usually referred to the architect who drew up the original specifications.

[6]** Obviously, then, the original drafting of specifications is a critical stage for suppliers of pool equipment. Both Paddock and Whitten try to influence architects at this stage by publishing descriptions of their products in architectural catalogues. In addition, when Paddock learns of a forthcoming public pool project, one of its agents or dealers visits the architect charged with supervising the bidding. While Whitten also attempts to enter the scene at this early stage, its more limited resources prevent it from doing so on the same broad scale as Paddock. Paddock endeavors, with a high degree of success, to persuade the architect to adopt Paddock's own specifications. One witness deposed that "a good many architects . . . have evidently not written any specifications at all but allow Paddock to do so or used the specifications which Paddock supplied." These specifications are on their face neutral technical descriptions of generally available pool accessories, but a closer inspection reveals that they describe Paddock's products -- and only those -- in a variety of ways. They require that the recirculating and filtering systems be purchased from a manufacturer who has produced **[**7]** them for specified number of years -- which only Paddock has done. Much of the equipment is described in a way that would rule out features of Whitten's equipment. The filter specification goes so far as to refer to Paddock equipment by Paddock's catalogue number. While the specifications provide for "an approved equal" for the described equipment, the specific functional or structural requirements would rule out the practicable possibility of an equal being accepted. Moreover, the time limitations on one who would submit a bid on alternative designs and equipment make such submission next to impossible.

Associated with this pressure to persuade architects to accept Paddock's proprietary and exclusionary specifications is other conduct which, under the ground rules of this case, we are to take as established. This includes falsely advertising that Paddock is the only manufacturer of pipeless swimming pool equipment and that its designs have benefitted from its national swimming program -- which in fact is non-existent; false statements about Whitten's lack of experience; and threats of litigation against public bodies and contractors who have contracted with Whitten or contemplate **[**8]** doing so. [3]

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[2] For example, in the critical area of product and specification approval, the federal government maintains elaborate independent testing services and a system of appeals to the Comptroller General for suppliers aggrieved by decisions of the contracting authority. *See* R. Nash and J. Cibinic, Federal Procurement Law, 170-177 (1966). State and local authorities, however, sometimes delegate this function entirely to so-called "strong" architects hired to supervise a particular project.

[3] Paddock feels that these allegations are not germane, in part because deception does not vitiate an otherwise valid *Noerr* defense, *365 U.S. at 145*, and in part because Whitten has not challenged the validity of Paddock's patent. *Noerr*, apart, however, we think systematic tale-tellling coupled with other relevant factors such as conspiracy or monopoly power may constitute an antitrust violation. We also doubt whether one must as a matter of law challenge the validity of a patent in order to

[*29] We are therefore confronted, for the purposes of this appeal, with government acting in a proprietary capacity purchasing goods and services to satisfy its own needs within a framework of competitive bidding, where the initial responsibility for recommending specifications has been entrusted to a hired professional, **[**9]** and where the selling effort directed at that professional and his public client by a leading supplier was monopolistically motivated and ran the gamut from high pressure salesmanship to fraudulent statements and threats.

Paddock is willing to present its case in this posture -- as it says, "The most extreme state of facts imaginable" -- because of its confidence in the proposition that efforts by private parties to influence the actions of government cannot violate the antitrust laws, even though such efforts are intended to eliminate competition. In support of this proposition, Paddock advances two separate but related principles of antitrust exemption. First, drawing on *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, Paddock argues that restraints of trade which result from valid governmental action cannot give rise to private antitrust liability. Second, relying primarily on *Eastern Railroad Presidents Conference v. Noerr Motor Freight, supra* and *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, Paddock maintains that joint efforts to influence public officials **[**10]** are beyond the scope of the antitrust laws. [4]

These propositions find ample support in the language of the Supreme Court opinions on which Paddock relies. None of these cases, however, addresses the factual profile presented here, [5] and we are particularly reluctant to rely on verbal formulae to solve problems of antitrust liability. The Sherman Act has been interpreted **[**11]** as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. ***HN3***[] In the light of this purpose, courts in considering conspiracies to restrain trade have held that, "It is not the form of the combination or the particular means chosen but the result to be achieved that the statute condemns." *American Tobacco Co. v. United States, 328 U.S. 781, 809, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*. In a similar vein, courts have condemned otherwise innocent practices if exploited to achieve or maintain monopoly power. *United States v. Griffith, 334 U.S. 100, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*; *United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953)*, aff'd **[*30]** per curiam, *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)*. There are occasional exemptions from the rule of unfettered competition for particular forms of combination and particular kinds of **[**12]** anti-competitive practices, but these exemptions are narrowly construed. *Cf.* *United States v. Borden Co., 308 U.S. 188, 196-202, 205-206, 84 L. Ed. 181, 60 S. Ct. 182 (1939)*; *Silver v. New York Stock Exchange, 373 U.S. 341, 347-349, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)*; *Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 216-220, 15 L. Ed. 2d 709, 86 S. Ct. 781 (1966)*. With these strictures in mind, we turn to examination of the tributary doctrines on which Paddock relies for its claim of antitrust immunity.

[13]** The Parker v. Brown Immunity

We ask first whether the adoption of Paddock's specifications by public bodies brings Paddock within the protection of *Parker v. Brown, supra.* *Parker* grew out of the efforts of a packer of raisins to enjoin the operation of California's agricultural marketing scheme. The object of the scheme was to avoid ruinous competition by placing a certain percentage of every grower's crop within the control of a committee of growers and packers, who could then sell or

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complain of the uses to which it is put. *Cf.* *United States v. Singer Manufacturing Co., 374 U.S. 174, 10 L. Ed. 2d 823, 83 S. Ct. 1773 (1963)*.

[4] ***HN2***[] While the two doctrines are often treated as one, we agree with Paddock's separate treatment of each. The two are not coterminous. For example, an unsuccessful attempt to influence government action may fall within the *Noerr-Pennington* immunity, but not the *Parker* immunity. Conversely, a state regulatory agency may decide to restrain competition without prompting; the beneficiaries, not having solicited government action, would enjoy a *Parker* immunity but not one based on *Noerr-Pennington*. Moreover, because of its *First Amendment* overtones, the *Noerr-Pennington* immunity is arguably broader than the *Parker* exemption.

[5] Paddock has cited one lower court decision, *United States v. Johns-Manville Corp., 259 F. Supp. 440 (E.D. Pa. 1966)*, which involved substantially similar facts and raised, among others, the precise issue raised here. The court, relying on *Noerr* and *Pennington*, granted summary judgment for defendant without extended analysis. For reasons which we express in the text, we disagree with this broad application of the *Noerr-Pennington* rule.

withhold the produce as conditions dictated. The Supreme Court assumed that this program would violate the Sherman Act if it had been the product of private agreement. The Court, however, stressed that the program had been established under state legislation and was administered by a group appointed by the Governor and confirmed by the State Senate. In the light of these indications of deliberate governmental guidance, the Court concluded:

> "We 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 **[**14]** 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." *317 U.S. at 350-351*.

The Court's emphasis on the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption. As one commentator has observed, the assertion that an act is "valid governmental action . . . suggests inquiry rather than ends it. . . . Generally, the underlying issue in determining the applicability of such an exemption is the degree of governmental involvement in, and supervision over, the allegedly wrongful private activity." Comment, Alabama Power Company v. Alabama Electric Cooperative, Inc., 55 Va. L. Rev. 325, 345-346 (1969). ***HN4***[] Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular **[**15]** field and deliberately attempts to provide an alternate form of public regulation.

In terms of such deliberate governmental occupation of a field normally left to the free winds of competition, this case falls at the opposite end of the spectrum from *Parker*. At the *parker* end of the spectrum lie cases like *Trucking Unlimited v. California Motor Transport Co., 1967 Trade Cas. (CCH) P 72298 (N.D. Cal. 1967)*, a case involving certification of common carriers, where the deliberate choice of a regulatory agency intervened between the private anti-competitive activity and the resulting restraint on trade, or cases like *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966)*, cert. denied, *385 U.S. 947, 17 L. Ed. 2d 226, 87 S. Ct. 320 (1967)*, a suit involving an airport service franchise, where a state agency exercised broad authority to manage a monopoly in the **[*31]** public interest. [6] Even at this end of the spectrum, no exemption will be found if state encouragement of price stability falls short of the delegation and approval in *Parker*. *See* *Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n, 272 F. Supp. 872 (D.N.J. 1967)*; **[**16]** *cf.* *United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561-562, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)*.

[17]** The middle of the spectrum is occupied by cases in which the state has chosen to regulate a field, but state policy is neutral or silent with respect to restraints of trade. Since there is no conflict in such cases between state regulatory action and the policy of unfettered competition, the courts have found no difficulty in denying anti-trust immunity. *Northern Securities Co. v. United States, 193 U.S. 197, 347-350, 24 S. Ct. 436, 48 L. Ed. 679 (1904)*, cited in *Parker v. Brown, supra at 351*; *Travelers Insurance Co. v. Blue Cross of Western Penn., 298 F. Supp. 1109 (W.D. Pa. 1969)*; *cf.* *Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959)*.

In the case at bar, however, the state policy is neither anti-competitive nor neutral. When the government acts under laws requiring competitive bidding, it signifies its intent to respond to the signals of a competitive market on the same terms as any other consumer, an intent which is entirely consistent with the aims of the Sherman Act.

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[6] *See also* *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954)* (state regulation of electric power lines along rights of way); *Alabama Power Co. v. Alabama Electric Cooperative, Inc., 394 F.2d 672 (5th Cir. 1968)*, cert. denied, ***393 U.S. 1000, 21 L. Ed. 2d 465, 89 S. Ct. 488 (1968)*** (conditions imposed on loan by Rural Electrification Administration); *Miley v. John Hancock Mutual Life Insurance Co., 148 F. Supp. 299 (D. Mass. 1957)*, aff'd, *242 F.2d 758 (1st Cir. 1957)* (state commission awarding insurance contract); *Independent Taxicab Operators' Ass'n of San Francisco v. Yellow Cab Co., 278 F. Supp. 979 (N.D. Cal. 1968)* (awarding taxi stand concession under state law permitting exclusive awards). For an excellent summary of the law on conflicts between federal regulatory action and the Sherman Act, *see* *Northern Natural Gas Co. v. FPC, 130 U.S. App. D.C. 220, 399 F.2d 953, 959-961 (1968)*.

This intent would be frustrated, and the ultimate cost to the public substantially increased, if some sellers could nevertheless **[**18]** engage in anti-competitive practices merely because they were dealing with the government. For example, suppose the plaintiff here was not a rival of Paddock, but a group of school boards seeking treble damages under the doctrine of *Georgia v. Evans, 316 U.S. 159, 86 L. Ed. 1346, 62 S. Ct. 972 (1942)*. It would be anomalous to dismiss the school boards' suit on the grounds that, by adopting Paddock's specifications, they had conferred immunity on monopolistic practices which they had never considered, which they lacked the authority to approve, and which undermined the entire process of competitive bidding. We conclude, therefore, that the adoption of Paddock's specifications by public bodies does not bring Paddock within the exemption for valid governmental action.

The Noerr-Pennington Immunity

HN5[] Assuming that Paddock's conduct is not protected by the doctrine of Parker v. Brown, we next consider whether such conduct falls within the teaching of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, and *United Mine Workers v. Pennington, supra*, **[**19]** which hold that joint efforts to influence public officials in the passage or enforcement of laws are beyond the scope of the antitrust laws. The basic case is *Noerr*, which grew out of a dispute between railroads and truckers. The railroads mounted an intensive but misleading publicity campaign to obtain anti-trucker legislation and to persuade the governor of a state to veto a pro-trucker bill. The truckers then brought suit, charging a conspiracy in restraint **[*32]** of trade. The Supreme Court reversed judgments of liability on two grounds. First the Court noted that:

> "To hold that the government retains the power to act in [a] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *365 U.S. at 137*.

The Court then defined as "of at least equal importance" the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of **[**20]** laws," *365 U.S. at 139*, a right protected by the *First Amendment*. The Court added that financial self-interest was an important motive in prompting citizens to participate in government.

The key to this decision, in our opinion, is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the "passage or enforcement of laws." The entire thrust of *Noerr* is aimed at insuring uninhibited access to government policy makers. A pluralistic society moves by many motives. The hope, supported by history, is that permitting every interest to be heard will produce a tolerable amalgam responsive to the needs of a given time. But the efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. By "enforcement of laws" we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter. *Noerr* alone, then, does not support Paddock's position.

[21]** *Noerr* was followed by *Pennington*, a case involving an effort by large mine operators and union officials to persuade the Secretary of Labor to prescribe higher minimum wages for companies selling coal to the TVA on long-term contracts. This effort at persuasion would seem to fall well within the *Noerr* immunity for attempts to influence the enforcement of laws. The Walsh-Healy Act, 41 U.S.C. § 35 *et seq.*, conferred considerable discretion on the Secretary of Labor to set wage levels in the public interest, and required the Secretary to observe the strictures of the Administrative Procedure Act, including notice, public hearing, and judicial review, in making wage rulings. 41 U.S.C. §§ 35(b), 43a; Costilo, Antitrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich. L. Rev. 333, 344-345 (1967). [7] Nevertheless, the trial court instructed the jury that efforts to influence the Secretary were illegal if part of a broader conspiracy to drive small mineowners from business. *Pennington v. United Mine Workers, 325 F.2d 804, 817 (6th Cir. 1963)*. The Court of Appeals took an even more restrictive **[**22]** view, holding that *Noerr* shielded only good-faith attempts to influence public officials, "unaccompanied by a purpose or intent to further a conspiracy to violate a statute." *325 F.2d at 817*. In rejecting this restrictive view of *Noerr*, the Supreme Court observed:

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *381 U.S. at 670*. **[*33]**

[23]** Paddock seizes on this statement to buttress its position that efforts to influence any public official are exempt. In context, however, the Court's emphasis is not on the role of the public officials involved, but rather on the irrelevance of intent or conspiracy in applying the *Noerr* doctrine. Nevertheless, there remains the question of whether a particular attempt to influence a public official is the kind of political activity which *Noerr* protects. *Noerr* stressed the importance of free access to public officials vested with significant policy-making discretion. We doubt whether the Court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues.

We find support for our reading of *Pennington* in *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*. In *Continental Ore*, a private firm acting as administrator of Canada's wartime rationing program used its discretionary power to exclude a competing processor of vanadium ore from the Canadian market. The Supreme Court, stressing **[**24]** that there was no evidence that the Canadian government had approved of the conduct of its agent, held that such conduct was subject to the Sherman Act. In *Pennington*, the Court was careful to distinguish *Continental Ore* on the grounds that there was no indication that any Canadian official "would have approved of joint efforts to monopolize the production and sale of vanadium . . . ." *381 U.S. at 671 n. 4*. Presumably a different result would have followed if defendants in *Continental Ore*, instead of seeking to subvert the administration of the rationing program, had boldly sought a change of policy from executive or legislative officials. *See* Costilo, *op. cit.*, 66 Mich. L. Rev. at 347. [8]

[25]** The same logic applies in this case. The state legislatures, by enacting statutes requiring public bidding, have decreed that government purchases will be made according to strictly economic criteria. Paddock is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers. Indeed, to hold otherwise might impair the effectiveness of competitive bidding. *See* Note, *op. cit*. n. 7, 81 Harv. L. Rev. at 851-852 (1968). We conclude, therefore, that the ***HN6***[] immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.

This conclusion does not, in our view, encroach on the freedom of speech and right to petition protected by the *First Amendment*. The *First Amendment* does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion. **[**26]** *Cf.* *Valentine v. Chrestensen, 316 U.S. 52, 86 L. Ed. 1262,*

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[7] Some have been troubled by the fact that the mineowners approached not only the Secretary of Labor, but also the TVA. *See* Note, Application of the Sherman Act to Efforts to Influence Government Action, 81 Harv. L. Rev. 847, 853 (1968). However, since the TVA had the power to undermine the Secretary's decision by making "spot market" purchases from low wage operators, the mineowners' conduct seems a reasonable addendum to the main proceedings before the Secretary.

[8] Unlike Paddock, we do not read *Continental Ore* to mean that any action by a Canadian public official would have resulted in exemption. An anti-competitive practice may receive only the most cursory inspection by public officials, *see* *Woods Exploration Co. v. Alcoa, 36 F.R.D. 107 (S.D. Texas 1963)*, or public officials may approve conduct without consideration or awareness of its anti-competitive aspects. *Cf.* *Angle v. Chicago, St. Paul, Minneapolis and Omaha Rwy. Co., 151 U.S. 1, 38 L. Ed. 55, 14 S. Ct. 240 (1893)*. The issue in such cases is not whether the action was in form "governmental", but whether the real decision makers were public officials or private businessmen. *See* American Bar Association, 1955-1968 Antitrust Developments, 211-12 (1968).

62 S. Ct. 920 (1942); Breard v. City of Alexandria, 341 U.S. 622, 641-643, 95 L. Ed. 1233, 71 S. Ct. 920 (1951). Moreover, the First Amendment does not prevent government from adopting reasonable rules for regulating the conduct of **[*34]** those who seek its favor. United States v. Harriss, 347 U.S. 612, 625-626, 98 L. Ed. 989, 74 S. Ct. 808 (1954). Finally, Paddock's right to tout its wares to government agencies, unlike the right to seek legislation involved in Noerr, is purely a creature of statute and must be exercised within the confines of bidding procedures designed to insure the maximum possible competition for the government's expenditures. In the light of these considerations, we see no constitutional objection to requiring that Paddock observe the same limitations in dealing with the government as it would in dealing with private consumers.

Nor do we see the practical difficulties which trouble Paddock. Paddock argues that by denying immunity we cast doubt on the legality of many existing public contracts and will in the future force public bodies to forego patented **[**27]** products and "procure at the lowest common denominator". Paddock has, however, confused the narrow issue of whether its conduct is exempt from antitrust regulation with the broader issue of whether it has in fact violated the Sherman Act. We address only the question of exemption; we intimate no view on whether a violation has actually occurred. Paddock's conduct may on inspection prove to be the muscle flexing of a budding monopolist, or it may prove to be no more than a vigorous selling effort. Nor do we mean to condemn the publication of proprietary specifications. Such specifications undoubtedly provide a useful service to architects and engineers. We hold only that the legality of Paddock's selling methods is to be judged without regard to whether its customer is a private consumer or a public official acting under a competitive bidding statute. Those who sell to private developers under competitive bidding procedures have never enjoyed antitrust immunity. We doubt whether applying the same standard to dealings with public customers will prompt a wholesale repudiation of contracts or hamstring the efforts of public bodies to buy desirable products. [9]

[28]** On the other hand, we think that such an even-handed rule will promote the policy of free and unfettered competition which underlies the Sherman Act. Government is the largest single customer in our economy, with expenditures amounting to over $150 billion in 1966. Note, *op. cit.* n. 7, 81 Harv. L. Rev. at 847 n. 3. Occasionally, government may encourage activity which would otherwise violate the antitrust laws, *e.g.*, 50 U.S.C. App. § 2158, or use its purchasing power to promote broader objectives of public welfare, *e.g.*, Walsh-Healy Act, 41 U.S.C. § 35(b). In this case, however, the government bodies which Paddock sought to influence were acting under elaborate bid procedures designed to insure that purchases were based solely on economic considerations. To hold that Paddock's conduct is exempt in such circumstances would be tantamount to a grant of total immunity for commercial dealings with the government. Our national reliance on the market to efficiently allocate resources would be misplaced if dealings with the nation's largest customer were totally exempt. We therefore hold that efforts to influence **[**29]** government officials acting under statutes requiring competitive bidding are within the scope of the antitrust laws.

Tying Agreements

Paddock has also moved to strike those portions of the complaint in which Whitten alleges that Paddock violated § 3 of the Clayton Act and § 2 of the **[*35]** Sherman Act by conditioning the sale of Paddock's patented gutter system on the purchase of Paddock accessories. These allegations, if true, would certainly constitute violation of the antitrust laws. International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947); Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969). Paddock, however, moved for summary judgment on the grounds that Whitten had failed to show any evidence of the illegal condition or agreement which is the gravamen of a tying offense.

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[9] Our reliance on state bidding statutes should not be taken as approval of Whitten's argument that Paddock's selling efforts fall within the Sherman Act because Paddock's specifications are illegal under state bidding statutes. State law on the validity of restrictive specifications varies widely. 63 C.J.S. Municipal Corporations § 1149: 43 Am. Jur. Public Works and Contracts §§ 16-17. We do not, therefore, equate immunity with legality under state law. Rather, we rely on bidding statutes as clear indicia that government is acting as a consumer rather than as a regulator.

As evidence of an illegal condition, Whitten relies primarily on the terms of Paddock's specifications, which, as we have seen, are widely adopted by contracting authorities. This document requires that a single manufacturer supply all the elements of the water recirculation system and **[**30]** expresses a preference for manufacturers who can supply accessories as well as recirculation equipment. Since only Paddock can meet these terms, a contracting authority which adopts Paddock's specifications in order to obtain its gutter system will eventually purchase an entire equipment package from Paddock.

In reply, Paddock argues that the specifications, whatever their restrictive effect, are not an agreement between Paddock and the contracting authority, but are instead guidelines freely adopted by the contracting authority for the use of potential bidders. In Paddock's view, the tying effect in this case results not from an illegal agreement imposed by the seller, but from the buyer's desire to insure that his bidders supply complementary equipment of high quality. [10]

[31]** Whatever the ultimate merits of this argument, we must view it through the prism of ***HN7***[] summary judgment, which should be granted only when the truth is clear, when no material fact remains for trial, and when the moving party is entitled to judgment as a matter of law. *Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 88 L. Ed. 967, 64 S. Ct. 724 (1944)*. The Supreme Court has often expressed its reluctance to dispose of complex issues of economic fact through the relatively blunt tool of summary judgment. *White Motor Co. v. United States, 372 U.S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*; *Kennedy v. Silas Mason Co., 334 U.S. 249, 92 L. Ed. 1347, 68 S. Ct. 1031 (1948)*. Moreover, ***HN8***[] a court has discretion to deny an otherwise justified motion for summary judgment if the arguments of the parties have failed to clarify the underlying facts, *cf.* *Kennedy v. Silas Mason Co., supra at 256*, or if the motion is tainted with procedural unfairness. *Williams v. Howard Johnson's of Washington, Inc., 323 F.2d 102, 107 (4th Cir. 1963)*; **[**32]** 6 J. Moore, Federal Practice para. 56.15(6).

In the light of these teachings, we think that the summary judgment on the tying issue should not stand. The gist of Paddock's defense is that the restrictive specifications were not imposed by the seller, but freely adopted by the buyer. But the fact -- which we must assume for purposes of summary judgment -- that many contracting authorities are willing to adopt Paddock's restrictive specifications, contrary to their apparent economic interest, provides at **[*36]** least some basis for inferring an illegal understanding. *Cf.* *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221-227, 83 L. Ed. 610, 59 S. Ct. 467 (1939)*. The record also contains allegations of several instances in which Paddock used threats of patent infringement litigation to persuade reluctant purchasers of the merits of its gutter system. When the "tying" product is patented, an infringement suit can be a powerful weapon in controlling the market for the unpatented "tied" products. *Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 493-494, 86 L. Ed. 363, 62 S. Ct. 402 (1942)*. Certainly, the tying issue would appear in **[**33]** a very different light if buyers regularly adopted Paddock's specifications in order to avoid litigation rather than because of the intrinsic merit of Paddock's products. Of course, unfavorable inferences about the motives of Paddock and its customers may be readily rebutted by appropriate evidence, but the arguments of counsel cannot supply the lack of such evidence in the record before us. On the basis of this scanty record, we cannot say that Paddock has conclusively dispelled the possibility of an illegal condition or understanding. *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 22 L. Ed. 2d 658, 89 S. Ct. 1391 (1969)*.

In addition, the record on appeal reveals considerable confusion about what Paddock conceded for purposes of its motion for summary judgment. In argument before the trial court, counsel for Paddock described his motion as essentially a motion to dismiss and stated that Paddock would concede all the material facts of the complaint. Counsel immediately clarified what this concession entailed for purposes of the first issue, the *Noerr-Pennington*

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[10] In advancing this argument, Paddock places heavy reliance on the deposition of Mr. George Whitten, president of Whitten, Inc., who admitted that he did not intend to allege that Paddock refused to sell its gutter system unless the purchaser also agreed to buy accessory equipment. This admission, however, must be qualified by Mr. Whitten's later allegation that Paddock has engaged in discriminatory pricing which had the effect of a refusal to deal. Moreover, a seller need not refuse to sell his tying product outright in order to induce purchasers to enter an illegal tying agreement; he may, for example, offer discounts for those who purchase both tying and tied products or threaten litigation against those who refuse to accept the whole package. Mr. Whitten's admission does not, therefore, dispose of the tying issue as a matter of law.

defense, but failed to make his meaning clear with respect to the second **[**34]** issue, the tying agreement. As a result, counsel for Whitten, thinking that Paddock's motion raised only legal issues, declined the trial court's offer of additional time to complete the taking of depositions. As a further result, Whitten on appeal has relied on Paddock's concession, while Paddock has argued that Whitten introduced no evidence of an illegal understanding. We do not pause to apportion blame for this confusion, nor do we hold that such misunderstanding bar summary judgment in every case. In this case, however, we have already decided that there must be a remand to consider Whitten's charges of conspiracy and attempt to monopolize. Both these allegations and the charges of illegal tying arrangements seem to turn on essentially the same facts. We therefore conclude that sensible judicial administration requires that we give the parties additional opportunity to develop the facts relevant to the alleged tying arrangements.

The judgment granting summary judgment for the defendant is vacated and the case is remanded for proceedings not inconsistent with this opinion.

Dickstein v. Du Pont

United States Court of Appeals for the First Circuit

June 2, 1971

No. 7808

Reporter

443 F.2d 783 *; 1971 U.S. App. LEXIS 9863 **; 1971 Trade Cas. (CCH) P73,593; Fed. Sec. L. Rep. (CCH) P93,078

Merritt DICKSTEIN, Plaintiff, Appellant, v. Edmond duPONT et al., as they are partners of Francis I. duPont & Co., Defendants, Appellees

Disposition: **[**1]** Affirmed.

Core Terms

arbitration, duPont, antitrust, stock exchange, employees, anti trust law

LexisNexis® Headnotes

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Labor & Employment Law > Employment Relationships > General Overview

HN1[] **Arbitration, Federal Arbitration Act**

The creation of an employment relationship that involves commerce is a sufficient transaction to fall within *§ 2* of the Federal Arbitration Act, *9 U.S.C.S. § 2*.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Stay Pending Arbitration

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN2[] Contract Conditions & Provisions, Arbitration Clauses

Under the Federal Arbitration Act, *9 U.S.C.S. § 3*, a district court shall stay its proceedings on application of one of the parties. The term "party" denotes either a party to the civil suit or a party to the arbitration provision.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Transportation Law > Interstate Commerce > Federal Powers

HN3[] Arbitration, Federal Arbitration Act

A court generally limits the exception in the Federal Arbitration Act for workers engaged in foreign or interstate commerce, *9 U.S.C.S. § 1*, to employees involved in, or closely related to, the actual movement of goods in interstate commerce.

Antitrust & Trade Law > Sherman Act > Defenses

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Sherman Act, Defenses

As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in the courts.

Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Defenses > Illegal Bargains

HN5[] Antitrust & Trade Law, Sherman Act

Antitrust defenses, such as a plea of illegality, in a contract action are allowed only in cases where the intrinsic illegality of the contract is so clear that enforcement would make a court party to the precise conduct forbidden by the law.

Counsel: C. Keefe Hurley, Boston Massachusetts, with whom Earle C. Cooley, David S. Mortensen, Gary W. Carlson, and Hale & Dorr, Boston, Massachusetts, were on brief, for Plaintiff, Appellant.

James C. Heigham, Boston, Massachusetts, with whom William Diller and Choate, Hall & Stewart, Boston, Massachusetts, were on brief, for Defendants, Appellees.

Judges: Aldrich, Chief Judge, McEntee and Coffin, Circuit Judges.

Opinion by: COFFIN

Opinion

[*784] COFFIN, Circuit Judge.

Merritt Dickstein, employed as a "registered representative" by Francis I. duPont & Co., a member of the New York Stock Exchange, helped obtain the Valle's Steak House chain as a financial and underwriting client for duPont. He received a "finder's fee" of $2,000, which he claimed was "grossly inadequate". After an unsuccessful demand on duPont for a "fair and reasonable finder's fee", Dickstein brought this diversity action in federal court, seeking damages in the amount of $200,000 for breach of contract. DuPont did not file a responsive pleading, but instead moved under the Federal Arbitration Act, *9 U.S.C. § 3*, to stay the action pending arbitration. After a hearing before **[**2]** the district court, duPont's motion was granted, *320 F. Supp. 150*, and Dickstein appealed. [1]

DuPont's **[**3]** motion was based on paragraph 34(j) of Dickstein's "Application for Approval of Employment" to the New York Stock Exchange (NYSE), pursuant to rule 345(a) (1) of the Exchange requiring registration with the NYSE of all persons seeking employment as a "registered representative". NYSE Form RE-1 Paragraph 34(j) states:

> "I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and rules then obtaining of the New York Stock Exchange."

Dickstein questions the applicability of the Federal Arbitration Act to his situation and the enforceability of the arbitration clause itself.

The Application was submitted jointly to the NYSE by duPont as **[*785]** "applicant" and Dickstein as "candidate". As a condition precedent to his employment by duPont, the application was an integral and mutually binding part of appellant's employment arrangement with duPont. Given this conclusion, appellant's argument that the promise **[**4]** to arbitrate disputes was not part of a "contract evidencing a transaction involving commerce", *9 U.S.C. § 2*, fails, for it is clear that ***HN1***[] the creation of an employment relationship which involves commerce is a sufficient "transaction" to fall within *section 2* of the Act. *Cf. Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 200-201, 76 S. Ct. 273, 100 L. Ed. 199 (1956)*; *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 n. 7, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)*. Our resolution of this question also disposes of appellant's argument that the appellees did not have standing to invoke the arbitration provision. ***HN2***[] Under *9 U.S.C. § 3*, the district court shall stay its proceedings "on application of one of the parties". The term "party" denotes either a party to the civil suit, which would include duPont, or a party to the arbitration provision, which under our above analysis of the "contract" would also **[**5]** include duPont. NYSE Constitution, Art. VIII, § 6.

Equally unavailing is appellant's argument that he was a worker "engaged in foreign or interstate commerce" within the exceptions to the Arbitration Act set out in *section 1*. *9 U.S.C. § 1*. ***HN3***[] Courts have generally limited this exception to employees, unlike appellant, involved in, or closely related to, the actual movement of goods in

[1] The district court's action is appealable as a final order under *28 U.S.C. § 1291*. *Chatham Shipping Co. v. Fertex S. S. Corp., 352 F.2d 291, 294 (2d Cir. 1965)*; 9 Moore's Fed.Practice para. 110.20 [4.-1] (1) (2d ed. 1970). The district court also denied appellant's motion to stay arbitration. Although appellant formally appealed from this ruling as well, he did not press the matter at oral argument, recognizing problems with the appealability of such a ruling. *See Greater Continental Corp. v. Schechter, 422 F.2d 1100 (2d Cir. 1970)*; 9 Moore's Fed. Practice para. 110.20 [4.-1] (3) (2d ed. 1970). In any case, the same issues are raised by both court orders, and the New York Stock Exchange has notified the appellee that it will not process its arbitration claim pending completion of this phase of the litigation in the federal courts.

interstate commerce. Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers, 207 F.2d 450, 452-453 (3d Cir. 1953); Signal-Stat Corp. v. Local 475, etc., 235 F.2d 298 (2d Cir. 1956), cert. denied, *354 U.S. 911, 77 S. Ct. 1293, 1 L. Ed. 2d 1428 (1957)*, reh'g denied, *355 U.S. 852, 78 S. Ct. 7, 2 L. Ed. 2d 61 (1957)*. Finally appellant raises a charge of default on the part of duPont in failing to file a formal complaint in arbitration until six months after this suit was commenced. This court's decision in Hilti, Inc. v. Oldach, 392 F.2d 368 (1st Cir. 1968), where an 18-month lapse between the filing of the **[**6]** action and the motion for a stay was held insufficient to constitute waiver or default, supports a contrary conclusion. Furthermore, appellant, who was informally notified of duPont's arbitration claim shortly after this suit was begun, has alleged no prejudice from the half-year delay.

The second issue -- the legality, and therefore the enforceability, of the arbitration agreement entered into by appellant -- was injected into the case only after the complaint was filed and appellee called appellant's attention to the arbitration condition he had accepted in applying for employment. Subsequently, appellant's attorney, on being sent a copy of the Application for Approval of Employment form, and on being informed that Rule 345 of the Exchange would be violated by failure to arbitrate, responded that appellant would arbitrate but asserted the position that the requirement and enforcement of the Application violated sections 1 and 2 of the Sherman Antitrust Act.

The district court, noting the grant of self-regulatory authority to stock exchanges under the Securities Act of 1934, 15 U.S.C. § 78a et seq., *see* Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963), **[**7]** held (1) that it was not "readily apparent" that conditioning approval of employment on submission to arbitration would result in unreasonable restraint of competition and (2) that, even assuming such restraint, such a requirement pursuant to Exchange rules approved by the S.E.C. "does not derogate from the self-regulatory grant of the Securities Act."

In arguing that his employment contract is, at least insofar as the agreement to arbitrate is concerned, illegal because it violates the antitrust laws, appellant is in the same position before this court as a defendant to a contract action who argues that his contract is **[*786]** void because it violates the antitrust laws. Such attacks by way of defense are not encouraged in the federal courts: "As ***HN4***[] a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court." Kelly v. Kosuga, 358 U.S. 516, at 518, 79 S. Ct. 429, at 431, 3 L. Ed. 2d 475 (1959) (footnote omitted). [2] There are several reasons for this disfavor. First, the availability of such **[**8]** a contract defense may be utilized by contracting parties to obtain the benefits of a contract without consideration. In *Kelly*, for example, a purchaser of goods failed to complete payment, and set up an antitrust defense to the seller's contract action for the purchase price. In this case, appellant accepted employment under the allegedly illegal contract and raised the antitrust question only when it no longer suited him to comply with his agreement. The Court has refrained from extending judicial sanction to the avoidance of private contracts where to do so is unnecessary. *See* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-757, 67 S. Ct. 1015, 91 L. Ed. 1219 (1947); D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165, 35 S. Ct. 398, 59 L. Ed. 520 (1915); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S. Ct. 431, 46 L. Ed. 679 (1902).

[9]** As a second reason for the *Kelly* policy, the Court has noted that an antitrust defense to contract actions is generally unnecessary to achieve compliance with the ***antitrust law***. The express remedies of those laws do not require supplementation by a defense in contract actions. Kelly, supra 358 U.S. at 519, 79 S. Ct. 429. Finally, the ready availability of such defenses would tend to prolong and complicate contract disputes. In this case, for example, an attempt to prove that the Stock Exchange rule resulted in an unreasonable restraint of trade would involve a massive and lengthy process of discovery plus a lengthy and complex trial. To convert a fairly simple contract dispute into such an unwieldy process seems wasteful. Moreover, the possibility of utilizing the threat of

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[2] *See* Sun Oil Co. v. Vickers Refining Co., 414 F.2d 383, 390 (8th Cir. 1969); Sunshine Packers, Inc. v. American Can Co., 395 F.2d 86 (5th Cir. 1968); Lewis v. Seanor Coal Co., 382 F.2d 437, 441 (3d Cir. 1967), cert. denied, ***390 U.S. 947, 88 S. Ct. 1035, 19 L. Ed. 2d 1137 (1968)***. *Cf.* American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821, 828 (2d Cir. 1968); Western Geophysical Co. v. Bolt Associates, Inc., 305 F. Supp. 1248 (D. Conn. 1969).

expensive litigation of complex antitrust issues as a contract defense could be used as a weapon by disgruntled contracting parties, were they able easily to litigate such issues.

Despite these policy reasons against litigating antitrust defenses in contract disputes, *Kelly* does not hold that no such defenses can be raised. *Kelly, supra at 520, 79 S. Ct. 429*. But **[**10]** ***HN5***[] antitrust defenses are allowed only in cases where the intrinsic illegality of the contract is so clear that enforcement would make a court party to the precise conduct forbidden by the law. *E. g.*, *Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 29 S. Ct. 280, 53 L. Ed. 486 (1909)*. [3] *See generally* J. Scott, Antitrust and Trade Regulation Today: 1969 at 174-77 (1969). In the instant case, the alleged antitrust violation does not even seem to be clear to appellant, much less to the court.

Appellant's attempt to make the linkage is the following:

> "A 'contract', such as the Application **[**11]** which requires a vast multitude of people with omnipotent control and impact upon the economy of the United States, to foreswear their basic rights to fundamental justice (e. g., the right to a jury trial; the right to **[*787]** employ discovery; the right to appeal) in order to obtain employment is a contract in restraint of trade among the several States, imposed by the weight of the NYSE's monopoly position in the industry, and is patently illegal."

But, while appellant cites *Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953)*, which held that a customer's agreement to arbitrate and thus forego the resort to court action granted by legislation was void under section 14 of the Securities Act, *15 U.S.C. § 77n*, [4] **[**12]** he does not offer a *Wilko* illegality claim. Nor could he, not being a security buyer. *See* *Brown v. Gilligan, Will & Co., 287 F. Supp. 766, 771 (S.D.N.Y. 1968)*. [5]

We are unable to see with any clarity how the requirement that employees of Stock Exchange firms agree to arbitrate any controversies could have an anti-competitive impact in the securities market. It is perhaps conceivable that potential employees, unwilling to subscribe to the Exchange's conditions, would refuse to seek employment with member firms. But this in no way would seem to diminish competition among the firms. The arbitration **[**13]** requirement in this case is to be contrasted with the "no-switching" agreement in *Union Circulation Co. v. F.T.C., 241 F.2d 652 (2d Cir. 1957)*, in which a magazine industry agreement which prevented a distributor from hiring any solicitor who had worked for another distributor during a specified prior period was recognized as discouraging labor mobility and therefore advantaging large and well established agencies to the prejudice of infant organizations. *Id. at 658*. Here we see no such differential impact. Although nothing before us indicates that arbitration favors employees less than management, [6] the requirement would seem at most only to affect the internal relations between management and employees. In short, while arbitration may be so linked with market-dominating devices

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[3] *Cf.* *Associated Milk Drivers, Inc. v. Milk Drivers Union, Local 753, etc., 422 F.2d 546, 552 (7th Cir. 1970)*; *Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 769 (6th Cir. 1965)*, cert. denied, ***382 U.S. 820, 86 S. Ct. 47, 15 L. Ed. 2d 66 (1965)***.

[4] This section invalidates any "stipulation * * * binding any person acquiring any security to waive compliance with any provision of this subchapter. * * *"

[5] Indeed, *15 U.S.C. § 78bb(b)*, explicitly provides: "Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby. * * *" While clause (2) may refer to the agreement of a third person to be bound by a decision settling a dispute between members, it may arguably cover an agreement by a member's employee to be bound by an exchange decision settling his own dispute.

[6] We note that the practice of the Exchange is to appoint five arbitrators, three having no connection with the securities business. *Cowen v. New York Stock Exchange, 371 F.2d 661, 663 (2d Cir.1967)*.

as to be antithetical to the antitrust laws in some situations, *cf.* *Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed. 145 (1930)*, we fail to see any such effect here.

[14]** Appellant's best antitrust argument would seem to be that the Stock Exchange rule unreasonably impairs the ability of its members to compete with one another in the labor market. This argument presupposes that if some members were not required to insist on arbitration of disputes with employees, they would not do so and that they would therefore have a competitive advantage over members who insisted on arbitration. It is possible that this argument could be verified if appellant were given the opportunity to marshal the facts, but we find the prospect of its prevailing remote. First, we doubt that the facts would reveal that the existence or absence of arbitration clauses would have any impact on competition between members for employees. Second, even if such an impact were shown, appellant would have to prove the rule was outside the self-regulatory grant of the Securities Act which is a partial exception to **[*788]** the antitrust laws. *Silver v. New York Stock Exchange, supra.* Such an alleged antitrust violation is far too uncertain for us to hold that the employment contract is clearly illegal. Nor can we say that enforcing the agreement would "make the **[**15]** courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Kelly, supra*, 358 U.S. at 520, 79 S. Ct. at 423.

Whatever might be the case were a rule suspect on its face or were a rule frontally attacked in a treble damage suit, we feel compelled by neither reason nor authority to order a district court to adjudicate the compatibility of the Exchange's arbitration requirement with the antitrust laws as part of a lawsuit to collect a commission.

Affirmed.

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Carroll v. Protection Maritime Ins. Co.

United States Court of Appeals for the First Circuit

February 19, 1975, Decided

No. 74-1309

Reporter

512 F.2d 4 *; 1975 U.S. App. LEXIS 16020 **; 1975 Trade Cas. (CCH) P60,167; 1975-1 Trade Cas. (CCH) P60,167; 1975 AMC 1633

RICHARD CARROLL, et al., PLAINTIFFS-APPELLANTS, v. PROTECTION MARITIME INSURANCE CO., LTD., et al., DEFENDANTS-APPELLEES

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Disposition: Affirmed in part and reversed in part. Remanded for further proceedings consistent with this opinion.

Core Terms

maritime, admiralty jurisdiction, vessels, locality, anti-trust, admiralty, vessel owner, cause of action, marine insurance, navigable waters, district court, allegations, tortious, libel

LexisNexis® Headnotes

Admiralty & Maritime Law > Maritime Personal Injuries > General Overview

Admiralty & Maritime Law > Practice & Procedure > Jurisdiction

HN1[] **Admiralty & Maritime Law, Maritime Personal Injuries**

Determination of the question whether a tort is "maritime" and thus within the admiralty jurisdiction of the federal courts traditionally depends upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not.

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

Contracts Law > Breach > General Overview

Admiralty & Maritime Law > Maritime Contracts > General Overview

Admiralty & Maritime Law > Maritime Contracts > Types of Contracts

Admiralty & Maritime Law > Maritime Personal Injuries > General Overview

HN2[] Admiralty & Maritime Law, Maritime Workers' Claims

Where a contract for services between a seaman and a vessel owner is at the heart of maritime relationships, suit for breach of such contract lies in admiralty.

Admiralty & Maritime Law > Maritime Personal Injuries > General Overview

HN3[] Admiralty & Maritime Law, Maritime Personal Injuries

Where a tort by definition involves the disruption or foreclosing of a seagoing relationship, the impact is of necessity a maritime one wherever the act of interfering may have taken place. The locale of the act is irrelevant to the harm done.

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

Real Property Law > Torts > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Maintenance & Safety

Admiralty & Maritime Law > Maritime Personal Injuries > General Overview

HN4[] Admiralty & Maritime Law, Maritime Workers' Claims

A tort, arising as it does out of a maritime "status" or "relation" is cognizable by the maritime law whether it arises on sea or on land.

Admiralty & Maritime Law > Maritime Workers' Claims > General Overview

Torts > Intentional Torts > False Imprisonment > General Overview

Admiralty & Maritime Law > Maritime Personal Injuries > General Overview

Admiralty & Maritime Law > Practice & Procedure > Jurisdiction

HN5[] Admiralty & Maritime Law, Maritime Workers' Claims

The admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.

Admiralty & Maritime Law > Maritime Personal Injuries > General Overview

Real Property Law > Torts > General Overview

Admiralty & Maritime Law > Practice & Procedure > Jurisdiction

HN6[] Admiralty & Maritime Law, Maritime Personal Injuries

There is no reason that torts which have no maritime locality, but have an intimate relationship to maritime service, commerce, or navigation should be excluded from admiralty jurisdiction.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Insurance Law > ... > Business Insurance > Marine & Inland Marine Insurance > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Insurance Law > Types of Insurance > Business Insurance > General Overview

HN7[] **Robinson-Patman Act, Claims**

A seller cannot violate section 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13*, unless he has sold similar commodities to different purchasers at different prices.

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

HN8[] **Regulated Practices, Market Definition**

The labor market is a market which the antitrust acts do not govern, as the labor of a human being is not a commodity or article of commerce, *15 U.S.C.S. § 17*.

Counsel: Alan R. Hoffman, with whom Michael B. Latti and Kaplan, Latti and Flannery were on brief, for Appellants.

Solomon Sandler, with whom Sandler, Sandler & Laramee was on brief, for Appellees.

Judges: Coffin, Chief Judge, Aldrich and McEntee, Circuit Judges. Aldrich, Senior Circuit Judge, concurring.

Opinion by: COFFIN

Opinion

[*5] COFFIN, Chief Judge.

Plaintiffs, seamen and commercial fishermen, appeal the dismissal of their complaint against defendants, the marine protection and indemnity insurers of fishing vessels on which plaintiffs work. [1] Plaintiffs assert that because they have in the past brought personal injury actions against their employers, they are now being denied employment through the practices of defendants. The defendants are alleged to have "listed" plaintiffs, i.e., to have notified vessel owners that some of the plaintiffs ("class A") would not be covered by defendants' insurance policies and that others ("class B") would be covered, but at much higher rates. Since marine **[**2]** insurance was not, allegedly, readily available elsewhere, vessel owners were forced to discharge or refuse employment to plaintiffs. Defendants' alleged purpose was to reduce insurance claims and cost of settlements, and, accordingly, to reduce

[1] Specifically, defendants are an English insurance company, Protection Maritime Insurance Co., Ltd.; a Massachusetts marine insurance broker, Trans-Atlantic Marine, Inc., which places business with Protection Maritime; and a Massachusetts citizen, Enos, who is the principal officer of Trans-Atlantic and an officer and director of Protection Maritime.

operating costs enabling defendants to sell marine insurance at an artifically low rate. The intended result was not only the discharge of plaintiffs from existing jobs and inability of plaintiffs to obtain new jobs, but a conspiracy in restraint of trade.

This basic set of allegations is distilled from a "Further Amended Complaint" of fifty pages and twelve counts which need not be summarized in any detail. It suffices **[**3]** to say that the complaint embraced several theories: a maritime cause of action for tortious interference with plaintiffs' contractual and advantageous business relations -- within admiralty jurisdiction, *28 U.S.C. § 1333*; a cause of action for conspiring to violate the anti-trust laws -- within federal question jurisdiction, *28 U.S.C. § 1331*; and a cause of action within diversity jurisdiction, *28 U.S.C. § 1332*.

The district court held (1) that admiralty jurisdiction was lacking, there being no allegation of tortious activity occurring on navigable waters; (2) that diversity jurisdiction was lacking, two of the defendants being citizens of the same state as plaintiffs; and (3) that plaintiffs lacked standing to sue for anti-trust law violations, their interest as employees of vessel owners being too remote and their injury too indirect.

We first address the question whether a cause of action for tortious interference with a seaman's present or **[*6]** prospective employment against the insurer of the seaman's employer is within admiralty jurisdiction. That the allegations in the complaint before us adequately describe a tort is clear. *E.g.*, *Pino v. Trans-Atlantic Marine, **[**4]** Inc., 358 Mass. 498, 265 N.E.2d 583 (1970)*; A.L.I. *Restatement of Torts 2d, § 766*. Any question as to privilege would be a matter of defense, *see* Prosser, Law of Torts (Fourth ed.), § 130, at p. 953, and is not suggested by the complaint, which alleges a knowing and intentional interference without just cause.

The critical issue is that of admiralty jurisdiction. The black letter law as to maritime torts is familiar lore:

> "Determination ***HN1***[] of the question whether a tort is 'maritime' and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not." *Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253, 34 L. Ed. 2d 454, 93 S. Ct. 493 (1972)*.

See also Victory Carriers, Inc. v. Law, 404 U.S. 202 n.2, 205, 92 S. Ct. 418, 30 L. Ed. 2d 383 (1971).

Before we examine whether or not the locality rule recognized by *Executive Jet Aviation* and its ancestors precludes admiralty jurisdiction in such a case as this, we observe that if it does, it would be on the **[**5]** basis of tradition alone and not reason or policy. ***HN2***[] For a contract for services between a seaman and a vessel owner is at the heart of maritime relationships. *Kossick v. United Fruit Co., 365 U.S. 731, 735, 6 L. Ed. 2d 56, 81 S. Ct. 886 (1961)*. Suit for breach of such contract lies in admiralty. There is no apparent reason or policy for requiring a seaman who wishes to sue both his employer for breach and a third party who provoked the breach to proceed in different courts. Not only would such a requirement result in piecemeal, bifurcated litigation, but the admiralty goal of uniformity in dealing with maritime matters would be frustrated. Seamen's rights against those who tortiously interfere with their seagoing employment would vary from port to port or state to state. Fears of open-ended expansion of admiralty jurisdiction through recognition of causes like that alleged here would not seem well founded. The essential maritime nexus would be not only present but dominant. Finally, ***HN3***[] since the tort, as here applied, by definition involves the disruption or foreclosing of a seagoing relationship, the impact is of necessity a maritime one wherever the act of interfering may have taken **[**6]** place. The locale of the act is irrelevant to the harm done. Indeed, no contrary policy or rationale has been noted by appellee or the district court, who relied solely on the time honored formulation of the locality rule relating to maritime torts.

Executive Jet Aviation established a "locality plus" rule in reaction to the absurdities inherent in predicating admiralty jurisdiction on the locality rule as the sole test. In so doing, it added, significantly, we think:

> "another indictment of that test is to be found in the number of times the federal courts and the Congress, in the interests of justice, have had to create exceptions to it in the converse situations -- *i.e.*, when the tort has no maritime locality, but does bear a relationship to maritime service, commerce, or navigation." *409 U.S. at 259*.

The Court referred to *O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 87 L. Ed. 596, 63 S. Ct. 488 (1943)* where it sustained the judicial "application of the Jones Act . . . to injuries to a seaman on land, because of the seaman's connection with maritime commerce", *id.*, and to *Gutierrez v. Waterman S. S. Corp., 373 U.S. 206, 10 L. Ed. 2d* ***[**7]*** *297, 83 S. Ct. 1185 (1963)*, where the doctrine of unseaworthiness was similarly applied. *Id., at 260*. More pertinently, the Court cited the Second Circuit precursor of *Gutierrez, Strika v. Netherlands Ministry of Traffic, 185 F.2d 555* ***[*7]*** *(1950)*, where Chief Judge Hand, in dealing with a longshoreman's action against a shipowner for injury suffered on land, based on breach of the implied warranty to furnish seaworthy equipment -- a tort, recognized the challenge to maritime jurisdiction. He wrote for the court: "Such ***HN4***[] a tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land."

Three decades earlier, Judge Hand, as a district judge, had dealt with a case where a vessel owner ("The Polish Company") had allegedly compelled the charterer of its vessel to break a contract with libellants. *The Poznan, 276 F. 418 (S.D. N.Y. 1921)*. Addressing the question of admiralty jurisdiction, he wrote,

> "At least for the purposes of this case I may assume that the injury must be maritime in its character as much as though the case sounded in contract. The injury here was the breach of the contract of carriage **[**8]** itself, the effective cause of which was the act of the Polish Company. Obviously, if that contract was maritime enough in its character to base a libel upon it in contract, the injury resulting from the wrongful act on shore was as maritime, because it was the same thing." *Id., at 435, 436*.

Similar analysis, drawing on both *Strika* and *The Poznan*, has been more recently applied within the Second Circuit. In *Cocotos Steamship of Panama v. Sociedad Maritima Victoria S.A. Panama, 146 F. Supp. 540 (S.D. N.Y. 1956)*, Judge Sugarman dealt, by way of dictum, with a libel against two corporations for conspiring to cause a third corporation to breach a charter-party. He characterized the defense of lack of maritime jurisdiction as "unstable", *Id., at 545*, relying on the language of *The Poznan* which we have quoted. In *Castillo v. Argonaut Trading Agency, 156 F. Supp. 398 (S.D. N.Y. 1957)*, Judge Dimock found admiralty jurisdiction over a libel by seamen charging officers of their employer with having caused their false imprisonment in Australia, relying on *Kyriakos v. Goulandris, 151 F.2d 132 (2d Cir. 1945)*, which had held justiciable in admiralty an assault on shore **[**9]** against a crew member. The circuit court had been influenced by the language in *O'Donnell, supra, 318 U.S. at 42*, that "the ***HN5***[] admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

In *Kamara v. S. Livanos & Co., 97 F. Supp. 435 (S.D. N.Y. 1951)*, Judge Kaufman held that an allegation that libellants had been blacklisted was properly before the admiralty court since it "deal[t] with seamen's employment." *Id., at 438*. [2] And the Second Circuit, holding injunctive relief unavailable to prevent the commission of a maritime tort also said, "We assume . . ., without deciding, that picketing which prevents a vessel's being unloaded when the owner is powerless to take action that will end the picketing, is a tort . . . and also that although the actions of the unions took place on land, the tort is maritime since its effect was felt on the navigable waters of New York harbor where the cargo continued to be held on the Cleopatra." *Khedivial Line, S.A.E. v. Seafarers' International Union, 278 F.2d 49, 52 (1960)*.

[10]** *Khedivial* suggests an alternative kind of analysis. Such cases as *Strika, The Poznan*, and their progeny find a sufficient maritime nexus to support jurisdiction in the fact that the allegedly tortious conduct had its source in maritime operations or relationships. *Khedivial* looked to the impact or effect of the tort on the vessel. This analytical approach is pursued elsewhere. Facts converse to **[*8]** those in *Khedivial* were presented in *O'Connor & Co. v. City of Pascagoula, 304 F. Supp. 681 (S.D. Miss. 1969)*, where a stevedore alleged that respondent city's fire marshal wrongfully prevented it from continuing to load explosives on several vessels, causing the shippers to

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[2] The same libellant fared less well two weeks later before Judge Clary, who ruled in *Kamara v. The Atlantic Emperor, 97 F. Supp. 722, 725 (E.D. Pa. 1951)*, that a cause of action for blacklisting "clearly is not an action cognizable in admiralty since no part of it is alleged to have taken place on navigable waters."

terminate their contract with the stevedore. The court found two bases for maritime jurisdiction. One was the fact that the alleged action of the fire marshal interfered with a maritime contract of transportation of goods, the same analysis used by Judge Hand in *The Poznan*. The other ground was the impact of the inducement of breach, "causing the vessels to sail light and late." *Id., at 683*. The court in *O'Connor* led up to its conclusion by referring to the "locality" test, rejecting **[**11]** its mechanical application, and observing that the critical focus should not be "where the wrongful act or omission has its inception, but where the impact of the act or omission produces [the] injury." *Id., at 683*. The reference to the above cited page in *O'Connor* by the Court in *Executive Jet Aviation*, 409 U.S. at 257 n. 6 [3] lends weight to this analysis.

O'Connor in turn found support in two recent cases in the Southern District of New York. In the first of these, *Upper Lakes Shipping, Ltd. v. International Longshoremen's Ass'n, 33 F.R.D. 348 (1963)*, Judge Bonsal found admiralty jurisdiction over a cause of action by a shipping company against two unions for unlawfully picketing **[**12]** its vessels and inducing grain elevator and stevedoring personnel to refuse to participate in loading and unloading operations, all with the purpose of forcing plaintiff to discharge certain seamen. The court held that the alleged activities "wrongfully interfered with the plaintiff's shipping business, including the handling of cargoes and the free operation of its ships on navigable waters. This is sufficient to confer Admiralty jurisdiction on this Court, even though the tortious acts may have taken place on land alongside plaintiff's vessels." *Id., at 350*. Similarly, *Judge McGohey in Orient Mid-East Lines, Inc. v. Albert E. Bowen, Inc., 255 F. Supp. 627 (1966)*, held that "the inducement of a breach of a maritime contract which causes a light sailing is indeed a maritime tort." *Id., at 628*.

So, in the case at bar, it can also be said that the impact of defendants' alleged actions, at least where existing employment was terminated, was felt in the operations of the affected vessels at sea. They not only have sailed without the black-listed plaintiffs but without the owners and officers of the affected vessels having exercised their unrestricted choice of crew members.

[13]** The district court, while acknowledging that the Second Circuit followed the test of relationship between the injury and vessel operations, rather than the historic locality test, interpreted us as accepting the traditional view, citing *Fireman's Fund American Insurance Co. v. Boston Harbor Marina, Inc., 406 F.2d 917, 919 (1969)*, where, in dealing with the responsibility for the destruction by fire of a yacht in winter storage, we affirmed the holding of the district court "that there was no admiralty jurisdiction for a claim sounding in tort because of its strictly land-based nature." We see no reason to question that holding. But we do not read into it the implication ***HN6***[] that torts, to draw on the passage we have quoted from *Executive Jet Aviation, supra*, which have "no maritime locality", but have an intimate "relationship to maritime *service*, commerce, or navigation" [emphasis ours] should be excluded from admiralty jurisdiction.

The tort alleged in this case seems to us so interwoven with present and potential maritime contractual relationships -- traditional concerns of admiralty **[*9]** -- as to fall within that jurisdiction. Moreover, as we have noted, the impact **[**14]** of such a tort as this, while felt by the blacklisted seamen, is equally manifest in the operations of the affected vessels. We construe the language and references in *Executive Jet Aviation*, which we have noted, to recognize this kind of exception to the locality test. [4] We therefore hold that the amended complaint states a cause

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[3] Similarly referenced was *J. W. Peterson Coal & Oil Co. v. United States, 323 F. Supp. 1198, 1201 (N.D. Ill. 1970)*, where the action of the United States in supplying a dredging contractor with maps and information as to river depths and dredging locations was held sufficient to invoke admiralty jurisdiction in tort.

[4] Apart from relying on the general locality test for admiralty tort jurisdiction, appellees cite only four cases said to be closely in point. *One is Kamara v. The Atlantic Emperor, 97 F. Supp. 722 (E.D. Pa. 1951)*, referred to in n. 2, *supra*, and which simply declared that the alleged blacklisting of crew members had not occurred on navigable waters. This we find close on point but not persuasive. *Clinton v. International Organization of Masters, 254 F.2d 370 (9th Cir. 1958)*, involved, *inter alia*, a claim of tortious interference with a contract between a union member and his local union governing allocation of available jobs. The court held the contract not maritime in nature and further observed that the tort was not alleged to have been committed on navigable waters. We find this less on point and no more persuasive. Finally, two old cases from the Southern District of New York were cited. *Marquardt v. French, 53 F. 603 (1893)*, simply held that, a contract to procure insurance not being a maritime contract,

of action cognizable in admiralty. We add that, because of the historic unavailability of equitable relief in admiralty, the plaintiffs' prayer for injunctive relief cannot be granted, even should they prevail on the merits.

[15]** We need not reach the question of diversity jurisdiction as the plaintiffs may proceed in admiralty.

We now turn to the anti-trust claims. The complaint alleged in essence two kinds of anti-trust violations. One was a conspiracy to reduce defendants' operating costs, through "listing" plaintiffs, and then sell marine insurance at discriminatory, artificially reduced rates to selected vessel owners in order to monopolize and restrain trade. The other alleged anti-trust activity was a conspiracy to threaten and coerce vessel owners not to hire plaintiffs, *i.e.*, a secondary boycott.

The district court, relying on a number of lower court cases involving employees of companies which had been allegedly injured by anti-trust violations, focused on the employee-employer relationship in finding that the plaintiffs lacked standing. We see the injuries here as more proximately related to the alleged unlawful behavior. *See* *Radovich v. National Football League, 352 U.S. 445, 435-55, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957)*; *Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967)*; *cf.* *Nationwide Auto Appraiser Serv. v. Ass'n of C. & S. Co., 382 F.2d 925 (10th Cir. 1967).* **[**16]** However, we do not pass on the issue because there is a more fundamental defect in the allegations. They state no cognizable substantive violation of the anti-trust laws. The gravamen of the first claim is that there was price discrimination in the marine insurance business. But the charge, taken in its most favorable light, as required in this context, does not make out a violation of the Robinson Patman Act § 2(a), *15 U.S.C. § 13*. ***HN7***[] A seller cannot violate § 2(a) unless he has sold similar commodities to different purchasers at different prices, *see, e.g.*, *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*; *see also* P. Areeda, Antitrust Analysis, 845 (2d ed. 1974). Here the claim is that the defendants conspired to and did sell marine insurance on the same conditions and at the same prices (for differing commodities) to different purchasers. No claim of price discrimination is stated.

As for the allegations that, independent of price discrimination, defendants sought to create an unlawful boycott of certain classes of seamen, ***HN8***[] the allegedly unlawful activity is directed exclusively at the labor market, a market which the anti-trust acts do **[**17]** not govern: "the labor of a human being is not **[*10]** a commodity or article of commerce." *15 U.S.C. § 17*. *See Nichols v. Spencer International Press, Inc., supra at 334-37*. The anti-trust claims were, therefore, properly dismissed.

Affirmed in part and reversed in part. Remanded for further proceedings consistent with this opinion.

Concur by: ALDRICH

Concur

ALDRICH, Senior Circuit Judge, concurring.

I have some initial reluctance in thinking, particularly with relation to a charge that because of defendant's shore-side conduct a prospective seaman was unable to obtain employment, there is admiralty jurisdiction. There must surely be some limits to such a concept. I find, however, that the same considerations are involved here as I anticipate on the basic issues on the merits. Since the court is willing to read the complaint with liberality in this respect without, I assume, committing itself to precisely what plaintiffs must prove in order to recover, I am content to accept the same approach to jurisdiction.

suit for its breach would not lie in admiralty. In *Williams v. Providence Washington Ins. Co., 56 F. 159, 160 (1893)*, the court held that a claim for false representations in inducing purchase of a maritime insurance policy, not "arising upon the water", did not state a maritime tort. *Marquardt* is not in point and *Williams* no more persuasive than the other *ipse dixits*.

Barry v. St. Paul Fire & Marine Ins. Co.

United States Court of Appeals for the First Circuit

May 16, 1977

No. 76-1226

Reporter

555 F.2d 3 *; 1977 U.S. App. LEXIS 13359 **; 1977-1 Trade Cas. (CCH) P61,431

David M. Barry, M.D., et al., Plaintiffs, Appellants, v. St. Paul Fire & Marine Insurance Co., et al, Defendants, Appellees

Disposition: **[**1]** Affirmed in part; reversed and remanded in part.

Core Terms

boycott, intimidation, Sherman Act, insurance company, regulation, coercion, McCarran-Ferguson Act, policies, legislative history, courts, insurance business, anti trust law, antitrust, district court, federal court, malpractice, rates, blacklisted, policyholders, abstain, coerce, cases, words, state regulation, authorities, restoration, consumers

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > General Overview

HN1[] **Scope, Exemptions**

Under the McCarran-Ferguson Act, *15 U.S.C.S. § 1012(b)*, "the business of insurance" is exempted from antitrust regulation to the extent that it is regulated by the states. However, the McCarran-Ferguson Act does not confer blanket immunity. Under the McCarran-Ferguson Act, *15 U.S.C.S. § 1013(b)*, insurers are subject to the Sherman Act if they engage in "acts of boycott, coercion, or intimidation," or if they agree to engage in such acts.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > ... > Savings Clause > Business of Insurance Test > General Overview

Antitrust & Trade Law > Clayton Act > Scope

HN2[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

See *15 U.S.C.S. § 1012(b)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN3[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

See *15 U.S.C.S. § 1013(b)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

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

Torts > Malpractice & Professional Liability > Healthcare Providers

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Insurance Law > Types of Insurance > Malpractice & Professional Liability Insurance > Physicians

HN4[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

In ***antitrust law***, a boycott is a "concerted refusal to deal" with a disfavored purchaser or seller.

Governments > Legislation > Interpretation

HN5[] Legislation, Interpretation

A license to construe statutory words narrowly to avoid defeating legislative purpose is not to be cavalierly exercised.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN6[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The McCarran-Ferguson Act, *15 U.S.C.S. §§ 1011-15*, as a whole, is meant to apply to the relationship between policyholders and their insurers.

Governments > Legislation > Interpretation

HN7[] **Legislation, Interpretation**

Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature, unless no doubt can be left that the legislature has in fact used a private code, so that what appears to be violence to language is merely respect to special usage.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

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

HN8[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ P. 9(b) requires complaints charging fraud to state "with particularity" the circumstances constituting fraud.

Counsel: Leonard Decof, with whom Mark S. Mandell and Leonard Decof, Ltd. were on brief, for Appellants.

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Judges: Coffin, Chief Judge, Campbell, Circuit Judge, and Gignoux, [*] District Judge. Campbell, Cir. J., dissenting in part.

Opinion by: COFFIN

Opinion

[*5] COFFIN, Ch. J.:

The primary issue presented by this appeal is whether a "consumer" of insurance can sue an insurance company for violating the antitrust laws. **[**2]** ***HN1***[] Under the McCarran-Ferguson Act, *15 U.S.C. §§ 1011-15*, "the business of insurance" is exempted from antitrust regulation to the extent that it is regulated by the states. *Id*. *§ 1012(b)*. But McCarran-Ferguson does not confer a blanket immunity: insurers are subject to the Sherman Act if they engage in "acts of boycott, coercion, or intimidation" or if they agree to engage in such acts. *Id*. *§ 1013(b)*. We must decide whether this exception applies only to insurance company boycotts of agents and other companies or also applies to refusals to deal with policyholders.

This suit is brought by plaintiffs seeking to represent two classes: all licensed physicians practicing in the state of Rhode Island and all citizens of Rhode Island who are or will be under a doctor's care. The defendants are four insurance companies that have sold malpractice insurance to Rhode Island doctors. The plaintiffs charge in their amended complaint that these companies violated the nation's antitrust laws by conspiring to shrink the malpractice

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[*] Of the District of Maine, sitting by designation.

coverage available to Rhode Island doctors. According to the complaint, one company, **[**3]** St. Paul Fire & Marine Insurance Company, changed its future malpractice policies to provide coverage only on a "claims made" basis, rather than an "occurrence" basis. [1] When St. Paul's disgruntled customers tried to take their business elsewhere, the other insurance companies refused to sell them malpractice policies of any sort. Believing this to be the result of an unlawful conspiracy in restraint of trade, plaintiffs sought injunctive relief and treble damages. [2] The viability of their suit **[*6]** depends on the scope of the McCarran-Ferguson Act. 15 U.S.C. § 1011-15.

[4]** The Act must be placed in historical context if it is to be understood. For many years, from 1869 to 1944, the Supreme Court steadfastly maintained that insurance was not "commerce" and that state regulation of insurance did not impinge on the federal government's power to regulate interstate commerce. *See, e.g., Paul v. Virginia, 75 U.S. (8 Wall.) 168, 19 L. Ed. 357 (1869)*. In 1944, however, the Supreme Court repudiated the principle that insurance is not commerce and held that federal antitrust laws could constitutionally be applied to insurance companies. *United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)*. This decision left the nation's insurance companies and the states' regulatory bodies dumbfounded; suddenly, state taxation and regulation of insurance seemed open to serious constitutional doubts. Federal authorities were loath to assume the burden of substituting national for state supervision of insurance.

To restore some certainty, Congress passed the McCarran-Ferguson Act in 1945. The Act made it clear that state regulation and taxation of insurance could continue. It also narrowed **[**5]** the impact of federal law on the insurance business, stating that ***HN2***[] "the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *15 U.S.C. § 1012(b)*. This provision allows the states to engage in a kind of "reverse preemption", and the states were quick to enact the necessary laws.

The parties agree that the defendants' acts were related to the business of insurance and that Rhode Island effectively regulates that business. *Cf. SEC v. National Securities, Inc., 393 U.S. 453, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969)*; *FTC v. Travelers Health Ass'n, 362 U.S. 293, 4 L. Ed. 2d 724, 80 S. Ct. 717 (1960)*. The controversy in this case centers on an exception to the "preemptive" powers of the ***HN3***[] states: "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, **[**6]** coerce, or intimidate, or act of boycott, coercion, or intimidation." *15 U.S.C. § 1013(b)*.

The district court concluded that "despite this provision's broad wording, which on first glance seems to support the plaintiffs' position, Congress intended this exception to be narrowly applied and that it does not, in fact, cover the situation presented in this case." It held that the "boycott, coercion, and intimidation" exception was intended by Congress solely to protect insurance agents or other insurance companies from being blacklisted by combinations of companies, and was not intended to have any bearing on the insurer-insured relationship. It also observed that a contrary holding would vitiate the McCarran-Ferguson Act by, presumably, cutting deeply into the area of regulation which has been given to the states. In so holding, it relied on the only case authorities which had dealt with this issue. *Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725 (9th Cir. 1974)*, *cert. denied*, *420 U.S. 929, 43 L. Ed. 2d 400, 95 S. Ct. 1129 (1975)*; *Meicler v. Aetna Cas. & Sur. Co., 506 F.2d 732 (5th Cir. 1975)*; **[**7]** *Transnational Ins. Co. v. Rosenlund, 261 F. Supp. 12 (D. Ore. 1966)*.

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[1] An "occurrence" policy protects the holder from liability for any act done while the policy is in effect; a "claims made" policy, in contrast, protects the holder only against claims made during the policy's life. Thus a doctor who practiced for only one year, say 1972, would need only one 1972 "occurrence" policy to be fully covered, but he would need several years of "claims made" policies to protect himself from claims arising out of his acts in 1972.

[2] At our request, both sides briefed the question of whether the plaintiffs' antitrust claim was mooted when the state of Rhode Island formed a joint underwriting association to provide malpractice insurance. Because of the state's action, St. Paul never gathered the fruits of the alleged conspiracy. Nonetheless, we are convinced that, for purposes of our jurisdiction, the state's act did not extinguish plaintiffs' every claim for relief. *United States v. Concentrated Phosphate Export Ass'n, Inc. 393 U.S. 199, 203-04, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)*. We do not decide whether plaintiffs were in fact "injured in [their] business or property". *15 U.S.C. § 15*, *Cf.* n. 7 *infra*. Nor do we decide whether this would be an appropriate case for injunctive relief.

Six other district courts have now taken the same view. Mathis v. Automobile Club Inter-Ins. Exch., 410 F. Supp. 1037 (W.D. Mo. 1976); Proctor v. State Farm Mut. Auto. Ins. Co., 406 F. Supp. 27 (D.D.C. 1975); McIlhenny v. American Tit. Ins. Co., 418 F. Supp. 364 (E.D. Pa. 1976); Royal Drug Co. v. Group Life and Health Ins. Co., 415 F. Supp. 343 (W.D. Tex.1976); Seasongood v. K & K Ins. Ag'cy, 414 F. Supp. 698 (E.D.Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. **[*7]** 1977); Frankford Hosp. v. Blue Cross, 417 F. Supp. 1104, 1976-2 TRADE CASES para. 61,030 (E.D. Pa. 1976). [3]

[8]** Since we feel compelled to disagree with this rather formidable array of authorities, we first try to summarize as fairly as we can the bases for their decision. We then make our own analysis of the wording of the statute and its legislative history. The line of cases begins with *Transnational Ins. Co. v. Rosenlund, supra.* Although the *Transnational* court found that it was not faced with a boycott even within the ordinary meaning of that word, it announced in passing that the boycott provision

> "was placed in the legislation to protect insurance agents from the issuance by insurance companies of a "black-list, " which would name companies or agents which were beyond the *pale*. This list, in effect, was a directive to an agent not to write insurance in the name of or for the black-listed company; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies." *261 F. Supp. at 26-27*.

Only blacklisting by an insurance company, the court intimated, was subject to the Sherman Act under this provision. The court, though referring broadly **[**9]** to "the legislative history", cited only a single page of the Congressional record in support of this reading. 91 Cong. Rec. 1087 (1945). *Transnational* stood alone until 1974, when the Fifth and Ninth Circuits followed its lead. The courts of appeals simply adopted without elaboration the *Transnational* court's discussion of "the" legislative history. One reason for taking so narrow a view of the provision was the courts' apparent fear that any other reading would "emasculate", Meicler, supra, 506 F.2d at 734, or "vitiate", Addrisi, supra, 503 F.2d at 729, the McCarran-Ferguson Act. To fend off this danger, the *Meicler* court adopted a rule that policyholders or members of the public could not seek the benefit of the boycott provision. Later cases have followed these pioneers without adding to their analysis.

As will be seen, we disagree with the conclusion reached by these courts. Simple disagreement might not be enough if the insurance business had long relied on authoritative rulings in other circuits. That is not the case here. The view we reject was not advanced until 1966, when a single district court suggested it. Only in the past **[**10]** three years has its narrow reading of the boycott provision begun to gain more general favor. What prevents us from following the trail blazed by the *Transnational* court is its decision to go behind the statutory language. We would be justified in probing legislative history if the language were ambiguous or if, even though unambiguous, the language literally read produced a senseless or unworkable statute. Massachusetts Financial Serv., Inc. v. Securities Investor Protection Corp., 545 F.2d 754 (1st Cir. 1976). *Cf.* United States v. Slater, 562 F.2d 58 (1st Cir. 1976).

The words "agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation", within the context of the Sherman Act, do not appear to us as ambiguous. ***HN4***[] In ***antitrust law***, a boycott is a "concerted refusal to deal" with a disfavored purchaser or seller. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959). [4] Concerted **[*8]** refusals by a number of companies to sell malpractice

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[3] In attacking the district court's decision, appellants cite an additional case from the Fifth Circuit. *Battle v. Liberty Nat'l Life Ins.* Co., 493 F.2d 39 (5th Cir. 1974), *cert. denied*, *419 U.S. 1110, 42 L. Ed. 2d 807, 95 S. Ct. 784 (1975)*. Although appellees correctly point out that *Battle* is distinguishable and that it was decided before Meicler, supra, the *Battle* court did not show a willingness to give the boycott provision a straightforward reading, an attitude that we share. *See also* Ballard v. Blue Shield, 543 F.2d 1075, 1078 (4th Cir. 1976), *cert. denied*, ***430 U.S. 922, 97 S. Ct. 1341, 51 L. Ed. 2d 601, 45 U.S.L.W. 3601 (1977)***.

[4] Most cases have dealt with boycotts directed against retailers or other links in the chain of production and distribution. *E.g.,* Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941); Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961). Consumers have less frequently been prey to illegal boycotts, perhaps because a large class of victims cannot easily be coerced without destroying the secrecy on

insurance policies **[**11]** to doctors who were dissatisfied with the policy offered by their insurer would seem to fit within this definition of boycott. Indeed appellees make no argument to the contrary. Nor do the cases attempt to justify their excursion into legislative history on the basis of ambiguity of language.

[12]** The articulated justification is based on the supposed "vitiation" of the McCarran-Ferguson Act if the boycott provision were to be given its normal Sherman Act scope. We observe first that ***HN5***[] a license to construe statutory words narrowly to avoid defeating legislative purpose is not to be cavalierly exercised. Under the McCarran-Ferguson Act, states were given authority to tax and regulate the business of insurance. This domain remains a vast one even if the boycott provision is read more broadly than appellees insist. McCarran-Ferguson would still insulate state tax and regulatory programs from challenges based on the dormant *commerce clause*. *See* *Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 90 L. Ed. 1342, 66 S. Ct. 1142 (1946)*. It would continue to protect the business of insurance from many federal regulatory statutes. *See e.g., SEC v. National Securities, Inc., supra* (securities laws). Even within the antitrust field, McCarran-Ferguson would have great significance. Only the Sherman Act is made applicable to the business of insurance by the boycott **[**13]** provision; the Clayton and Federal Trade Commission Acts, for example, could still be "preempted" by state regulation. Moreover, not every violation of the Sherman Act can be characterized as an act of boycott, coercion, or intimidation. *See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)* (use of "benign" means to maintain monopoly violates Sherman Act); *Standard Oil Co. v. United States, 221 U.S. 1, 43, 55 L. Ed. 619, 31 S. Ct. 502 (1911)* (predatory pricing).

Nor would the introduction of antitrust principles into dealings between policyholders and insurers hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business. A necessary regulatory measure could seldom be successfully challenged as a state-inspired "boycott, coercion, or intimidation", for the boycott provision merely guarantees that "nothing contained in *this chapter* shall render the said Sherman Act inapplicable" to boycotts and the like. *15 U.S.C. § 1013 (b)*. The chapter in question is the McCarran-Ferguson Act. The boycott provision merely neutralizes that Act, leaving **[**14]** intact the doctrine of *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, which today insulates state regulatory schemes outside the insurance context from antitrust liability. *See also Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)*. Indeed, *Parker v. Brown* may have **[*9]** added strength in the insurance field because of the policies reflected in the McCarran-Ferguson Act. But there is a large difference between allowing a state to fix insurance rates without fear of antitrust sanctions and similarly insulating companies which, outside any state-permitted structure or procedure, agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies. Contrary to the argument of some of the appellees, giving normal scope to the boycott provision will not plunge federal courts into the enterprise of retroactive rate-making. Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity.

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which illegal boycotts often depend. But the features that make boycotts objectionable do not disappear when consumers are boycotted. Like boycotts aimed at retailers, concerted refusals to deal with consumers may restrain traders' "ability to sell in accordance with their own judgment"; they can deprive consumers of the "freedom to buy . . . in an open competitive market"; and they "interfere with the natural flow of interstate commerce". *See Klor's, Inc. v. Broadway-Hale Stores, Inc., supra, 359 U.S. at 212-13*. The Ninth Circuit has held that a boycott of customers is a boycott for antitrust purposes. *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 376* (9th Cir.), *cert. denied*, ***384 U.S. 963, 16 L. Ed. 2d 674, 86 S. Ct. 1590 (1966)***.

Some commentators would artificially restrict the meaning of "boycott", apparently fearing an overbroad application of the rule that boycotts are illegal per se. *See* L. Sullivan, *Antitrust* §§ 83, 90 (1977). This fear may be allayed more directly by recognizing that, while some boycotts are irredeemably anticompetitive and thus fit subjects for a per se rule, others are benign and not properly treated as illegal per se. *See* P. Areeda, *Antitrust Analysis* 287 (1967); *see also Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969)* (boycott not illegal per se when participants had no anti-competitive motive). Certainly nothing in this opinion requires the application of a per se rule to all acts falling within the ordinary meaning of the word "boycott".

When we look to public policy, the limitation **[**15]** sought by appellees again lacks support. Throughout this century, preserving competition by means of the antitrust laws has been a continuing national purpose. A primary aim of ***antitrust law*** is assuring consumers the benefits of a free market economy. To exclude consumers of insurance from the protection afforded by the boycott provision thus cuts against a basic policy of ***antitrust law***. Such an interpretation also conflicts with the Supreme Court's view that ***HN6***[] the McCarran-Ferguson Act as a whole is meant to apply to the relationship between policyholders and their insurers. *SEC v. National Securities, Inc., supra, 393 U.S. at 460*. The boycott provision presumably also reflects this concern for the insurer-insured relationship. On a broader scale, we note that legislative and judicial exceptions to the general rule favoring free competition have often been narrowed over the years. *See, e.g., Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110* (July 6, 1976) ("state action" exception restricted); *Goldfarb v. Virginia State Bar, 421 U.S. 773, 785-88, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)* **[**16]** ("learned profession" exception questioned); *United States v. International Boxing Club of New York, Inc., 348 U.S. 236, 99 L. Ed. 290, 75 S. Ct. 259 (1955)* (refusing to extend "baseball" exemption to boxing); *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 95 L. Ed. 1035, 71 S. Ct. 745 (1951)* (narrow view of Miller-Tydings "fair trade" exception). The McCarran-Ferguson Act is of course a legislative exception to the antitrust laws, and it deserves a fair reading. [5] But the artificial reading of the boycott provision that appellees urge on us can only be characterized as a judge-made expansion of the Act. We think the national commitment to a free market places a special burden on courts to think long and hard before creating such exceptions to the antitrust laws. In short, the usual reading of "boycott, coercion, or intimidation" does not lead to irrationality, nor does it pose a grave danger to state authority. It conforms to the nation's antitrust policies. We see no reason, therefore, to look to the legislative history for a special and narrow meaning of these words.

[17]** Nevertheless, in deference to the courts which have found support in that history, we have studied it in detail. The decision in *South-Eastern Underwriters, supra*, was issued on June 5, 1944. That decision approved an indictment charging that the members of an insurance underwriters' association "not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [association] members on [association] terms." *322 U.S. at 535*. **[*10]** Following that decision, an intensive several-month period of discussion produced a compromise measure agreed to generally by the insurance industry. The right of states to collect taxes from insurance companies had been put in doubt; the states' tax collecting effort would normally take place between February 20 and March 10, 1945. Thus legislative consideration was expedited, debate taking place between January 25 and February 27, 1945. The reports accompanying the bills being debated both referred to the boycott provision, stating **[**18]** "These provisions of the Sherman Act remain in full force and effect." [6]

In the first Senate debate, on January 25, the boycott provision was broadened by a quickly accepted amendment from "Nothing contained in this section shall render the Sherman Act inapplicable to any agreement or act of boycott . . ." to "Nothing in this act . . ." 91 Cong. Rec. 479 (1945). The chief issue debated, reflecting Senator O'Mahoney's concern, was whether the act could be used to authorize attempts to monopolize. Senator Ferguson, a sponsor, gave the answer: "No. I will answer that by saying that if agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void . . . . *Id. at 480*.

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[5] We cannot ignore, however, the great haste with which the Act was drafted and passed. The provision that all now agree is central to the Act - the exception of insurance to the extent that it is regulated by state law - did not appear in the Act until it was inserted by the House and Senate conferees. *See* 91 Cong.Rec. 488 (1945); *id*. 1945; *id. 1396*. Only at the last moment did a measure that was intended originally as a three-year moratorium on Sherman and Clayton Act coverage become a lasting exemption. This change was not noted in the conference report or the statement of the House conferees, *id*., although it was uncovered by Senator Pepper in the floor debates. *Id. at 1478*.

[6] S.Rep.No. 20, 79th Cong., 1st Sess. (1945), accompanying S. 340; and H.Rep.No. 143, 79th Cong., 1st Sess. (1945).

The bill was debated in the House on February 14. The language concerning "agreement" to boycott had been stricken in committee, but the deletion **[**19]** was challenged by Congressman Celler, who said his concern reflected the view of the Attorney General. Congressman Celler, in arguing for the restoration of "agreement" language, adverted to the danger of an oral blacklist being issued by large companies which "would frighten the wits out of all these small companies", and an agreement of "separation" barring a company whose agent wrote insurance for a blacklisted company from participation in "the self-constituted governing organizations". *Id. at 1087*. On Congressman McCormack's suggestion, language was accepted proscribing "any agreement to boycott, coerce, or intimidate". Much of the debate then focused on the nature of the moratorium of three years on the general application of the Sherman and Clayton Acts.

The bill went to conference. The House, on February 23, agreed to the conference report without debate. In the Senate, on February 26, Senator Pepper was concerned about states taking action during the moratorium period which would defeat the purpose of the antitrust acts. Senator Ferguson replied that states could not, even during the moratorium, "interfere with the application of the Sherman Act to any agreement . . **[**20]** . or . . . act of boycotting". *Id. at 1443*. On the next day, Senator Pepper levelled his attack at the basic provision making the Sherman, Clayton, and Federal Trade Commission Acts permanently inapplicable to the extent that states had regulated the industry. His concern was that price fixing could continue with impunity. Senator O'Mahoney reassured him that private agreements enforcing certain rates would remain violations with the restoration of the "agreement" language taken out but restored by the House. He added:

> "Therefore any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision." *Id. at 1480*.

Senator Pepper was not satisfied, believing that states could legitimize and therefore insulate rating bureaus. Senator Ferguson pointed out that "there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate." *Id. at 1481*. He acknowledged that states would **[**21]** be permitted to authorize rating bureaus. Senator Pepper continued to **[*11]** gnaw at the issue, asking why the states should be given the right to "cloud" the Sherman and Clayton Acts. Again Senator O'Mahoney attempted reassurance by saying that there were three forms of regulation: state regulation permitted by the bill, federal regulation, which no one was urging, and private regulation by combinations "through private rules and regulations under which persons engaged in the insurance industry could be tried and convicted for the violation of private law." *Id. at 1483*. This latter type, he said, would be absolutely outlawed. Senator Pepper still felt that, with state-authorized rating bureaus being allowed by the bill, states were being given "carte blanche" to legitimize vices. *Id. at 1484*.

Senator O'Mahoney rejoined that "the vice in the insurance industry . . . was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." *Id. at 1485.* **[**22]** After reading from the elaborate rules and regulations of a powerful association of insurance companies the Senator said, "The Insurance Executive Association undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." *Id. at 1486*.

Senator Barkley then asked if the boycott provision was sufficient to prevent combinations that do not involve boycott, coercion, or intimidation. Senator O'Mahoney replied,

> "My judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the section. . . . There are agreements and combinations in the public interests [sic] which can safely be permitted, but this agreement from which I have been reading is the sort of agreement which ought to be condemned . . . and which . . . would be completely outlawed. *Id. at 1486*.

The debate shortly ended and the conference report was accepted.

Assuming for the moment that we have license to go beyond the words of the statute, we cannot turn to the legislative **[**23]** history with our minds in equipoise. H. Hart and A. Sacks, *The Legal Process* 1264 (tent. ed. 1958). The plain meaning of the boycott provision, the strength of the nation's antitrust policies, and the substantial scope that an ordinary reading of the provision would leave to the McCarran-Ferguson Act - all these at the least create a presumption for the legislative history to overcome. Our question, then, is whether we can distill from this history the clear intent of Congress to limit "boycott, coercion, or intimidation" to acts or agreements affecting the relationships between insurance companies and their competitors and agents. The basis for appellees' argument lies in the remarks of Congressman Celler about the danger of blacklisting small companies and Senator O'Mahoney's remarks about the evil of private enforcement of private law by the companies. And it is true that at no point were any remarks directed to the possibility of boycotts, coercion, or intimidation aimed at consumers.

We would hesitate long before characterizing the Congressional intent as one narrowly restricting the boycott provision. We make two preliminary observations. The first is that *South-Eastern* **[**24]** *Underwriters*, which seems to have been the ultimate source of the "boycott, coercion, or intimidation" language, apparently dealt in part with threats and boycotts directed at policyholders. *322 U.S. at 535*. The second is that the insurance industry participated deeply in the drafting of this legislation; if the boycott provision were intended to cover less than what the Sherman Act would normally cover, one might suppose that the language would not have been left so bald and general.

Of more pertinence is the central role which the boycott provision played as the **[*12]** all purpose safety valve. It was amended twice, in each case to make it broader, first by making it effective across the entire Act and second by restoring the agreement language. Time after time the concerns of skeptics and opponents were met by reference to this provision. We cannot imagine that they would have been at all satisfied if they had understood that "boycott" was a code word confined to industry personnel. *See*, Levi *An Introduction to Legal Reasoning*, 15 U.Chi.L.Rev. 501, 522 (1948). The inescapable fact is that in this four-day debate the only specific references **[**25]** to evils were made on two occasions, once in the House and once in the Senate. Congressman Celler voted against the bill in the House and while Senator O'Mahoney was supporting the measure as an acceptable compromise and was on the committee of conference, he was not a sponsor. While the vice of insurance company self-government outside the law obviously lay in their minds as a major evil to be combatted by the legislation, there is no suggestion that the legislation was limited to that evil. Indeed Senator O'Mahoney referred to the Insurance Executives Association rules as "the sort of agreement" to be condemned. His summary answer to Senator Barkley that "every effective combination or agreement to carry out a program against the public interest" would be prohibited by the boycott section could not be more unrestricted.

We simply do not find in these debates or reports any evidence that would justify our reading the boycott provision in the special way urged by appellees. With all deference to the courts which have accepted the argument, we are reminded of the following advice of Mr. Justice Frankfurter:

> **[**26]** *HN7*[] "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature. Unless indeed no doubt can be left that the legislature has in fact used a private code, so that what appears to be violence to language is merely respect to special usage." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 543-44 (1947).

We therefore reverse the lower court on this issue. The plaintiffs have charged the defendants with an unlawful boycott, and they are entitled to seek both injunctive relief and treble damages. *See* *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841 (2d Cir. 1963)*, cert. denied, *376 U.S. 952, 11 L. Ed. 2d 971, 84 S. Ct. 968 (1964)*. [7]

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[7] We recognize that the dismissal could be affirmed if none of the plaintiffs have standing to sue. But the change in malpractice coverage has increased costs for the doctors. The alleged conspiracy thus strikes at their "business or property", *15 U.S.C. § 15*, even if that phrase refers only to "commercial interests". *Hawaii v. Standard Oil Co., 405 U.S. 251, 264, 31 L. Ed. 2d 184, 92 S.*

[27]** The plaintiffs also object to the district court's decision to abstain on the plaintiffs' fraud claims, which were based on state law. In essence, plaintiffs pleaded that past and present insurance rates had been inflated by false statements to the public and the state insurance commissioner. Plaintiffs asked for restitution of all amounts paid in excess of a "fair and justifiable" malpractice insurance rate. Rhode Island courts have never ruled on the existence of a cause of action for recovery of excessive insurance premiums, but the district court noted that the state has provided elaborate administrative and judicial procedures for challenging existing rates. Rather than risk interfering with the state's regulatory scheme or misinterpreting state law, the district court abstained. Plaintiffs are apparently satisfied with the district court's decision to abstain with respect to insurance rates now in effect, for they do **[*13]** not appeal from that disposition. They do appeal from the court's abstention regarding past rates, which cannot be challenged administratively. The court's reluctance to take the case is understandable; recognizing a cause of action for the recovery **[**28]** of excessive past insurance premiums would profoundly affect the state's ratemaking machinery and policies. *See* *Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943)*; *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 3 L. Ed. 2d 1058, 79 S. Ct. 1070 (1959)*. In cases like this, federal courts prefer to tread lightly, following trails already blazed by the state courts. Nonetheless, the court's jurisdiction over this claim was founded on diversity of citizenship. Abstaining in a diversity case often means completely relinquishing the case to the state courts; it thus defeats the purposes behind the grant of federal jurisdiction. A less drastic step might have served the purposes of the grant without unduly interfering in state regulatory matters. In Rhode Island, a novel and controlling question may be certified from the federal courts to the state courts. *See* *Lehman Bros. v. Schein, 416 U.S. 386, 40 L. Ed. 2d 215, 94 S. Ct. 1741 (1974)*; R.I.Sup.Ct. Rule 6.

The district court did not certify this question. Two reasons for its choice are now advanced. First, the court's unappealed decision to abstain **[**29]** on the present rate question means that state courts and administrators will soon be wrestling with plaintiffs' claim, and it would not serve judicial economy for the federal court to begin work on a closely related claim. Second, even if a cause of action for recovering past premiums is proper, the federal court should abstain for fear of disrupting important state concerns. We doubt that either of these factors alone would permit abstention when balanced against the duty imposed on every federal court to decide cases within its jurisdiction. *See* *Meredith v. Winter Haven, 320 U.S. 228, 88 L. Ed. 9, 64 S. Ct. 7 (1943)*. In combination, however, they persuade us that abstention was justifiable. *See* *Louisiana Power & Light Co. v. City of Thibodaux, supra, 360 U.S. at 27 n. 2*.

Appellants also object to the granting of summary judgment to two defendants, the Aetna and St. Paul insurance companies, on a count charging fraud in the sale of certain "consent to rate" policies. Plaintiffs offered no evidence that any named physician-plaintiff ever bought such a policy from either Aetna or St. Paul, nor that any named patient-plaintiff was ever treated by **[**30]** a doctor holding such a policy. Appellants thus had at best only a tenuous right to bring this claim against these companies, *Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3d Cir. 1975)*, and we find no error in the district court's decision to adhere strictly to the traditional rules. *La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 469 (9th Cir. 1973)*. *See also* *O'Shea v. Littleton, 414 U.S. 488, 494-95, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974)*.

The district court disposed of the remaining charges of fraud in "consent to rate" policies by referring to *Fed. R. Civ. P. 9(b)*. ***HN8***[] *Rule 9(b)* requires complaints charging fraud to state "with particularity" the circumstances constituting fraud. The judge found that the complaint did not meet the standards set by *rule 9(b)* and dismissed the count without prejudice. The judge was correct; the complaint could hardly be more vague. While the judge might have ordered a more definite statement, it was within his power to grant a dismissal without prejudice. If the plaintiffs can plead fraud with more particularity, **[**31]** they may file an amended complaint. 2A Moore's Federal Practice para. 9.03 p. 1934.

Affirmed in part; reversed and remanded in part.

Ct. 885 (1972). And no one is more directly injured by a conspiracy among insurance sellers than those who buy the insurance. *See generally*, L. Sullivan, *Antitrust* § 247 (1976). Because the doctors named as plaintiffs have standing, we find it unnecessary to decide whether the patients have standing or not.

Dissent by: CAMPBELL (In Part)

Dissent

CAMPBELL, Cir. J. (dissenting in part):

The court seems to me to be straining mightily to reinterpret the legal relationship ordinarily understood to have been established under the McCarran-Ferguson Act, perhaps because it has some doubts about the policies of that Act.

[*14] The McCarran-Ferguson Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest", *15 U.S.C. § 1011*, and "shall be subject to the laws of the several States which relate to the regulation or taxation of such business", *§ 1012(a)*. [1] The Act goes on to say that no Act of Congress shall invalidate, impair or supersede state regulatory laws, *§ 1012(b)*. Finally, it provides that the various antitrust statutes, including the Sherman Act, shall apply only to the extent a state does not exercise its right to regulate, *§ 1012(b)*. The court concedes, as do the parties, that Rhode Island has exercised its right to regulate all material aspects **[**32]** of the business of insurance and that the actions complained of relative to withholding malpractice insurance were all part of such regulated business. Thus, under the clear implication of *§ 1012*, neither the Sherman Act nor the other antitrust laws apply except insofar as the *§ 1013(b)* exception permits. That exception provides, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Significantly this language does not track the broad "contract, combination . . . or conspiracy" language of the Sherman Act which Congress reasonably might have chosen had the intent been, as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.

[33]** While the precise scope of the exception language may be less than crystal clear, given the statutory scheme, I have no difficulty understanding why two circuit courts and six district courts - every court except, now, ourselves - have held that the *§ 1013(b)* exemption is to be read narrowly as describing boycotts, coercion or intimidation directed against other companies and agents rather than, broadly, as also encompassing the gamut of company-policyholder relations. *See, e.g., Meicler v. Aetna Casualty & Surety Co., 372 F. Supp. 509, 513-14 (S.D. Tex. 1974)*, *aff'd*, *506 F.2d 732 (5th Cir. 1975)*. The legislative history indicates that the former problem was what worried Congress when it enacted the exception, and a narrow reading is more consistent with *§ 1012* and with the purpose and structure of the act generally. [2] Indeed, to read *§ 1013(b)* expansively is to hold that what Congress

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[1] The Supreme Court has said that "the relationship between insurer and insured, the type of policy which [can] be issued, its reliability, interpretation, and enforcement - these [are] the core of the 'business of insurance'" covered by the McCarran-Ferguson Act. *SEC v. National Securities, Inc., 393 U.S. 453, 460, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969)*.

[2] I do not question that the boycott-coercion-intimidation language might in some other context be pushed to the limits which the court approves. But these words are hardly so focused as to permit only the broadest, most general meaning. A more limited interpretation, besides comporting with the statutory structure and the legislative history, squares with the Supreme Court's definition of a group boycott as "concerted refusals by traders to deal with other traders", *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*. *See* L. Sullivan, *Antitrust* § 90 at 257 (1976).

Furthermore, even reading the boycott exception to include the complained of behavior does not wholly solve the question of plaintiffs' standing. If St. Paul is attempting to corner the malpractice market, the more obvious harm is to those companies that are being closed out. It can be argued that the higher prices to doctors are only an indirect consequence and that the physicians have not suffered the sort of direct injury necessary to bring suit. *See Battle v. Liberty National Life Insurance Co., 493 F.2d 39, 49 (5th Cir. 1974)*, *cert. denied*, ***419 U.S. 1110, 42 L. Ed. 2d 807, 95 S. Ct. 784 (1975)*** (plaintiff must show himself to be in sector of economy in which violation threatens to break down competitive conditions). This sort of problem suggests that the doctors' ostensible antitrust action is aimed less at protecting the free market system than at consumer protection goals left by gave with one hand it took with the other, since while my brothers' reading does not introduce the entirety of federal ***antitrust law*** into the business of insurance, it introduces a very major part thereof and does so with no clear explanation of why **[*15]** **[**34]** Congress should first take pains to eliminate the antitrust laws and then reintroduce by the back door most of the Sherman Act. Only if, like all other courts, we read *§ 1013(b)* as dealing with a limited type of problem which troubled Congress does the exception fit sensibly into the statute as a whole.

[35]** The central thread running through the McCarran-Ferguson Act is that regulation of insurance rates and policies - both of them matters falling under the general heading of relations between companies and policyholders - is left to the states. The present litigation brought by physicians who believe that they have been deprived, unfairly, of insurance on terms that are economically favorable focuses precisely upon company-policyholder matters. My brothers are now putting the federal courts in the same arena as the State of Rhode Island, contrary, I believe, to the purpose of the McCarran-Ferguson Act. Doubtless the federal perspective is somewhat different but the potential for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting *§ 1012(b)* of the Act.

This is, I think, a most unfortunate decision. It not only introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit, but it could have unforeseeable effects upon state regulatory policies. Plaintiffs may see this case as another string to their bow in attempting **[**36]** to deal with the crushing malpractice burdens being imposed as the result not only, perhaps, of predatory insurance practices but of inflated claims and verdicts. We might sympathize with them without going this far. The State of Rhode Island has apparently now enacted regulatory legislation dealing with some or all of the problem - a means of redress which seems far more responsive to the problem than any likely to be achieved through reinterpreting the McCarran-Ferguson Act thirty years after enactment.

I shall not attempt to deal with the legislative history which my brothers make much of, beyond saying that like most legislative history, it is capable of being argued both ways depending on which legislator one reads and to whose views one ascribes final authority. Certainly, in the expressed concerns of the legislators there is explicit support for the view which all other courts have adopted to date. More important to me, however, is the statutory scheme which suggests, in the positioning of the exception, and in the very fact that the exception is just that, that *§ 1013(b)* should be construed in a manner complementary to, rather than subversive of, the major premises of the **[**37]** Act. Under my brothers' reading, the tail now wags the dog.

I would affirm the district court which acted, I think, correctly and in accordance with all existing laws.

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Congress to state regulation. *See generally* *SEC v. National Securities, Inc., 393 U.S. 453, 460, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969)*.

Engine Specialties, Inc. v. Bombardier, Ltd.

United States Court of Appeals for the First Circuit

October 9, 1979, Submitted ; February 21, 1980, Decided

No. 78-1492

Reporter
615 F.2d 575 *; 1980 U.S. App. LEXIS 20289 **; 1980-1 Trade Cas. (CCH) P63,197

ENGINE SPECIALTIES, INC., PLAINTIFF, APPELLANT, v. BOMBARDIER LIMITED, ET AL., DEFENDANTS, APPELLEES.

Core Terms

minicycles, antitrust, manufacturing, injuries, damages

Counsel: **[**1]** John Vanderstar, Washington, D. C., with whom John D. Taurman, Covington & Burling, Washington, D. C., Paul B. Galvani, Ropes & Gray, Boston, Mass., and Paul V. Donahue, Pittsfield, Mass., were on brief, for Bombardier Limited, et al.

Thayer Fremont-Smith, Boston, Mass., with whom Robert S. Frank, Jr., Wm. Shaw McDermott, and Choate, Hall & Stewart, Boston, Mass., were on brief, for Engine Specialties, Inc.

Judges: Before COFFIN, Chief Judge, BOWNES, Circuit Judge, PETTINE, District Judge.*

Opinion by: PER CURIAM.

Opinion

[*575] After consideration of the petition for rehearing and the briefs filed in connection therewith, it is ordered that the corrected judgment entered July 26, 1979, *nunc pro tunc*, shall remain in effect.

Dissent by: COFFIN

Dissent

COFFIN, Chief Judge (dissenting).

In view of the intrinsic importance of the issue of standing in private antitrust actions and the relative infrequency of Supreme Court review in this complicated area, we granted rehearing in this case to reconsider whether plaintiffs Durham Distributors, Inc. (Durham) and Watercraft Sales Center, Inc. (Watercraft) have standing to recover **[**2]** for injuries caused as a result of an illegal horizontal agreement between appellants Bombardier Limited (Bombardier) and Agrati-Garelli (Agrati). My brethren have determined that our initial decision was correct and they stand on that opinion. Fully recognizing the complexity of the issues involved and the closeness of the question

* Of the District of Rhode Island, sitting by designation.

presented, I nevertheless respectively dissent from that view and would hold that Durham and Watercraft do have standing.

The full relevant factual background of this case is set forth in the prior opinion of this court, *see* *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979)*. I briefly summarize only the especially pertinent portions thereof.

In late 1970, appellants Bombardier and Agrati entered into a territorial and product market division agreement. In return for Bombardier's agreement to abandon the manufacturing and selling of its own "Fun-Doo' minicycle, Agrati agreed not to manufacture or sell a new 50-100 cc motorcycle, to terminate its exclusive distribution agreement with Engine Specialties, Inc. (ESI), and to grant Bombardier exclusive distribution rights for Agrati's "Broncco' minicycle in North America.

Durham **[**3]** and Watercraft purchased Agrati minicycles from ESI for subsequent distribution to dealers. When ESI had its supply cut off pursuant to the Agrati-Bombardier agreement, Durham and Watercraft likewise lost their ability to procure Agrati minicycles, the subsequent distribution of which was taken over by Bombardier and its subsidiary, Bombardier East, Inc. ESI and Durham went out of business, and Watercraft discontinued sales of minicycles.

[*576] There is no doubt that Durham and Watercraft were injured as a result of the described transactions. This fact alone, as the court indicates in its opinion, does not give them standing. It should, however, lead us to proceed to consider in further detail the question of standing on the facts of this case.

The underlying substantive antitrust violation which gave rise to this case was a horizontal agreement between Agrati and Bombardier to allocate territorial and product markets between themselves and terminate ESI's role in the distribution of Agrati minicycles. Horizontal market divisions in general are condemned under the antitrust laws because they serve no purpose other than the stifling of competition, *White Motor Co. v.* ***[**4]*** *United States, 372 U.S. 253, 263, 83 S. Ct. 696, 702, 9 L. Ed. 2d 738 (1963)*. In this case, it is possible that the purchasers of minicycles, including ESI, Durham and Watercraft, would have benefited had Bombardier chosen to compete with Agrati rather than illegally agreeing not to do so. "[Had] Bombardier and Agrati not so conspired, there would have been *two* minicycles . . . to choose from . . . rather than the *one* that the conspiracy delivered up.' *605 F.2d at 14*. In any event, ESI's bargaining power vis-a-vis Agrati most certainly would have been increased had Agrati not succeeded in securing Bombardier's agreement not to compete in the manufacturing and selling of minicycles.

This is not to say that ESI necessarily would have retained its ability to purchase minicycles for distribution. It is to say, rather, that the question whether ESI would retain that ability would have been determined by the forces of competition rather than by agreement between competitors. "[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. **[**5]** Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector o the economy because [others so agree].' *United States v. Topco Assoc., 405 U.S. 596, 610, 92 S. Ct. 1126, 1135, 31 L. Ed. 2d 515 (1972)*. Because the damage to ESI caused by the Agrati-Bombardier agreement was the loss of that freedom, we correctly found that it is able to recover antitrust damages against the defendants.

Turning to Durham and Watercraft, I note that they in effect tied their fortunes to ESI's success in obtaining access to the minicycle manufacturing and sales market. They therefore could be charged with assuming the risk that ESI might prove unsuccessful if, for example, Agrati unilaterally terminated ESI as its chosen distributor. They did not however, assume the risk that Agrati and Bombardier would get together, carve up their territories according to agreement, and completely foreclose ESI from the minicycle market. When that foreclosure occurred, Durham and Watercraft suffered injury which was similar to, albeit derivative of, that suffered by ESI. All were foreclosed from the minicycle market as a result of the Agrati-Bombardier agreement. The key question **[**6]** therefore, is why should we distinguish between ESI on the one hand and Durham and Watercraft on the other on the issue of standing.

In attempting to show that the court errs in creating such a distinction, I note first that the mere fact that the injury to Durham and Watercraft was derivative, or that they operated at different levels of the minicycle distribution market than did ESI is not itself dispositive. Courts have often found standing in such circumstances. *See, e. g., Sanitary Milk Producers v. Bergjans Farm Dairy, 368 F.2d 679, 688-89 (8th Cir. 1976)*; *South Carolina Council of Milk Producers v. Newton, 360 F.2d 414* (4th Cir.), *cert. denied*, *385 U.S. 934, 87 S. Ct. 295, 17 L. Ed. 2d 215 (1966)*; *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955)*. This fact does, however, justify a careful scrutiny of a variety of additional factors, because the derivative nature of the injury, while itself not dispositive, can indicate that other reasons exist for denying standing. *See, e. g., Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 164 (1977)* (duplicative recoveries).

[*577] A helpful analysis of the pertinent **[**7]** possible factors is set forth in 2 P. Areeda and D. Turner, ***Antitrust Law*** para. para. 334-341 (1978). Courts have generally tended to focus upon various sets of these factors under the rubric of either the "target area' test or the "direct injury' test. My brethren have opted for such an approach in this case. Finding the use of these rubrics unhelpful and in this case misleading, *see generally*, D. Berger & R. Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale Law Journal 809 (1977), I prefer to proceed to a direct analysis of the pertinent factors themselves.

The fact that the injuries to Durham and Watercraft derived from those to ESI gives rise to a concern that awarding damages to both sets of plaintiffs might result in the awarding of duplicative recoveries. In this case, however, ESI, Durham, and Watercraft joined as plaintiffs and the measure of damages employed was lost profits. Thus, granting Durham and Watercraft standing will not result in duplicative recoveries since each party will only be reimbursed for its own actual injuries, nor will the defendant incur the risk of inconsistent judgments. Indeed, the court's decision to deny standing **[**8]** might result in a windfall to the defendant. Moreover, since the lost profits measure of damages was employed and since the injury consisted of complete foreclosure from the market, allowing Durham and Watercraft standing would not create the complicated damage computations which the court in *Illinois Brick* sought to avoid with regard to "pass on' damage measures in price fixing cases. *See 431 U.S. at 740-45, 97 S. Ct. at 2071-2074*.

The lack of a possibility of duplicative recoveries is a particularly important factor. The fear of allowing such recoveries has been a major rationale behind the judicial limitation of the Clayton Act's seemingly limitless literal grant of standing. Once this rationale is removed, as it is in this case, I think we should be hesitant to continue to limit the Act's broad language given the substantive congressional policies of compensation and deterrence which lay behind its enactment, *see* D. Berger & R. Bernstein, *supra*, as long as the injury for which plaintiffs seek compensation is one which the substantive antitrust rules are intended to prevent.

The derivative nature of the injuries in this case also requires us to focus our attention **[**9]** on the possibility that problems of tracing causation might render an award to Durham and Watercraft unduly speculative. In some cases, there may be "too many layers, changes of product form, or independent business decisions by intermediate persons to permit reasonable tracing of the connection between the plaintiff's injury and the defendant's violation.' 2 P. Areeda and D. Turner, *supra*, para. 334e, at 168. Here, however, the basic product -- the minicycle -- remained unchanged as it passed from defendants to ESI and then to Durham and Watercraft. Thus, the problems of tracing causation and apportioning damages are not present. *Compare South Carolina Council of Milk Producers v. Newton, 360 F.2d 414 (4th Cir. 1966) with Billy Baxter v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970)*, *cert. denied*, *401 U.S. 923, 91 S. Ct. 877, 27 L. Ed. 2d 826 (1971)*. *See generally*, 2 P. Areeda & D. Turner, *supra* at para. 340d.

Finally, I address the point upon which the court bases its holding -- that Durham and Watercraft were "hit but not aimed at'. *605 F.2d at 17*. On further reflection, I find the court's reliance on this point misplaced and the major cause of what **[**10]** I regard as its error. The pertinent inquiry required in this case is not which companies were "aimed at' by the defendants, but rather which area of the economy was affected in a manner that the antitrust laws are designed to prevent. *See, e. g., In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129* (9th Cir.), *cert. denied*, *414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1973)*. "In order to state a cause of action under the anti-trust laws a plaintiff must show . . . that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.' *Conference of Studio Unions v. Loew's, 193 F.2d 51, 54-55 (9th Cir. 1951)*, *cert. denied*, **[*578]** *342 U.S. 919, 72 S. Ct. 367, 96 L. Ed. 687 (1952)*.

In holding that ESI had standing, we necessarily held that the distribution level of the minicycle market was affected by the agreement between the manufacturers. Indeed, in this case it would have been particularly inappropriate to have held otherwise, for here the defendants as part of their agreement jointly dictated the manner in which the minicycles would be distributed. Specifically, they jointly **[**11]** agreed that ESI would no longer be able to obtain minicycles, either "Bronccos" or "Fun-Doos". Since Durham and Watercraft were minicycle distributors and their access to the manufacturing market through ESI was completely foreclosed by the defendants' agreement, they, too, were in the area of the economy affected by the illegal aspects of the defendants' actions.

In light of the foregoing analysis, I would find that Durham and Watercraft do have standing to recover for injuries caused as a result of the illegal and horizontal agreement between Agrati and Bombardier.

A.D.M. Corp. v. Sigma Instruments, Inc.

United States Court of Appeals for the First Circuit

June 6, 1980, Argued ; September 5, 1980, Decided

No. 80-1088

Reporter

628 F.2d 753 *; 1980 U.S. App. LEXIS 14296 **; 1980-2 Trade Cas. (CCH) P63,515

A.D.M. CORP. (Formerly Known As Frost Controls Corp.), PLAINTIFF, APPELLANT, v. SIGMA INSTRUMENTS, INC., ET AL.,DEFENDANTS, APPELLEES

Prior History: [1]** *APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [HON. JOSEPH L. TAURO, U.S. District Judge] [481 F. SUPP. 1297]*

Core Terms

Antitrust, anti trust law, district court, competitor, antitrust violation, treble damages, time of sale, divest, harmed

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > Business Torts > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

While it is not inconceivable that mere unfair business practices, or business torts, could in the proper situation constitute an antitrust violation, the transmutation of these state law torts into federal antitrust violations would have to be based upon a finding that the injuries for which compensation is sought have an unreasonable effect on competition, as well as on a particular competitor.

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Michael S. Gardener, Boston, Mass., with whom Joseph C. Tanski and Mintz, Levin, Cohn, Glovsky & Popeo, Boston, Mass., were on brief for appellees, Arthur J. Thomson and Frost Controls, Inc.

Donald B. Gould, Boston, Mass., with whom James E. McGuire, James B. Farmer, and Goodwin, Procter & Hoar, Boston, Mass., were on brief for appellee, Sigma Instruments, Inc.

Judges: Before COFFIN, Chief Judge, BOWNES, Circuit Judge, BOYLE, District Judge. *

Opinion by: PER CURIAM.

Opinion

[*753] In 1974 appellant A.D.M. Corporation sold its assets to appellee Frost Controls, Inc., which then resold them to appellee Sigma Instruments, Inc. (Sigma), an alleged competitor of appellant before the sale took place. Almost four years later, appellant filed suit in federal court, seeking treble damages under **[**2]** section four of the Clayton Antitrust Act, *15 U.S.C. § 15*. Appellant claims that the sale and the manner in which it was accomplished violated section seven of the Clayton Antitrust Act, *15 U.S.C. § 18*, and sections one and two of the Sherman Antitrust Act, *15 U.S.C. §§ 1* & *2*. The theory of the complaint is that Sigma, along with Factors Corp., which controlled A.D.M. at the time of the sale, conspired with Arthur J. Thompson, A.D.M.'s president at the time of the sale, to divest **[*754]** A.D.M. of its assets without paying an adequate price. The district court, *481 F. Supp. 1297*, after allowing several amendments to the complaint, dismissed the action for failure to state an antitrust claim. * We affirm.

The district court found that appellant's alleged injury was not "antitrust injury" in the sense of being "injury of the type **[**3]** 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)*. ***HN1***[] While it is not inconceivable that "mere" unfair business practices, or business torts, could in the proper situation constitute an antitrust violation, see *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 560 (1st Cir. 1974)*, cert. denied, *421 U.S. 1004, 95 S. Ct. 2407, 44 L. Ed. 2d 673 (1975)*, the transmutation of these state law torts into federal antitrust violations would have to be based upon a finding that the injuries for which compensation is sought have an unreasonable effect on competition, as well as on a particular competitor. See III P. Areeda & D. Turner, ***Antitrust Law*** P 737 (1978).

In the present case, appellant forthrightly conceded at oral argument that had there been no instances of disloyalty by its president, and had a fair price been paid for its assets, it would not have been harmed, would have had no complaint, yet would still have been divested of its assets and out of competition. This admission, which is consistent **[**4]** with the gravamen of the complaint, points out the correctness of the district court's holding. If the sale of assets had an effect on competition, it would have occurred whether or not appellant was harmed. There is thus lacking the essential connection between injury and the aims of the antitrust laws necessary to give appellant standing.

Had appellant been less forthcoming in characterizing its injury, the result, we think, would nevertheless be the same. To the extent that the sale of assets by one competitor to another implicates antitrust concerns, section seven of the Clayton Antitrust Act would be the most clearly pertinent statutory provision. Realizing this, appellant focuses its claim on appeal primarily on this provision of the federal antitrust laws, arguing that the sale of assets "resulted at the very least in a reasonable probability of a substantial lessening of competition . . . ." While such an allegation could in the proper circumstances state a claim for injunctive relief under section sixteen of the Clayton Antitrust Act, *15 U.S.C. § 26*, standing for treble damage actions under section four is less readily available than is standing under section sixteen. **[**5]** See II P. Areeda & D. Turner, ***Antitrust Law*** P 335e (1978). Moreover, the interests of the target corporation itself, in this case appellant, are outside of section seven's protection. See *GAF Corp. v. Circle Floor Co., 463 F.2d 752, 757-59 (2d Cir. 1972)*, cert. dismissed, *413 U.S. 901, 93 S. Ct. 3058, 37 L. Ed. 2d 1045 (1973)*; *Missouri Portland Cement Co. v. Cargill, 498 F.2d 851*, cert. denied, *419 U.S. 883, 42 L. Ed. 2d 123, 95 S. Ct. 150 (1974)*; II P. Areeda & D. Turner, supra, at P 346b. Nor do we see any reason why the result in

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* Of the District of Rhode Island, sitting by designation.

* Several causes of action arising under state law and contingent upon a finding of pendent jurisdiction were also dismissed in light of the dismissal of the federal claims.

this case should be any different under the Sherman Act merely because the sale itself is characterized as a "conspiracy", or because boilerplate language concerning an "attempt to monopolize" is included in the complaint. Accordingly, the judgment of the district court is affirmed.

Affirmed.

Allied Int'l v. International Longshoremen's Ass'n

United States Court of Appeals for the First Circuit

October 8, 1980, Argued ; January 6, 1981, Decided

No. 80-1425

Reporter

640 F.2d 1368 *; 1981 U.S. App. LEXIS 21218 **; 106 L.R.R.M. 2659; 90 Lab. Cas. (CCH) P12,589; 1980-81 Trade Cas. (CCH) P63,826

ALLIED INTERNATIONAL, INC., PLAINTIFF, APPELLANT, v. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL., DEFENDANTS, APPELLEES.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [HON. WALTER JAY SKINNER, U.S. District Judge]

Core Terms

picketing, commerce, boycott, ships, secondary, secondary boycott, cases, maritime, handle, labor dispute, district court, Sherman Act, employees, relations, induced, unload, load, protest, vessels, stevedores, cease, labor organization, foreign-flag, domestic, shipper, wood product, labor union, labor law, shipowners, transport

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN1[] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

See *29 U.S.C.S. § 158(b)(4)*.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN2[] **Union Violations, Secondary Activities**

The secondary boycott prohibition contained in § 8(b)(4) of the National Labor Relations Act, *29 U.S.C.S. § 158(b)(4)* reaches only activities aimed at individuals employed by any person engaged in commerce or in any industry affecting commerce.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN3[] **Appellate Jurisdiction, State Court Review**

The terms "in commerce" and "affecting commerce," as used in the National Labor Relations Act (Act), are obviously not self-defining. They must be considered in light of the gloss placed upon them in a series of Supreme Court cases dealing with the scope of jurisdiction under the Act.

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

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN4[] **Jurisdiction, Jurisdictional Sources**

In the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a "primary dispute" cannot be extricated from a "secondary dispute" for purposes of contrary jurisdictional findings.

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

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN5[] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

There is three-part test to identify a violation of § 8(b)(4) of the National Labor Relations Act, *29 U.S.C.S. § 158(b)(4)*: (1) Employees must be induced; (2) they must be induced to engage in a strike or concerted refusal; and (3) an object must be to force or require their employer or another person to cease doing business with a third person.

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Union Refusal to Bargain

HN6[] **Pipelines & Transportation, Electricity Transmission**

A union engages in prohibited secondary activity when it induces employees of a neutral employer to refuse to handle or work on goods originating from or bound for a particular person with whom the union, or another labor group, is having a dispute. When a union orders all employees of a neutral employer to cease handling goods originating from a particular source, it is a fortiori forcing that employer to cease doing business with that source. In such a case, it is difficult to say that the cessation of business is not at least an object of the union order, in the absence of facts that might indicate the contrary; and it is not necessary that the cessation of business be the sole object in order to be an object prohibited under § 8(b)(4) of the National Labor Relations Act, *29 U.S.C.S. § 158(b)(4)*.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN7[] **Union Violations, Secondary Activities**

The object of a boycott, for purposes of § 8(b)(4)(ii)(B) of the National Labor Relations Act (Act), *29 U.S.C.S. § 158(b)(4)(ii)(B)*, can be inferred from the virtually inevitable results generated by it, at least when the union's conduct can under no reading of the facts be characterized as "primary activity" protected by the Act. Section 8(b)(4) forbids secondary picketing against a "struck product" when such picketing predictably encourages consumers to boycott a neutral party's business. Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii)(B).

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty of Fair Representation

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

HN8[] **Collective Bargaining & Labor Relations, Right to Organize**

Unions are protected when engaging in primary activity no matter how severe the impact on neutral employers, but are forbidden from pressuring an employer when the pressure is calculated to satisfy union objectives elsewhere.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN9[] **Federal Preemption, Primacy of Labor Policy**

Descriptions of the reach of the secondary boycott prohibition are normally couched in terms of union conduct emanating from a primary "labor dispute," since this is the typical situation in which § 8(b)(4) of the National Labor Relations Act, *29 U.S.C.S. § 158(b)(4)*, is, and was meant to be, applied. It is not permissible under § 8(b)(4) for a union to direct pressure against a neutral employer in order to satisfy objectives unrelated to any "labor dispute" at all. Such an interpretation would be contrary to the congressional purpose behind the section.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN10[] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

The labor laws do not confer upon bargaining representatives a voice in the conduct of foreign policy.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Copyright Law > ... > Notice > Requirements > Notice Placement

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Labor, Statutory Exemptions

The Sherman Act, *15 U.S.C.S. § 1*, does not proscribe union activity so long as the union acts in its self-interest and does not combine with non-labor groups.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Labor & Employment Law > Wage & Hour Laws > Statutory Application > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Sherman Act > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN12[] Collectives & Cooperatives, Clayton Act

Activities are in the self-interest of a labor organization if they bear a reasonable relationship to a legitimate union interest. In particular, the statutory labor exemption from the antitrust laws, Clayton Act §§ 6 & 20, *15 U.S.C.S. § 17* and *29 U.S.C.S. § 52*; Norris-LaGuardia Act, *29 U.S.C.S. §§ 101-15*, has been applied when the union acts to protect the wages, hours of employment, or other working conditions of its member-employees, objectives that are at the heart of national labor policy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN13[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The classic anticompetitive "group boycott" is a concerted action by competitors at one level to protect themselves from competition by non-group members who seek to compete at that level.

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Antitrust & Trade Law, Sherman Act

It is not a violation of the Sherman Act, *15 U.S.C.S. § 1*, for laborers in combination to refuse to work.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN15[] **Federal & State Interrelationships, Federal Common Law**

Section 303 of the Labor Management Relations Act, *29 U.S.C.S. § 187*, displaces state law in private damage actions based on peaceful union secondary activity.

Admiralty & Maritime Law > Maritime Personal Injuries > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN16[] **Admiralty & Maritime Law, Maritime Personal Injuries**

The area of secondary boycotts is one of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.

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Judges: Before ALDRICH, CAMPBELL and BOWNES, Circuit Judges.

Opinion by: CAMPBELL

Opinion

[*1369] This is an appeal from a decision of the district court, *492 F. Supp. 334*, denying plaintiff-appellant's motion for a preliminary injunction and granting defendants-appellees' motion to dismiss. [1.]

[2]** The facts are much like those recently before this court in *Walsh v. ILA, Local 799, 630 F.2d 864 (1st Cir. 1980)*. Allied International, Inc., is an importer of Russian wood products, which has contracted with two agencies of

1. Defendants moved to dismiss plaintiff's complaint for failure to state a claim on which relief could be granted. Since, in adjudicating this motion, the district court considered various affidavits submitted by the parties, we will treat the motion as if it were a motion for summary judgment. *Fed.R.Civ.P. 12(b)*.

the USSR for the purchase of birch hardwood and plywood. Allied has also contracted (through a third Soviet agency) with Waterman Steamship Co. for the shipment of these wood products to the United States from the USSR. Waterman employs John T. Clark & Son, a stevedoring company, to unload its ships docking in Boston. Clark's initial source of longshoremen is a hiring hall, operated by defendants International Longshoremen's Association (ILA) and its Local 799 pursuant to a collective bargaining agreement between the unions and the Boston Shipping Association.

On January 9, 1980, one of Waterman's ships, the Walton, was in Boston unloading a portion of Allied's plywood and hardwood, prior to further unloading at other ports along the East Coast. On that date, defendant Thomas Gleason, President of the ILA, ordered ILA members to cease handling cargoes bound for or arriving from the Soviet Union, in protest of the invasion of Afghanistan by Soviet armed forces. **[**3]** [2.] In **[*1370]** response to Allied's inquiries, Gleason informed Allied that ILA members would unload the Walton's cargo in Boston, but not at any other United States port. As a result, Waterman cancelled the Walton's scheduled calls, and unloaded all of Allied's wood products cargo in Boston, where it was stored, accruing demurrage and security charges. Waterman also restricted the cargo then being loaded into the Middleton in Leningrad to one-third its scheduled size, cancelled its delivery to scheduled United States ports, and unloaded the wood products in Montreal. In addition, Waterman repudiated its agreement to transport Allied's wood products aboard the Jefferson, which had not yet been loaded. ILA and Local 799 representatives informed Allied on March 12 and March 25, 1980 that no ILA members would unload any cargo originating in the USSR.

[4]** On March 31, 1980, Allied filed a complaint in the district court alleging that the ILA's actions violated (1) the National Labor Relations Act (NLRA) prohibition against secondary boycotts, section 8(b)(4), *29 U.S.C. § 158(b)(4)*, for which Allied has a private right of action under section 303 of the Labor Management Relations Act (LMRA), *29 U.S.C. § 187*, and *(2)* the Sherman Act, *15 U.S.C. § 1*, and *(3)* constituted tortious interference with Allied's business relationships, in violation of admiralty law. The action was consolidated with *Walsh v. ILA, supra*, in which the Regional Director of the NLRB sought a preliminary injunction against the ILA Russian boycott. In a memorandum of June 17, 1980, the district court concluded that Allied had failed to state a cause of action on any of its three legal theories, and consequently dismissed the complaint. We examine each of appellant's claims seriatim.

Secondary Boycott

The district court relied on its decision in *Walsh v. ILA, 488 F. Supp. 524 (D.Mass.1980)*, in holding that Allied had not alleged a violation of NLRA section 8(b)(4), *29 U.S.C. § 158(b)(4)*, the secondary boycott prohibition. We did not reach the merits of the secondary **[**5]** boycott question on appeal in Walsh, because we considered the issue foreclosed in that case by the decision in Baldovin v. ILA, Civ.No. 80-259 (S.D.Tex. Feb. 15, 1980). Baldovin involved the ILA's refusal to load grain aboard a ship bound for the Soviet Union, and the district court held the NLRB lacked jurisdiction over the dispute because it was not "in commerce." Subsequent to our decision in Walsh,

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[2.] The directive stated:

"In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

"This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

"The reason for this action should be apparent in light of international events that have affected relations between the U. S. & Soviet Union.

"However, the decision by the Union leadership was made necessary by the demands of the workers.

"It is their will to refuse to work Russian vessels and Russian cargoes under present conditions of the world.

"People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs."

the Court of Appeals for the Fifth Circuit affirmed that holding. *Baldovin v. ILA, 626 F.2d 445 (5th Cir. 1980)*. Because this case concerns parties different from those in Baldovin, that decision has no preclusive effect here. We therefore confront the secondary boycott issue on the merits.

HN1[] Section 8(b)(4) provides, in pertinent part:

> "(b) It shall be an unfair labor practice for a labor organization or its agents
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) **[**6]** to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is
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> **[*1371]** (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person … Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing…."

We proceed first to the same question decided negatively by the Fifth Circuit in Baldovin whether the secondary activity in question is sufficiently related to commerce to come within the prohibitions of the NLRA. See NLRA §§ 2(6) & (7), *29 U.S.C. §§ 152(6)* & *(7)*. While this case does not, as did Baldovin and Walsh, require consideration of the jurisdiction of the National Labor Relations Board, see NLRA § 10(a), *29 U.S.C. § 160(a)*, ***HN2***[] the secondary boycott prohibition itself reaches only activities aimed at individuals "employed by any person engaged in commerce or in any industry affecting commerce."

At first blush, it might appear **[**7]** too plain for discussion that the ILA's refusal to unload Allied's goods affects both commerce and a person engaged in commerce. Allied, Waterman and Clark are American companies and the ILA is an American union. All engage regularly in business affecting the transportation of goods among the several states. Indeed, the instant dispute arose when the ILA's actions allegedly impeded Allied's ability to move its wood products from Boston to other ports along the East Coast, and Allied contends that the ILA continues to frustrate its ability to transport its goods into this country.

HN3[] However, the terms "in commerce" and "affecting commerce," as used in the NLRA, are "obviously not self-defining," *Windward Shipping (London) Ltd. v. American Radio Association, 415 U.S. 104, 112, 94 S. Ct. 959, 964, 39 L. Ed. 2d 195 (1974)*. They must be considered in light of the gloss placed upon them in a series of Supreme Court cases dealing with the scope of jurisdiction under the Act.

In *Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 77 S. Ct. 699, 1 L. Ed. 2d 709 (1957)*, the Court held that the protections of the Act did not extend to picketing by American unions in support of a strike staged by **[**8]** foreign seamen against their foreign shipowner-employers. Since Congress did not intend the Act to cover "wage disputes arising on foreign vessels between nationals of other countries," *id., at 142, 77 S. Ct. at 702*, the Act did not preempt a state law damage action brought by the shipowners against the unions.

While Benz relied solely on the legislative history of the *NLRA, Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24, 83 S. Ct. 611, 9 L. Ed. 2d 557 (1963)*, joined the Benz rationale to the Act's "affecting commerce" terminology. Incres, like Benz, considered whether the NLRA deprived a state court of jurisdiction over picketing of foreign-flag ships by American unions in support of a labor dispute between shipowners and a foreign crew. Concluding that "maritime operations of foreign-flag ships employing alien seamen are not "in commerce' within the meaning of (NLRA) § 2(6)," *id., at 27, 83 S. Ct. at 613*, the Court held that the Act did not protect the picketing from operation of state law. In *McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963)*, a companion case to Incres, the Court held that the NLRB had no **[**9]** jurisdiction to order a "representation election" among the foreign crews of foreign-flag vessels.

In contrast, the Court in *ILA, Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 90 S. Ct. 872, 25 L. Ed. 2d 218 (1970)*, held that picketing directed at foreign-flag ships in order to protest substandard wages paid to non-union American longshoremen was arguably protected by section 7 of the Act, and thus not subject to the jurisdiction of the Florida courts. As the Court later described the case, in *Windward Shipping (London) Ltd. v. American Radio Association, supra, 415 U.S. at 114, 94 S. Ct. at 965*, Ariadne differed from Benz and Incres in that the protest "could be accommodated by a wage decision on the part of the shipowners **[*1372]** which would affect only wages paid within this country." In Windward Shipping itself, however, the Court again held that picketing foreign ships to protest wages paid to foreign seamen was not activity "affecting commerce," even though the picketing was staged by American unions not in support of the foreign crew but to publicize the competitive advantage enjoyed by the foreign ships vis-a-vis American shippers which employed American union members. **[**10]** According to the Windward Court, the line of cases beginning with Benz sought to delineate "the threshold of interference with the maritime operations of foreign vessels which makes the (Act) inapplicable." *Id., at 114, 94 S. Ct. at 965*. Because the pickets in Windward "(a)t the very least … must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to American shippers," thus occasioning "more than a negligible impact on the "maritime operations' of these foreign ships," id., the dispute was at root an attempt to interfere with the internal workings of a foreign vessel, the sort of controversy to which the Act had already been held not to apply in Benz and Incres.

Were this the extent of the precedent before us, we would have little hesitation finding the instant dispute within the coverage of the NLRA. We note that all of the above cases involved the question whether the Act affirmatively protected union activity directed at the working conditions aboard foreign-flag vessels (with the exception of Ariadne, in which the Act was found to apply). None considered the scope of the secondary boycott provisions, **[**11]** or whether secondary activity by an American union against an American employer was outside the purview of those provisions simply because "motivated" by a "primary dispute" between the union and a foreign entity. To find that the picketing in Incres, Benz and Windward was protected by the Act would have implied the jurisdiction of the NLRB over the foreign labor conditions that gave rise to the picketing. This, in turn, "would necessitate inquiry into the "internal discipline and order' of a foreign vessel, an intervention thought likely to "raise considerable disturbance not only in the field of maritime law but in our international relations as well.' " ILA, *Local 1416 v. Ariadne Shipping Co., supra, 397 U.S. at 198, 90 S. Ct. at 873-874* (quoting *McCulloch v. Sociedad Nacional de Marineros, supra, 372 U.S. at 19, 83 S. Ct. at 676*). In McCulloch, the Court confronted an actual attempt by the Board to interfere in what was essentially a foreign labor dispute.

In such cases there exist considerations of "comity and accommodation in international trade," *Windward, supra, 415 U.S. at 113, 94 S. Ct. at 964*, clearly not present in the instant action. Here, an American union has ordered **[**12]** its members not to work for an American stevedore which had contracted to service an American ship carrying goods of an American importer, insofar as the work would involve handling goods originating in the Soviet Union. There is no question of interference in the affairs of a foreign employer. Moreover, while the work stoppage was motivated by what might be termed a "primary dispute" between the ILA and the USSR over the latter's military policy, [3.] it would be absurd **[*1373]** to contend that application of the secondary boycott provisions

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[3.] The elusiveness of any attempt to fit aspects of this rather unique case comfortably within the traditional categories of labor law is illustrated by the fact that the "primary dispute" could just as easily, and perhaps more appropriately, be characterized as one between Afghanistan and Russia (or assuming the viewpoint of the ILA, between the Soviet Union and American governments). There is no dispute between the ILA and Russia over matters traditionally thought to be the subject of union concern.

In *Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014 (7th Cir. 1964)*, cert. denied, ***379 U.S. 967, 85 S. Ct. 661, 13 L. Ed. 2d 560 (1965)*** (discussed infra), an American union directed employees of an American grain wholesaler not to load grain onto ships owned by a Canadian employer engaged in a dispute with a Canadian union. There was no suggestion of a primary dispute or any dispute between the American union and the Canadian shipper, regardless of the fact that the American union may have disapproved of the way in which the Canadian employer was treating Canadian union members. In conventional labor law analysis, the court found the primary dispute to be between the Canadian employer and the Canadian union, and the secondary dispute to be between the American union and the American employer. If the analogy is followed here, the primary would imply NLRB jurisdiction over this primary dispute, i. e., over Soviet military policy. By the same token, the inability of the NLRB to adjudicate the propriety of the Soviet Union's incursion into Afghanistan need not, at least as a matter of logic, inexorably preclude a finding that the "secondary dispute" on which this lawsuit is based satisfies the jurisdictional requirements of section 8(b)(4). What is at stake is simply whether an American firm is entitled to be shielded by the Act from illegal actions in this country directly affecting its domestic business.

[13]** Our consideration of the issue is complicated, however, by the Supreme Court's decision in *American Radio Association v. Mobile Steamship Association, 419 U.S. 215, 95 S. Ct. 409, 42 L. Ed. 2d 399 (1974)*. Mobile involved facts similar to those in Windward. Six maritime unions engaged in picketing designed to publicize the adverse impact on American seamen of the low wages paid foreign crews working on foreign-flag carriers. In Windward, it was the shipowners who had sued the unions, and the Court rejected the unions' claim that the picketing was protected by section 7 of the Act. In Mobile, the plaintiffs were American stevedoring companies which sought to service the ships, and the unions defended on the ground that, since the picketing was arguably prohibited by section 8(b)(4), state court jurisdiction was preempted. Faced with this attempt to distinguish the controversy between the unions and the ships from that between the unions and the stevedores, the Court rejected the argument "that the line of cases commencing with Benz and culminating in Windward permit such a bifurcated view of the effects of a single group of pickets at a single site." *Id., at 222, 95 S. Ct. at 414*. **[**14]**

There is language in Mobile that can be read as indicating that the reach of the secondary boycott prohibition depends solely on the nature of the underlying "primary dispute" giving rise to the secondary activity. The rejection of a "bifurcated view" of a union's actions might seem to imply that characterization of the primary dispute as not "in commerce" controls the jurisdictional issue. See *Baldovin v. ILA, supra, 626 F.2d at 452-53*. See also *Walsh v. ILA, supra, 630 F.2d at 874-75* & n.13. Indeed, the Mobile majority apparently rejected, in the course of discussing precedent relied upon by the four dissenters, "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its statutory authority over unfair labor practices "affecting commerce.' " *Id., 419 U.S. at 226, 95 S. Ct. at 416*.

On the other hand, the Court also said that Mobile "need cast no doubt on those cases which hold that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States. See *Madden v. Grain Elevator Workers **[**15]** Local 418, 334 F.2d 1014 (CA7 1964)*, cert. denied, *379 U.S. 967, 85 S. Ct. 661, 13 L. Ed. 2d 560 (1965)*; *Grain Elevator Workers Local 418 v. NLRB, 126 U.S.App.D.C. 219, 376 F.2d 774*, cert. denied, *389 U.S. 932, 88 S. Ct. 296, 19 L. Ed. 2d 285 (1967)*." *419 U.S. at 225 n.10, 95 S. Ct. at 415 n.10*. Madden and Grain Elevator Workers both involved the same dispute. A Canadian union was engaged in a labor dispute with a Canadian shipper-employer. In support of the Canadian union, Grain Elevator Workers, an American union representing employees of the American secondary employer, induced its member-employees to cease loading the American employer's grain onto the Canadian ships. Both courts soundly rejected the contention that the NLRB lacked jurisdiction over the secondary boycott. As the court said in Madden:

> **[*1374]** "No attempt is being made to regulate or to apply the Act to the "internal management or affairs' of the Upper Lakes Ships .... No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic **[**16]** plant of the American employer."

334 F.2d at 1019.

We think, likewise, that application of section 8(b)(4) here would portend no interference in the management or affairs of foreign companies, workers, or labor organizations. This case is thus far removed from the situation that faced the Court in Mobile. There, the Court was concerned, as it had been in Windward, with an attempt by picketing unions to influence the "internal maritime operations of foreign ships." The Court noted that

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dispute is between the USSR and Afghanistan, and the secondary dispute between the ILA and persons carrying Russian-made goods.

> "the response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected.... The effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same whether it be complained of by the foreign-ship owners or by persons seeking to service and deal with the ships."

419 U.S. at 224-25, 95 S. Ct. at 415. We read Mobile as establishing that **HN4**[] in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a "primary dispute" cannot be extricated from a "secondary **[**17]** dispute" for purposes of contrary jurisdictional findings.

Here, however, there is no attempt to "bifurcate" the effects of a single union action. The only labor-related activity in issue has been played out by an all-American cast. The fact that this domestic labor dispute was inspired by military events in foreign lands events far beyond NLRB jurisdiction does not counsel against application of the NLRA to the labor dispute ongoing here at home. In sum, none of the considerations that prompted the Court in cases such as Windward, Incres, and Benz to find the Act inapplicable have force in this context. We hold, therefore, that section 8(b)(4) applies, and we must thus determine whether the ILA's activities are proscribed by that section. [4.]

[18]** In Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93, 98, 78 S. Ct. 1011, 1015, 2 L. Ed. 2d 1186 (1958), the Supreme Court formulated a **HN5**[] three-part test to identify a violation of section 8(b)(4):

> "Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person."

There can be little doubt that the first two parts of this test are met here: it is uncontroverted that the ILA leadership directed ILA members, including members of Local 799, employees of Clark, to engage in a concerted refusal to handle a certain class of goods which Clark had contracted to service. The ILA argues, however, that it lacked an "object" to bring about the entirely foreseeable result of its action the forced cessation of business between Clark and Waterman, and Waterman and Allied, **[*1375]** in relation to Russian goods being transported into this country.

According to the ILA, its "sole object is to vindicate the consciences of its members who find it repugnant to do business as usual with the aggressor and, by passive action, to protest **[**19]** politically the invasion of Afghanistan." [5.] However, the ILA has chosen to carry out its goal of protest through action a selective work stoppage which by its very nature is designed to force at least partial cessation of business between companies with which ILA has no labor-related grievance. While the ILA boycott may be a heartfelt act of protest against conduct that the ILA leadership and many ILA members find "repugnant," we cannot accept the proposition that this negates a finding that the "objective" of the boycott is one proscribed by section 8(b)(4). Nor do we think that this section was meant to permit any and all union actions designed to keep union members from "doing unconscionable work" or to protect their "moral integrity, spiritual welfare, and political convictions."

[20]** It is well established **HN6**[] that a union engages in prohibited secondary activity when it induces employees of a neutral employer to refuse to handle or work on goods originating from or bound for a particular person with whom the union, or another labor group, is having a dispute. NLRB v. Local No. 3, International

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4. Contrary to the suggestion in Judge Aldrich's separate opinion, this conclusion is not dependent on the "result reached." We quite agree that "either an act of Congress covers a particular dispute or it does not"; in our view, however, section 8(b)(4) "covers" this dispute, and we believe that the scope of the Benz-Mobile line of cases is narrower than the dissent/concurrence would have it. We understand our brother to construe the Benz-Mobile line as reflecting a fundamental principle that Board jurisdiction exists only where the Board has jurisdiction over the primary dispute. But we think those cases are adequately explained on the principle that in a case involving intertwined "primary" and "secondary" labor disputes, lack of Board jurisdiction over the primary dispute will preclude Board jurisdiction over the secondary conduct more particularly where a contrary ruling might well suggest an improper interference by the United States in the relationship between foreign employers and laborers. We see no need to extend Benz-Mobile beyond this.

5. Accepting that the boycott sought to protest Soviet aggression, we may still note that this goal of protest was certainly furthered by causing Clark and Waterman to cease handling Allied's Russian-made goods and was additionally enhanced by Allied's resulting cutback in its trade with the Soviet Union.

Brotherhood of Electrical Workers, 477 F.2d 260 (2d Cir.) (refusal to install material delivered by nonunion employees), cert. denied, *414 U.S. 1065, 94 S. Ct. 572, 38 L. Ed. 2d 470 (1973)*; Grain Elevator Workers Local 418 v. NLRB, 126 U.S. App. D.C. 219, 376 F.2d 774 (D.C.Cir.) (refusal to load grain on ships owned by Canadian employer embroiled in foreign labor dispute), cert. denied, *389 U.S. 932, 88 S. Ct. 296, 19 L. Ed. 2d 285 (1967)*; Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014 (7th Cir. 1964) (same), cert. denied, *379 U.S. 967, 85 S. Ct. 661, 13 L. Ed. 2d 560 (1965)*; NLRB v. Local 810, Steel, Fabricators & Warehousemen, 299 F.2d 636 (2d Cir. 1962) (refusal to work for secondary employer in connection with contract with primary employer against which union conducting strike); NLRB v. Brewery & Beer Distributor Drivers, Local 830, 281 F.2d 319 (3d Cir. 1960) **[**21]** (refusal to load beer orders bound for companies which had not signed union agreement); NLRB v. Wine Workers Union Local 1, 178 F.2d 584 (2d Cir. 1949) (refusal by employees of distributors to handle product of company engaged in strike with sister union). Of any of these cases it could be said that the defendant unions and their members would have found it "repugnant" to facilitate the business of companies they thought were, for example, mistreating brother laborers or paying substandard wages. Cf. NLRB v. Local No. 3, International Brotherhood of Electrical Workers, supra, 477 F.2d at 263 (concerted refusal to handle said to result initially from "individual acts of conscience"). Yet when a union orders all employees of a neutral employer to cease handling goods originating from a particular source, it is a fortiori forcing that employer to "cease doing business with" that source. In such a case, it is difficult to say that the cessation of business is not at least an object of the union order, in the absence of facts that might indicate the contrary; and it is not necessary that the cessation of business be the sole object in order to be an object prohibited under section 8(b)(4), **[**22]** NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 689-90, 71 S. Ct. 943, 952, 95 L. Ed. 1284 (1951).

We think that ***HN7***[] the object of a boycott, for purposes of section 8(b)(4)(ii)(B), can be inferred from the virtually inevitable results generated by it, at least when, as here, the union's conduct can under no reading of the facts be characterized as "primary **[*1376]** activity" protected by the Act. [6.] See NLRB v. Retail Store Employees Union,

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[6.] The conclusion might be somewhat different in a situation where identical union conduct could be found to be either protected primary activity or unlawful secondary activity depending on the union's objective. For example, in National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 87 S. Ct. 1250, 18 L. Ed. 2d 357 (1967), the Court considered whether a union's refusal to handle prefabricated goods was a protected effort to preserve the jobs of union members or activity calculated to satisfy the union's objectives elsewhere. The Court held that once it was found, by reference to circumstances such as "the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry," *id., at 644 n.38, 87 S. Ct. at 1268 n.38*, that the union action did serve the legitimate purpose of work preservation, the conduct could not be held unlawful simply because it had the ancillary effect of diminishing business between the employer and the source of the prefabricated materials. Cf. NLRB v. Enterprise Ass'n & General Pipefitters, Local 638, 429 U.S. 507, 97 S. Ct. 891, 51 L. Ed. 2d 1 (1977) (objective of work preservation will not protect pressure leveled against employer with no power to assign work sought).

The Court recently faced a similar situation in NLRB v. ILA, 447 U.S. 490, 100 S. Ct. 2305, 65 L. Ed. 2d 289 (1980), which involved the ILA's "Rules on Containers," characterized by the Board as a "hot cargo" provision and by the union as a "work preservation agreement." The Court remanded the case to the Board for further consideration, holding that the dispositive issue was whether the agreement had the effect of preserving work of the sort performed by ILA members prior to the era of containerization, and not whether the agreement would displace work performed by truckers and consolidators after the introduction of containerized shipping. In the course of criticizing the Board's treatment of the case, the Court noted that, should the agreement be found to preserve work for union members, it would not matter that it also generated secondary effects:

"The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer."

Id., 100 S. Ct. at 2315 n.22. In the context in which this statement was made, it reflects nothing more than a reiteration of the accepted proposition that a union is entitled to engage in primary activity no matter how severe the incidental effects on neutral parties. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 627, 87 S. Ct. 1250, 1259, 18 L. Ed. 2d 357 (1967). It should be noted, moreover, that the Court directed the Board to determine whether the agreement had "as its objective" the preservation of work traditionally performed by union members by focusing on the "nature of the work both before and after (containerization)" i.

Local 1001, 447 U.S. 607, 100 S. Ct. 2372, 65 L. Ed. 2d 377 (1980); NLRB v. Local 825, International Union of Operating Engineers, 400 U.S. 297, 91 S. Ct. 402, 27 L. Ed. 2d 398 (1971); NLRB v. Twin City Carpenters District Council, 422 F.2d 309, 314 (8th Cir. 1970). The Supreme Court recently held, in NLRB v. Retail Store Employees Union, supra, that section 8(b)(4) forbids secondary picketing against a "struck product" when such picketing "predictably encourages consumers to boycott a neutral party's business," 100 S. Ct. at 2374 (emphasis added). In determining whether the union's "object" was one proscribed by section 8(b)(4), the Court not only held that the union was "responsible for the foreseeable consequences of its **[**23]** conduct," id., 100 S. Ct. at 2377 n.9, it did so in a context in which the union's activity picketing a struck product differed only in degree from conduct that had already been held to be protected primary activity in NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 84 S. Ct. 1063, 12 L. Ed. 2d 129 (1964). Holding the picketing in Retail Store Employees to constitute a forbidden secondary boycott, the Court focused almost exclusively on the nature of the foreseeable injury to neutral parties: "Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii) (B)." 100 S. Ct. at 2377 (emphasis added).

[24]** **[*1377]** It has long been recognized that section 8(b)(4) was enacted for the purpose of "shielding unoffending employers and others from pressures in controversies not their own." National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 627, 87 S. Ct. 1250, 1259, 18 L. Ed. 2d 357 (1951). Balanced against this congressional objective is the "right of labor organizations to bring pressure to bear on offending employers in primary labor disputes." Id. This competing concern is reflected in the proviso of section 8(b)(4)(ii)(B) which exempts from the section "any primary strike or primary picketing" and in the affirmative protection accorded primary union activity under the NLRA. Thus, ***HN8***[] unions are protected when engaging in primary activity no matter how severe the impact on neutral employers, id., at 627, 87 S. Ct. at 1259, but are forbidden from pressuring an employer when the pressure is "calculated to satisfy union objectives elsewhere." Id., at 644, 87 S. Ct. at 1268. See also NLRB v. Enterprise Association & General Pipefitters, 429 U.S. 507, 528, 97 S. Ct. 891, 903, 51 L. Ed. 2d 1 (1977).

In this case neither of these "dual congressional objectives" would be furthered **[**25]** by finding the ILA boycott beyond the scope of section 8(b)(4). We think it plain that the ILA was not engaged in primary activity and that the boycott against Allied's goods was "calculated to satisfy union objectives elsewhere." The ILA concedes it has no dispute with Clark, Waterman, or Allied, and there is no suggestion that it seeks to affect the labor relations of any of these employers. It is also plain that these "unoffending employers" have been embroiled in a "controversy not their own" as a result of union action which "reasonably could be expected" to "threaten a neutral party with ruin or substantial loss," cf. NLRB v. Retail Store Employees Union, supra, 100 S. Ct. at 2377. [7.]

[26]** The district court in Walsh v. ILA, supra, nevertheless held that the ILA boycott did not violate section 8(b)(4) because the "primary dispute" was not a "labor dispute." 488 F. Supp. at 530. In so holding, the court relied in large part on the following language from Mishara Construction Co. v. International Brotherhood of Electrical Workers, 554 F.2d 488, 491 (1st Cir. 1977): "the statutory prohibition only applies when employees of a secondary employer are induced to strike or … to use other economic pressures against their employer to aid a union that has a dispute with another employer." The district court interpreted this passage to require a dispute with a "primary employer" before a violation of section 8(b)(4) could be found. As the district court noted, however, this statement was made in the course of dealing with an entirely different issue whether the union had used the sort of "coercive" measures a violation of the section requires.

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e., an examination of external facts and circumstances. It was nowhere suggested that the union leadership's subjective "intent" to preserve jobs would save such an agreement that did not, in fact, have the effect of preserving work. The ILA boycott at issue here does not have the effect of realizing any protected union goal.

[7.] The fact that the ILA did not engage in more extensive forms of coercion e. g., picketing or a total boycott of employers trading with Russia or handling Russian cargo does not dictate the conclusion that its limited boycott had no proscribed object. See NLRB v. Twin City Carpenters District Council, 422 F.2d 309, 315 (8th Cir. 1970); Local 5, United Ass'n of Journeymen v. NLRB, 53 L.R.R.M. 2424, 321 F.2d 366, 370 (D.C.Cir.), cert. denied, ***375 U.S. 921, 84 S. Ct. 266, 11 L. Ed. 2d 165 (1963)***.

To be sure, ***HN9***[] descriptions of the reach of the secondary boycott prohibition are normally couched in terms of union conduct emanating from a primary "labor dispute," since this is the typical situation in which section 8(b)(4) is, and was **[**27]** meant to be, applied. For example, the Supreme Court has said that enactment of the section was prompted by "(congressional) concern over the involvement of third parties in labor disputes not their own." *NLRB v. Local 825, International Union of Operating Engineers, 400 U.S. 297, 302, 91 S. Ct. 402, 406, 27 L. Ed. 2d 398 (1971)* (emphasis added). However, this language does not suggest that it is permissible under section 8(b)(4) for a union to direct pressure against a neutral employer in order to satisfy objectives unrelated to any "labor dispute" at all. Such an interpretation would be contrary to the congressional purpose behind the section, and we reject it. Cf. *National Maritime Union v. NLRB, 342 F.2d 538* (2d Cir.), cert. denied, **[*1378]** *382 U.S. 835, 86 S. Ct. 78, 15 L. Ed. 2d 78 (1965)*; *National Maritime Union v. NLRB, 120 U.S. App. D.C. 299, 346 F.2d 411, 416-20* (D.C.Cir.), cert. denied, *382 U.S. 840, 86 S. Ct. 90, 15 L. Ed. 2d 82 (1965)*; *NLRB v. Twin City Carpenters District Council, 422 F.2d 309, 312-13 (8th Cir. 1970)*; *NLRB v. Local No. 751, Carpenters, 285 F.2d 633, 639 & n.6 (9th Cir. 1960)*.

We think it more rather than less objectionable that a national labor **[**28]** union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity. Cf. *NLRB v. Washington-Oregon Shingle Weavers' District Council, 211 F.2d 149, 152 (9th Cir. 1954)* (boycott ordered "not because of any dispute, but merely because the union dislikes the producer for any reason, or for no reason, … would appear even more reprehensible"). ***HN10***[] The labor laws do not confer upon bargaining representatives a voice in the conduct of foreign policy. The fact that there have been few, if any, cases that have applied the secondary boycott provisions to activity motivated by a "purely political dispute" [8.] illustrates little more than the rarity with which labor unions have seen fit to engage in this sort of "political strike" conduct. The language of section 8(b)(4) and the congressional objectives that prompted its enactment point to no reason why the section should not prohibit such secondary pressure, for whatever reasons motivated. The potential danger of uncontrolled, whimsical activity **[**29]** is obvious. It must be remembered that a union's ability to apply crippling secondary pressure is greatly enhanced by its position under the federal labor laws; without even the justification of a labor-oriented motive, such forbidden secondary activity is a fortiori precluded. [9.]

[30]** Likewise, we reject the view, apparently adopted by the district court, that section 8(b)(4) may not be applied to national boycotts undertaken as a form of "political expression." To our knowledge, the only other precedent that would support such a sweeping proposition is *NLRB v. ILA (Ocean Shipping Services), 332 F.2d 992 (4th Cir. 1964)*, which involved the ILA's refusal, during the height of the Cuban missile crisis in 1962, to load ships that were trading or had traded with Cuba. The court decided the case on the ground that the NLRB lacked jurisdiction over the dispute, but "deem(ed) it appropriate to consider further" whether an unfair labor practice had been alleged. The court then suggested that a politically motivated and selective boycott would not violate section 8(b)(4) because "if the bare refusal to work in the circumstances shown should be held illegal, the union would be deprived of its right of expression and the proviso of section 8(b)(4)(ii)(B) would be emptied of meaning." *Id., at 997*.

We cannot agree that prohibiting the ILA from ordering employees not to handle Russian goods would rob either the ILA or its members of their "right of expression." (Nor can we **[**31]** understand why, in any event, the proviso of section 8(b)(4)(ii)(B) would thereby "be emptied of meaning"; this proviso protects only a "primary strike or primary picketing.") Certainly the union and its members have numerous alternative forms of "expression" left to

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8. But cf. the decision of the NLRB in *Local 1355, ILA and Ocean Shipping Service, Ltd., 146 NLRB 723 (1964)*, reversed by the Fourth Circuit in *NLRB v. ILA, 332 F.2d 992 (4th Cir. 1964)*, discussed infra.

9. The district court also characterized the ILA action as "a primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods." *488 F. Supp. at 531*. Clearly this is not the case. The ILA boycott does not differ in this regard from innumerable refusals to handle "hot cargo" that have been held to be prohibited secondary activity, e. g., *NLRB v. Local 3, Int'l Bhd. of Electrical Workers, 477 F.2d 260* (2d Cir.), cert. denied, *414 U.S. 1065, 94 S. Ct. 572, 38 L. Ed. 2d 470 (1973)*; *NLRB v. Wine Workers Union Local 1, 178 F.2d 584 (2d Cir. 1949)*; and cases cited at page 1375 supra. These cases might likewise have been described as boycotts of a primary employer's "goods" with "incidental effects" on the secondary employers that dealt with the goods.

them, including the right to assemble **[*1379]** or leaflet in protest of Russian aggression and the right to petition and lobby elected representatives in pursuit of a reassessment of United States foreign policy regarding American-Russian trade. [10.] By resorting to coercive tactics against neutral parties, the union has exceeded the bounds of "political expression" in its pure form; indeed, the sort of union-directed work stoppage at issue here is much farther removed from "pure" expression than the peaceful picketing that has been found to violate section 8(b)(4) in numerous cases. [11.] E. g., N.L.R.B. v. Retail Store Employees Union, *Local 1001, supra, 447 U.S. 607, 100 S. Ct. 2372, 65 L. Ed. 2d 377*. *International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694, 71 S. Ct. 954, 95 L. Ed. 1299 (1951)*. For this reason we also reject ILA's argument that its concerted conduct, carried out on orders of top union **[**32]** management, is protected by the *first amendment*. See also *American Radio Association v. Mobile Steamship Association, 419 U.S. 215, 229-31, 95 S. Ct. 409, 417-419, 42 L. Ed. 2d 399 (1974)*; *Teamsters Union v. Vogt, Inc., 354 U.S. 284, 77 S. Ct. 1166, 1 L. Ed. 2d 1347 (1957)*.

[33]** In conclusion, we hold that Allied has alleged a violation of NLRA section 8(b)(4). We therefore vacate the district court's dismissal of Count I of the complaint, and remand for further consideration of Allied's prayer for damages and preliminary and permanent injunctive relief.

Sherman Act

We next proceed to whether or not the ILA boycott amounts to a violation of *section 1* of the Sherman Act. As such a violation would entitle Allied to treble damages, this issue is not mooted by our holding that a cause of action exists under the NLRA. We first consider whether the union's activity falls within the statutory "labor exemption" from the antitrust laws. Clayton Act §§ 6 & 20, *15 U.S.C. § 17* and *29 U.S.C. § 52*; Norris-LaGuardia Act, *29 U.S.C. §§ 101-15*. In *United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*, the Supreme Court held that, in light of these statutory provisions, ***HN11***[] the Sherman Act does not proscribe union activity "so long as (the) union acts in its self-interest and does not combine with non-labor groups." *Id., at 232, 61 S. Ct. at 466*. This standard, which has been referred to as the "two-prong test," has been developed in a series of Supreme **[**34]** Court cases. E. g., *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939* ***[*1380]*** *(1945)*; *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *American Federation of Musicians v. Carroll, 391 U.S. 99, 88 S. Ct. 1562, 20 L. Ed. 2d 460 (1968)*; *Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*.

While "the test to determine if a union's actions are in its "self-interest' has not been precisely formulated," the principle that emerges from the above cases is that ***HN12***[] activities are in the self-interest of a labor organization "if they bear a reasonable relationship to a legitimate union interest." *Adams, Ray & Rosenberg v.*

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10. In response to the Soviet invasion of Afghanistan, the United States government placed certain restrictions on exports to the USSR but did not impose any restrictions that would limit the importation of Russian wood products. See generally President's Message on the State of the Union, 126 Cong.Rec.H. 20, reprinted in (1980) U.S.Code Cong. & Ad.News 112-13.

11. We also note that the ILA directive orders all ILA members to "express themselves" in a manner that may well be contrary to the views of some. See Hampton Roads Shipping Ass'n v. ILA, Civ.No. 80-186-N (E.D.Va. March 1980), slip op. at 10 ("the Union's position that its action constitute (sic) only the joint expression of its members' opinion… is neither factually nor legally supportable. No evidence of a mandate from the Union's membership has been presented, nor did the Union make any effort to notify its members or employees that Union members who wished to work or who did not support this action could ignore the Union's order without fear of retaliation.") rev'd on other grounds, *631 F.2d 282 (4th Cir. 1980)*. Cf. *Abood v. Detroit Board of Educ., 431 U.S. 209, 234-36, 97 S. Ct. 1782, 1799-1800, 52 L. Ed. 2d 261* (union may not finance "expression of political views, on behalf of candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" through assessments paid by employees who object to advancing such ideas). Whatever the rights of individual ILA members to refuse work as an act of conscience an issue we need not decide the ILA directive went considerably beyond anything necessary to enable these members to assert such a right. See Truck Drivers & Helpers *Local 728, 119 NLRB 399, 407 (1957)* ("what is here involved is not an assertion of individual right by individuals, but rather the formulation and enforcement by the Respondent Union as a labor organization… of a collective policy or program"). See also *NLRB v. Local 74, United Bhd. of Carpenters, 341 U.S. 707, 713, 71 S. Ct. 966, 970, 95 L. Ed. 1309 (1951)*.

William Morris Agency, 411 F. Supp. 403, 410 (C.D.Cal.1976). In particular, the labor exemption has been applied when the union acts to protect the wages, hours of employment, or other working conditions of its member-employees, objectives that are at the heart of national labor policy. We think the district court was correct in concluding that the ILA's "political dispute" with the Soviet Union does not relate **[**35]** to a "legitimate union interest" as that term has been defined in American labor history and law, and thus that the ILA boycott is not immunized by statute from operation of the antitrust laws. [12.]

The question still remains whether the ILA's refusal to handle Russian-made goods is the sort of activity which the Sherman Act was intended to proscribe. Allied seeks to characterize the boycott as a "concerted refusal to deal," and, in a literal sense, it is. On the other hand, there are significant differences between the activity at issue in this case and the sorts of "concerted refusals to deal" that have been found per se unlawful under the Sherman Act.

HN13[] The classic anticompetitive "group boycott" is a concerted action by competitors at one level to protect themselves from competition by non-group members who seek to compete at that level. Sullivan, Handbook of the Law of Antitrust 230, 261-62 (1977). See, e. g. *Fashion Originators **[**36]** Guild v. FTC, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941)*; *Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490 (1914)*. While many of the boycotts that have been found per se illegal have involved the participation of suppliers or customers of the boycotted firm, e. g., *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, "it is (the) purpose to exclude competition that has characterized the Supreme Court's decisions invoking the group boycott per se rule." *Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173, 1178 (D.C.Cir.1978)*. There is no allegation here that the ILA is engaged in an effort to drive Allied out of business or, indeed, that the ILA has any economic or commercial objective in pursuing the boycott of Russian goods.

It is not the motivation for the boycott alone that distinguishes this case from the paradigmatic anticompetitive refusal to deal, but also its scope. ILA members are not refusing to handle any and all goods imported by Allied, in retaliation for Allied's dealings with the Russians. Cf. *Missouri v. National Organization for Women, Inc., **[**37]** 620 F.2d 1301 (8th Cir. 1980)* (politically motivated boycott of all convention facilities in states that had not ratified proposed equal rights amendment). ILA members have refrained from boycotting any ships not involved in trade with the Soviet Union, including ships owned by carriers which maintain Russian trade elsewhere. The limited scope of the boycott, while it does not immunize the conduct from antitrust scrutiny, is relevant to the question of the significance of the action's anticompetitive purpose or effect.

We think this limited refusal to handle goods, undertaken as a political protest by a labor union acting on its own, and ill-designed as a means of gaining a competitive or commercial advantage for the union or its members, is not the sort of evil at which the Sherman Act is aimed. The Sherman Act was a product of "the era of "trusts' and of "combinations' of businesses **[*1381]** and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex Hosiery v. Leader, 310 U.S. 469, 492-493, 60 S. Ct. 982, 992, 84 L. Ed. 1311 **[**38]** (1940)*. The Supreme Court has said that "the Act is aimed primarily at combinations having commercial objectives and is applied only to a limited extent to organizations, like labor unions, which normally have other objectives." *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra, 359 U.S. at 213 n.7, 79 S. Ct. at 710 n.7*. While we have rejected appellees' claim that the boycott falls within the statutory exemption from the antitrust laws, we nevertheless think that it would be a rare case when, absent a specific anticompetitive object or collaboration with non-labor groups, a mere refusal to work by members of a labor union, even though the result of concerted action, would be held to violate the Sherman Act. See *Hunt v. Crumboch, 325 U.S. 821, 824, 65 S. Ct. 1545, 1547, 89 L. Ed. 1954 (1944)* ("It ***HN14***[] is not a violation of the Sherman Act for laborers in combination to refuse to work"); *Apex Hosiery, supra, 310 U.S. at 500-504, 60 S. Ct. at 996-998*. We hold that the ILA activity at issue here is not sufficient to warrant application of the antitrust laws. Cf. *Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, Inc., 139 U.S. App. D.C. 217, 432 **[**39]** F.2d 650, 654* (D.C.Cir.), cert. denied, *400 U.S. 965, 91 S. Ct. 367, 27 L. Ed. 2d 384 (1970)*.

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12. There is no real indication that the ILA "conspired" with any non-union group.

This conclusion is fortified, though not compelled, by our finding, supra, that the facts alleged make out a violation of LMRA § 303(a), *29 U.S.C. § 187(a)*. While the prohibitions of labor law and ***antitrust law*** overlap to some degree, it has been said that, in general, "s 303 was enacted as an alternative to subjecting unions to antitrust liability for secondary activities" amounting to a violation of section 8(b)(4) of the Act. *Mead v. Retail Clerks International Association, Local 839, 523 F.2d 1371, 1376 (9th Cir. 1975)*. Cf. *Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 634-35, 95 S. Ct. 1830, 1840-1841, 44 L. Ed. 2d 418 (1975)*; *id., at 646, 95 S. Ct. at 1846-1847* (Stewart, J., dissenting).

Admiralty Tort

Finally, we turn to the claim of tort liability. Allied contends that the ILA boycott wrongfully interfered with its "existing and prospectively advantageous business relationships" and that this amounted to tortious conduct said to be cognizable in admiralty because of its relationship to maritime service, commerce and navigation. See *Carroll v. Protection Maritime* ***[**40]*** *Insurance Co., Ltd., 512 F.2d 4 (1st Cir. 1975)*. In light of our conclusion that Allied has alleged a violation of LMRA section 303 based on the same facts, we think the claim in tort, whether governed by federal maritime or state common law, cannot stand.

The Supreme Court has held that ***HN15***[] section 303 displaces state law in private damage actions based on peaceful union secondary activity. *Local 20, Teamsters Union v. Morton, 377 U.S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280 (1964)*; *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1958)*. We think the rationale behind these cases suggests that in enacting section 303 Congress also meant to supersede any federal common law that might upset the balance carefully drawn between the rights of management and labor in national labor policy. In *Local 20, Teamsters Union v. Morton, supra, 377 U.S. at 261, 84 S. Ct. at 1259*, the Court said that ***HN16***[] the area of secondary boycotts is one "of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather **[**41]** than by local law" (quoting *Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176, 63 S. Ct. 172, 174, 87 L. Ed. 165 (1942)* (emphasis added)). In this context, an admiralty action sounding in tort would function simply as a substitute for "local law," applicable to tortious acts having a sufficient nexus to maritime commerce. No reasons are advanced why such an action should survive enactment of the **[*1382]** federal labor laws whereas a similar state action would not. See *Navios Corp. v. National Maritime Union, 236 F. Supp. 657 (E.D.Pa.1964)*, aff'd, *359 F.2d 853* (3d Cir.), cert. denied, *385 U.S. 900, 87 S. Ct. 205, 17 L. Ed. 2d 132 (1966)*. We hold therefore that the district court properly dismissed Count III of the complaint.

Reversed and remanded.

Dissent by: ALDRICH

Dissent

ALDRICH, Senior Circuit Judge (concurring and dissenting).

While I agree with part of the court's thorough opinion, and with the conclusion that plaintiff is entitled to relief, I feel more comfortable with a different route. For the reasons given by the court I agree that this is not a Sherman Act case. I have doubts, however, whether relief is within the reach of the NLRA.

By my reading, the Benz **[**42]** line of cases cited by the court establishes the general proposition that the NLRA does not reach, directly or indirectly, labor controversies in which the "primary" dispute relates to the internal affairs of a foreign entity (in those cases, foreign shipowners). See *American Radio Ass'n v. Mobile Steamship Ass'n, 1974, 419 U.S. 215, 221-26, 42 L. Ed. 2d 399, 95 S. Ct. 409* (Mobile); *Windward Shipping (London) Ltd. v. American Radio Ass'n, 1974, 415 U.S. 104, 109-13, 94 S. Ct. 959, 962-964, 39 L. Ed. 2d 195* (Windward) and cases cited. The one exception is where the primary dispute centers around the foreign entity's employment relations with American labor. See *ILA, Local 1416 v. Ariadne Shipping Co., 1970, 397 U.S. 195, 90 S. Ct. 872, 25 L. Ed. 2d 218*. This distinction, while couched in terms of whether or not the dispute is "in" or "affecting commerce," stems more basically from the recognition that Congress, in passing legislation to govern domestic labor relations, "simply did not intend … to erase long-standing principles of comity and accommodation in international maritime trade." Windward, ante, *415 U.S. at 112-13, 94 S. Ct. at 964*.

If I understand it correctly, the court **[**43]** is willing to extend the NLRA to cover the present, secondary, dispute because the result reached "would portend no interference in the management or affairs of foreign companies, workers, or labor organization;" indeed, will doubtless avert it. With due respect, I cannot agree. Either an act of Congress covers a particular dispute or it does not; the determination should not depend on the desirability of the ultimate result reached. It is, moreover, happenstance that the court can take this approach. Prior to the Taft-Hartley Act, the labor laws were held to protect secondary boycotts. *United States v. Hutcheson, 1941, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788*. To say that defendants' conduct is a labor matter would then have meant it protected, with the inevitable effect upon the primary dispute. I cannot believe that we would then, given the proposition that the primary dispute involved long-standing principles of comity and accommodation in international maritime trade that Congress did not intend to erase, Windward, ante, have extended the act's protection to a secondary boycott designed very significantly to affect it. Equally, I do not believe that the fact that Congress came **[**44]** to have a broader general view of the labor injunction should be taken to evince an intent for the NLRA to partake in international decisions.

Continuing with Windward and Mobile, these cases arose out of picketing of foreign-flag vessels by six American maritime unions in order to draw attention to the low wages paid by the vessels to their (foreign) crews and the consequent competitive disadvantage of American shipping, which had to pay union scale. Longshoremen and other dock workers refused to cross the picket lines to load and unload the ships. Suit was brought, in the state courts, [1.] by the foreign owners of two of the ships (Windward) and by American stevedores and an American shipper whose crops were waiting to be loaded (Mobile). In each case the unions sought to defeat the state court's jurisdiction **[*1383]** as preempted by the NLRA. In Windward, the Supreme Court rejected the unions' contention that their activity was covered by the Act, and protected by section 7. In Mobile, the unions argued that whatever the case in a suit by the foreign shipowners, their activities vis-a-vis the American stevedores and shipper were governed by the NLRA, since they were arguably **[**45]** a secondary boycott prohibited by section 8(b)(4), which declares it an unfair labor practice for a labor organization or its agents

> "(1) to engage in, or to induce or encourage any individual employed by any person engaged in commerce … to engage in, … a refusal in the course of his employment to … handle … any goods … where … an object thereof is
>
> "(B) forcing or requiring any person … to cease doing business with any other person …."

In rejecting this argument, the Court referred to its earlier holding in Windward that the picketing, insofar as it was designed to influence the foreign shippers' internal affairs, was not activity "affecting commerce," and stated

> "it would be wholly inconsistent to now hold, insofar as concerns Board jurisdiction over a complaint by respondents, that the employer **[**46]** of the longshoremen who honored the picket line, or the shipper whose goods they did not handle, was in or affecting commerce." *419 U.S. at 224, 95 S. Ct. at 415*.

Stating it differently, the Court rejected "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its statutory authority over unfair labor practices "affecting commerce,' " (emphasis in orig.) *419 U.S. at 226, 95 S. Ct. at 416*, and held the propriety, vel non, of the picketing not an NLRA matter.

[1.] Windward and Mobile were separate suits, in the courts of Texas and Alabama, respectively, arising out of factually identical activities by the unions in Houston and Mobile.

Mobile, then, looks to the primary dispute: if this is beyond the Board's reach as not "affecting commerce," then so are secondary activities designed to influence its outcome. While this last may be semantically troublesome, it is fully consistent with the notion that the internal management or affairs of foreign entities are none of the Board's business, directly or indirectly. I therefore ascribe less importance than does the court to the Mobile Court's dictum that its holding "need cast no doubt on" the Madden and Grain Elevator Workers cases. *419 U.S. at 225 n.10, 95 S. Ct. at 415 n.10*. To my mind, Mobile casts considerable **[**47]** doubt on them. The only analytically significant distinction between these two cases and Mobile is that the former involved an actual work stoppage to force the secondary employer not to deal with the primary, while the Mobile defendants induced such action by their secondary picketing. Where section 8(b)(4)(i) applies, it declares unlawful the engaging in, or the inducement or encouragement of, a secondary boycott. It is difficult to see how one affects "commerce" more than the other.

To summarize, it seems to me that in looking at the Act clause by clause, instead of as a whole, the court has adopted the approach of the Mobile dissent where, again, it was said that "following the literal language of § 8(b)(4)(B) and recognizing the Board's exclusive jurisdiction over the dispute would not in any way undermine the principles of comity emphasized in our decision in Windward Shipping." 419 U.S., ante, at 241-42, *95 S. Ct. at 423*. That approach did not prevail in Mobile, and I would not follow it here. Accordingly I would hold that just as state court, rather than NLRA, jurisdiction existed in Mobile, plaintiff must look to our admiralty jurisdiction in the case at bar.

Nor do I find **[**48]** that wanting; the facts in the present case bear an intimate "relationship … to traditional maritime activity." *Executive Jet Aviation, Inc. v. Cleveland, 1972, 409 U.S. 249, 261, 93 S. Ct. 493, 501, 34 L. Ed. 2d 454*. See *Pino v. Protection Maritime Ins. Co., 1 Cir., 1979, 599 F.2d 10, 12-13*, cert. denied, *444 U.S. 900, 100 S. Ct. 210, 62 L. Ed. 2d 136*; *Carroll v. Protection Maritime Ins. Co., 1 Cir., 1975, 512 F.2d 4, 6-9* and cases cited, particularly *O'Connor & Co. v. Pascagoula, S.D.Miss., 1969, 304* ***[*1384]*** *F. Supp. 681*; *Orient Mid-East Lines, Inc. v. Albert E. Bowen, Inc., S.D.N.Y., 1966, 255 F. Supp. 627*; *Upper Lakes Shipping, Ltd. v. ILA, S.D.N.Y., 1963, 33 F.R.D. 348*. Having concluded that this action is not preempted by the NLRA, I would hold that Allied has properly alleged the elements of maritime tort for interference with its contractual relations.

Section 766A of the Restatement (Second) of Torts reads:

> "s 766A. Intentional Interference With Another's Performance of His Own Contract
>
> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other **[**49]** from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Most of the requisite elements are easily found in the case at bar and require little discussion. Contrary to ILA's assertion, malice in the sense of ill will need not be shown; intent (knowledge to a substantial certainty) is ordinarily enough. In the case of a remote interference, see post, the "motive or purpose" to interfere may be required. See Restatement, ante, § 766 comments j, r, s; *§ 766A comment e*; § 767 comment d. However, it is reasonably clear that the ILA's purpose here was to prevent the loading and unloading of Russian and Russia-bound cargos stated differently, to disrupt Soviet-American trade, of which Allied's contract represented a portion and while the only ill will may have been directed toward the Soviet Union, the target of the boycott was this trade and, necessarily, this and other contracts. Allied has credibly alleged that it was prevented from or burdened in performing its contract, [2] **[**50]** and has suffered pecuniary loss. [3]

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[2] The complaint recites that the contract under which the February shipment was made ran out on December 31, 1979, and that a new contract was under negotiation. If Allied has been hampered in the latter, Restatement § 766B (intentional interference with prospective contractual relation) might become relevant.

[3] Damages may include lost profits as well as consequential losses. Restatement, ante, § 774A.

A number of factors persuade me that the ILA's interference was "improper" within the meaning of *section 766A*. [4.] Labor unions, under the protective wing of federal law, have achieved tremendous social and economic power. This is balanced, in labor controversies "in commerce," by protections given management and others notably, the prohibitions of section 8(b). My conclusion that the secondary boycott provisions of section 8(b)(4) do not apply in no way detracts from the soundness of the general policy, embodied therein, of "shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building & Constr. Trades Council, 1951, 341 U.S. 675, 692, 71 S. Ct. 943, 953, 95 L. Ed. 1284*. As the court observes, a labor organization's secondary activity in pursuit of a political goal in no way related to the labor interests of its members may be thought doubly objectionable.

[51]** I am further influenced by the same "considerations of comity and accommodation in international trade" which argue against NLRA coverage. The ILA has sought ultimately to involve itself in the affairs of a foreign nation a matter, in my opinion, better entrusted to the State Department than to labor unions. Union activity which unduly interferes with the non-"commerce" policies of a foreign entity is **[*1385]** denied the protections of the NLRA, because such an intervention would be "likely to "raise considerable disturbance not only in the field of maritime law but in our international relations as well.' " Ariadne, ante, *397 U.S. at 198, 90 S. Ct. at 873*, quoting *McCulloch v. Sociedad Nacional de Marineros, 1963, 372 U.S. 10, 19, 83 S. Ct. 671, 676, 9 L. Ed. 2d 547*. The protection of this interest alone might strain the limits of Allied's standing and this court's power. However, where we are asked to consider the propriety or impropriety of an injury done to a plaintiff properly before us, this concern diminishes "the social interest in protecting the freedom of action of the actor." Restatement, ante, § 767(c).

The ILA's argument that its boycott is too remote in its effect **[**52]** on Allied to be actionable is undercut by the fact that disruption of Soviet-American trade, of which Allied's business was a part, was not only a predictable and intended consequence of the boycott; it was the primary purpose behind it. [5.] In such a case, "remoteness" of the type here is not a bar to recovery. See Restatement, ante, § 767 comment h.

Finally, I agree with the court's assessment of the ILA's *First Amendment* claim. While action may in some cases speak louder than words and receive similar protection, see *Spence v. Washington, 1974, 418 U.S. 405, 409-10, 94 S. Ct. 2727, 2730, 41 L. Ed. 2d 842* (per curiam), at some point the concrete injury inflicted on others overshadows the expressive content inherent in the act. If the *First Amendment* does not protect the inducement of a secondary boycott by picketing, **[**53]** *NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 612-616, 100 S. Ct. 2372, 2376-2378, 65 L. Ed. 2d 377 (1980)*, I do not see how it protects the boycott itself.

I would affirm the district court's dismissal of the NLRA and Sherman Act claims, and reverse its dismissal of the tort claim.

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4. Restatement § 767 presents a (nonexhaustive, see comment b) list of factors to be considered:

"(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."

5. This fact adequately distinguishes the ILA's cited cases of *Isbrandtsen Co. v. Local 1291, ILA, 3 Cir., 1953, 204 F.2d 495* and *R. J. Caldwell Co. v. Fisk Rubber Co., 1 Cir., 1933, 62 F.2d 475*.

B. C. Recreational Indus. v. First Nat'l Bank

United States Court of Appeals for the First Circuit

November 4, 1980, Argued ; January 30, 1981, Decided

No. 80-1383

Reporter

639 F.2d 828 *; 1981 U.S. App. LEXIS 20528 **; 1980-81 Trade Cas. (CCH) P63,778

B.C. RECREATIONAL INDUSTRIES, HARRY FIREMAN, PAUL FIREMAN, STEVEN FIREMAN AND RICHARD W. WENNETT, EXECUTOR OF THE ESTATE OF SAMUEL FIREMAN, PLAINTIFFS-APPELLANTS, v. THE FIRST NATIONAL BANK OF BOSTON, JOHN HORVITT, CLARK MILLER, BENJAMIN BOWDEN, VICTOR MOUREY AND ROBERT WEISBERG, DEFENDANTS-APPELLEES.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [HON. A. DAVID MAZZONE, U.S. District Judge]

Core Terms

fiduciary, Factors, district court, practices, cause of action, national bank, banking, hire, tying arrangement, Counts

LexisNexis® Headnotes

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

HN1[] **Jurisdiction, Jurisdictional Sources**

See *28 U.S.C.S. § 1348*.

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

HN2[] **Jurisdiction, Jurisdictional Sources**

See *28 U.S.C.S. § 1337*.

Civil Procedure > Preliminary Considerations > Venue > General Overview

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

HN3[] **Preliminary Considerations, Venue**

See *12 U.S.C.S. § 1975*.

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

HN4[] Jurisdiction, Jurisdictional Sources

See *15 U.S.C.S. § 15*.

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Commercial Banks

HN5[] Banking Law, Commercial Banks

See *12 U.S.C. § 1972*.

Banking Law > ... > Banking & Finance > Regulators > US Office of the Comptroller of the Currency

HN6[] Regulators, US Office of the Comptroller of the Currency

See *12 U.S.C.S. § 92a*.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Holding Company Act

Banking Law > ... > Business & Corporate Compliance > Banking & Finance > Commercial Banks

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

HN7[] Financial Institutions, Bank Holding Company Act

Tying arrangements prohibited are those that require bank customers to accept or provide other services or products or refrain from dealing with other parties. The tying prohibitions do not interfere with the conduct of appropriate traditional banking practices. The Act does not prohibit attempts by banks to protect their investments. Conditioning the grant and extension of credit on the requirement that the bank supervise and control plaintiff's checking account and other corporate affairs, including veto power over purchases and payments of dividends, was not prohibited by the Act.

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

HN8[] Antitrust & Trade Law, Sherman Act

For a tying arrangement to violate the Sherman Act, it must, to some extent, have the effect of restraining free competition in the market for the tied product.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN9[] **Supplemental Jurisdiction, Pendent Claims**

Pendent jurisdiction is a doctrine of discretion not of plaintiff's right.

Counsel: Morris Michelson, Boston, for plaintiffs-appellants.

Francis H. Fox, Boston, with whom Rory Fitzpatrick, and Bingham, Dana & Gould, Boston, were on brief, for defendants-appellees.

Judges: Before COFFIN, Chief Judge, BOWNES, Circuit Judge, HOFFMAN, * District Judge.

Opinion by: BOWNES

Opinion

[*829] This is an appeal from an order of the district court granting defendants' motion for summary judgment on two counts of a nine-count complaint and dismissing the seven remaining counts. The complaint was brought by B.C. Recreational Industries (BC) and its principal shareholders, officers, and directors, Harry, Paul, Steven, and Samuel Fireman, against the First National Bank of Boston (Bank), the FNB Financial Company nB, John Horvitt, ** a former financial advisor of BC, and four other individuals alleged to be officers of the Bank.

[2]** A summary of the undisputed facts is necessary to understand the complaint and the issues before us. In September of 1964, BC entered into a factoring agreement with the Bank. In 1969 the Bank assigned all of its interest in BC's loan and collateral to First National Factors of Boston, a newly organized affiliate of the Bank. The same individuals who had handled BC's factors loan at the Bank continued in the same role for First National Factors. On September 1, 1970, BC executed a new factoring agreement with First National Factors and, pursuant thereto, gave it a security interest in all of the property held by the Bank as collateral. The collateral at this time was the usual type for a factors loan, an assignment of all accounts receivable.

In 1972 First National Factors changed its name to FNB Financial Company. There was no change in the factoring arrangement, and BC continued to deal with the same individuals. FNB was organized as a Massachusetts business trust. All of its shares were owned or controlled by First National Boston Corporation, a bank holding company that also owned all of the stock of the Bank. The three corporate entities the Bank, FNB, and First National **[**3]** Boston Corporation were located in the same building, shared common offices, had common directors, and, at times, used one another's stationery.

In August 1972 FNB required BC to employ John Horvitt as a full-time business advisor, because it felt that BC was in a precarious financial condition. Horvitt continued as a business advisor to BC until early in May 1974. BC filed a Chapter XI bankruptcy proceeding on July 2, 1974.

From a stipulation dated December 23, 1974, and filed in BC's bankruptcy proceeding, it also appears that in August of 1972 the Fireman Realty Trust, a trust comprised of the owners and directors of BC, granted to FNB, as agent for the Bank, mortgages on certain properties owned by the trust in Miami, Florida, and in Braintree **[*830]** and Stoughton, Massachusetts. The trust also granted to the Bank a security interest in a beneficial interest of the

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* Of the Eastern District of Virginia, sitting by designation.

** Appellants spell Horvitt with two "t's"; appellees use one. We apologize to the gentleman if our spelling is incorrect.

trust in real estate in Chicago, Illinois. The stipulation also recites that Steven, Paul, Harry, and Samuel Fireman pledged private stockholdings to the Bank as further security for the loan.

The main thrust of the complaint is that the Bank, using FNB as a subsidiary, forced BC to hire Horvitt and that **[**4]** its purpose in doing so was not to strengthen the business position of BC, but to manage it so that the Bank's factors lien would be fully protected at all times. It is alleged that Horvitt insisted on increasing BC's line of credit with manufacturers and suppliers, thus increasing the debt owed the Bank at high interest rates. The management policy of Horvitt, allegedly carried out in concert with and at the request of the Bank, resulted, plaintiffs claim, in injury to BC, its shareholders and directors.

Paragraph two of the complaint grounds jurisdiction on *28 U.S.C. § 1348* [1] **[**5]** (banking association as party) and *28 U.S.C. § 1337* [2] **[**6]** (antitrust violations). Its causes of action are predicated on *12 U.S.C. § 1975*, [3] which grants a federal civil remedy to any person injured by the tying arrangement prohibited in *12 U.S.C. § 1972*, and *15 U.S.C. § 15*, [4] which grants a federal cause of action to a person injured in business or property by violations of the antitrust laws.

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[1] ***HN1***[] *§ 1348*. Banking association as party

The district court shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

[2] ***HN2***[] *§ 1337*. Commerce and antitrust regulations; amount in controversy, costs

(a) 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: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11) or section 219 of part II of such Act (49 U.S.C. 319), only if the matter in controversy for each receipt or bill of lading exceeds $ 10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11) or section 219 of part II of such Act (49 U.S.C. 319), originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $ 10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(As amended Oct. 20, 1978, Pub.L. 95-486, § 9(a), 92 Stat. 1633.)

[3] ***HN3***[] *§ 1975*. Civil actions by persons injured; jurisdiction and venue; amount of recovery.

Any person who is injured in his business or property by reason of anything forbidden in *section 1972* of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

Pub.L. 91-607, Title I, § 106(e), Dec. 31, 1970, 84 Stat. 1767.

[4] ***HN4***[] *§ 15*. Suits by persons injured; amount of recovery

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 the suit, including a reasonable attorney's fee.

Count I alleges that the defendants violated **[**7]** the tying prohibitions of *12 U.S.C. § 1972* [5] by forcing plaintiffs to hire Horvitt **[*831]** as a financial advisor. The district court granted summary judgment on the following grounds: that FNB was not the agent or subsidiary of the Bank; that, since the factoring agreement was with FNB, there could be no violation of *12 U.S.C. § 1972* because FNB was not a bank; that there was no showing of any anticompetitive tying arrangement.

[8]** Count II alleges that the forced hiring of Horvitt was an "illegal tie-in in restraint of a free market and free trade" in violation of *15 U.S.C. §§ 1-7*. This count was dismissed under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a cause of action.

Count IV alleges that the Bank violated *12 U.S.C. § 92a(a)* [6] by acting in a fiduciary capacity without obtaining a permit from the Comptroller of the Currency. The district court granted summary judgment on the ground that FNB, the lending entity, was not a bank and, therefore, not subject to the statute.

[9]** Count VIII, which was added in the amended complaint, does not set forth a specific cause of action. It is a summary of Counts I and II and alleges a violation of "Title 12 and Title 15 of U.S.C."

Counts III, V, VI, VII and IX are based on alleged violations of Massachusetts law. They were dismissed by the district court for lack of pendent jurisdiction on the authority of *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966)*.

Our approach to Count I is different from that of the district court. We start our analysis by assuming that FNB was the agent of the Bank. [7] The core issue, as we see it, is whether plaintiffs have stated a cause of action for a violation of *12 U.S.C. § 1972* by the Bank.

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[5] ***HN5***[] *12 U.S.C. § 1972* provides in pertinent part:

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

[6] ***HN6***[] *§ 92a*. Trust powers Authority of Comptroller of the Currency.

(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

[7] We intimate no ruling on whether or not summary judgment should have been granted for defendants on plaintiffs' claim that FNB was an agent of the Bank.

The legislative history of this statute reveals that it was aimed at preventing the use of the economic power **[**10]** of a bank to lessen competition or engage in unfair competitive practices. S.Rep. No. 1084, 91st Cong., 2d Sess., reprinted in (1970) U.S.Code Cong. & Ad.News, pp. 5519, 5535. It is specifically stated: "The committee does not intend, however, that the provision interfere with the conduct of appropriate traditional banking practices." Id. The purpose of the tying provision "is to prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire." Id.

[*832] The two cases that have considered alleged violations of *12 U.S.C. § 1972* are in agreement that the ***HN7***[] tying arrangements prohibited are those that require bank customers to accept or provide other services or products or refrain from dealing with other parties. *Duryea v. Third Northwestern Nat'l Bank, 606 F.2d 823, 825 (8th Cir. 1979)*; *Swerdloff v. Miami Nat'l Bank, 584 F.2d 54, 58 (5th Cir. 1978)*. See also *Costner v. Blount Nat'l Bank, 578 F.2d 1192 (6th Cir. 1978)*.

So also, it has been held that the tying prohibitions do not interfere with the conduct of appropriate **[**11]** traditional banking practices. *McCoy v. Franklin Savings Ass'n & Mortgage Management Co., 636 F.2d 172 (9th Cir. 1980)*; *Clark v. United Bank of Denver Nat'l Ass'n, 480 F.2d 235, 238 (10th Cir. 1973)*. In *Sterling Coal Co. v. United Am. Bank, 470 F. Supp. 964, 965 (E.D.Tenn.1979)*, the court held: "The Act does not prohibit attempts by banks to protect their investments." The court ruled specifically that conditioning the grant and extension of credit on the requirement that the bank supervise and control the plaintiff's checking account and other corporate affairs, including veto power over purchases and payments of dividends, was not prohibited by the Act. Id.

Plaintiffs argue that the forced hiring of Horvitt was in violation of *12 U.S.C. § 1972(1)(C)*, which forbids the extension of credit on the requirement "that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service(.)" [8] We are hard put to find any tie-in, let alone one which is prohibited. There is nothing in the pleadings, affidavits, and depositions filed indicating that Horvitt had any **[**12]** financial connection with either the Bank or FNB. Although we can understand how Horvitt might have provided additional security, in the form of management control, to the Bank, this does not come within the ambit of "additional credit, property or service" no matter how broadly those terms are construed. We add that in addition to there being no tie-in alleged or proved, in any event, the arrangement complained of falls within the range of appropriate traditional banking practices permissible under the Act.

Plaintiffs' pleadings have a Faustian ring; in return for credit, they delivered themselves into the hands of the Bank, and it insisted that its investment be protected by installing the devil Horvitt to run their company when it got into financial difficulty. Horvitt may have done everything plaintiffs allege, and the Bank may have instructed him to do so, but this was done **[**13]** in order to protect the Bank's investment. It is possible that some of the specific practices directed by Horvitt may have been tortious as to BC, [9] but since his retention constituted legitimate bank practice, such actions do not implicate any prohibited tying arrangements. We rule that plaintiffs have failed to state a cause of action for violation of *12 U.S.C. § 1972*.

Our ruling that the pleadings do not admit of a claim that the actions of the Bank or FNB were intended to or resulted in the lessening of competition or encouraging unfair competitive practices also disposes of Count II. This count was properly dismissed by the district court for failure to state a cause of action. ***HN8***[] For a tying arrangement to violate the Sherman Act, it must, to some extent, have the effect of restraining free competition in the market for the tied product. *Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 78 S.* ***[**14]*** *Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*. Here, there were no facts alleged which indicated any restraint of competition in the market for services such as Horvitt provided, even if such a market exists.

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8 For some reason, plaintiffs in their brief at 31 have substituted numbers for the alphabetical listings used in the statute.

9 We express no opinion on whether plaintiffs have stated a cause of action under Massachusetts law.

Nor can we see how Horvitt's hiring had any effect on competition in the recreational **[*833]** goods market, except, of course, that the demise of BC, which plaintiffs attribute to Horvitt's management, decreased the number of companies in that field by one. There is nothing in the material filed by plaintiffs alleging or suggesting that the Bank forced BC to hire Horvitt so that the business posture of a competitor or competitors of BC would be strengthened at BC's expense. And there is nothing suggesting that the Bank or FNB had any interest, direct or indirect, in such a competitor. The observations we made in *A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir. 1980)*, are pertinent:

> While it is not inconceivable that "mere" unfair business practices, or business torts, could in the proper situation constitute an antitrust violation, see *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 560 (1st Cir. 1974)*, cert. denied, *421 U.S. 1004,* ***[**15]*** *95 S. Ct. 2407, 44 L. Ed. 2d 673 (1975)*, the transmutation of these state law torts into federal antitrust violations would have to be based upon a finding that the injuries for which compensation is sought have an unreasonable effect on competition, as well as on a particular competitor. See III P. Areeda & D. Turner, ***Antitrust Law*** P 737 (1978).

The gravamen of Count IV is contained in paragraph 50 of the complaint:

> The defendant Bank violated Title *12, U.S.C., Section 92A*; that it did not receive a permit from the Comptroller to take on a fiduciary capacity with a separate corporation; that the Bank not only unlawfully assumed a fiduciary duty, but it breached that duty as well.

We must assume that plaintiffs were referring to *section 92a(a)*, see footnote 6, supra, because it is only this section that authorizes the Comptroller of the Currency to permit national banks to act in a fiduciary capacity. As the district court pointed out, the purpose of this statute is to allow national banks to compete on an equal footing with state banks as fiduciaries. Our analysis again assumes that the Bank acted through FNB. It is difficult to discern a fiduciary relationship **[**16]** between the Bank and any of the plaintiffs. In paragraph 49 of the complaint it is asserted that the defendants "had a fiduciary duty to promote the interest of the plaintiff BCRI and that this duty was breached by actions which promoted the interests and accumlated (sic) debt to the Bank at the detriment and disadvantage of the plaintiffs." The scope of "fiduciary" is specified in the statute; national banks may be granted

> the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

12 U.S.C. § 92a(a). It would indeed be stretching the definition of fiduciary to hold that a bank, by lending money on a factors lien agreement, owes a fiduciary duty to the borrower. The pleadings and other material filed do not allege any facts indicating that there was a fiduciary relationship between the Bank or FNB and BC, and therefore defendants were entitled **[**17]** to summary judgment as a matter of law. *Fed.R.Civ.P. 56(c)*. [10]

[18]** We affirm the district court's dismissal of Count VIII. This count was only a conclusory **[*834]** summary of Counts I and II and stated no separate cause of action.

Finally, we turn to the pendent state claims. "It has consistently been recognized that ***HN9***[] pendent jurisdiction is a doctrine of discretion not of plaintiff's right." *United Mine Workers v. Gibbs, 383 U.S. at 726, 86 S. Ct. at 1139*;

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[10] The question of whether or not plaintiffs have standing to sue as to this claim is not without difficulty. Although it is doubtful that plaintiffs could meet the test of *Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)*, the predecessor statute of *12 U.S.C. § 93*, which prescribed the actions that the Comptroller could take for violations of the National Bank Act, was construed by the Supreme court to give a private cause of action to a stockholder who suffered injury by relying on false bank reports. *Chesbrough v. Woodworth, 244 U.S. 72, 76-77, 37 S. Ct. 579, 581-82, 61 L. Ed. 1000 (1916)*. In *Harmsen v. Smith, 542 F.2d 496 (9th Cir. 1976)*, the Ninth Circuit relied on Chesbrough to rule that *12 U.S.C. § 93*, which sets forth the procedures, penalties and remedies available to the Comptroller of the Currency for violations of the National Bank Act, including *§ 92a(a)*, can also be the basis for a private right of action. See also *Seiden v. Butcher, 443 F. Supp. 384 (S.D.N.Y.1978)*.

see *Landrigan v. City of Warwick, 628 F.2d 736, 748 (1st Cir. 1980)*. Plaintiffs made a deliberate, if not very well reasoned, choice to proceed in federal court. They have been unable to cross the federal threshold. The district court did not abuse its discretion in dismissing the pendent jurisdiction claims.

Affirmed.

Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank N.A.

United States Court of Appeals for the First Circuit

February 5, 1981 Heard; May 19, 1981 Decided

No. 80-1350

Reporter

649 F.2d 36 *; 1981 U.S. App. LEXIS 13116 **; 1981-1 Trade Cas. (CCH) P64,017

CORDOVA & SIMONPIETRI INSURANCE AGENCY INC., Et Al., PLAINTIFFS, APPELLANTS, v. CHASE MANHATTAN BANK N.A., Et Al., DEFENDANTS, APPELLEES.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO [HON. JUAN M. PEREZ-GIMENEZ, U.S. District Judge]

Core Terms

interstate commerce, Sherman Act, territory, policies, self-government, district court, dealers, defendants', Relations, antitrust, restraint of trade, local affairs, financed, locally inapplicable, local matter, respondents', reinsurance, broker

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

See § 1 of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

See § 3 of the Sherman Act.

Governments > State & Territorial Governments > General Overview

HN3[] **Governments, State & Territorial Governments**

Pursuant to the Puerto Rican Federal Relations Act, 64 Stat. 319 (1951), Puerto Rico may adopt its own Constitution.

Governments > State & Territorial Governments > General Overview

Governments > Legislation > Interpretation

HN4[] Governments, State & Territorial Governments

For purposes of statutes such as the Sherman Act which by their terms apply to "intra-territory" but not to "intra-state" activities, the Commonwealth of Puerto Rico is to be treated like a state and not like a territory.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Interpretation

HN5[] Antitrust & Trade Law, Sherman Act

Whether Puerto Rico is to be treated as a state or a territory for purposes of the Sherman Act (Act) depends upon the character and aim of the Act. Words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.

Governments > State & Territorial Governments > Relations With Governments

HN6[] State & Territorial Governments, Relations With Governments

Congress has progressively recognized the right of self-government of the people of Puerto Rico.

Governments > State & Territorial Governments > Relations With Governments

HN7[] State & Territorial Governments, Relations With Governments

Puerto Rico's status has changed from that of a mere territory to the unique status of Commonwealth. The United States Government's relations with Puerto Rico have changed from being bounded merely by a territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico constitutions, the Puerto Rican Federal Relations Act, 64 Stat. 319 (1951), and the rights of the people of Puerto Rico as United States citizens. The purpose of such legislation is to accord to Puerto Rico the degree of autonomy and independence normally associated with a State of the Union.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > State & Territorial Governments > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

As a general matter, the Sherman Act ceases to apply to purely local affairs once territories become states, leaving state governments free to enact various local antitrust laws broadly consistent with general federal policy, but occasionally divergent as to details. The states are clearly able to adopt variations as to purely local matters. There is no reason of policy discernible in the Sherman Act for treating Puerto Rico differently, given a general congressional intent to grant Puerto Rico state-like autonomy.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > State & Territorial Governments > General Overview

HN9[] **Legislation, Expiration, Repeal & Suspension**

See § 6 of the Puerto Rican Federal Relations Act, 64 Stat. 320 (1951).

Governments > State & Territorial Governments > General Overview

Governments > Legislation > Effect & Operation > General Overview

HN10[] **Governments, State & Territorial Governments**

See § 9 of the Puerto Rican Federal Relations Act.

Antitrust & Trade Law > Sherman Act > Claims

Governments > Legislation > Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN11[] **Sherman Act, Claims**

It is well established that to satisfy the "interstate commerce" requirements of §§ 1 and 2 of the Sherman Act, a challenged activity must either occur in interstate commerce or while wholly local in nature, nevertheless substantially affect interstate commerce. In showing a connection between defendant's' activities and interstate commerce, plaintiff need not show that defendant's unlawful conduct itself had an effect upon interstate commerce. To establish the jurisdictional element of a Sherman Act violation it would be sufficient for plaintiff to demonstrate a substantial effect on interstate commerce generated by defendant's activity. If establishing jurisdiction requires a showing that unlawful conduct itself had an effect on interstate commence, jurisdiction will be defeated by a demonstration that an alleged restraint failed to have its intended anticompetitive effect.

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Sherman Act, Penalties**

For purposes of §§ 1 and 2 of the Sherman Act, plaintiff need not prove that defendant's unlawful activities have actually affected interstate commerce. However, defendant's business still must be so connected with interstate commerce that it is logical, as a matter of practical economics, to believe that an unlawful activity will affect interstate commerce. For jurisdictional purposes plaintiff must point to the relevant channels of interstate commerce logically affected by defendant's unlawful conduct.

Counsel: Gilberto Mayo Aguayo, Hato Rey, P. R., with whom Cancio, Cuevas & Mayo, Hato Rey, P. R., was on brief, for plaintiffs, appellants.

Jay A. Garcia Gregory, San Juan, P. R., with whom Fiddler, Gonzalez & Rodriguez, San Juan, P. R., was on brief, for defendants, appellees.

Judges: Before CAMPBELL, BOWNES and BREYER, Circuit Judges.

Opinion by: BREYER

Opinion

[*37] Plaintiffs brought an antitrust action alleging that defendants entered into an agreement violating sections 1 and 3 of the Sherman Act. [1] ***HN1***[] Section 1 forbids agreements "in restraint of trade or commerce among the several States"; ***HN2***[] section 3 forbids agreements "in restraint of trade or commerce in any Territory of the United States." The district court dismissed the complaint, holding that plaintiffs did not make sufficient showing of an effect upon interstate commerce to fall within the reach of section 1, and that, in light of the change in Puerto Rico's status from "territory" to "Commonwealth", section 3 no longer applies to Puerto Rico. We affirm the judgment of the district court. **[**2]**

I.

Plaintiffs are an insurance broker and its president who, among other activities, arranged for automobile dealers to obtain "single interest" insurance policies. These policies insure a dealer against loss of the unpaid amount of the loan on each car that he sells. If, for example, a customer buys a $ 5,000 car, finances it with a $ 3,000 loan, and then refuses to pay the loan, the policy satisfies the dealer's obligation on the loan and would pay $ 3,000 directly to the bank that had financed the purchase of the car. Typically, these policies are issued under a master agreement, insuring loans on all cars sold by the dealer, financed through whatever bank is the dealer's customary source of funds. [2]

[3]** Plaintiffs claim that they were the agent (or broker) for two car dealers who obtained their financing for auto sales from the Puerto Rico branch of the Chase Manhattan Bank. In seeking policies, plaintiffs, as a broker, would contact a general agent ("Benitez") who, in turn, obtained the policies from Puerto Rico Fire and Casualty Company. Evidently, Chase, the ultimate beneficiary of the policies, approved the arrangement.

Plaintiffs' antitrust claim, in essence, asserts that after Puerto Rico Fire and Casualty cancelled the policies because of losses, [3] Chase and Puerto Rico Fire and Casualty agreed with each other to reinstate the policies, but without making use of plaintiffs' brokerage services. Rather, the auto dealers were to place their order for policies directly through Benitez, Puerto Rico Fire and Casualty's general agent. Plaintiffs assert **[*38]** that this arrangement among Chase, Benitez, Puerto Rico Fire and Casualty (and presumably the auto dealers) amounts to

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[1] Plaintiffs also alleged a violation of section 2 of the Sherman Act, but alleged no facts sufficient to make out a separate offense. This allegation adds nothing to the issue whether an effect on "commerce" must be established under sections 1, 2 and 3.

[2] The bank would seem to be the primary beneficiary of the policy; presumably the dealer is the purchaser of the policy because the policy proceeds satisfy the dealer's liability to the bank for the remainder due on the car customer's defaulted loan.

[3] It is not completely clear from the record whether Puerto Rico Fire and Casualty cancelled the policies, which it had a right to do, or merely threatened to cancel.

an agreement in restraint of trade, injuring competition in the Puerto Rico "single interest" insurance policy business and depriving plaintiffs of commissions.

[4]** After depositions were taken and a pre-trial order was approved, defendants moved to dismiss the complaint for lack of subject matter jurisdiction. They claimed an inadequate showing of effect upon interstate commerce. Plaintiffs' reply referred to evidence in the depositions, which stated that the Puerto Rico insurance companies reinsured policies on the mainland United States, and plaintiffs attached two exhibits purporting to demonstrate this reinsurance. After reviewing the motion, response, and this evidence on "commerce effects", the district court dismissed the complaint.

II.

The first, and most important, question that this case presents is whether section 3 of the Sherman Act applies to Puerto Rico. If so, no effect on interstate commerce need be shown, for section 3 governs restraints of trade within "any territory". The Supreme Court, in 1937, specifically held that section 3 applied to *Puerto Rico. Puerto Rico v. Shell Co., 302 U.S. 253, 58 S. Ct. 167, 82 L. Ed. 235 (1937)*. ***HN3***[] But, in 1951 Congress passed the Puerto Rican Federal Relations Act, 64 Stat. 319, ("FRA") pursuant to which Puerto Rico adopted its own Constitution. Does the coming into effect of the FRA and this **[**5]** Constitution mean that certain federal acts, such as the Sherman Act, which apply within territories but not within states, can no longer be given greater effect as applied to Puerto Rico than as applied to states of the Union? Chief Judge Magruder first posed this question in 1953. [4] This court discussed the question, but did not answer it definitively, in *Mora v. Mejias, 206 F.2d 377 (1st Cir. 1953)*. [5] **[**6]** Subsequently, the District Court for the District of Puerto Rico in a series of opinions refused to apply to "intra-commonwealth" activities the Federal Firearms Act, the Federal Alcohol Administration Act, and the Sherman Act all statutes which, by their terms, apply to "intra-territory", but not to "intra-state", activities. [6] ***HN4***[] These district court judges reasoned that, for purposes of these statutes, the Commonwealth of Puerto Rico is to be treated like a state and not like a territory. The district court in this case followed their approach. We hold that the district court is correct.

A.

HN5[] Whether Puerto Rico is now to be treated as a state or a territory for purposes of the Sherman Act

> depends upon the character and aim of the act. Words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances **[**7]** under which the words were employed.

Puerto Rico v. Shell Co., 302 U.S. at 258, 58 S. Ct. at 169. Using these criteria, the Court, in Shell, held that Sherman Act section 3 did apply to Puerto Rico and coexisted with Puerto Rico's own local ***antitrust*** **[*39]** ***law***. The Court noted that Congress wished to deal comprehensively with restraints of trade, that it wished to exercise all the constitutional power that it possessed, see *Atlantic Cleaners and Dyers v. United States, 286 U.S. 427, 433, 52 S. Ct. 607, 608, 76 L. Ed. 1204 (1932)*, and that there "is no reason why Puerto Rico should not be held to be a

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[4] Magruder, The Commonwealth Status of Puerto Rico, 15 U.Pitt.L.Rev. 1 (1953).

[5] See also *Caribtow Corp. v. Occupational Safety & Health Review Commission, 493 F.2d 1064, 1068 n.10 (1st Cir. 1974)* (question whether Congress has power to legislate concerning purely local Puerto Rico matters where it could not do so as to a state not reached).

[6] Federal Firearms Act: *United States v. Figueroa Rios, 140 F. Supp. 376, 381* (D.P.R.1956.) Federal Alcohol Administration Act: *Trigo Bros. Packing Corp. v. Davis, 159 F. Supp. 841 (D.P.R.1958)*, vacated on other grounds, *266 F.2d 174 (1st Cir. 1959)*. Sherman Act: *Truxes v. Rolan Electric Corporation, 314 F. Supp. 752, 757 (D.P.R.1970)*; *Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Company, 303 F. Supp. 414, 419 (D.P.R.1969)*; *Cooperativa de Seguros Multiples de Puerto Rico v. San Juan, 289 F. Supp. 983, 987 (D.P.R.1968)*; *David Cabrera, Inc. v. Union de Choferes y Duenos, 256 F. Supp. 839 (D.P.R.1966)*.

"territory' within the meaning of section 3 of the Sherman Act." *Puerto Rico v. Shell Co., 302 U.S. at 259, 58 S. Ct. at 170*. The Shell Court was considering, however, whether the Sherman Act's framers would have intended it to apply to Puerto Rico as a "territory" or not to apply at all.

We consider the quite different question of whether the Sherman Act's framers, if aware of Puerto Rico's current constitutional status, would have intended it to be treated as a "state" or "territory" under the Act. And, we consider that question in light of the subsequent enactment into **[**8]** law of the Federal Relations Act and the promulgation of the Puerto Rico Constitution. Did these subsequent events so change the legal status of Puerto Rico that the Shell decision no longer has effect?

B.

The FRA and the Puerto Rico Constitution were intended to work a significant change in the relation between Puerto Rico and the rest of the United States. In its last years of Spanish rule Puerto Rico had achieved a measure of independence, [7] but, under the Treaty of Paris, which ceded Puerto Rico to the United States, the island lost its autonomy. It became a "territory" of the United States [8] **[**10]** and subject to the command of Congress. [9] From 1900 to 1917, Puerto Rico was governed by the First Organic Act, [10] which created a body politic known as the "People of Porto Rico", imposed a short-lived tariff, and made no provisions for United States citizenship. [11] In 1917, Congress enacted a Second Organic Act, [12] providing for a greater measure of self-government. [13] The Second Organic Act contained a *bill of rights* [14] and a grant of collective United States citizenship to the people of Puerto Rico. [15] In the Supreme Court's view, the effect of these acts was to give Puerto **[**9]** Rico a legislative autonomy similar to that of the states in local matters. *Puerto Rico v. Shell Co., 302 U.S. at 261-63, 58 S. Ct. at 171-172*. Yet, Congress retained major elements of sovereignty. In cases of conflict, Congressional statute, not Puerto Rico law, would apply no matter how local the subject; [16] and Congress insisted that acts of the Puerto Rico legislature be reported to it, retaining the power to disapprove them. [17] Those federal acts applying to territories by and large applied to Puerto **[*40]** Rico. [18] Thus, prior to 1950, Puerto Rico's legal status was closer to that of a "territory" than of a "state". [19]

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[7] Puerto Rico had become a semi-autonomous overseas province of the Kingdom of Spain. Royal Decree of November 25, 1897, Constitution Establishing Self-Government in the Island of Puerto Rico by Spain in 1897, Documents on the Constitutional History of Puerto Rico (1948).

[8] Under Article II of the Treaty of Paris, Spain ceded the island of Puerto Rico to the United States, and in Article IX it was provided that, "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." 30 Stat. 1754, 1759 (1899).

[9] *U.S. Constitution, Article IV, § 3, Clause 2*; see also Article 1, § 8, Clause 18; see generally, Cabranes, Citizenship and the American Empire, 127 U.Pa.L.Rev. 391 (1978).

[10] Popularly known as the Foraker Act, 31 Stat. 77 (1900).

[11] Estrella, The ***Antitrust Law*** in Puerto Rico, 28 Revista del Colegio de Abogados de Puerto Rico 505 (1968).

[12] Popularly known as the Jones Act, 39 Stat. 951 (1917).

[13] Committee on Interior and Insular Affairs, Puerto Rico A Survey of Historical, Economic and Political Affairs, U.S. House of Representatives (1959) at 6.

[14] Section 2 of the Jones Act, 39 Stat. at 951.

[15] Section 5 of the Jones Act, 39 Stat. at 953.

[16] Sections 37 and 57 of the Jones Act, 39 Stat. at 964, 968.

[17] Section 34 of the Jones Act, 39 Stat. at 961.

[18] See *Puerto Rico v. Shell Co., 302 U.S. at 257-59, 58 S. Ct. at 169-170*.

The FRA was intended to end this subordinate status. It was introduced into the House of Representatives by the Puerto Rico resident commissioner **[**11]** on March 13, 1950. It was titled, "A bill to provide for the organization of a constitutional government by the People of Puerto Rico". [20] It was approved by the 81st Congress as Public Law 600. [21] A short preamble suggested that its object was to provide additional self-government. [22] After a favorable vote on the Act, a constitutional convention was held in Puerto Rico. A constitution was adopted with support of a majority of the voters of Puerto Rico and, upon recommendation of the President, Congress approved the Constitution as a "compact" with the people of Puerto Rico on July 3, 1952. [23]

[12]** The theme that consistently runs throughout the legislative history of Puerto Rico's attainment of Commonwealth status is that Commonwealth represents the fulfillment of a process of increasing self-government over local affairs by the people of Puerto Rico. ***HN6***[] The preamble of Public Law 600 notes that Congress "has progressively recognized the right of self-government of the people of Puerto Rico." The Senate Report accompanying S.3336 stated that the Organic Act of 1917 ensured "almost complete political and economic autonomy", whereas "This measure is designed to complete the full measure of local self-government in the island " The Report noted that the compact was "a logical step in the process of political freedom and economic development." [24]

In the Constitutional Convention of Puerto Rico, resolutions were adopted in February 1952 that confirmed the understanding that Puerto Rico was to attain legislative autonomy **[**13]** in local matters. Resolution 22, for example, defined the term "commonwealth" as "a state which is free of superior authority in the management of its own local affairs." Resolution 23 declared "that by the approval of a constitution we attain the goal of complete self-government". [25]

In transmitting the newly adopted Constitution to Congress, President Truman recognized that with such approval "full authority and responsibility for local self-government will be vested in the people of Puerto Rico." And in signing the joint resolution by which Congress approved the new Constitution, President Truman characterized the Constitution as the "culmination of a consistent policy of the United States to confer an ever-increasing measure of local self-government upon the people of Puerto Rico." [26]

[14]** Prior to approval of the Puerto Rico Constitution the United States had regularly transmitted to the Secretary General of the United Nations statistical and other information of a technical nature relating to economic, social and educational conditions in Puerto Rico pursuant to Article 73 of the U.N. Charter. Article 73 requires such reports from members who have assumed responsibilities "for the administration of territories whose people have not yet attained **[*41]** the full measure of self-government." [27] Shortly after approval of the Constitution, the United States

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[19] *Mora v. Mejias, 206 F.2d 377, 386-88 (1st Cir. 1953)*.

[20] H.R. 7674, 81st Cong.2d Sess. Introduced in the Senate as S.3336.

[21] 64 Stat. 319; *48 U.S.C. §§ 731b*-e.

[22] Id.

[23] Pub.L.No.477, 82nd Cong., 66 Stat. 327. Congressional approval was conditioned on requirements that amendments to the Puerto Rico Constitution be consistent with the United States Constitution, the Puerto Rican Federal Relations Act, and Public Law 600. All such conditions were adopted and approved by the Puerto Rico Constitutional Convention and a second referendum.

[24] Senate Report No. 1779, 81st Cong., 2d Sess., June 6, 1950 at 2 (emphasis added).

[25] Quoted in *Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Company, 303 F. Supp. 414, 418 (D.P.R.1969)*.

[26] Id.

[27] U.N. Charter Article 73(e).

advised the U.N. that it would no longer report with respect to Puerto Rico since Puerto Rico was now a self-governing territory. [28]

[15]** The internal policy of the executive branch was consistent with this statement. For example, in 1961, President Kennedy sent a memorandum to all heads of the executive departments and agencies, which stated in part:

> The Commonwealth structure, and its relationship to the United States which is in the nature of a compact, provide for self-government in respect of internal affairs and administration subject only to applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act, and the acts of Congress authorizing and approving the constitution.
>
> On November 27, 1953, the General Assembly of the United Nations recognized that the people of the Commonwealth of Puerto Rico, exercising effectively the right of self-determination in a free and democratic way, had achieved a new constitutional status and that, in view of this new status, it was appropriate that the United States should cease the transmission of information with regard to Puerto Rico under Article 73(e) of the Charter. U.N.Cen.Ass.Res. 748 (VIII) (1953)
>
> All departments, agencies, and officials of the executive branch of the Government should faithfully observe and respect this **[**16]** arrangement in relation to all matters affecting the Commonwealth of Puerto Rico. If any matters arise involving the fundamentals of this arrangement, they should be referred to the Office of the President.

Memorandum of July 25, 1961, *26 Fed.Reg. 6695*.

HN7[] In sum, Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens. As the Supreme Court has written, "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with a State of the Union " *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 594, 96 S. Ct. 2264, 2277, 49 L. Ed. 2d 65 (1976)*.

HN8[] The significance of this change from the point of view of the Sherman Act arises out of the fact that, **[**17]** as a general matter, the Sherman Act ceases to apply to purely local affairs once territories become states, leaving state governments free to enact various local antitrust laws broadly consistent with general federal policy, but occasionally divergent as to details. [29] The local Puerto Rico antitrust act, though virtually identical to the federal act at the time Shell was decided, was subsequently modified and has ceased to replicate federal law in **[*42]** every detail. [30] **[**19]** The states are clearly able to adopt such variations as to purely local matters. And, there is no

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[28] Memorandum by the Government of the United States of America concerning the Cessation of Transmission of Information under Article 73(e) of the Charter with regard to the Commonwealth of Puerto Rico. Annex II, U.N. Doc. A/Ac.35/L.121 at 8 (1953). See generally Magruder, The Commonwealth Status of Puerto Rico, 15 U.Pitt.L.Rev. 1, 12-13 (1953). The memorandum stated:

Congress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision. Those laws which directed or authorized interference with matters of local government by the Federal Government have been repealed.

[29] See *Coyle v. Smith, 221 U.S. 559, 31 S. Ct. 688, 55 L. Ed. 853 (1911)*; *Moore v. United States, 85 F. 465 (8th Cir. 1898)*.

[30] The Puerto Rico Anti-Monopoly Act of 1964 (Act No. 77 of June 25, 1964) superseded the Puerto Rico Act of March 14, 1907, and draws heavily on federal legislation. However, there are important differences. For example, the prohibition of restraints of trade in the Puerto Rico Act is expressly limited to "unreasonable" restraints. But see *Standard Oil v. U. S., 221 U.S. 1, 31 S. Ct.*

reason of policy discernible in the Sherman Act for treating Puerto Rico differently, given a general Congressional intent to grant Puerto Rico state-like autonomy. [31] We believe that there would have to be specific evidence or clear policy reasons embedded in a particular statute to demonstrate a statutory intent to intervene more extensively into the local affairs of post-Constitutional Puerto Rico than into the local affairs of a state. Thus, it is fair to assume that the framers of the Sherman Act, had they been aware of the FRA and subsequent Constitutional developments, would have intended that Puerto Rico **[**18]** be treated as a "state" under the Act, once Commonwealth status was achieved.

This holding is consistent with that of the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974)*. There, the Court considered whether Puerto Rico was a "state" for the purposes of 28 U.S.C. § 2281, which required a three-judge court for a proceeding seeking to enjoin the operation of a "state statute" as unconstitutional. The Court noted that before 1950 the courts had held that this statute did not apply to Puerto Rico because it was a territory, not a state. But, the FRA and Constitution changed Puerto Rico's status so **[**20]** that the statute, applicable to states, applied to Puerto Rico as well. Similarly, as previously pointed out, when lower courts have considered other statutes that apply to intra-territorial, but not to intra-state, transactions, they have held that after 1952, Puerto Rico is to be treated as a state and not a territory. *United States v. Figueroa Rios, 140 F. Supp. 376 (D.P.R.1956)* (Federal Firearms Act); *Trigo Bros. Packing Corp. v. Davis, 159 F. Supp. 841 (D.P.R.1958)*, vacated on other grounds, *266 F.2d 174 (1st Cir. 1959)* (Federal Alcohol Administration Act). And, the National Labor Relations Board has held the same in respect to the Labor Management Relations Act of 1947. *Hilton Hotels International, Inc., 37 L.R.R.M. 1474* (P.R.Lab.Rel.Bd.1955). [32]

[21]** **[*43]** C.

502, 55 L. Ed. 619 (1911). The Puerto Rico Act's anti-merger provision extends to acquisitions by "any person", defined to include natural persons and unincorporated associations, which were not included within the comparable provision of the Clayton Act. The Puerto Rico Act's anti-merger provisions also exempt asset acquisitions which are for the purpose of developing new local industries. There is no comparable provision under federal law. See generally Estrella, ***Antitrust Law*** in Puerto Rico, 28 Revista del Colegio de Abogados de Puerto Rico 505, 580-709 (1968).

[31] The application of section 2 of the Sherman Act to Puerto Rico is a different matter, for there is no comparable provision in section 3 to the section 2 prohibition of monopolization. Whether section 2 applies to Puerto Rico following Commonwealth status, when no equivalent prohibition applied before it, is an issue not before us and not briefed. Consideration of such an issue would require, among other things, exploration of the reasons why Congress chose not to extend such a prohibition to the territories.

[32] We find nothing to the contrary in *First Federal Savings and Loan Association of Puerto Rico v. Hector L. Ruiz de Jesus, 644 F.2d 910 (1st Cir. 1981)*. In that case, we held that post-1952 Banking Act amendments did not alter the scope of *section 632* of the federal banking code, *12 U.S.C. § 632*. *Section 632*, enacted in 1933, grants federal question jurisdiction to district courts in all civil suits involving "international or foreign banking, or banking in a dependency or insular possession of the United States " where a federally chartered corporation is a party to the suit. Post-Commonwealth Banking Act amendments did not reflect any congressional intent to narrow this grant of jurisdiction by discontinuing federal question jurisdiction in civil cases involving banking in Puerto Rico where a federally chartered corporation is a party. And, Commonwealth status itself, although it established the full measure of local self-government, did not necessarily withdraw this jurisdictional grant. Such a grant, in contradistinction to congressional regulation of local affairs, does not threaten the balance between federal prerogatives and local autonomy. Although there is not a parallel grant of jurisdiction over banking transactions in a state where a federally chartered corporation is a party, that fact alone does not suggest that, as a matter of comity, *section 632* no longer applies to Puerto Rico. Among other things, its history, language and mercantile custom may, in Congress' view, render Puerto Rico sufficiently different as to merit availability of a federal forum for a federally chartered corporation banking there. Cf. *12 C.F.R. § 211.2(a)*, *213.2(b) (1979)*; *12 C.F.R. § 211.2(f) (1980)* (Federal Reserve Board regulations which define the terms "foreign", "foreign country" and "abroad" to include the Commonwealth of Puerto Rico). Such a result respects the interests of both sovereigns. Finally, there have been different historical understandings with respect to section 3 of the Sherman Act and *section 632* of the federal banking code. The Puerto Rico District Court held soon after Commonwealth status that section 3 of the Sherman Act no longer applied to Puerto Rico, whereas that court and this court until quite recently assumed that *section 632* continued to apply to banking transactions in Puerto Rico.

The result that we reach here can be supported as well by two other independent lines of argument. ***HN9***[] First, Section 6 of the Federal Relations Act states that all federal "laws or parts of laws inconsistent with the provisions of this Act are hereby repealed." [33] A strong argument can be made that Sherman Act section 3, as applied to intra-commonwealth transactions, is inconsistent with the autonomy that the FRA grants, and it is, therefore, repealed.

Second, the Sherman Act applies to Puerto Rico by virtue of a provision originally contained in the Foraker Act of 1900, reenacted in the Second Organic Act of 1917, and reenacted again as ***HN10***[] section 9 of the FRA a provision that states "The statutory laws of the United States not locally inapplicable, shall have the same force and effect in Puerto Rico as in the United States " (Emphasis added.) One could claim that **[**22]** the "intra-territorial" aspect of Sherman Act section 3 is now "locally inapplicable" to Puerto Rico. This argument has some force, for an examination of the history of the "locally inapplicable" language reveals a design to defer to local legislatures in local matters and an intent to interpret the phrase dynamically: [34] **[**24]** **[*44]** changing events, such as enactment of a different local ***antitrust law*** or the change in the island's legal status, might well make Sherman Act section 3 "locally inapplicable" today though it was applicable at the time of the Shell decision in 1937. Given our holding, we do not believe it necessary to explore these theories in detail, or to choose among them, for the same

[33] Pub.L.No.600 § 5, 64 Stat. 320, continuing in force section 58 of the Second Organic Act, and Pub.L.No.600 § 6, 64 Stat. 320.

[34] The phrase "not locally inapplicable" originated in Henry Clay's Report of the Committee of Thirteen, the proposed Compromise of 1850. As part of the settlement of the clash of interests sparked by the Wilmot Proviso (a proposed Congressional ban of slavery in New Mexico and other territories), the Compromise was silent on introduction of the "local" institution of slavery to these territories. The Southern view was that changing social and economic conditions (including adaptation to dry soil) might bring about slavery in New Mexico, perhaps supported by retained Mexican law and custom. In addition, the Southern view held that the territorial legislature should be free to recognize and support slavery even if such territorial law thereby superseded general federal law dealing with personal rights. Of course, the North differed strongly on the propriety of establishing slavery in New Mexico and took its chances on the dry soil and local sentiment. Thus, the phrase "not locally inapplicable" was viewed by its Southern proponents as a means by which New Mexico, should it choose to do so, could adopt slavery despite general federal laws dealing with personal rights. And, the Northerners apparently considered it sufficiently ambiguous as to minimize its import. The phrase "not locally inapplicable" (and elimination of the Wilmot Proviso) expressly left the issue of slavery in New Mexico to be determined by developing local social, economic and legislative conditions, and, thereby, staved off the political crisis that enveloped the nation several years later.

This history of the compromise language is perhaps of some continuing significance. Senator Foraker, in 1900, deliberately chose this model (rather than following the simpler Wisconsin territorial act model "so far as may be applicable"). His choice reflects, if anything, a more, rather than less, deferential view of the effect of local social, economic and legislative developments on general federal law. In sum, the phrase reflects at least some intent that not only developing social and economic conditions but also emerging territorial self-government could render general federal law inapplicable. Cf. *United States v. Ferrer, 613 F.2d 1188, 1192-93 (1st Cir. 1980)* (Puerto Rico has authority to enact local legislation inconsistent with federal maritime legislation). For the history of the phrase "not locally inapplicable", see Congressional Globe, 31 Cong. 1st Sess. 944-48 (May 8, 1850) (H. Clay); Hamilton, Prologue to Conflict, the Crisis and Compromise of 1850 89, 146-47, 204 (1964); Congressional Globe, 31 Cong. 1st Sess. 59, 72-73, 436-39, 461, 508-10, 567-73, 587, 592; Appendix 612-16, 902, 911, 1104-06, 1118, 1120, 1134, 1145-46, 1519-61, 1581-1630. The Wisconsin provision is set forth in Act of April 20, 1836, ch. 54 § 12, 5 Stat. 15. For Senator Foraker's report, see Temporary Civil Government for Puerto Rico, Report of the Committee on Public Lands and Puerto Rico to Accompany S.2264, S.Rep.No.249, February 5, 1900 at 5-6. On the Mexican law and Kearney Military Code as sources of New Mexico Territorial law, see *Leitensdorfer v. Webb, 1 N.M. 34, 55 (1853)*, aff'd *61 U.S. (20 How.) 176, 15 L. Ed. 891 (1857)*; see also Rodriguez-Antongiorgi, Review of Federal Relations on the Applicability of the United States Laws in Puerto Rico Subsequent to the Establishment of the Commonwealth in Puerto Rico, 26 Rev.Jur.U.P.R. 321, 343 (1957). On the use of the provision "not locally inapplicable" in other contexts, see *Examining Board v. Flores De Otero, 426 U.S. 572, 588-89 n.20, 96 S. Ct. 2264, 2274-75 n.20, 49 L. Ed. 2d 65 (1976)*, and see also, e. g., 31 Stat. 141 (Hawaii), 37 Stat. 512 (Alaska), and *Shuttle Corp. v. Transit Commission, 393 U.S. 186, 196* n.*, *89 S. Ct. 354, 360* n.*, *21 L. Ed. 2d 334 (1968)* (District of Columbia). For another expansive view of territorial legislative power over "local" matters and a limited view of Congressional power to legislate for the territories see Mr. Justice Campbell's concurring opinion in ***Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 513-14, 15 L. Ed. 691 (1856)***. Finally, for a discussion of the scope of the exception to federal law encompassed by the provision "not locally inapplicable", see Leibowitz, The Applicability of Federal Law to the Commonwealth of Puerto Rico, 56 Geo.L.J. 221, 234-39 (1967).

functional considerations underlie the application of these latter two theories as underlie the first, namely, a significant change in the degree of autonomy exercised by Puerto Rico over local affairs and the lack of any strong reason why the Sherman Act should apply to purely local matters in Puerto Rico but not the states. These considerations lead us to conclude that Sherman Act section 3 does not apply to Puerto Rico, whether one bases the result on a view of the "intent" of the Sherman **[**23]** Act's framers, on a "repeal" of inconsistent law implicit in FRA section 6, or on the view that section 3 is now "locally inapplicable" while section 1 is not. In other words, all roads lead to Rome. [35]

III.

The district court also held that plaintiffs failed to make a sufficient showing of impact upon "interstate commerce" to bring defendants' alleged conduct within Sherman Act sections 1 and 2. ***HN11***[] It is well established that to satisfy the "interstate commerce" requirements of these provisions, the challenged activity must either occur "in interstate commerce" or "while wholly local in nature, nevertheless substantially affect interstate commerce." *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)*. To show that the activity is "in" interstate commerce, plaintiffs would have to demonstrate, at least, that defendants' single interest insurance business "is an integral part" of an interstate **[**25]** transaction. *Goldfarb v. Virginia State Bar, 421 U.S. 773, 785, 95 S. Ct. 2004, 2012, 44 L. Ed. 2d 572 (1975)*. They do not claim that they can do so.

Rather, plaintiffs rely upon the second branch of the test and argue that they can show the defendants' activities significantly "affect" interstate commerce. The Supreme Court recently discussed this test in McLain, where it stated that in showing a connection between defendants' activities and interstate commerce, plaintiffs need not show that defendants' unlawful conduct "itself had an effect" upon interstate commerce. The Court wrote:

> To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the **[*45]** more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction required a showing that the unlawful **[**26]** conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anti-competitive effect. This is not the rule of our cases. See *American Tobacco Co. v. United States, 328 U.S. 781, 811, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1946)*; *United States v. Socony Vacuum Oil Co., 310 U.S. 150, 225, n.59, 60 S. Ct. 811, 846 n.59, 84 L. Ed. 1129 (1940)*.

McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. at 242-43, 100 S. Ct. at 509-510.

While the Court's language is somewhat ambiguous, its specific reference to "respondents' brokerage activity" would seem to require plaintiffs in that price-fixing case to do more than simply point to some aspect of defendants' business which involves interstate commerce. Were so minimal a showing sufficient, the most local of conspiracies would fall inside, or outside, the Sherman Act, depending upon the fortuitous circumstance of whether a defendant firm happened to be owned by an interstate conglomerate. The Court does not sanction that result. ***HN12***[] Rather, its opinion simply emphasizes that a plaintiff need not prove that a defendant's unlawful activities **[**27]** actually affected interstate commerce; [36] but it goes on to suggest that defendants' business still must be so connected with interstate commerce that it is logical, as a matter of practical economics, to believe that the unlawful activity will affect interstate commerce. Thus, the Court speaks of "the requirement that respondents' activities

[35] Whatever special considerations might move a court to hold that Congress did not intend section 2 of the Sherman Act to apply to Puerto Rico, see note 31 supra, would also lead a court to say that the FRA was not "inconsistent" with the nonapplication of section 2 or that section 2 was still "locally inapplicable". Again, all roads lead to Rome.

[36] To hold the contrary in a price-fixing case, such as McLain, would undo years of jurisprudence making clear that a plaintiff need only prove a price-fixing agreement, not the agreement's effects, in order to prevail. The cases cited by the Court, American Tobacco and Socony-Vacuum, make clear that the Court had just this problem in mind.

which allegedly have been infected by a price-fixing conspiracy be shown "as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. at 246, 100 S. Ct. at 511*, citing *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 745, 96 S. Ct. 1848, 1852, 48 L. Ed. 2d 338 (1976)*. This interpretation of McLain has been followed by the Tenth Circuit, which wrote that "for jurisdictional purposes a plaintiff must point to the relevant channels of interstate commerce logically affected by the defendant's unlawful conduct." *Crane v. Intermountain Health Care, 1980-81 Trade Cas. (CCH) P 63,743* (10th Cir. January 20, 1981). And, McLain, as so interpreted, has the practical virtue of allowing plaintiffs to proceed against those local price fixing **[**28]** agreements (and similar restraints of trade) that are most likely to affect interstate commerce without imposing, under jurisdictional guise, a "proof of effects" test that, in a turbulent, ever-changing economy, may be difficult, or impossible, to meet. [37]

Despite the liberality of this test, plaintiffs have failed to meet it here. When challenged by defendants' motion to dismiss, plaintiffs responded by pointing to the deposition **[**29]** of plaintiff Ramon Cordova Oliver, brokerage president, and two documents, which, they claimed, showed that defendants reinsured their "single interest" policies outside Puerto Rico. They made no offer of other, specific pieces of evidence. The district court found that these pieces of evidence did not show that any such reinsurance existed in this case. That finding is reasonable. The two documents consisted of a sample policy and a list of policies **[*46]** written by the firm (with coded numbers). They do not, on their face, describe reinsurance. Though plaintiffs were adequately informed of the need for evidence and were close to trial, they offered nothing else. [38]

Nor can it be claimed that the type of antitrust violation charged by the plaintiffs is, in the context of the "single-interest" insurance business, likely to have an impact upon **[**30]** interstate commerce as a matter of "practical economics". As the pre-trial order makes clear, plaintiffs do not allege price fixing. Neither do they charge a classical boycott: [39] They do not allege an agreement among competitors not to deal with a third party; rather, they claim an agreement among persons within a single chain of product supply, each of whom buys from, or sells to, one of the others. To be more specific, the agreement is between a customer for insurance, a financer/beneficiary of the policy, a broker, and an insurance company. If these claims assert any form of antitrust violation at all and we do not say that they do it must be some form of unlawfully exclusive supply arrangement (an agreement to patronize Benitez "exclusively" which plaintiffs would seek to prove unreasonable) or conceivably some form of unlawful "tie" ("Chase would supply the dealers with financing only if they agreed to buy insurance from Benitez"). Unlike price fixing, which directly affects price and output, the injury to competition worked by these types of agreements, if unlawful, would consist of making it more difficult for firms to enter the business of brokering "single interest" insurance **[**31]** policies. On the state of the record here, there is simply no reason to believe, in logic or practical economics, that any such injury could have more than an insubstantial effect upon interstate commerce.

The judgment of the district court is

Affirmed.

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[37] See *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*; *United States v. Trenton Potteries Co., 273 U.S. 392, 47 S. Ct. 377, 71 L. Ed. 700 (1927)*; 2 Areeda and Turner, ***Antitrust Law*** P 314 (1978).

[38] The brokerage president stated in a deposition that many firms engage in reinsurance; but his deposition does not show that defendants did so in this case.

[39] Whether these allegations fit within the boycott exception of the McCarran-Ferguson Insurance Regulation Act, *15 U.S.C. § 1013(b)*, was neither briefed nor argued.

Auburn News Co. v. Providence Journal Co.

United States Court of Appeals for the First Circuit

June 2, 1981, Argued ; September 23, 1981, Decided

No. 81-1047

Reporter

659 F.2d 273 *; 1981 U.S. App. LEXIS 17424 **; 1981-2 Trade Cas. (CCH) P64,298; 7 Media L. Rep. 1969

AUBURN NEWS COMPANY, INC., ET AL., PLAINTIFFS-APPELLEES, v. PROVIDENCE JOURNAL COMPANY, ET AL., DEFENDANTS-APPELLANTS.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND [HON. FRANCIS J. BOYLE, U.S. District Judge]

Core Terms

newspapers, preliminary injunction, antitrust, independent distributor, vertical integration, merits, distributors, district court, Sherman Act, distributorships, wholesale, distribution system, injunctive relief, distribute, enjoining, damages, papers

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

Criminal Law & Procedure > Sentencing > Fines

HN2[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 2*.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Private Actions, Remedies**

Private parties may be afforded preliminary injunctive relief in antitrust cases when and under the same conditions and principles as injunctive relief is granted by courts of equity, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

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

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

Before preliminary injunctive relief becomes available there must be a showing that there is no adequate remedy at law. In addition, a plaintiff must satisfy four criteria in order to be entitled to a preliminary injunction. The Court must find that plaintiff will suffer irreparable injury if the injunction is not granted; that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; that plaintiff has exhibited a likelihood of success on the merits; and that the public interest will not be adversely affected by the granting of the injunction. Application of these standards to a particular set of facts is not a mechanical process. None of these criteria should be slighted. The moving party must exhibit a likelihood of success on the merits.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5[] **Standards of Review, Abuse of Discretion**

The decision to grant or deny a preliminary injunction is reversible only for an abuse of discretion. It is also well settled, however, that the application of an improper legal standard in determining the likelihood of success on the merits is never within the district court's discretion. Similarly, misapplication of the law to particular facts is an abuse of discretion.

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

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To be sure, maximum price-fixing is per se illegal.

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

HN7[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Vertical integration may come in a variety of forms with different impacts on economic performance. Where substantial market power is absent at any one product or distribution level, vertical integration will not have an anticompetitive effect. Vertical integration by a monopolist, however, can have adverse consequences on competition because monopoly at one level of the production-distribution continuum may carry with it the ability to affect competition in earlier or later phases. Moreover, the lack of competition may have negative effects on efficiency and progressiveness. But vertical integration can also result in economic advantage to society. It can result in savings in market transaction costs and production economies. New efficiencies and innovations may ultimately yield lower prices on the end product. Integration can thus be a good faith effort to do business in more efficient ways.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN8[] **Antitrust & Trade Law, Sherman Act**

Any assessment of vertical integration must take into account the variables present in the particular situation. It is clear that vertical integration, as such without more, cannot be held violative of the Sherman Act, *15 U.S.C.S. § 1 et seq.* The extent of permissible integration must be governed by the other circumstances of individual cases.

Syllabus

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Counsel: Joseph V. Cavanagh, Jr., Providence, R. I., with whom Edward F. Hindle, Edwards & Angell, Providence, R. I., Daniel C. Kaufman and Waddey, Lundin & Newport, Nashville, Tenn., were on brief, for defendants-appellants.

Frank Licht, Providence, R. I. and David L. Foster, New York City, with whom Richard A. Licht, Letts, Quinn & Licht, Providence, R. I., Howard C. Buschman, III, Richard L. Posen, Jack A. Pawa, Willkie, Farr & Gallagher, New York City, Austin T. Stickells, Boston, Mass., Leonard Decof and Decof & Grimm, Providence, R. I., were on brief, for plaintiffs-appellees.

Judges: Before CAMPBELL, BOWNES and BREYER, Circuit Judges.

Opinion by: BOWNES

Opinion

[*274] Defendant-appellant Providence Journal Company (Journal) and its wholly-owned subsidiary, defendant-appellant Southern New England News Distributors, Inc. (SNENDI) appeal from a preliminary injunction of the District Court for the District of Rhode Island, enjoining them from refusing to deal with plaintiffs-appellees, eighteen independent wholesale newspaper **[**2]** distributors, and from using their customer lists. We vacate that part of the preliminary injunction enjoining appellants from not doing business with appellees. Because appellants apparently did not object to that part of the preliminary injunction forbidding them from using the customer list of appellees, [1.] we do not review it on appeal.

The Journal, a privately-owned corporation in Rhode Island, publishes and circulates The Providence Sunday Journal, The Providence Journal (Monday-Friday morning newspaper), The Evening Bulletin (Monday-Friday afternoon newspaper), and the Providence Journal Bulletin (Saturday morning newspaper) throughout Rhode Island and southeastern Massachusetts. The Evening Bulletin is the only newspaper facing direct competition from other Rhode Island local papers. The Journal's subsidiary, SNENDI, distributes directly to store accounts and to

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1. In their brief and reply brief, appellants do not discuss this prohibition at all.

home delivery carriers in parts of Rhode Island **[**3]** and southeastern Massachusetts. The Journal determines SNENDI policy and its circulation department employees directly supervise SNENDI personnel on a daily basis.

Appellees are sole proprietorships, family partnerships and family corporations which own and operate independent wholesale newspaper distribution businesses. They mainly purchase and resell Journal newspapers to home delivery carriers and store accounts in areas not directly covered by **[*275]** the Journal. During the week, most appellees do not distribute non-Journal newspapers. Two of the appellees supply less than three dozen copies of out-of-town newspapers (New York Times, New York News, Boston Globe and Boston Herald) on weekdays, and a third distributes 137 copies daily of the Attleboro Sun Times. On Sundays, appellees distribute out-of-town newspapers to their retailers. They and the Journal operate in geographically separate areas. Although such territorial division was not an explicit condition of the relationship between either the appellees and the Journal or among the appellees themselves, the arrangement was respected by all. The absence of price competition benefited the appellees.

The Journal distributed **[**4]** its paper through independent distributors until 1973. Its creation in that year of SNENDI with the object of directly entering the distributorship business was a marked shift from its prior reliance upon the independent distributors. At a breakfast of independent distributors called by the Journal in March 1973, its circulation director further emphasized the move towards an in-house distribution system; he announced that the Journal would purchase distributorships from those independents who wished to sell "at fantastic prices, starting at 100% increase above cost," rising "all the way to 800-900% and/or over," and that, in effect, it would not recognize the sale of distributorships, except to those who were part of the immediate family of the current distributors. This policy would thus foreclose the acquisition of new distributorships by independent wholesalers, and fortify the Journal's direct role in the distribution of its newspapers. In fact, the Journal did not always adhere to its new policy; it did do business with six distributorships sold to third parties. But as an aftermath of the breakfast meeting, the Journal did acquire about thirty distributorships through SNENDI **[**5]** so that it had direct dealing with retailers accounting for 50% of the Journal's circulation.

In late 1979 or early 1980, the Journal sought to complete the change in its method of distribution. In a letter of August 11, 1980, it told all independent distributors that effective September 6, 1980, it would not sell its newspapers at wholesale rates to them. Direct sale and distribution of newspapers, the Journal explained, would result in a more efficient economical system and provide more uniform service to the readership. It also stated that it would be "pleased to discuss … a reasonable offer for the purchase of … subscriber lists of Journal newspapers" and that the offer of purchase would expire at the close of business on Friday, September 5, 1980. Fourteen of the thirty-two independent distributors with whom the Journal was then dealing sold out to it; appellees are the remaining eighteen distributors who did not. The Journal also informed store proprietors served by appellees that they "would be receiving (their) papers directly from the Providence Journal Company." In addition, the Journal placed advertisements in its newspapers informing home delivery carriers that they **[**6]** had to contact the Journal if they wanted to continue delivering Journal papers.

On September 2, 1980, the independent distributors brought suit challenging the direct distribution plan. They filed a thirteen-count complaint alleging that the Journal had conspired to restrain trade and destroy competition in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*, [2] **[**7]** and that it **[*276]** had monopolized and attempted to monopolize trade in contravention of *§ 2* of the Sherman Act, *15 U.S.C. § 2*. [3] They also asserted parallel claims

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2. *15 U.S.C. § 1* states:

HN1[] 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: Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal 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.

3. *15 U.S.C. § 2* provides:

under the Rhode Island Antitrust Act, *R.I.Gen.Laws §§ 6-36-1 et seq.*, as well as common law claims of unfair competition and tortious interference with contractual relations. Plaintiffs' complaint prayed for treble damages and for interim and permanent injunctive relief. Together with their complaint, they filed a motion for a temporary restraining order, which the court below issued pending hearing and determination of the motion for preliminary injunction.

Discovery was expedited, but could not be completed because of the pressures of time. Nevertheless, numerous depositions were taken, extensive documentary evidence was produced, and the hearing on the preliminary injunction consisted of seven days of trial and a half day of argument. The district court heard fifteen witnesses, including four experts. It determined that the plaintiffs had demonstrated adequate grounds for issuance of a preliminary injunction that they would suffer irreparable harm if defendants were not enjoined, that the balance of harm **[**8]** tipped in the direction of the plaintiffs, that they established a public interest requiring preliminary relief, and that they produced credible evidence which, if accepted at the hearing on the merits, would result in ultimate success. The court employed the "alternative test" standard enunciated in the Second Circuit, see, e. g., *U. S. v. Bedford Associates, 618 F.2d 904, 912 n.15 (2d Cir. 1980)*, that the plaintiff need not make as persuasive a showing that he is likely to succeed on the merits where other factors are strong, such as the potential harm to plaintiff and the lack of a similar potential for harm to defendant. In granting the injunction, the district court rejected treble damages as an adequate remedy at law, concluding that such an award (1) would convert litigation "into a kind of private eminent domain proceeding" in which the Journal would "have purchased Plaintiffs' businesses, at a price determined by the Court"; (2) would fail to recognize the interests of the many retailers not party to the action; and (3) would obstruct "the lofty purpose of the Sherman Act." In its order entered December 23, 1980, the district court enjoined the Journal pendente lite from "refusing **[**9]** to deal with plaintiffs and from using plaintiffs' customer lists"; plaintiffs were required to post a $ 30,000 bond without surety.

Before this court, appellants argue that the district court erred as a matter of law in granting the preliminary injunction by not requiring that plaintiffs show a probability of success on the merits; that plaintiffs, contrary to the district court's determination, had an adequate remedy at law; and that the district court, in effectively enjoining the Journal's conversion to a direct wholesale distribution system, misapplied fundamental antitrust principles, and failed to accept the Journal's valid business reasons for the conversion to a direct distribution system.

We begin by observing that ***HN3***[] private parties may be afforded preliminary injunctive relief in antitrust cases

> when and under the same conditions and principles as injunctive relief … is granted by courts of equity, … and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate.

15 U.S.C. § 26. We, therefore, briefly review our standard for granting a preliminary **[*277]** **[**10]** injunction. We adhere, of course, to the basic requirement, which originated centuries ago in the English Court of Chancery, that ***HN4***[] before such relief becomes available there must be a showing that there is no adequate remedy at law. In addition, we reiterate that

> "in the First Circuit, a plaintiff must satisfy four criteria in order to be entitled to a preliminary injunction. The Court must find: (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction."

HN2[] 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 year's, or by both said punishments, in the discretion of the court.

Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981), quoting *Women's Community Health Ctr., Inc. v. Cohen, 477 F. Supp. 542, 544 (D.Me.1979)* (citations omitted). "Application of these standards to a particular set of facts is not a mechanical process." *Nat. Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819, 823 (1st Cir. 1979)*. None of these criteria should be slighted. The moving party must exhibit a likelihood **[**11]** of success on the merits; indeed, the probability-of-success component has loomed large in cases before this court. See, e. g., *Planned Parenthood League v. Bellotti, 641 F.2d at 1009-1022*; *Conservation Law Foundation of New England, Inc. v. Andrus, 623 F.2d 712 (1st Cir. 1979)*; *Grimard v. Carlston, 567 F.2d 1171 (1st Cir. 1978)*.

At the stage of appellate review, ***HN5***[] the "decision to grant or deny a preliminary injunction … is reversible … only for an abuse of discretion. It is also well settled, however, that the application of an improper legal standard in determining the likelihood of success on the merits is never within the district court's discretion. Similarly, misapplication of the law to particular facts is an abuse of discretion." *Planned Parenthood League v. Bellotti, 641 F.2d at 1009*, quoting *Charles v. Carey, 627 F.2d 772, 776 (7th Cir. 1980)* (citations omitted).

We assess the particular claims in the case at hand in terms of two analytically distinct periods before and after August 11, 1980, when the Journal announced its intention in a letter to distributors to assume total control of the distribution system. In our view the action taken in each period has different **[**12]** antitrust consequences. With respect to conduct before the August 11 notice, the independent distributors allege that the Journal combined with SNENDI to price-fix and that the Journal coerced them to combine with it to do the same as well. In the course of a hearing on the preliminary injunction, independent distributors testified that the Journal's approval of them as franchisees was tacitly contingent upon their agreeing to the Journal's suggested retail price; some claim to have suffered late deliveries when they raised the price of the papers to their carriers; and some testified that they were told that they could not raise the price of their papers to meet increased costs of distribution. ***HN6***[] To be sure, maximum price-fixing is per se illegal, *Albrecht v. Herald Co., 390 U.S. 145, 151-53, 88 S. Ct. 869, 872-873, 19 L. Ed. 2d 998 (1968)*. But however strong appellees case may be on the merits with respect to the Journal's conduct before the August 11 letter, they cannot secure preliminary injunctive relief unless they can show that an adequate remedy at law is not present. Their injury may be substantial, but we are not persuaded that such remedy treble damages is inadequate. Section **[**13]** 4 of the Clayton Act provides for such an award to any person "injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. It seems to us that if the independent distributors prevail on the merits of their claims, they should be able to demonstrate actual and measurable injury to their businesses or properties was caused by the antitrust violations; the remedy of treble damages would therefore be entirely adequate.

[*278] We consider next appellant's behavior after August 11, as indicated in its letter of that date. Appellees contend that the Journal's decision to assume completely the distribution function was anticompetitive and in violation of *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* & *2*. In essence, appellant decided to vertically integrate downstream that is, to undertake the distribution of its products which had been and could be sold to independent producers or distributors. 3 P. Areeda and D. Turner, ***Antitrust Law*** P 724, at 195 (1978). ***HN7***[] Vertical integration may come in a variety of forms with different impacts on economic performance. [4.] Where substantial market power is absent at any one product or distribution level, **[**14]** vertical integration will not have an anticompetitive effect. Vertical integration by a monopolist, however, can have adverse consequences on competition because monopoly at one level of the production-distribution continuum may carry with it the ability to affect competition in earlier or later phases. Moreover, the lack of competition may have negative effects on efficiency and progressiveness. See F. M. Scherer, Industrial Market Structure and Economic Performance 405 (1970). But vertical integration can also result in economic advantage to society. It can result in savings in market transaction costs and production economies. New efficiencies and innovations may ultimately yield lower prices on the end product. Integration can thus be a good faith effort to do business in more efficient ways.

[15]** ***HN8***[] Any assessment of vertical integration must take into account the variables present in the particular situation. As the Supreme Court stated, it is "clear … that vertical integration, as such without more, cannot be held

[4.] The literature on vertical integration has become quite substantial. For an overview of the different approaches, see, e. g., Kaserman, Theories of Vertical Integration: Implications for Antitrust Policy, 23 Antitrust Bulletin 483 (1978).

violative of the Sherman Act.... (T)he extent of permissible integration must be governed, as other factors in Sherman Act violations, by the other circumstances of individual cases." *United States v. Columbia Steel Co., 334 U.S. 495, 525-26, 68 S. Ct. 1107, 1123, 92 L. Ed. 1533 (1948)*. In the specific context of the case before us, we cannot see how the kind of vertical integration at issue integration into distribution violates the antitrust laws. Appellants seek to better control and market their product by changing their distribution structure. See, e. g., *Naify v. McClatchy Newspapers, 599 F.2d 335, 336 (9th Cir. 1979)*; *Knutson v. Daily Review, Inc., 548 F.2d 795, 805 (9th Cir. 1976)*, cert. denied, *433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977)*. They assert that the direct system would result in uniformity of sales, service and promotion across the market. Their experts testified that newspapers secure most of their revenue from advertising, that implementation **[**16]** of the direct wholesale distribution system, by enabling the Journal to build its distribution base, would enhance its ability to attract and retain advertisers. The objectives of appellants, as witnesses testified, were sometimes in conflict with appellees' goal of maximizing profits on the sale of newspapers. It was appellees, not appellants, who sought to charge higher prices to consumers, and it must not be forgotten that it is ultimately consumers whom the antitrust laws are designed to protect. This case, moreover, is not one in which vertical integration would drive out competition; appellees concede that they do not compete among themselves. The core of the distributors' case is that they cannot remain in business on the revenues secured from the sale of non-Journal publications. While this is unfortunate for them, we cannot mandate that the Journal, in effect, bear the distribution costs of its competitors by maintaining the old distribution network.

With respect to all antitrust claims made under state law, we reach the same results, observing simply that Rhode Island law provides that its antitrust statutes "be construed in harmony with judicial interpretations of comparable **[**17]** federal antitrust statutes insofar as practicable." *R.I.Gen.Laws § 6-36-2(c)* (Supp.1980).

Reversed and remanded.

Gilbuilt Homes, Inc. v. Continental Homes of New England, etc.

United States Court of Appeals for the First Circuit

September 10, 1981, Submitted ; December 16, 1981, Decided

No. 81-1200

Reporter

667 F.2d 209 *; 1981 U.S. App. LEXIS 15123 **; 1981-2 Trade Cas. (CCH) P64,441

GILBUILT HOMES, INC. A/K/A GILBILT HOMES, INC., PLAINTIFF, APPELLANT, v. CONTINENTAL HOMES OF NEW ENGLAND, A DIVISION OF WYLAIN, INC., DEFENDANT, APPELLEE

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE [HON. MARTIN F. LOUGHLIN, U.S. District Judge]

Core Terms

pleadings, commerce, dealers, Sherman Act, products, Clayton Act, allegations, customer, monopolize

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN1[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, *§ 1*, *15 U.S.C.S. § 1*, prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states.

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > 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 > Remedies > General Overview

International Trade Law > General Overview

HN2[] Sherman Act, Penalties

The Sherman Act, *§ 2*, *15 U.S.C.S. § 2*, provides sanctions for every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of interstate or foreign trade or commerce.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN3[] Market Definition, Relevant Market

To establish monopolization or attempt to monopolize a part of trade or commerce under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, it would be necessary to appraise the exclusionary power of a defendant's conduct in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure a defendant's ability to lessen or destroy competition.

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] Antitrust & Trade Law, Clayton Act

See Clayton Act, *15 U.S.C.S. § 14*.

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 > Coverage > Commerce Requirement

HN5[] Robinson-Patman Act, Claims

The Robinson-Patman Act, *15 U.S.C.S. § 13*, provides that it shall be unlawful for any person engaged in commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, 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.

Counsel: Jonathan Prew, Nashua, N. H., and Robert W. Gardner, Ayer, Mass., on brief, for plaintiff, appellant.

Joseph A. Millimet, William C. Saturley and Devine, Millimet, Stahl & Branch Professional Associates, Manchester, N. H., on brief, for defendant, appellee.

Judges: Before COFFIN, Chief Judge, VAN DUSEN [*] and BOWNES, Circuit Judges.

Opinion by: BOWNES

Opinion

[*210] This is an appeal by plaintiff Gilbuilt Homes, Inc., from an order of the district court dismissing its complaint for failure to state a claim under various antitrust statutes. From a nearly incoherent set of complaints and motion to amend produced by plaintiff, we set forth the relevant chronology and factual allegations.

In February 1980, plaintiff filed its initial complaint. In April, in response to a motion to dismiss, plaintiff filed a "motion to amend and clarify plaintiff's complaint." During that summer, plaintiff filed a "reply to defendant's amended motion to dismiss" which, by order of court, was **[**2]** incorporated as part of the complaint. Finally, in November and as a result of a threatened dismissal by the court, plaintiff filed a "motion to amend and consolidate" which, for the first time, fully cited the statutory provisions allegedly violated by defendant. [1.]

(1) Sherman Act, *§ 1*, *15 U.S.C. § 1*. Plaintiff's allegations, gleaned from its various pleadings, were vague but may fairly be summarized as follows. The plaintiff was "an Authorized Builder/Dealer of Defendant" engaged, we infer, in the marketing of newly built houses. After four or five years of this relationship, the defendant terminated **[**3]** plaintiff as its "builder/dealer." The termination was alleged to be arbitrary, "anti-competitive" and "not substantiated by any business purpose." However, no conspiracy or agreement with other persons or entities was pleaded, apart from a vague reference to "inter-family relationships." In fact, plaintiff alleged in one of its early pleadings, never retracted, that "this unilateral action of the defendant was directed specifically at the Plaintiff and not, to the best of Plaintiff's knowledge, directed at any other builder/dealer of said Defendant nor were any lending institutions involved with the Defendant and/or the Defendant's builders/dealers notified or involved of the Defendant's unilateral action." Finally, the only other pleadings relevant to a Sherman Act claim were conclusory allegations of an "internal conspiracy" whereby plaintiff was to be removed from competition with defendant at the "builder/dealer" level, an attempt, we gather, to allege that defendant was vertically integrating its operations.

HN1[] The Sherman Act, *§ 1*, *15 U.S.C. § 1*, prohibits "(e)very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among **[**4]** the several States...." Despite plaintiff's liberal use of terms such as "conspire," it failed to allege facts suggesting that the decision to terminate plaintiff as a dealer was other than an intracorporate one, i.e., a unilateral decision to cease doing business with plaintiff. The pleadings admitted as much. There is no suggestion that the termination was "exercised in furtherance of an unlawful arrangement with others-such as a tie-in arrangement, reciprocal dealing arrangement, market allocation arrangement, or price-fixing plan...." ABA, ***Antitrust Law*** Developments 20 (1975) (footnotes and citations omitted). Nor is there any basis for inferring an anticompetitive "conspiracy" emanating from a pattern of "unilateral" steps and pressure tactics employed by defendant. See *United States v. Parke, Davis & Co.,* ***[*211]*** *362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*. Rather, we see no more than "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." *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919)*; cf. *Auburn* ***[**5]*** *News Co. v. Providence Journal Co., 659 F.2d 273, 278 (1st Cir. 1981)* (holding vertical integration of newspaper distribution system lawful).

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[*] Senior Circuit Judge of the Third Circuit, sitting by designation.

[1.] There is no merit to appellant's apparent argument that an August 1980 court order that it file an amended complaint denied with prejudice a pending motion to dismiss. The motion to dismiss was explicitly and properly renewed on October 9, 1980. We are at a loss to understand how plaintiff thinks that it should be both free to file repeated, incoherent pleadings and immune to a motion to dismiss.

(2) Sherman Act, *§ 2*, *15 U.S.C. § 2*. In addition to the above-summarized facts, plaintiff alleged the following in attempting to plead a violation of *§ 2*.

> That the Plaintiff further alleges that the Defendant has violated *Section 2* of the Sherman Act by attempting to establish its own channel of distribution which is monopolistic in nature and intent. The Plaintiff alleges that it is the intent of the Defendant to establish a separate channel of distribution to the detriment other Plaintiff and the Plaintiff's business and states that in establishing said channel of distribution the Defendant did entice and hire away from the Plaintiff some of its sales personnel.

HN2[] *Section 2* of the Sherman Act provides sanctions for "(e)very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of (interstate or foreign) trade or commerce…." The Supreme Court has ruled:

> "***HN3***[] To establish monopolization or attempt to monopolize a part of trade or commerce under *§ 2* **[**6]** of the Sherman Act, it would … be necessary to appraise the exclusionary power of the (defendant's conduct) in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure (defendant's) ability to lessen or destroy competition." *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 350, 15 L. Ed. 2d 247 (1965)*.

See *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778 (1966)*. It is necessary for the pleadings, as a threshold matter, to sketch such relevant details of a *§ 2* claim. See, e.g., *Person v. New York Post Corp., 427 F. Supp. 1297, 1308* (E.D.N.Y.), aff'd mem., *573 F.2d 1294 (2d Cir. 1977)*. Despite ample opportunity to do so, however, plaintiff failed to plead any facts defining the market, as mandated by *Walker Process Equipment, Inc., supra.* Because of this material omission in the pleadings, the basis relied upon by the district court in dismissing, we affirm dismissal of the *§ 2* claim. See *Americana Industries v. Wometco de Puerto Rico, Inc., 556 F.2d 625, 627-28 (1st Cir. 1977)*; *Granader v. Public Bank, 417 F.2d **[**7]** 75, 81 (6th Cir. 1969)*, cert. denied, *397 U.S. 1065, 90 S. Ct. 1503, 25 L. Ed. 2d 686 (1970)*; *Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 9 (9th Cir. 1963)*, cert. denied, *385 U.S. 976, 87 S. Ct. 507, 17 L. Ed. 2d 438 (1966)*; *McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 339 (4th Cir. 1959)*; *Unibrand Tire & Product Co. v. Armstrong Rubber Co., 429 F. Supp. 470, 477 (W.D.N.Y.1977)*; compare *Walker Process Equipment, Inc., supra, 382 U.S. at 178, 86 S. Ct. at 351*.

(3) Clayton Act, § 3, *15 U.S.C. § 14*. Plaintiff alleged the following:

> That the Defendant did expect their authorized builder/dealers to utilize the Defendant's products in all situations with the customer even though the Defendant did complete directly with the authorized builder/dealers. It is Plaintiff's contention that such an arrangement is in direct violation of Section 3 of the Clayton Act (*15 U.S.C.A. § 14*) and that such an arrangement was forced upon the Plaintiff by the Defendant and that the Defendant did state in its contract with its authorized builder/dealers and/or the Plaintiff that the Plaintiff must deal in the Defendant's and the Defendant's products alone to the exclusion **[**8]** of competitive products. Further, in support of the violation of Section 3 of the Clayton Act, mentioned heretofore, that the Plaintiff was forced by this violation to establish a separate corporate entity in which to **[*212]** carry on other business dealings, not directly related to the sale of the Defendant's products; i.e. the building of garages, the "stick building" of homes, and other interior and exterior remodeling performed by the Plaintiff which had no relation or basis upon the Defendant's product. It was the Plaintiff's sincere belief and the Defendant's expectation that the Plaintiff would use its corporate entity for the sole benefit of the Defendant and the sale of the Defendant's products alone.

HN4[] 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 … 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 of such lease, sale, or contract for sale or such condition, **[**9]** agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

In the present case, plaintiff adequately pleaded a contract with defendant barring it from purchasing competitors' products. A § 3 violation then hinges on the anti-competitive effect of defendant's conduct, i.e., whether "performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 628, 5 L. Ed. 2d 580 (1961)*. Plaintiff's allegations under § 3 of the Clayton Act are as devoid of facts pertaining to this crucial issue as they were with respect to the market definition aspect of the claim under *§ 2* of the Sherman Act. We are left in the dark as to the economic circumstances of the arrangement, such as defendant's size and the amount of commerce affected. See *Tampa Electric Co., supra.* There is simply no factual basis from which to infer an anti-competitive effect. The district court properly dismissed this claim as well. See *Walker Distributing Co., supra, 323 F.2d at 9-10*; *Giant Paper & Film Corp. v. Albemarle Paper Co.,* ***[**10]*** *430 F. Supp. 981, 984-85 (S.D.N.Y.1977)*; *Stokes Equipment Co. v. Otis Elevator Co., 340 F. Supp. 937, 940 (D.Md.1972)*; cf. *Paul M. Harrod Co. v. A.B. Dick Co., 204 F. Supp. 580, 584 (N.D.Ohio 1962)*.

(4) Robinson-Patman Act, *15 U.S.C. § 13*. Under this statute, plaintiff pleaded the following:

> That the Defendant did violate the letter and spirit of *Section 2* of the Clayton Act, as amended by the Robinson-Patman Act (*15 U.S.C.A. § 13*), wherein it refused to deal with the Plaintiff and did discriminate against the Plaintiff in its channel of distribution regarding pricing of the products and further discrimination against the Plaintiff in the method in which the Plaintiff would continue to wind up its business relationship with the Defendant.
>
> That the Defendant did violate the said Robinson-Patman Act in its direct refusal to deal with the Plaintiff and in its discriminatory policies against the Plaintiff, such as: the change in Defendant's check acceptance policies applicable only to the Plaintiff; the distribution of leads amongst it(s) authorized builder/dealers; the interfamilial relationships and interferences with customers and customer leads; the Defendant's direct **[**11]** contact with Plaintiff's customers directly and without the knowledge of the Plaintiff; the non-referral to the Plaintiff of Plaintiff's customer calls and/or warranty problems; etc.

HN5[] The Robinson-Patman Act, provides in relevant part: "It shall be unlawful for any person engaged in commerce … either directly or indirectly, to discriminate in price between different purchasers of commodities … 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 **[*213]** of either of them…." Here the pleadings are so vague and conclusory that we can discern no facts pleading a claim that defendant directly or indirectly discriminated in price.

Affirmed.

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9 to 5 Organization for Women Office Workers v. Board of Governors of Federal Reserve System

United States Court of Appeals for the First Circuit

November 2, 1983, Decided

No. 83-1171

Reporter
721 F.2d 1 *; 1983 U.S. App. LEXIS 15618 **

9 TO 5 ORGANIZATION FOR WOMEN OFFICE WORKERS, Plaintiff, Appellee, v. THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Defendant, Appellant

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

[Hon. Andrew A. Caffrey, U.S. District Judge]

Core Terms

exemption, confidential, disclosure, district court, national park, salary, documents, financial information, trade secret, requested documents, salary survey, promise, governmental interest, federal reserve bank, necessary information, government's ability, legislative history, employees, submitter, impair, disclose information, customarily, proposals, contends, disclose, withhold, courts, authorized by law, agencies, purposes

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN1[] **Governmental Information, Freedom of Information**

See *5 U.S.C.S. § 552(b)*.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Trade Secrets Law > Federal Versus State Law > Freedom of Information Act Exemptions

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN2[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

Commercial or financial matter is "confidential" for purposes of *5 U.S.C.S. § 552(b)(4)* if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Governments > Public Lands > General Overview

Trade Secrets Law > Federal Versus State Law > Freedom of Information Act Exemptions

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN3[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

Information will not be regarded as confidential under *5 U.S.C.S. § 552(b)(4)* unless it can be demonstrated that disclosure will harm a specific interest that Congress sought to protect by enacting the exemption.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Governments > Public Lands > General Overview

Trade Secrets Law > Federal Versus State Law > Freedom of Information Act Exemptions

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN4[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

If it can be demonstrated with particularity that a specific private or governmental interest will be harmed by the disclosure of commercial or financial information, the government should not be precluded from invoking the protection of *5 U.S.C.S. § 552(b)(4)* merely because the asserted interest is not precisely one of those two identified in National Parks I. The emphasis, however, should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Trade Secrets Law > Federal Versus State Law > Freedom of Information Act Exemptions

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN5[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

The inquiry in each case should be whether public disclosure of the requested commercial or financial information will harm an identifiable private or governmental interest which Congress sought to protect by enacting *5 U.S.C.S. § 552(b)(4)*.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN6[] **Governmental Information, Freedom of Information**

The burden rests with the government to identify the particular interest, and, also, to demonstrate how that interest will be harmed by public disclosure of the specific information which has been requested.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN7[] **Judicial Review, Standards of Review**

In the regular confines of administrative law, the courts are generally required to show considerable deference to the decisions of agency officials. In the absence of bad faith or abuse of discretion, it is normally not for a court to substitute its judgment for that of the administrative agency in determining what otherwise appropriate and relevant data is particularly helpful in fulfilling the agency's statutory responsibilities, or in defining the most effective means in acquiring it.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN8[] **Governmental Information, Freedom of Information**

While there can be no doubt that the disclosure requirement should be construed broadly, and the exemptions narrowly, the courts must nevertheless give effect to both the disclosure requirements as well as to the exemptions set forth in the *5 U.S.C.S. § 552(b)*.

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > Investigations

Governments > Federal Government > Employees & Officials

Trade Secrets Law > Federal Versus State Law > Federal Trade Secrets Act

HN9[] **US Department of Justice Actions, Investigations**

See *18 U.S.C.S. § 1905*.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Commercial Information & Trade Secrets

Trade Secrets Law > Federal Versus State Law > Federal Trade Secrets Act

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

Trade Secrets Law > Federal Versus State Law > Freedom of Information Act Exemptions

HN10[] **Defenses & Exemptions From Public Disclosure, Commercial Information & Trade Secrets**

Only the disclosure of information which fits into one of the nine exemptions of *5 U.S.C.S. § 552(b)* may constitute unauthorized disclosure and thus may activate the provisions of the Trade Secrets Act, *18 U.S.C.S. § 1905*.

Counsel: Peter R. Maier, Appellate Staff, Civil Division, Department of Justice, J. Paul McGrath, Assistant Attorney General, William F. Weld, United States Attorney, Joseph J. McGovern, Assistant United States Attorney, Leonard Schaitman, Appellate Staff, Civil Division, Department of Justice, Michael Bradfield, General Counsel, and Stephen L. Siciliano, Senior Counsel, for appellant.

Robert E. Williams, Douglas S. McDowell, Lorence L. Kessler, and McGuiness & Williams, for the Equal Employment Advisory Council, amicus curiae.

John Reinstein, Marjorie Heins, for appellee.

Cornish F. Hitchcock, and David C. Vladeck, for the Freedom of Information Clearinghouse, amicus curiae.

Judges: Campbell, Chief Judge, Breyer, Circuit Judge, and Re, * Chief Judge. Breyer, Circuit Judge (dissenting).

Opinion by: RE

Opinion

[*2] RE, Chief Judge.

In this action, brought under the Freedom of Information Act, *5 U.S.C. § 552* ***[**2]*** *(1976)*, the Board of Governors of the Federal Reserve System appeals from a decision of the District Court for the District of Massachusetts ordering the Board to disclose to the 9 to 5 Organization for Women Office Workers documents containing salary survey data obtained from the Boston Salary Survey Group, a private organization. The Board contends that the documents, which consist primarily of salary-related correspondence between the Board and the Federal Reserve Bank of Boston, are exempt from disclosure under exemption 4 of the FOIA because they contain "commercial or financial information obtained from a person and . . . confidential." *5 U.S.C. § 552(b)(4)*.

The district court, relying on *National Parks and Conservation Ass'n v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765 (D.C. Cir. 1974)*, *aff'd in part and rev'd in part sub nom.* *National Parks and Conservation Ass'n v. Kleppe, 178 U.S. App. D.C. 376, 547 F.2d 673 (D.C. Cir. 1976)*, held that the documents are not "confidential" within the meaning of *section 552(b)(4)* because their disclosure "will not impair the government's ability to obtain *necessary* information **[**3]** in the future." *551 F. Supp. 1006, 1010 (D. Mass. 1982)* (emphasis in original). Because we find that the Boston Salary Survey Group salary data may be sufficiently "necessary" to merit confidential treatment, we vacate the judgment of the district court and remand this action so that the district court may determine, in light of this opinion, whether the requested information is confidential within the meaning of FOIA exemption 4.

The Facts

The Board of Governors of the Federal Reserve System (the Board) is an agency of the United States Government. By statute, it is required to supervise the operations of the twelve congressionally chartered federal reserve banks. *12 U.S.C. § 248(j) (1976)*. **[*3]** Included among the Board's supervisory responsibilities is the duty to review and approve the salaries paid to employees of the federal reserve banks. *12 U.S.C. § 307 (1976)*.

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* The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

The Board has determined that, in order to attract, retain and motivate qualified employees, the federal reserve banks should maintain levels of compensation which are competitive with those offered by other employees in the relevant labor market. **[**4]** Toward this end, the Board requires that the regional reserve banks base their salary proposals on timely surveys of pay rates, benefits and other elements of compensation offered by competitive employers. The Board directs the reserve banks to participate, when possible, in broadly-based community salary surveys.

Since 1956, the Federal Reserve Bank of Boston (the Bank) has been a member of the Boston Salary Survey Group (BSSG), a private organization composed of approximately 40 of the Boston area's largest employers. On a periodic basis, BSSG compiles salary and wage data obtained from each of its members and distributes the results of the survey to each member of the group. Before the survey is distributed to the members of BSSG, the data is encoded to prevent the identification of individual employers. The members of BSSG have explicitly agreed to treat the salary information contained in the surveys as confidential, and to refrain from making the information available to the public. Members who violate this pledge of confidentiality are subject to expulsion from the group.

On September 29, 1980, the Secretary of the Board of Governors received an FOIA request from the **[**5]** 9 to 5 Organization for Women Office Workers (9 to 5). 9 to 5 sought access to all documents in the possession of the Board relating to: 1) BSSG surveys; 2) the Federal Reserve Bank of Boston's use of BSSG surveys; 3) BSSG membership lists and criteria; 4) use of BSSG surveys by member companies; 5) salary adjustments made by the Bank since 1956; and 6) correspondence within the Federal Reserve System involving BSSG salary surveys.

Relying on exemptions 2, 4 and 5 of the FOIA, *5 U.S.C. § 552(b)(2)*, *(4)*, *(5)*, the Secretary declined to release any of the documents requested by 9 to 5. 9 to 5 appealed the denial of its request to the Board of Governors, which also declined to release the requested documents.

Proceedings in the District Court

After the denial of its administrative appeal, 9 to 5 filed in the District Court for the District of Massachusetts a suit to compel disclosure of the requested documents. The Board identified more than 350 documents which it thought were responsive to 9 to 5's request. Among these documents were annual reserve bank reports containing BSSG salary information; correspondence between the Board and the Bank concerning **[**6]** salary recommendations; and internal Board memoranda in which the Board's staff analyzed the Bank's salary proposals. The Board maintained that each of the documents was exempt from the FOIA's general mandate of disclosure under at least one, and sometimes more than one, of four exemptions specified in *5 U.S.C. § 552(b)*, which provides in pertinent part:

> ***HN1***[] (b) This section does not apply to matters that are --
> * * *
> (2) related solely to internal personnel rules and practices of an agency;
> * * *
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
> (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
> * * *

[*4] The Board also claimed that disclosure of some of the documents would violate the Trade Secrets Act, *18 U.S.C. § 1905 (Supp.* ***[**7]*** *IV 1980)*, which makes it a criminal offense for employees of the government to disclose trade secrets and other confidential business information obtained from private sources unless the disclosure is authorized by law.

Both parties filed motions for summary judgment, and the district court, in a series of memorandum opinions and orders, ruled as follows. *See 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System, 527 F. Supp. 1163 (D. Mass. 1981)*; *Id.*, *547 F. Supp. 846 (D. Mass. 1982)*; *Id.*, *551 F. Supp. 1006 (D. Mass. 1982)*.

In an opinion issued on December 21, 1981, the district court rejected the Board's contention that disclosure of some documents would violate the *Trade Secrets Act. 527 F. Supp. 1163, 1166-67 (D. Mass. 1981)*. The court held that, since the FOIA authorized disclosure of all information held by government agencies, "only the disclosure of information which fits into one of the nine exemptions of *[section] 552(b)* may constitute unauthorized disclosure and thus may activate the provisions of the Trade Secrets Act." *527 F. Supp. at 1167*. **[**8]** Consequently, the district court held that invocation of the Trade Secrets Act provided no additional justification for withholding the requested documents.

Since 9 to 5 did not oppose the Board's contention that some of the documents were exempt from disclosure under exemptions 2 and 6 of the FOIA, the district court granted the Board's motion for summary judgment as to those documents. *527 F. Supp. at 1167*.

Finding that a genuine issue of fact existed as to the Board's exemption 4 claim, the court deferred its consideration of that issue. At the same time the court ordered the Board to submit some of the remaining documents for an *in camera* inspection to determine whether they could properly be withheld under exemption 5.

Following the *in camera* inspection, and after the Board had complied with an order requiring it to submit a revised *Vaughn* index, [1] describing the remaining documents and correlating each of them with the statutory provision under which it was claimed to be exempt, the district court issued a second opinion on September 30, 1982. *547 F. Supp. 846 (D. Mass. 1982)*. In that opinion, the district court addressed the Board's **[**9]** contention that the requested documents could be withheld under FOIA exemption 5, *5 U.S.C. § 552(b)(5)*, which allows agencies to withhold inter-agency or intra-agency memoranda, which would not be available by law to a party other than an agency in litigation with the agency. The court ruled that the internal Board memoranda, in which the Bank's salary proposals were analyzed by the Board's staff, were intra-agency memoranda containing recommendations and advice which had not been explicitly adopted as the policy of the Board. These internal memoranda, therefore, were held to be exempt from disclosure under exemption 5 of the FOIA.

As to the remaining documents, however, the court held that exemption 5 was inapplicable. The court found that the remaining documents consisted of letters from the Bank to the Board, requesting approval of changes in the Bank's salary structure; letters from **[**10]** the Board to the Bank announcing the Board's decisions as to the Bank's salary proposals; and salary reports compiled by the Bank and submitted to the Board in support of the Bank's salary proposals. Since the Bank's salary proposals were routinely adopted by the Board, and thus became the policy of the Board, the court held that the documents did not fall within the ambit of exemption 5, which is intended to protect only pre-decisional, deliberative materials. See *N.L.R.B. v. Sears-Roebuck & Co., 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)*; *Environmental Protection Agency v. Mink, 410 U.S. 73, 35 L. Ed. 2d 119, 93 S. Ct. 827 (1973)*.

[*5] After the district court's first two opinions, the sole issue left to be decided was whether the same documents which had been denied exemption 5 status, were protected from disclosure under FOIA exemption 4, which allows agencies to withhold commercial or financial information that was obtained from a person and is privileged or confidential. Before the district court ruled on this issue, it was informed that, as a result of an investigation into the Group's survey practices, the Boston Salary **[**11]** Survey Group and the Attorney General of the Commonwealth of Massachusetts had entered into a consent decree. Under the terms of the decree, BSSG agreed that future salary surveys would be randomly encoded, would contain only aggregate data, would not include any job category having fewer than 10 incumbents, and would not include an industry-by-industry analysis of the data. BSSG also

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[1] *See Vaughn v. Rosen, 173 U.S. App. D.C. 187, 523 F.2d 1136 (D.C. Cir. 1975)*.

agreed to disclose upon reasonable request the identity of its members, and to permit group members, if they so wished, to disclose to an employee the aggregate weighted average salary data for the pertinent job category.

On December 2, 1982, the district court issued its decision as to the Board's exemption 4 claim. *551 F. Supp. 1006 (D. Mass. 1982)*. The court noted that under that provision information is exempt from disclosure if it is 1) commercial or financial in nature, 2) obtained from a person, and 3) confidential. Having determined in its first memorandum opinion that the requested information was commercial or financial in nature, and had been obtained from a person, the court focused on the issue of confidentiality.

The district court stated, and in the district court the parties **[**12]** agreed, that the standard for determining whether information is confidential under exemption 4 was enunciated in *National Parks and Conservation Ass'n v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765 (D.C. Cir. 1974)* *(National Parks I), aff'd in part and rev'd in part sub nom.* *National Parks and Conservation Ass'n v. Kleppe, 178 U.S. App. D.C. 376, 547 F.2d 673 (D.C. Cir. 1976)* (*National Parks II*). According to *National Parks I*:

> ***HN2***[] Commercial or financial matter is "confidential" for purposes of [exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; n17 or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F.2d at 770 (footnote 17 omitted).

Before the district court, the Board relied exclusively on the first part of the *National Parks I* test. It contended that the government's ability to obtain necessary information would be **[**13]** impaired because disclosure of the requested documents would lead inevitably to the Board's expulsion from the Boston survey group, and thus deprive the Bank of information needed to keep the salaries of Bank employees competitive.

In applying *National Parks I* to the facts of this case, the district court observed that the first part of the test was itself a two-part test. According to the district court, in order for the Board to prevail it had to establish "first, that disclosure is *likely* to impair the Government's ability to obtain such information in the future, and secondly, that the information is 'necessary. '" *551 F. Supp. at 1008* (emphasis in original).

After ruling that a genuine issue of fact still existed as to the likelihood that disclosure would impair the Government's ability to obtain information in the future, the district court granted 9 to 5's motion for summary judgment based on the court's determination that the survey data was not "necessary" information. In so ruling the court said that "an inspection of the legislative history reveals that one of the major Congressional goals was to safeguard information given to an agency in its **[**14]** *official capacity*." (emphasis in original) (citations omitted). Here, however, the court felt that the Board obtained the information merely in a commercial capacity. The legislative history, the court concluded, does not "reflect any particular Congressional desire that an exemption to the FOIA be created to protect information gained by an agency **[*6]** through commercial relationships established with non-governmental business entities."

The court noted that 8 of 12 Federal Reserve Banks establish salary levels without participating in private salary survey groups, and that the Federal Reserve Bank of Boston itself utilized other sources of wage information. This evidence, it concluded, showed usefulness but not necessity:

> The information provided to the Federal Reserve Bank by the BSG undoubtedly facilitates the establishment of a competitive compensation structure; however, the information is not "necessary," within the meaning of exemption 4, to the Federal Reserve Bank's role in the Government. The salary data is not of such importance to the Government, or more importantly, to the governing process, that it should be exempt from the general policy of disclosure **[**15]** embodied in the [FOIA].

551 F. Supp. at 1010. Thus, the district court found that the salary survey information was not confidential within the meaning of exemption 4 because it was not "necessary " to the Reserve Bank's role in the federal government.

The Board has appealed the decision of the district court that the requested documents are not confidential within the meaning of FOIA exemption 4. Although in the district court the Board relied on *National Parks I* in attempting to bring the requested documents within the ambit of exemption 4, on this appeal the Board urges us to reject the reasoning of *National Parks I*. Instead, the Board urges us to hold that information is confidential under exemption 4 if "it is commercial or financial information that (1) the submitter expects to be treated confidentially, and (2) is of a type that is entitled to a reasonable expect[at]ion of confidentiality by the submitter." Alternatively, the Board contends that even under *National Parks I*, the decision of the district court should be reversed.

In addition, the Equal Employment Advisory Council, which has filed an *amicus* brief, contends that the **[**16]** district court erred in summarily rejecting the Board's contention that disclosure of the requested documents would violate the Trade Secrets Act.

9 to 5 and *amicus curiae*, the Freedom of Information Clearinghouse, have filed briefs urging that we affirm the decision of the district court. At the outset, 9 to 5 contends that we should dismiss without consideration the Board's attack on *National Parks I* because that issue was not raised in the district court. Should we consider the precedential impact of *National Parks I*, 9 to 5 urges that we approve its reasoning. However, 9 to 5 also contends that, under either *National Parks I* or the more permissive standard proposed by the Board, the requested documents should not be treated as confidential because the Board has not made a factual showing sufficient to support a finding of confidentiality. [2]

[17]** *FOIA Exemption 4*

The nature of the information that is "confidential" within the meaning of exemption 4 has troubled the courts since the enactment of the FOIA. At least part of the confusion surrounding exemption 4 must be attributed to what has been described as "the tortured, not to say obfuscating, legislative history of the FOIA. . . ." *American Airlines, Inc. v.* ***[*7]*** *Nat'l Mediation Board, 588 F.2d 863, 865 (2d Cir. 1978)*. Most important as to the present case is that, with reference to exemption 4, both the House and Senate reports speak of information which is *customarily* regarded as confidential. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2418, 2427; S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). Yet, neither of the reports which accompanied the Act explains why an earlier version of exemption 4, which would have exempted "trade secrets and other information obtained from the public and customarily privileged or confidential," was amended to delete the word "customarily" and add the words "commercial or financial," bringing the provision to its enacted form. *See National Parks I, 498 F.2d at 769*; **[**18]** K. Davis, *Administrative Law Treatise* § 3A.10 (Supp. 1970).

The attempt to analyze the FOIA's legislative history is complicated further by the fact that the 1966 House Report has been discredited as an aid to interpreting the Act because it was submitted after the Senate had made its report and passed the bill. The House then passed the bill without amendment, thereby depriving the Senate of the opportunity to object or concur in the interpretation of the Act written into the House Report. *See Dep't of the Air Force v. Rose, 425 U.S. 352, 365-67, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976)*; K. Davis, *Administrative Law Treatise* § 5.3 (2d ed. 1978).

Despite the shortcomings of the FOIA's legislative history, it has nonetheless been relied upon by the courts which have had to interpret exemption 4. A 1978 Report of the House Committee on Government Operations collected

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[2] In the special circumstances of this case, we reject 9 to 5's argument that because the Board did not oppose the *National Parks I* standard below, we should not now consider the Board's opposition to that standard. Here we believe it will help explain our construction of *section 552(b)(4)*, if we discuss the merits of the Board's contention that *National Parks I* is flawed. As we ultimately reject the Board's view and accept the *National Parks I* formulation, there is no unfairness to the parties. As Justice Blackmun observed in *Singleton v. Wulff, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868* ,2877 (1976): "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *See United States v. Krynicki, 689 F.2d 289, 291 (1st Cir. 1982)*; *United States v. Golon, 511 F.2d 298, 300-01* (1st Cir.), *cert. denied*, ***421 U.S. 992, 44 L. Ed. 2d 483, 95 S. Ct. 1999 (1975)***.

and analyzed the various approaches taken by the courts which have interpreted and applied exemption 4 of the FOIA. H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 16-21 (1978). Early cases which applied exemption 4 utilized a "promise of confidentiality test" which exempted from disclosure any **[**19]** commercial or financial information that was revealed to the government under an express or implied promise by the Government to keep the information confidential. The promise of confidentiality test was soon abandoned, however, because it established no standards for determining when the Government could properly extend a promise of confidentiality. Neither was it useful to determine whether to release information that was arguably confidential, but which had been obtained without a Government promise of confidentiality. *Id. at 16-17*.

The promise of confidentiality test was succeeded by the "expectation of confidentiality test." Under that test, commercial or financial information was regarded as confidential if it was of a type that *customarily* would not be released to the public by the person from whom it was obtained. The expectation of confidentiality test was criticized and ultimately rejected because it placed too much emphasis on the intent of the submitter, making the Government's disclosure policy contingent on the disclosure policy of the individual submitter. *Id. at 17-18*.

The expectation of confidentiality test was followed by the two-prong test announced **[**20]** in *National Parks I*. In *National Parks I*, the Court of Appeals for the District of Columbia Circuit addressed the question whether information contained in Department of the Interior records concerning the operation of concessions in the national parks was "confidential" within the meaning of FOIA exemption 4. After noting that whether the records were customarily treated as confidential was a "relevant inquiry," the court stated that before holding information to be confidential "[a] court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *498 F.2d at 767*.

Based on its examination of exemption 4's legislative history, the court in *National Parks I* identified two important purposes served by the exemption: it "encourag[es] cooperation with the Government by persons having information useful to officials;" and "it protects persons who submit financial or commercial data to government agencies from the competitive disadvantages **[*8]** which would result from its publication." *Id. at 768*. With these purposes in mind, the court concluded that "commercial or financial matter is 'confidential **[**21]** ' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; n17 or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id. at 770* (footnote 17 omitted).

Since 1975, numerous courts have used the two-prong test announced in *National Parks I* as a basis for determining whether documents are confidential within the meaning of FOIA exemption 4. *See e.g., Orion Research, Inc. v. E.P.A., 615 F.2d 551* (1st Cir.), *cert. denied*, *449 U.S. 833, 66 L. Ed. 2d 38, 101 S. Ct. 103 (1980)*; *American Airlines v. National Mediation Board, supra*; *Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976)*, *cert. denied*, *431 U.S. 924, 53 L. Ed. 2d 239, 97 S. Ct. 2199 (1977)*; *Continental Oil Co. v. F.P.C., 519 F.2d 31 (5th Cir. 1975)*, *cert. denied*, *425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976)*.

On this appeal the Board maintains that the court in *National* **[**22]** *Parks I* erroneously superimposed upon the statutory language of exemption 4 another requirement, *i.e.*, "that documents not be exempt unless exemption was mandated by one of two particular policy interests that were among many reasons why Congress included the exemption." According to the Board, "the *National Parks I* court arbitrarily selected two particular policy interests that Congress recognized in adopting exemption 4 and elevated them to the equivalent of statutory language."

We believe that the Board's analysis of *National Parks I* is unduly restrictive. In its brief, the Board states that, under *National Parks I*, government records fall within the ambit of exemption 4 "*only* in instances where the records contained information that, if disclosed would jeopardize the Government's ability to obtain necessary information in the future or would threaten competitive harm to the submitter." (Emphasis added.)

This interpretation of the *National Parks I* test ignores footnote 17 of that court's opinion, in which it stated:

> We express no opinion as to whether other governmental interests are embodied in this exemption. *Cf. 1963 Hearings* at 200 where **[**23]** the problems of compliance and *program effectiveness* are mentioned as governmental interests possibly served by this exemption.

498 F.2d at 770 n. 17 (emphasis added). Thus, in *National Parks I*, the court recognized the possibility that government interests other than the ability to obtain necessary information in the future could justify non-disclosure under exemption 4.

The admonition against viewing the two prongs of the *National Parks I* test as the exclusive criteria for determining confidentiality under exemption 4 was repeated by the Court of Appeals for the District of Columbia Circuit in *Washington Post Co. v. U.S. Dep't of Health and Human Services, 223 U.S. App. D.C. 139, 690 F.2d 252 (D.C. Cir. 1982)*. The question presented in that case was whether, under the FOIA, the National Cancer Institute could be compelled to disclose the non-federal employment and financial interests of its consultants. Speaking of the basis for determining confidentiality under exemption 4, the court approved the reasoning of *National Parks I*, but noted:

> We reserved in *National Parks I*, have not since decided, and do not decide **[**24]** here the question "whether other governmental interests are embodied in this exemption." *498 F.2d at 770 n. 17*. In particular, we do not decide whether it is proper to take into account the government's need to attract qualified scientists, who might choose not to seek consulting positions in order to avoid public disclosure of Form 474's financial information. The government did not ask us in this case to consider including that specific interest in the *National Parks I* test.

690 F.2d at 268 n. 51. *See also* National Parks II, 547 F.2d at 678 n. 16.

[*9] The possibility alluded to in *National Parks I* and *Washington Post* became a reality in *Comstock International (U.S.A.), Inc. v. Export-Import Bank of the United States, 464 F. Supp. 804 (D.D.C. 1979)*. In *Comstock*, the District Court for the District of Columbia was called upon to decide whether documents containing information about parties seeking loans from the Export-Import Bank could be withheld from disclosure under FOIA exemption 4. The district court stated:

> The Court of Appeals in *National Parks I* suggested that the most **[**25]** common governmental interest threatened by disclosure of commercial and financial information would be the Government's ability to obtain similar necessary information in the future. . . . This interest is not affected here, for the information contained in the loan agreement is not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process. The *National Parks I* court, however, expressly left open the possibility that other governmental interests, such as the interest in *program effectiveness*, are embodied by this exemption. . . .

464 F. Supp. at 807-08 (emphasis added). The court proceeded to hold that the likelihood that disclosure would impair the effectiveness of the Eximbank justified treating the requested documents as confidential within the meaning of exemption 4. *Id. at 808*.

The test of confidentiality which is proposed by the Board as a substitute for *National Parks I* does not resolve the problems that have been presented. To satisfy the first part of the Board's test, *i.e.*, that the submitter expects the information to be treated confidentially, would depend **[**26]** solely on the submitter's subjective intent. This approach to exemption 4 was considered, and, for good reason, rejected by the House Committee on Government Operations in its 1978 Report, in which the Committee stated:

> disclosure policy cannot be contingent on the subjective intent of those who submit information. For example, it clearly would be inappropriate to withhold all information, no matter how innocuous, submitted by a corporation with a blanket policy of refusing all public requests for information.

H.R. Rep. No. 95-1382, 95th Cong. 2d Sess. 18 (1978).

The second part of the Board's proposed test, which the Board refers to as the "objective portion" of the test, would require that the information be of a type that is entitled to a reasonable expectation of privacy. The difficulty with this aspect of the Board's test is readily illustrated by the Board's application of its proposed standard to the facts of this case. The Board asserts that the salary information which 9 to 5 seeks "is entitled to a reasonable expectation of privacy by the BSSG inasmuch as private employers like those that comprise the BSSG normally keep such data closely confidential. **[**27]** " Thus, the second part of the Board's proposed test would focus on the treatment submitters customarily accord information rather than on the reasons why certain kinds of information should be deemed confidential.

A more objective and superior method for determining whether commercial or financial information is confidential within the meaning of FOIA exemption 4 is suggested in *National Parks I*. The principle to be derived from *National Parks I*, and the cases which have followed it, is that ***HN3***[] information will not be regarded as confidential under exemption 4 unless it can be demonstrated that disclosure will harm a specific interest that Congress sought to protect by enacting the exemption. The court in *National Parks I* identified the two interests which are most frequently threatened by the disclosure of commercial or financial information. However, we do not view *National Parks I* as imposing a limitation on the number of legitimate interests which are protected by exemption 4.

HN4[] If **[**28]** it can be demonstrated with particularity that a specific private or governmental interest will be harmed by the disclosure of commercial or financial information, the **[*10]** Government should not be precluded from invoking the protection of exemption 4 merely because the asserted interest is not precisely one of those two identified in *National Parks I*. The emphasis, however, should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential. ***HN5***[] The inquiry in each case should be whether public disclosure of the requested commercial or financial information will harm an identifiable private or governmental interest which the Congress sought to protect by enacting exemption 4 of the FOIA. It is clear that ***HN6***[] the burden rests with the Government to identify the particular interest, and, also, to demonstrate how that interest will be harmed by public disclosure of the specific **[**29]** information which has been requested.

The court in *National Parks I* specifically noted that the "various exemptions included in the [FOIA] serve two interests -- that of the government in *efficient operation* and that of persons supplying certain kinds of information in maintaining its secrecy." *498 F.2d at 767* (emphasis added). More specifically, the court in that case made the following statement which is very pertinent here:

> The "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and *the ability of the Government to make intelligent, well informed decisions will be impaired*.

Id. (emphasis added).

Significantly, the court added that "this concern," that is, the ability of the Government to make intelligent, well-informed decisions, "finds expression in the legislative history as well as the case law." *Id.*

We conclude, therefore, that the district court took a too narrow view of the *National Parks I* court's use of **[**30]** the term "necessary" in its explanation of exemption 4's confidentiality requirement. That term was meant, we believe, to reflect Congress' purpose to protect information which would be particularly helpful to agency officials in carrying out their mandate. We find no intimation in the FOIA's legislative history that for commercial or financial information to be confidential within exemption 4, it must be "necessary" in the sense of being absolutely *essential* to the operations of the agency or to the governing process itself.

We also see little basis in this case for the district court's distinction between information gathered in the government's official capacity and information gathered in some supposed commercial capacity. The Bank's apparent reason for participating in the Boston Salary Survey Group was to help maintain competitive levels of compensation for its employees. This purpose was in accordance with regulations and policies promulgated by the Board pursuant to its statutory duty to review and approve the salaries paid to employees of the Federal Reserve Banks. These aims are neither so trivial nor so remote from the Bank's and the Board's official purposes as **[**31]** to render exemption 4 necessarily inapplicable. Effective personnel policies and salary structures are legitimate goals of official agencies of this type.

HN7[] In the regular confines of administrative law, courts are generally required to show considerable deference to the decisions of agency officials. In the absence of bad faith or abuse of discretion, it is normally not for a court to substitute its judgment for that of the administrative agency in determining what otherwise appropriate and relevant data is particularly helpful in fulfilling the agency's statutory responsibilities, or in defining the most effective means in acquiring it. Nothing now before us indicates that the Bank sought the salary data for other than a proper purpose, nor that the Board has sought to shield the data in bad faith. Furthermore, there is no suggestion that the Board abused its discretion by allowing the Reserve Bank of Boston to participate in a private salary group that was determined to be the most efficient and **[*11]** cost effective method of obtaining salary data, even though similar data might **[**32]** have been obtained by different means. [3]

HN8[] While there can be no doubt that "the disclosure requirement [should] be construed broadly, [and] the exemptions narrowly," *Soucie v. David, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1080 (D.C. Cir. 1971)*, courts must nevertheless give effect to both the disclosure requirements as well as to the exemptions set forth in the statute. In view of the legitimate governmental interest of efficient operation, it would do violence to the statutory purpose of exemption **[**33]** 4 were the Government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities.

We accordingly vacate the district court's judgment based on its determination that exemption 4 was inapplicable because the information was not necessary. The matter will be remanded to the court for further consideration in light of this opinion. The court remains free to determine that exemption 4 does or does not apply but should consider the matter in accordance with the preceding principles.

Trade Secrets Act

Finally, we turn to the contention of *amicus curiae*, the Equal Employment Advisory Council (EEAC), that the district court should not have summarily rejected the Board's argument that disclosure of the salary survey data would violate the Trade Secrets Act, *18 U.S.C. § 1905 (Supp. IV 1980)*. EEAC contends that even if the requested documents are not confidential within the meaning of FOIA exemption 4, the Board may nevertheless be prohibited from disclosing the documents by *section 1905*.

Section 1905 makes it a criminal offense for an officer or employee of the **[**34]** United States to disclose information relating to the trade secrets or confidential business information, including "confidential statistical data," of any person, firm, partnership, corporation or association "to any extent not authorized by law." [4] *Section 1905* has been construed to prohibit both unofficial "leaks " by individual Government employees, and formal agency

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[3] While Judge Breyer's dissent suggests that the BSSG's contract requirement that the information should be kept confidential may be against public policy and thus, unenforceable, we do not understand the district court decision to rest on that point. To the extent this issue is not precluded by the Massachusetts attorney general's consent decree, the district court, of course, may consider it on remand.

[4] *18 U.S.C. § 1905* provides: HN9[] Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $ 1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

action which results in unauthorized disclosures. *See* *Chrysler Corp. v. Brown, 441 U.S. 281, 298-99, 60 L. Ed. 2d 208, 99 S. Ct. 1705 and n. 29 (1979)*.

[35]** EEAC argues that despite the similarity in the language of *section 1905* and that of FOIA exemption 4, "where a severely restrictive interpretation is given to exemption 4, there remains the possibility that the information is within the ambit of protection provided by *section 1905*." According to EEAC, this result is possible because *section 1905* is a disclosure exemption statute within the meaning of FOIA exemption 3, *5 U.S.C. § 552(b)(3)*, which provides that the FOIA's disclosure mandate does not apply to matters that are specifically exempted from disclosure by another statute.

[*12] Whether *section 1905* is an exempting statute referred to in FOIA exemption 3 has not been finally resolved, *see* *Chrysler v. Brown, 441 U.S. 281, 319, 60 L. Ed. 2d 208, 99 S. Ct. 1705 n. 49 (1979)*, and we need not decide it here. For the purpose of argument, however, it may be assumed that *section 1905* is an exempting statute. Nevertheless, in this case, *section 1905* cannot serve as a basis for prohibiting disclosure.

Section 1905 only prohibits information disclosures not authorized by law. The FOIA expressly authorizes the disclosure of all government **[**36]** information that is not exempted from disclosure by one of the nine exemptions enumerated in the FOIA. Thus, the district court correctly observed that ***HN10***[] "only the disclosure of information which fits into one of the nine exemptions of *§ 552(b)* may constitute unauthorized disclosure and thus may activate the provisions of the Trade Secrets Act." *527 F. Supp. at 1167*.

This result was anticipated by Congress when it amended FOIA exemption 3 in the 1976 Government in the Sunshine Act. P.L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976). The House Report stated:

> The Trade Secrets Act, *18 U.S.C. § 1905* which relates only to the disclosure of information where disclosure is "not authorized by law," would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, *section 1905* would not justify withholding; . . .

H. **[**37]** R. Rep. No. 94-880 Part I, 94th Cong., 2d Sess. 23 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2183, 2205. *See also* J. O'Reilly, *Federal Information Disclosure* § 13.06 (1982). Consequently, if the government cannot prove that the requested documents are within FOIA exemption 4, their disclosure will not violate *section 1905*. If the documents are found to be exempt from disclosure under the FOIA, they will not be disclosed and no question will arise under *section 1905*. Therefore, the district court correctly dismissed the Board's *section 1905* contention.

The judgment of the district court is vacated, and this action is remanded so that the district court may determine, consistent with this opinion, whether the requested information is confidential within the meaning of exemption 4 of the FOIA.

It is so ordered.

Dissent by: BREYER

Dissent

BREYER, Circuit Judge (dissenting).

While I agree with most of the majority opinion, I disagree with the result. I think it unlikely that the district court, on remand, will find a policy reason strong enough to prevent disclosure; I would affirm its judgment now.

National Parks and Conservation Association v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765 (D.C. Cir 1974), **[**38]** and the majority's opinion make clear that Congress did not intend to apply the word "confidential" *automatically* whenever an agency official agrees to a business request to keep information confidential. Otherwise, given the temptation of government and business officials to follow the path of least resistance and say "confidential" whenever they seek to satisfy the government's vast information needs, the exemption would expand beyond what Congress intended. Thus, *National Parks* (which I agree is illustrative and does not lay down a dispositive test) looked beyond the simple promise of confidentiality and examined whether either the business or government had a legitimate interest in ascribing confidential status to the information. And, the majority holds that the government can invoke the exemption only if it shows how disclosure will significantly harm some relevant private or governmental interest.

The record, in my view, shows that the legitimate business and governmental interests against disclosure are unusually weak in this case. First, the BSSG has entered into a consent decree with the Attorney General of Massachusetts promising to make all future anonymous **[**39]** salary compilations public. It is not obvious why there would be a significantly greater need to **[*13]** keep past compilations private. Moreover, as the Commonwealth's suit against the BSSG suggests, employers who collect cost information, circulate it only among themselves, and deny others access to it, risk antitrust difficulties. Their practice may be viewed as an agreement among buyers of a factor (secretarial services), *see* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 92 L. Ed. 1328, 68 S. Ct. 996 (1948); Cordova v. Bache & Co., 321 F. Supp. 600 (S.D.N.Y. 1970); 1 P. Areeda & D. Turner, ***Antitrust Law*** P229a (1978), to circulate price information, *see* United States v. Container Corp. of America, 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969); Sugar Institute, Inc. v. United States, 297 U.S. 553, 80 L. Ed. 859, 56 S. Ct. 629 (1936); American Column & Lumber Co. v. United States, 257 U.S. 377, 66 L. Ed. 284, 42 S. Ct. 114 (1921); Tag Manufacturers Institute v. FTC, 174 F.2d 452 (1st Cir. 1949); P. Areeda, *Antitrust Analysis* **[**40]** ch. 3C (3d ed. 1981), where the purpose or effect of the agreement is to suppress competition and where the agreement provides no offsetting benefit through the public dissemination of the information. I do not know whether the Commonwealth Attorney General would have proven such an antitrust violation in his suit, for the parties settled the case by consent decree. But, the legitimate business need for confidentiality is far from obvious in the case of a confidential salary information-sharing agreement among competitors.

Second, the government's need for confidentiality seems slight. The government activity at issue -- the setting of salaries -- is peripheral to the main job of the Federal Reserve Board and its regional banks. Normally government salary setting is conducted in public. Of course, the Federal Reserve Banks set their salaries differently and they are authorized by the Board to find out what comparable businesses pay their workers. But, these facts do not show any special need to enter into what was evidently a legally questionable, private salary information-sharing agreement among various competing organizations. Rather, the only interest to which the government **[**41]** can point is its general interest in keeping a promise of confidentiality -- an interest that is at stake whenever a promise of confidentiality is made, but an interest that is weakest when the information is related as peripherally to the agency's main mission as it is here. To accept the threat to this interest as determinative in this case would come close to making a simple "request plus promise" *necessarily* sufficient to apply the "confidentiality" exemption.

In the majority's view, these matters are better explored on remand. However, this litigation over a few documents has gone on for some time. It has been the subject of several district court opinions. No information of great moment is involved. And, the fact that a directly related state court consent decree exists prevents the case from having much precedential significance. It thus seems to me better to settle the matter now than to remand the case for yet another district court determination, another opinion, and possibly still another appeal. The government has had sufficient opportunity to demonstrate its interest in the confidentiality of the information. I do not think it has done so adequately. It is **[**42]** unlikely that the district court can reach a different result under the standards the majority instructs it to apply. Therefore, I would simply affirm the district court's result.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth

United States Court of Appeals for the First Circuit

December 20, 1983, Decided

No. 82-1913

Reporter

723 F.2d 155 *; 1983 U.S. App. LEXIS 14291 **; 1984-1 Trade Cas. (CCH) P65,774

MITSUBISHI MOTORS CORPORATION, Plaintiff, Appellee, v. SOLER CHRYSLER-PLYMOUTH, INC., Defendant, Appellant

Subsequent History: [1]** As Amended December 30, 1983.

Prior History: Appeal from the United States District Court for the District of Puerto Rico [Hon. Gilberto Gierbolini-Ortiz, U.S. District Judge].

Core Terms

arbitration, arbitration clause, antitrust, sales, counterclaims, anti trust law, district court, antitrust claim, distributorship, Dealers', allegations, termination, settlement, disputes, transshipment, investor, Awards, courts, trademarks, domestic, scope of arbitration, public policy, Sherman Act, nonarbitrability, arbitration agreement, subject matter, provisions, contracts, argues, public policy exception

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

International Law > Dispute Resolution > Arbitration & Mediation > Agreements

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Contracts Law > Breach > General Overview

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

HN1[] **Contract Conditions & Provisions, Arbitration Clauses**

Puerto Rican law does not recognize any arbitration agreement that obligates a dealer to arbitrate any controversy regarding the dealer's contract outside of Puerto Rico, or under foreign law or rule of law. *10 P.R. Laws Ann. § 278b-2*.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Constitutional Law > Supremacy Clause > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

HN2[] **Contract Conditions & Provisions, Arbitration Clauses**

Under *9 U.S.C.S. § 2*, arbitration agreements are valid and enforceable as a matter of preemptive federal law, save upon such grounds as exist at law or in equity for the revocation of any contract; state laws like *10 P.R. Laws Ann. § 278b-2* that single out arbitration agreements are preempted.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

HN3[] **Contract Conditions & Provisions, Arbitration Clauses**

The scope of an arbitration clause as it appears on the face of a contract is a question of law for a court's independent determination and not one of fact reversible only for clear error. All doubts are resolved in favor of arbitration; arbitration will be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN4[] Contract Conditions & Provisions, Arbitration Clauses

The Puerto Rico Dealers' Act, 10 P.R. Law Ann. *§ 278 et seq.*, 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.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

HN5[] Standards of Performance, Discharge & Termination

See *15 U.S.C.S. § 1222*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] Regulated Practices, Price Fixing & Restraints of Trade

10 P.R. Laws Ann. §§ 258, *259* forbid contracts, combinations, and conspiracies in restraint of trade and unfair methods of competition.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > Authority to Regulate > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

International Trade Law > General Overview

HN7[] International Aspects, Commerce With Foreign Nations

The antitrust laws apply to restraints not merely of interstate but also of foreign commerce. *15 U.S.C.S. § 1*. Although the presence of foreign parties is a factor that should be considered in deciding to take jurisdiction of a case involving foreign conduct, it is not dispositive.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

International Law > Dispute Resolution > Arbitration & Mediation > Agreements

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > General Overview

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Foreign Arbitral Awards

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > International Trade Law > Dispute Resolution > International Commercial Arbitration

HN8[] **Contract Conditions & Provisions, Arbitration Clauses**

As defined by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), implemented by 9 U.S.C.S. § 210 et seq., an arbitration agreement for recognition purposes must involve subject matter capable of settlement by arbitration. The Convention further defines recognized arbitration agreements that must be referred to arbitration as including only those recognized arbitrable agreements that are not null and void, inoperative or incapable of being performed. An arbitration award will not be recognized or enforced if the subject matter of the difference is not capable of settlement by arbitration under the law of the country where recognition and enforcement are sought but an award may not be enforced if recognition of enforcement of the award would be contrary to the public policy of the affected country.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Contracts Law > Contract Conditions & Provisions > General Overview

HN9[] **Conflict of Law, Forum Selection**

A forum-selection clause in an international contract will be respected by the United States courts unless enforcement is shown by the resisting party to be unreasonable under the circumstances.

Antitrust & Trade Law > Clayton Act > Scope

Business & Corporate Law > Foreign Corporations > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > Authority to Regulate > General Overview

HN10[] **Antitrust & Trade Law, Clayton Act**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, applies to conduct of foreign corporations that has a direct effect on United States commerce.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

International Trade Law > General Overview

International Trade Law > Authority to Regulate > General Overview

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

An agreement in restraint of trade made or predominantly carried out in the United States is subject to U.S. antitrust laws regardless of the nationality or place of business of the participants.

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Judges: Campbell, Chief Judge, Coffin and Bownes, Circuit Judges.

Opinion by: COFFIN

Opinion

[*157] COFFIN, Circuit Judge.

Soler Chrysler-Plymouth Corp. appeals from the grant of an order compelling arbitration of certain claims and counterclaims between it and Mitsubishi Motors Corp. The principal issue on this appeal is whether arbitration of federal **[**2]** antitrust claims may be compelled under the Federal Arbitration Act, *9 U.S.C. §§ 4*, *201*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1970).

I. Background

Soler Chrysler-Plymouth ("Soler") is a Puerto Rico corporation, formerly a franchised Chrysler dealer, with its principal place of business in Puerto Rico. Mitsubishi Motors Corp. ("Mitsubishi") is a Japanese corporation and automaker with its principal place of business in Japan. Mitsubishi was formed in 1970 as part of a joint venture between Chrysler International, S.A. ("Chrysler"), a Swiss corporation and wholly owned subsidiary of the U.S. Chrysler Corp., and Mitsubishi Heavy Industries, Inc. Under the joint venture, Mitsubishi manufactured vehicles for sale in certain territories outside the continental United States through Chrysler dealers such as Soler.

Soler became a Chrysler-Mitsubishi dealer in 1979 when it entered into a "distributor agreement" with Chrysler. At the same time, Soler entered into a separate "sales procedure agreement" with both Chrysler and Mitsubishi, paragraph VI of which contains the arbitration clause **[**3]** in issue here. Under that clause, "all disputes, controversies or differences which may arise between [Mitsubishi and Soler] out of or in relation to Articles I-B through V of [the sales procedure agreement] or for breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association".

The dispute in this case had its genesis some two years later in the soft new car market of 1981 when Soler became unable to meet minimum sales commitments in its territory, and Mitsubishi and Chrysler refused to permit Soler to "transship" vehicles to Central and South America and the continental United States. As Soler's inventory swelled and its finances worsened, Mitsubishi withheld shipment of additional new vehicles to Soler, eventually storing some 966 vehicles in Japan.

In February 1982, Soler disclaimed responsibility for the 966 vehicles stored in Japan. A month later, on March 15, Mitsubishi brought suit against Soler in federal court, alleging nonpayment for the stored vehicles, nonpayment of contractual storage penalties, damage to Mitsubishi's warranties and goodwill, expiration of Soler's distributorship, **[**4]** and other breaches of the sales procedure agreement. On the basis of these allegations, Mitsubishi petitioned for an order compelling arbitration under the Federal Arbitration Act, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Convention's implementing legislation. On March 18, Mitsubishi filed a request for arbitration with the Japan Commercial Arbitration Association.

Soler denied the allegations and counterclaimed, alleging violations of, *inter alia,* the Sherman Act, *15 U.S.C. §§ 1 et seq.*, the Federal Automobile Dealers' Day in Court Act, *15 U.S.C. §§ 1221 et seq.*, the Puerto **[*158]** Rico Dealers' Act, *10 L.P.R.A. §§ 278 et seq.,* and the Puerto Rico antitrust and unfair competition statute, *10 L.P.R.A. §§ 257 et seq.*

The district court ordered arbitration of all the above claims and counterclaims and entered partial final judgment to that effect under *Fed. R. Civ. P. 54(b)*. As to certain additional counterclaims against Mitsubishi and Chrysler, the district court retained jurisdiction, finding that they were outside the scope of the arbitration clause. Soler thereupon **[**5]** appealed.

Soler does not dispute the district court's referral of Mitsubishi's claims to arbitration, and neither Chrysler nor Mitsubishi challenges the district court's retention of jurisdiction over certain of Soler's counterclaims. Our review is therefore limited to two arguments raised by Soler: that its statutory counterclaims are outside the arbitration clause, and that its Sherman Act claims are in any event nonarbitrable as a matter of law. We examine each argument in turn.

II. Validity of the Arbitration Clause

Soler argues that the arbitration clause is of no effect because ***HN1***[] Puerto Rican law does not recognize any arbitration agreement that "obligates a dealer to . . . . arbitrate . . . . any controversy . . . . regarding [the] dealer's contract outside of Puerto Rico, or under foreign law or rule of law". *10 L.P.,.R.A. § 278b-2*. For several reasons, we reject Soler's argument.

First, federal law preempts the direct application of *section 278b-2*. ***HN2***[] Under *9 U.S.C. § 2*, **[**6]** arbitration agreements are declared valid and enforceable as a matter of preemptive federal law, "save upon such grounds as exist at law or in equity for the revocation of *any* contract" (emphasis added); state laws like *10 L.P.R.A. § 278b-2* that single out arbitration agreements are preempted.

Evidently recognizing the force of federal preemption, Soler does not argue that *section 278b-2* applies *directly*. Instead, it argues that *section 278b-2* is in effect "incorporated" indirectly into the sales procedure agreement, on the theory that the Soler-Chrysler distributorship agreement contains a savings and separability clause for provisions in violation of local law, [1] and that article XII of the sales procedure agreement "incorporates" the savings and separability clause of the distributorship agreement into the sales procedure agreement.

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[1] The separability clause of the distributor agreement reads as follows:

"22. LEGAL INTERPRETATION

[7]** The short answer to this tortured argument is that the savings and separability clause on its face applies only to the distributorship agreement between Chrysler and Soler; it does not apply to the sales procedure agreement with Mitsubishi. Moreover, the purposes of article XII and the separability clause are not implicated here. Article XII of the sales procedure agreement does not actually "incorporate" the distributorship agreement into the sales procedure agreement; it merely obligates Mitsubishi to avoid action inconsistent with the distributorship agreement in certain circumstances. [2] The separability clause of the **[*159]** distributorship agreement in turn is designed to preserve the larger aspects of the distributorship agreement when one of its portions violates local law. Nothing in the arbitration clause, however, violates local law or threatens the distributorship agreement, for *section 278b-2* is preempted by the federal Arbitration Act. Even if there were no preemption and *section 278b-2* did apply, the only result would be to render the arbitration clause void; the remainder of the sales procedure agreement would stand, as would the distributorship agreement. **[**8]**

III. Scope of the Arbitration Clause

Our analysis of the arbitration clause is guided by two basic principles. First, ***HN3***[] the scope of the clause as it appears on the face of the contract is a question of law for our independent determination and not, as Mitsubishi argues, one of fact reversible only for clear error. Second, **[**9]** all doubts are resolved in favor of arbitration; arbitration will be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute". *United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-83, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960)*.

Soler argues that it never specifically agreed to arbitrate controversies that arose under such statutes as the Sherman Act. Soler, however, mistakes the nature of our inquiry. The arbitration clause of the sales procedure agreement is not limited to contractual claims, but extends to *"all* disputes, controversies or differences" arising "out of" or "in relation to" Articles I-B through V of the agreement, as well as "for breach thereof" (emphasis added). The question, therefore, is not whether the arbitration clause mentions antitrust or any other particular cause of action, but whether the factual allegations underlying Soler's counterclaims -- and Mitsubishi's bona fide defenses to those counterclaims -- are within the scope of the arbitration clause, whatever the legal labels attached to those allegations. **[**10]** [3]

At the same time, the arbitration clause is not unlimited in scope. It does not extend to all disputes of any sort or to all provisions of the sales procedure agreement, but only to disputes touching specified provisions of the agreement. In addition, although Soler itself argues in another context that the issues in the case are too interwoven to separate, Soler's "defenses" are also counterclaims, and on their face raise matters extraneous to

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> This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein, and will bind the heirs, executors, administrators, successors and assigns of both parties. If it is found that any portion or portions of this Agreement violate in any particular any law of any government or governmental unit, division or subdivision having jurisdiction in the premises, and said violation would cause said authorities to consider this Agreement as void and without effect regardless of the present election of law, then within that political unit, division or subdivision, such portion or portions of this Agreement will be of no force and effect, and this Agreement will be treated in any such jurisdiction as if such portion or portions had not been inserted herein."

[2] Article XII of the sales procedure agreement reads as follows:

> "XII -- STATUS OF DISTRIBUTOR AGREEMENT
>
> The Distributor Agreement remains in full force and effect between CISA and Buyer *except that the provisions thereof which are in conflict with this Agreement shall be deemed to be in suspense during the term hereof,* and to the extent that no such conflict exists, MMC hereby agrees not to take any action inconsistent with the provisions of the Distributor Agreement not deemed to be in suspense in its relationship with BUYER pursuant to this Agreement." (Emphasis added.)

[3] Although the sales procedure agreement states that it is to be governed by Swiss law, the scope of an arbitration agreement is an issue of federal law. *See* *Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 616 (1st Cir. 1975)* and authorities cited thereat. In any event, the parties have neither argued nor offered to prove Swiss law, and have not suggested that Swiss contract law of general applicability would generate a different result.

Mitsubishi's claims. We therefore reject the temptation to hold Soler's counterclaims arbitrable **[**11]** solely because they are raised as defenses to claims covered by the arbitration clause. Rather, we look to the specific allegations underlying the dispute and determine arbitrability on an allegation-by-allegation basis. With these principles in mind, we turn to Soler's counterclaims.

A. Puerto Rico Dealers' Act

The crux of Soler's counterclaim under the ***HN4***[] Puerto Rico Dealers' Act [4] is that Mitsubishi "refused to comply with the terms and conditions of the Sales Procedure **[*160]** Agreement concerning orders placed for delivery of automobile products to Soler". Since the relevant terms and conditions are contained in the portions of Article I of the sales procedure agreement that are subject to arbitration, Soler's first counterclaim is plainly within the arbitration clause.

[12]** B. Sherman Act

Soler's Sherman Act counterclaim poses a murkier problem. The gist of Soler's theory is that Mitsubishi and Chrysler unlawfully divided markets. To that end, Soler alleges, Mitsubishi unjustifiably refused to allow transshipment of vehicles from Puerto Rico to North, Central, and South America. In addition, Soler alleges that Mitsubishi engaged in a "boycott" and other predatory practices intended to drive Soler out of business -- in particular, that Mitsubishi wrongfully refused to fill orders for parts and vehicles, and wrongfully terminated Soler's distributorship.

On this last allegation (wrongful termination), Mitsubishi asserts that Soler's distributorship expired by its own terms, and, in any event, that just cause for termination or nonrenewal existed by reason of Soler's failure to pay for orders and of other material breaches of the sales procedure agreement.

Although some aspects of termination are, as Soler argues, outside the scope of the arbitration clause *(see, e.g.,* Article VII: circumstances triggering automatic termination; notice in cases of automatic termination), the propriety of termination or nonrenewal here -- i.e., the existence of **[**13]** "cause" for termination -- necessarily and directly involves at least three other provisions of the sales procedure agreement: Article I-D(1) (dealer's orders "firm"), I-F (payment obligations and payment procedure), and I-E (distress unit penalties in event of nonshipment owing to dealer's fault). These other provisions all fall within the arbitration clause.

On the nonshipment issue, Mitsubishi counters that shipment was withheld in most instances at Soler's own request, and that shipment was withheld on other instances because Soler failed to arrange an acceptable letter of credit. Since such a letter of credit is required for shipment under Article I-F of the sales procedure agreement, the nonshipment dispute would appear to be within the arbitration clause.

Finally, on the transshipment issue, Mitsubishi raises a number of justifications for refusing transshipment permission, among them Soler's inexperience with ocean shipping, its inability to make warranted post-sale service on transshipped vehicles, and the unsuitability of vehicles manufactured to Puerto Rican specifications for use in countries with different climates and unsuitable grades of gasoline. [5] In essence, **[**14]** Mitsubishi's objections all raise concerns that transshipment "would immediately and irreparably damage [Mitsubishi's] name, reputation,

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[4] The Dealers' Act 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 § 278a***.

[5] Mitsubishi was concerned that additional equipment such as heaters and defoggers would be required in the countries to which Soler contemplated transshipment, and that such equipment "might be installed in an unworkmanlike manner, or might violate local motor vehicle laws". Letter of Yasuo Goto to Soler Chrysler-Plymouth, Inc., September 4, 1981. As for fuel, Mitsubishi feared that the use of leaded or low-octane unleaded fuel commonly available in Latin America would drastically shorten the life of its cars and would cause Mitsubishi cars to appear seriously underpowered.

goodwill and trademarks by creating the false impression that [Mitsubishi] vehicles are of substandard quality, and would therefore constitute acts of trademark infringement".

Under current antitrust thinking, such concerns are relevant to the legality of territorially based restricted distribution **[**15]** arrangements of the sort in issue here. *See* *Continental T.V. v. GTE Sylvania, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. We need not delve further into the merits of Mitsubishi's defense, however, for it is enough for present purposes that its trademark and goodwill concerns are plainly germane to Soler's antitrust allegations. The only remaining question is whether those concerns implicate a provision of the sales procedure agreement covered by the arbitration **[*161]** clause. An examination of Article IV of the agreement persuades us that they do.

Under Article IV, the "manner in which [Soler] . . . . shall use [Mitsubishi's] Trademarks" is "subject to prior approval by [Mitsubishi]":

> "In the event that [Mitsubishi] shall object to the manner in which BUYER or any Controlled Person is using or allowing Dealers to use any Trademark, *either on Products* or in advertising *or otherwise,* BUYER agrees promptly to remedy the situation to [Mitsubishi's] satisfaction." (Emphasis added.)

While the transshipment dispute undeniably implicates other, uncovered provisions of the sales procedure agreement and the Chrysler-Soler **[**16]** distribution agreement, we cannot say that the transshipment dispute's connection with Article IV is insufficient to trigger the arbitration clause. We therefore conclude that Soler's transshipment allegations, like its nonshipment and termination allegations, are within the scope of the arbitration clause.

We discuss in part IV of this opinion the important question whether these claims, though within the scope of the arbitration clause, are arbitrable.

C. Dealers' Day in Court Act

On appeal, Soler advances two contentions under the federal Dealers' Day in Court Act. [6] The first is that Mitsubishi acted in bad faith "in establishing minimum sales volumes for Soler"; the second is that Mitsubishi attempted to "coerce and intimidate Soler into accepting a proposal whereby Mitsubishi would replace Soler with its own wholly owned subsidiary."

[17]** As for the latter contention, the allegation arises from Soler's difficulties in paying for orders. It essentially restates allegations made in claims under the Puerto Rican Dealers' Act and the Sherman Act. It is sufficiently related to covered articles of the sales procedure agreement to trigger the arbitration clause. As for the minimum sales agreement, the district court itself held with respect to another of Soler's counterclaims that minimum sales volumes were outside the scope of the arbitration clause. Neither Mitsubishi nor Chrysler challenges this conclusion. We reach the same conclusion.

D. Puerto Rico ***Antitrust Law***

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[6] The act provides as follows:

> ***HN5***[] "An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* that in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith." *15 U.S.C. § 1222*.

Soler's local antitrust claim relies entirely on the factual allegations made in connection with the three claims already discussed. [7] It therefore suffices to state that the counterclaim is within the arbitration clause to the same extent as the three foregoing counterclaims, and is outside the arbitration clause to the same extent as Soler's federal Dealers' Day in Court claim.

[18]** IV. Arbitrability of the Antitrust Issues

The second major question in this appeal is whether the antitrust issues raised by Soler's third counterclaim are subject to arbitration. We have already determined that they are germane to issues covered by Article I and Article IV of the sales procedure agreement. The important question now before us is whether, despite such coverage, they are nonarbitrable because of a judicially created policy, hitherto applied only to "domestic" contracts involving United **[*162]** States citizens, reserving antitrust issues for judicial determination.

Because this question appeared as one of first impression, we sought, after hearing argument, the views of the United States as an amicus curiae. In a brief submitted by the Department of Justice and joined in by the Legal Advisor of the Department of State, the United States urged that we apply to international contracts the same antitrust exception to arbitrability that courts, beginning with *American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968)*, have applied to purely domestic agreements. After deliberation, we agree.

We divide our discussion into **[**19]** three areas. First we consider whether recognition of the antitrust exception to arbitrability is compatible with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [reprinted following *9 U.S.C. § 201 (Supp. 1982)*] ("Convention"), which was adopted by a United Nations conference in 1958, consented to by the United States in 1970, and implemented when Congress passed Chapter 2 of the United States Arbitration Act, *9 U.S.C. § 201 et seq.* Finding that it is compatible, we next consider whether, as the district court held, *Scherk v. Alberto-Culver Co., 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974)*, proscribes application of the *American Safety Equipment* doctrine to the contract in this case. Concluding that *Scherk* does not so proscribe, we reach the final inquiry: since Soler's antitrust claims against Mitsubishi must be decided by a court, should the district court stay all arbitration pending a judicial decision? We answer this by concluding that decisions as to separability of issues, likelihood of success of the antitrust claims, and timing are within the informed discretion **[**20]** of the district court.

A. The Convention and the Antitrust Exception

We begin by noting a rarity in our jurisprudence, the overriding of a strong policy in favor of arbitration as evidenced by the Federal Arbitration Act, *9 U.S.C. § 1 et seq.*, by a judicially created rule excepting antitrust claims. This ruling, the reasons marshalled for it, and the unanimity of its acceptance in the field of domestic contracts are solid evidence of the strength of the policy on nonarbitrability. The most complete exegesis is found in the decision establishing the exception, *American Safety Equipment, supra.* The reasoning is fourfold: (1) governance of the realm of ***antitrust law***, so vital to the successful functioning of a free economy, is delegated by statute to both government and private parties, the latter being given special incentive to supplement efforts of the former, the work of both being equally the grist of judicial decisions, *391 F.2d at 826*; (2) the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract, *id. at 827*; **[**21]** (3) antitrust issues are -- an understatement -- "prone to be complicated, and the evidence extensive and diverse", *id.,* and, we may add, the economic data subject to rigorous analysis dictated by a growing and increasingly sophisticated jurisprudence, with the subject correspondingly ill-adapted to strengths of the arbitral process, *i.e.,* expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity; and (4) the notion, suggestive of the proposition that issues of war and peace are too important to be vested in the generals, that decisions as to antitrust regulation of business are too important

[7] In brief, ***HN6***[] the Puerto Rico statutes in question forbid contracts, combinations, and conspiracies in restraint of trade, ***10 L.P.R.A. § 258***, and unfair methods of competition, *id.* ***§ 259***.

to be lodged in arbitrators chosen from the business community -- particularly those from a foreign community that has had no experience with or exposure to our law and values. *Id.*

So far as we have ascertained, all other circuits that have had occasion to consider the doctrine of *American Safety Equipment* have embraced it. *Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116, 117 (7th Cir. 1978)*; *Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974)*; *Helfenbein v. International Industries, Inc., 438 F.2d 1068, 1070 (8th Cir. 1971)*; **[**22]** *Power Replacements, Inc. v. Air Preheater* **[*163]** *Co., 426 F.2d 980, 983-84 (9th Cir. 1970)*. We conclude, therefore, that the nonarbitrability of antitrust issues in domestic contract disputes is established as solid and sound doctrine.

Before endeavoring to parse the Convention, we pause to examine whether there are factors which suggest that the exception be confined to disputes between United States citizens. We begin by noting that ***HN7***[] the antitrust laws apply to restraints not merely of interstate but also of foreign commerce. *15 U.S.C. § 1*. Although the presence of foreign parties is a factor that should be considered in deciding to take jurisdiction of a case involving foreign conduct, it is not dispositive. *Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976)*; *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979)*.

More importantly, we consider two questions. The first is: is the American antitrust ethic and system of law so "parochial" that insistence on the application **[**23]** of the nonarbitrability of antitrust issues to international agreements would be anathema to other countries and would incite retaliation? We have in mind the admonition in *The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972)*, to abjure parochial considerations.

We doubt that other nations are ignorant of the primacy we accord to ***antitrust law***. A typical reference to our ideological topography is the Court's statement in *United States v. Topco Associates, Inc., 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*:

> "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."

We are advised by the United States that the Federal Republic of Germany also accords high status to its antitrust rule and prohibits agreements entrusting future such disputes solely to arbitration. [8] We also note the policy of the European Economic Community, as embodied in the Treaty of Rome, in Articles **[**24]** 85-90, to forbid practices restricting or distorting competition. In any event, whether or not other nations agree with United States law and attitudes relating to competition, it is extremely doubtful that they would describe them as "parochial" in the sense of being petty provincialisms.

The obverse question, whether any policy reason supports the application of the rule against arbitration of antitrust issues to agreements involving American companies and foreign suppliers and sellers, is also easily answered. In an increasingly interdependent and interrelated commercial world, where the multinational corporation with ties to several countries is becoming more prevalent, *see* *Scherk v. Alberto-Culver Co., 417 U.S. 506, 533, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974)* (Douglas, J., dissenting), the insulation of agreements with some international **[**25]** coloration from the antitrust exception would go far to limit it to the most minor and insignificant of business dealings. Indeed, suppliers and sellers could achieve immunity from ***antitrust law*** threats and sanctions by the simple expedient of co-opting some foreign or international entity into the arrangement. Specifically, the sovereign sway of ***antitrust law*** and policy in the United States economy would be hopelessly fragmented if, say, all domestic manufacturers with overseas partners, suppliers, or financiers could force all their dealers and distributors to arbitrate their antitrust claims.

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[8] *See* section 91(1) of the Act Against Restraints of Competition, reprinted in OECD, I Guide to Legislation on Restrictive Business Practices (1980).

We conclude that the nonarbitrability of antitrust issues is an American doctrine that is alive, well, justified both in its conception and in its application to at least the kind of international agreement we confront in this case -- an agreement governing the sales and distribution of vehicles *in the United States.* What remains for us to do **[*164]** is to see how such law and policy fit, if at all, with the Convention.

The Convention, insofar as it concerns the problem we are dealing with, was preceded by very little helpful history, and followed by very little illuminating history **[**26]** or adjudication. We work with a scattering of crumbs -- and, hopefully, a sound sense of the balance struck by the Convention between deeply felt national policies and the desire to facilitate international arbitration. The Convention has three relevant categories of decision making. The first is simply the definition of ***HN8***[] an arbitration agreement for "recognition" purposes. To be recognized, an agreement must involve " subject matter capable of settlement by arbitration". Article II(1). A second category, narrower than the first, defines those recognized arbitration agreements that must be referred to arbitration; they include only those recognized, arbitrable agreements that are not "null and void, inoperative or incapable of being performed". Article II(3). A third category deals not with recognition or reference to arbitration but with the enforcement of arbitral awards. One provision is symmetrical with the earlier provision regarding reference and simply says that an award will not be recognized or enforced if "the subject matter of the difference is not capable of settlement by **[**27]** arbitration under the law of that country [where recognition and enforcement are sought]". Article V(2)(a). Another, however, introduces a new concept in saying that an award may not be enforced if "recognition or enforcement of the award would be contrary to the public policy" of the affected country. Article V(2)(b). Thus, theoretically, there could be a duty to refer a matter to arbitration under Article II(3), even though it was so offensive to a nation's public policy that it could not be enforced under Article V. Our own approach make it unnecessary to try to fill this hiatus, although there is respectable authority for such an effort. [9]

[28]** Our analysis begins by excluding that part of Article II(3) which would bar from reference to arbitration any provision that is "null and void, inoperative or incapable of being performed". In *Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982)*, we declared that this "clause must be interpreted to encompass only those situations -- such as fraud, mistake, duress, and waiver -- that can be applied neutrally on an international scale." We see no reason to withdraw this statement, which is consistent with the proposition that the public policy exception in Article II(3) is to be narrowly construed. This clause seems to us to be of a different order from the words in Article II(1), not addressed in *Ledee,* requiring as a prerequisite for recognition "subject matter capable of settlement by arbitration".

The precise question we ask is whether a matter that has been barred by unanimous judicial precedent for a decade and a half from resolution by arbitration, because of a multiplicity of solid reasons that lose no pertinence or weight in an international context, is a matter "capable of settlement by arbitration". It seems to us that "capable" means legally **[**29]** capable -- for any matter can theoretically be arbitrated or compromised, even if the decision be to divide an infant. 1 Kings 3:16-28. And if, absent fraud, mistake, duress, and waiver and absent something shocking to the sensibilities of a nation's public policy, there is no other **[*165]** basis for refusing arbitration, then the Convention's words "capable of settlement by arbitration" have no meaning at all.

We are aided in reading some meaning into this clause by statements made in a memorandum from the Department of State when the Convention was submitted to the Senate. Apropos of the clause we are interpreting, the memorandum explained:

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[9] Justice Douglas, in his dissenting opinion in *Scherk v. Alberto-Culver Co., 417 U.S. 506, 530-31 n.10, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974)*, recapitulates the conference discussion of this hiatus and quotes G. W. Haight, a delegate to the conference, representing The International Chamber of Commerce, as speculating that "courts may under this wording be allowed some latitude; *they may find an agreement incapable of performance if it offends the law or the public policy of the forum".* (Emphasis in opinion.) In other words, it could be argued that an agreement to arbitrate an antitrust dispute would, because it offends public policy under V(2)(b), be, ipso facto, "incapable of performance" under II(3) and should thus not even be referred to arbitration. As our discussion in the text, *infra,* indicates, we have taken a narrower view of "incapable of performance". We remain mystified, however, at the sense of, say, having to refer to arbitration a dispute involving the selling of slaves, knowing that an award could never be enforced.

> "The requirement that the agreement apply to a matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration." S. Doc. Exec. E, 90th Cong., 2d Sess. (1968), at 19.

As a specific example, it noted laws in some states of the United States precluding the arbitration of real estate title disputes. This seems to us suggestive of the kind of subject matter oriented, deep seated rejection of the arbitral **[**30]** process even more convincingly demonstrated in the *American Safety Equipment* exception. The same State Department memorandum also commented on the hiatus between Article II reference and Article V enforcement mentioned in footnote 9, *supra.* It expressed the view that the exceptions in V(2) would also be read into II(3)'s requirements for enforcing agreements to arbitrate. S. Doc. Exec. E., *supra,* at 19. [10]

This interpretation **[**31]** is emphatically reinforced by the scholarly commentary. Beginning in 1961, Leonard V. Quigley, commenting on the language of Article II(1), "capable of settlement by arbitration", remarked on the " considerable latitude . . . . thus afforded the tribunal deciding the issue of arbitrability" and speculated that "predictability of result under the Convention is weakened" by this latitude. *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 70 Yale L.J. 1049, 1064 (1961). He noted the fact that Article V(2)(a), dealing with enforcement of awards, relegated the issue of arbitrability in that context to the laws of the country where enforcement is sought, and prophesied, " It can be expected that the courts of the State where recognition of the agreement is sought will adopt a similar standard of judging the arbitrability of the dispute under the law of the forum". *Id.* at n. 70.

Professor Gerald Aksen predicted that the "capable of settlement" provision of Article II(1) could be "one of the most troublesome". *American Arbitration Accession Arrives in the Age of Aquarius: United States* **[**32]** *Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 3 Southwestern University Law Review 1, 8 (1971). Although personally hoping that arbitrability would be decided by the arbitrator, he concluded, "Another provision in the Convention, however, in Article V para. 2(a) makes such a desirable result unlikely." *Id.* at 9 (footnote omitted). He thought this unfortunate because applying domestic standards of arbitrability "poses unduly complicated legal questions" and because the "public policy" language of Article V(2)(b) could be utilized to refuse enforcement of an award involving, for example, a question of ***antitrust law***. *Id.* at 13. A similar regret about the "significant inadequacy" of Article II(1) was voiced by John P. McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States,* 2 J. Mar. L. & Com. 735, 753 n.83 (1971), with the recognition that Article V(2)(a) would "permit the court to refuse to recognize the agreement if its subject matter is incapable of settlement by arbitration under federal law." **[*166]** *Id.* at 757. *See also* **[**33]** Robert A. J. Barry, *Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards Under the New York Convention: A Modest Proposal,* 51 Temp. L.Q. 832, 835 n.14 (1978).

Finally, *International Commercial Arbitration New York Convention,* Booklet 1, September 1980 (G. Gaja ed.), at I.B.2 states:

> "The similarity in the texts of Article II(1) and Article V(2)(a) and the fact that Article II was introduced in the Convention only at the late stage of the drafting indicate that also according to Article II the arbitrability of the dispute must be tested under the *lex fori* -- the law of the State where the effects of the arbitral agreement are sought. (Footnote omitted)."

We therefore conclude that an agreement to arbitrate antitrust issues is not "an agreement within the meaning of" Article II(3) of the Convention because such an agreement does not concern "a subject matter capable of

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[10] Other examples of matters not "capable of settlement by arbitration", provided to us by the government, are *Audi-NSU Auto Union A.G. v. S.A. Adelin Petit & Cie* (Cour de Cassation, Belgium) (1979), *reported in* V Yearbook Commercial Arbitration 257 (1980) (Belgian law precludes arbitration of disputes arising under a Belgian law on unilateral termination of exclusive distributorships); *Compagnia Costruzioni v. Piersanti* (Corte di Cassazione, Italy) (1979), *reported in* VI Yearbook Commercial Arbitration 229 (1981) (Italian law precludes arbitration of labor disputes).

settlement by arbitration", as required by Article II(1). Not being such, any award, were such to be issued, could not be enforced, by the specific terms of Article V(2)(a).

B. Does *Scherk v. Alberto-Culver Co.* Compel Arbitration?

[34]** *Scherk* poses a considerable roadblock to the above analysis, if its holding is extrapolated to fit a situation of demonstrably greater impact on the United States and a public policy of incommensurably greater depth. We note at the outset what would be the impact of such an extension: if even antitrust claims arising from international contracts are found to be arbitrable, the Convention's language "not capable of settlement by arbitration" would have little or no meaning.

In *Scherk* an American company selling toiletries in the United States and abroad acquired three European manufacturing companies from German defendant Fritz Scherk. The negotiations, the signing of the sales contract (which included a clause providing for arbitration of "any controversy or claim . . . . [arising] out of this agreement or the breach thereof"), and the closing had been accomplished largely in European countries. The plaintiff company discovered that the critical trademarks, which defendant had warranted to be unencumbered, were indeed substantially encumbered, and brought suit in federal court, alleging that the defendant had misrepresented the status of the trademarks in violation of **[**35]** § 10(b) of the Securities Exchange Act of 1934.

Defendant moved that the action in federal court be dismissed or that it be stayed pending arbitration pursuant to the contract clause. Plaintiff, relying on *Wilko v. Swan, 346 U.S. 427, 98 L. Ed. 168, 74 S. Ct. 182 (1953)*, argued that the arbitration clause was inapplicable to its securities claim. In *Wilko,* the Court had held that an arbitration clause in a domestic contract could not deprive a securities buyer of his right to the judicial remedy provided in the Securities Act of 1933, since § 14 of the 1933 Act specifically prohibited any "condition, stipulation, or provision" waiving the Act's protection.

A 5-4 majority of the Court declined to apply the *Wilko* holding to the contract in *Scherk.* While *Wilko* had addressed the validity of an arbitration clause in a domestic contract, the Court noted that the agreement in *Scherk* was "truly international", involving "the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets". *417 U.S. at 515*. The Court had **[**36]** held two terms earlier that ***HN9***[] a forum-selection clause in an international contract would be respected by the United States courts "unless enforcement is shown by the resisting party to be 'unreasonable ' under the circumstances". *The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972)*. In *Scherk,* the Court observed that "an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause". **[*167]** *417 U.S. at 517*. The Court had already decided that arbitration of the Scherk contract was not "unreasonable".

In reaching this decision, the Court held that a "parochial refusal by the courts of one country to enforce an international arbitration agreement" would not only frustrate the orderly and predictable resolutions that the parties had intended to achieve with their forum-selection clause, but would also invite "mutually destructive jockeying" for advantage. *Id. at 516-17*. The supposed counterweight to these harmful results -- the benefit of having securities **[**37]** claims heard in American courts -- was without substance; for if one party resorted to American courts to have arbitration enjoined, "an opposing party [might] by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice". *Id. at 518*.

We have several reasons for finding that *Scherk* does not control the case now before us. We begin by noting that the Court did not rely on the Convention for its decision in *Scherk.* Although it noted the Convention as a factor that "confirmed" the decision, *id. at 520 n.15*, it offered no analysis of the "capable of settlement" language of Article II(1). [11] The Court did allude in *Scherk* to the possibility that an award in favor of the defendant might be challenged

[11] The court simply stated, "We think that this country's adoption and ratification of the Convention . . . . [provides] strongly persuasive evidence of congressional policy consistent with the decision we reach today ". *417 U.S. at 521 n.15*. This language prompted the following comment by A. Jason Mirabito, *The United Nations Convention on the Recognition and Enforcement of*

under Article V(2)(b) of the Convention as contrary to public policy, *id. at 519 n.14*, and to that extent it affirmed the existence and importance of a public policy exception under the Convention; but the opinion offered no guidance on the scope of the public policy exception in Article II limiting the *recognition* of certain agreements as arbitrable and the *reference* **[**38]** of those agreements to arbitration. For this reason, a large portion of the statutory analysis that we have found persuasive in establishing an antitrust exception to arbitration of international contract disputes is unaffected by the Court's decision in *Scherk.*

[39]** We do not attempt to make much of the fact that the agreement in *Scherk* was much more "international" than the agreement before us -- involving, as it did, the European sale of European trademarks whose validity could only be determined by reference to foreign law. *Id.* at 516 n.10. The important point is that the parties here could not be blind to the obvious fact that American law would normally apply to any claim of monopolization or restraint of trade. *See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)* (in which a special panel of the Second Circuit, sitting as a court of last resort, held that ***HN10***[] the Sherman Act applies to conduct of foreign corporations that has a direct effect on United States commerce); Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, §§ 401-03, 96 Stat. 1233, 1246 (1982) (affirming that both the Sherman Act and the Clayton Act apply to conduct of foreign nationals affecting import trade); Restatement of Foreign Relations Law § 415 (1) (Tentative Draft No. 2, 1981) (providing that **[**40]** ***HN11***[] an agreement in restraint of trade made or predominantly carried out in the United States is subject to U.S. antitrust laws regardless of the nationality or place of business of the participants). Even more apparent is the fact that ***antitrust law*** is not a "parochial" consideration. We have already noted that the importance the United **[*168]** States accords its antitrust laws is well known, and that our insistence on a judicial forum for antitrust claims in international agreements has a precedent in the laws of Germany. *See supra* at note 8 and accompanying text. In view of these considerations, we cannot imagine that our invoking the public policy exception of the Convention to preserve antitrust claims from arbitration will promote "jockeying" for forums or invite retribution from foreign courts.

Perhaps the major difference between *Scherk* and the case at hand lies in the different policies at issue. In *Wilko,* the Court observed that the securities laws were "designed to protect investors", *346 U.S. at 431*, and that arbitration clauses impermissibly deprive investors of this protection by restricting **[**41]** the "wider choice of courts and venue" provided by the securities laws. *Id. at 435*. The Court declined in *Scherk* to extend this reasoning to international contracts: first, because it found that the private investor's ability to choose an American judicial forum at the time the dispute arose was illusory, since the other party could block the forum choice in a foreign court; and second, because it found that the private investor's interest in choosing his forum ahead of time was greater in an international contract, where the forum and substantive law that would govern any specific dispute absent an arbitration clause were so uncertain. 471 U.S. at 516-18. In short, the Court engaged in a balancing test, weighing the policy considerations of giving the investor the full protection of the securities laws against the policy considerations of giving the investor the certainty of an arbitration clause; and it decided that the individual investor would be better served by enforcement of the arbitration clause.

The policy underlying the antitrust laws, however, is not to protect individual companies, but to protect *competition.* In *American Safety* **[**42]** *Equipment,* the Second Circuit observed:

> "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest [citations omitted]. Antitrust violations can affect hundreds of thousands -- perhaps millions -- of people and inflict staggering economic damage . . . . We do not believe that Congress intended such claims to be resolved elsewhere than in the courts". *391 F.2d at 826-27*.

Foreign Arbitral Awards: The First Four Years, 5 Ga. J. Int'l. & Comp. L. 471, 498 (1975): "Thus, the Court basically ignored the Convention Comment, *Greater Certainty in International Transactions Through Choice of Forum?,* 69 Am. J. Int'l L. 366, 371 (1975), observing that in *Scherk* the Court had not addressed the provisions of private international law and the Convention that "permit the courts of one state to refuse to enforce an agreement to arbitrate which is void because contrary to the public policy of that state".

Although it is true that an investor like Scherk who brings an action under the securities laws serves the public interest by policing the securities market, the securities laws are designed primarily to protect a fairly small "special interest" group: those investors in a particular security who read and are influenced by information in the company's prospectuses or financial reports. Antitrust laws, on the other hand, protect the general public by preserving a competitive atmosphere that keeps prices down in an entire industry or in a group of related **[**43]** industries. The strength of the public interest in private enforcement of antitrust laws is illustrated by the fact that successful antitrust plaintiffs are allowed to recover treble damages, while securities plaintiffs may only recover their actual damages. If we engage in a Scherk-type balancing exercise, therefore, we must weigh the private party's interest in the arbitration of international contract disputes against the public's interest in the preservation of economic order in the United States. Such a balancing exercise can have only one result: to enforce the private arbitration clause at the expense of public policy would be "unreasonable". [12] *Cf.* *Zapata, 407 U.S. at 10*.

[44]** **[*169]** C. Implications for the District Court

Appellant has argued briefly that, since the antitrust issues "permeate" the claims in arbitration, the arbitration proceedings should be stayed. *Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978)*; *Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974)*. Appellee counters with *Kelly v. Kosuga, 358 U.S. 516, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959)*, and *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045 (5th Cir. 1982)*. The district court, however, has not had the occasion to decide whether the matters are sufficiently separable to justify separate and contemporaneous treatment. Moreover, the district court has not, because of its application of *Scherk* to this case, been called upon to assess the likelihood of success of the antitrust claims, a relevant factor in deciding whether or not to stay arbitration. *See* *N.V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp., 532 F.2d 874 (2d Cir. 1976)*. Such cases as *Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025 (2d Cir. 1979),* **[**45]** *Continental T.V. Inc. v. G.T.E. Sylvania Inc., 694 F.2d 1132 (9th Cir. 1982)*, and our own *Auburn News Company, Inc. v. Providence Journal Co., 659 F.2d 273 (1st Cir. 1981)*, may be relevant. *See also* American Bar Association Section of ***Antitrust Law***, Monograph 9, *Refusals to Deal and Exclusive Distributorships,* at 28 n.110.

The district court may now, in the light of our holding that Soler's antitrust claims against Mitsubishi are not arbitrable, focus on such matters as permeation and likelihood of success and decide whether both arbitrable and nonarbitrable matters should proceed on their own course or whether one set of problems should await resolution of the other. For example, the claim that Mitsubishi had "good cause" to terminate its dealership arrangement with Soler is part of Mitsubishi's case in chief, which will be submitted to arbitration. If the district court believes that Soler's antitrust claims are separable and that the interests of judicial economy would be served by staying a determination of these claims pending arbitration, it will be able to allow the arbiter to make an initial determination on the "good cause" issue. **[**46]** If the arbiter finds that good cause existed, the district court may not need to reach the antitrust issues; if the arbiter finds that Mitsubishi did not have good cause to terminate the contract, the district court may then need to decide whether the termination was caused by a violation of the antitrust laws. We leave the method of decision, including specifically whether or not to entertain further evidence and/or argument, to the district court.

The judgment of the district court submitting Soler's antitrust claims to arbitration is reversed; as to all other issues, the judgment of the district court is affirmed. The case is remanded for further proceedings in accordance with this opinion. Appellee to receive half its costs.

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[12] We speak here, as we have throughout this opinion, only of the enforcement of a *prospective* arbitration clause affecting an antitrust claim. We express no opinion on the question whether the parties can agree to arbitrate a specific antitrust claim once the dispute has arisen, a practice that some courts have likened to the settlement of a private antitrust suit. *See* *Cobb v. Lewis, 488 F.2d at 49*; Pitofsky, *Arbitration and Antitrust Enforcement,* 44 N.Y.U. L. Rev. 1072, 1079-80 n.31 (1969); *cf.* *Wilko v. Swan, 346 U.S. at 438*.

Barry Wright Corp. v. ITT Grinnell Corp.

United States Court of Appeals for the First Circuit

December 29, 1983, Decided

No. 83-1292

Reporter
724 F.2d 227 *; 1983 U.S. App. LEXIS 14061 **; 1984-1 Trade Cas. (CCH) P65,787

BARRY WRIGHT CORPORATION, Plaintiff, Appellant, v. ITT GRINNELL CORPORATION, ET AL., Defendants, Appellees

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Walter Jay Skinner, U.S. District Judge].

Disposition: Affirmed.

Core Terms

prices, snubbers, costs, percent, anti trust law, exclusionary, Predatory, buy, incremental, price cut, competitors, mechanical, discount, district court, Sherman Act, buyer, total cost, anticompetitive, damages, courts, cuts, foreclosure, contracts, promise, price cutting, concentrated, antitrust, suggests, seller, price fixing

LexisNexis® Headnotes

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

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN1[] **Monopolies & Monopolization, Attempts to Monopolize**

15 U.S.C.S. § 2 makes it unlawful to monopolize any part of the trade or commerce among the several states.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Regulated Practices, Monopolies & Monopolization**

Monopolization, under *15 U.S.C.S. § 2*, has two elements: First, the possession of monopoly power in the relevant market, and; second, the acquisition or maintenance of that power by other than such legitimate means as patents, superior product, business acumen, or historic accident.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Regulated Practices, Monopolies & Monopolization**

Under *15 U.S.C.S. § 2*, a practice, a method, a means, is "improper" if it is exclusionary.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Regulated Practices, Monopolies & Monopolization**

"Exclusionary" conduct is conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Regulated Practices, Monopolies & Monopolization**

A legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risk interference with one of the Sherman Act's, *15 U.S.C.S. § 1 et seq.*, most basic objectives: The low price levels that one would find in well-functioning competitive markets.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

The modern antitrust courts look to the relation of price to "avoidable" or "incremental" costs as a way of segregating price cuts that are "suspect" from those that are not.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Regulated Practices, Monopolies & Monopolization**

When prices exceed "average variable cost," but are "below average total cost," plaintiff must prove by a preponderance of the evidence that defendant's pricing policy depends on its exclusionary or disciplinary tendency. And, in a case involving "prices above average total cost," plaintiff can still win if it proves by clear and convincing evidence, i.e., that it is highly probably true that defendant's pricing policy was predatory.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not make unlawful prices that exceed both incremental and average costs.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Virtually every contract to buy "forecloses" or "excludes" alternative sellers from some portion of the market, namely the portion consisting of what was bought. It is not surprising then that the courts have judged the lawfulness of contracts to purchase not under per se rules but under a rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Requirements Contracts

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

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

HN10[] **Exclusive & Reciprocal Dealing, Requirements Contracts**

In determining the probable effect of a requirements contract on the relevant area of effective competition, a court is to take into account both the extent of the foreclosure and the buyer's and seller's business justifications for the arrangement. A court must look both to the severity of the foreclosure (a fact which, other things being equal, suggests anticompetitive harm) and the strength of the justifications in determining whether the "size" of the contract to purchase is reasonable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

HN11[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

There is an important difference between a requirements' contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements. A true requirements contract flatly eliminates the buyer from the market for its duration; a fixed quantity contract leaves open the possibility that the buyer's needs will exceed his contractual commitment; he is free to purchase from others any excess amount that he may want.

Commercial Law (UCC) > ... > Application & Construction > Remedies > Damages

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Commercial Law (UCC) > Sales (Article 2) > General Overview

Commercial Law (UCC) > ... > Remedies > Limitations & Modifications > General Overview

Commercial Law (UCC) > ... > Remedies > Limitations & Modifications > Liquidated Damages

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > ... > Damages > Types of Damages > Liquidated Damages

HN12[] **Remedies, Damages**

The parties to a contract have a right to collect damages for breach. And, they can insert a liquidated damages provision in the contract as a measure of damages. *U.C.C. § 2-718*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Commercial Law (UCC) > ... > Application & Construction > Remedies > Damages

Commercial Law (UCC) > Sales (Article 2) > General Overview

Commercial Law (UCC) > ... > Remedies > Limitations & Modifications > General Overview

Commercial Law (UCC) > ... > Remedies > Limitations & Modifications > Liquidated Damages

Contracts Law > ... > Types of Damages > Compensatory Damages > General Overview

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Contracts Law > ... > Damages > Types of Damages > Liquidated Damages

HN13[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

A liquidated damages provision is enforceable only if it is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. *U.C.C. § 2-718(1)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Requirements Contracts

Contracts Law > Contract Conditions & Provisions > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Contracts Law > ... > Damages > Types of Damages > Liquidated Damages

HN14[] **Exclusive & Reciprocal Dealing, Requirements Contracts**

If the cancellation clause in a requirements contract provides only for lawful liquidated damages, it is no more "exclusionary" than the underlying substantive agreement that it helps to enforce.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Monopolies & Monopolization, Attempts to Monopolize**

A monopolist's conduct that from a competitive point of view is unreasonable, is "exclusionary." Thus, conduct that is not "exclusionary" is not "unreasonable."

Torts > ... > Commercial Interference > Contracts > General Overview

HN16[] **Commercial Interference, Contracts**

Under Massachusetts law, one essential element of the tort of tortious interference is that defendant's conduct be either per se unlawful or conducted with malice.

Counsel: Donald B. Gould, Kenneth A. Cohen, Jonathan P. Feltner, Andrew S. Hogeland, and Goodwin, Procter & Hoar, for Appellant.

Joseph J. O'Malley, Norman A. Dupont, Paul, Hastings, Janofsky & Walker, John A. Nadas, and Choate, Hall & Stewart, for Appellee Pacific Scientific Company.

Judges: Campbell, Chief Judge, Skelton, * Senior Circuit Judge, and Breyer, Circuit Judge.

Opinion by: BREYER

Opinion

[*228] BREYER, Circuit Judge. The question that this case presents is whether defendant Pacific Scientific Company ("Pacific") engaged in "exclusionary practices" in violation of the anti-monopoly law, Sherman Act *§ 2*, *15 U.S.C. § 2*. The practices at issue are embodied in agreements between Pacific and ITT Grinnell ("Grinnell"), under which Pacific agreed to sell its product (mechanical snubbers) to Grinnell at a specially low price and Grinnell agreed to take nearly all its snubber requirements from Pacific. The district court, *555 F. Supp. 1264,* **[**2]** found that the relevant contract provisions did not violate the antitrust laws. We agree with the district court on this matter, and on others less important; and we affirm its judgment.

I

On appeal from a judgment in defendant's favor, we must, of course, accept the district court's findings insofar as they determine, or rest upon, the facts, unless they are "clearly erroneous." *Fed. R. Civ. P. 52(a)*. Our reading of the record, in light of this standard, suggests the following somewhat simplified account of the most important factual matters:

[*229] Pacific produces mechanical snubbers; they are shock absorbers used in building pipe systems for nuclear power plants. No other domestic firm makes mechanical snubbers; foreign mechanical snubbers do not satisfy Nuclear Regulatory Commission standards; and snubber users have found the closest substitute, namely *hydraulic* snubbers, to be less reliable than the mechanical version. Thus, in 1976, Pacific's sales accounted for 47 percent of all snubbers sold; in 1977, 83 percent; in 1978, 84 percent, and in 1979, 94 percent.

Grinnell makes and installs nuclear plant pipe systems; it is a major snubber user. Its snubber **[**3]** purchases accounted for 51 percent of all mechanical snubbers and related hardware sold domestically in 1977; 52 percent in 1978; and 43 percent in 1979. By 1976, most of Grinnell's pipe system customers were requiring Grinnell to use mechanical snubbers. Recognizing Pacific's strong market position, Grinnell sought to develop an alternate

* Of the Federal Circuit, sitting by designation.

mechanical snubber source. Hence, it entered into a contract with Barry Wright Corporation ("Barry"), the plaintiff here, under which it would help Barry develop a full mechanical snubber line. Grinnell agreed to contribute to Barry's development costs. It also agreed to use Barry as an exclusive source of supply between 1977 and 1979, promising to buy between $9 million and $15 million worth of snubbers during that period. Barry was to have its full line of six snubber sizes in production by the first quarter of 1977.

While waiting for Barry, Grinnell satisfied its current needs by buying mechanical snubbers from Pacific at Pacific's ordinary "discount" price -- 20 percent below list. Pacific noticed that Grinnell's orders seemed small in relation to its likely needs. And, by September, 1976, Pacific realized that Grinnell was trying to **[**4]** develop its own supply source through Barry. In August, 1976, Pacific offered Grinnell a special price break -- a 30 percent discount from list for small snubbers, 25 percent for larger ones -- in return for a large $5.7 million order that would have met Grinnell's snubber needs through 1977. Grinnell, after tentatively accepting this proposal, consulted with Barry and then rejected Pacific's offer. Instead, it placed a smaller $1 million order at the standard 20 percent discount.

Barry coult not meet the required January, 1977 production schedule. By mid-January, 1977, it told Grinnell that it would not be able to produce small snubbers until August, 1977 nor large ones until February, 1978. Grinnell then met with Pacific and (at the end of January, 1977) negotiated a $4.3 million snubber contract -- enough snubbers to meet Grinnell's estimated needs for the next twelve months. Pacific gave Grinnell the large 30 percent/25 percent discounts. It also gave Grinnell an option -- open until July, 1977 -- to buy its 1978 requirements at the same price (as long as Grinnell agreed to buy as much as in 1977). Grinnell, in turn, agreed to a non-cancellation clause that would have made **[**5]** it especially onerous for Grinnell to break the agreement.

Grinnell then told Barry that is production delays were unacceptable and that Barry had breached its development contract. Grinnell wanted Barry to continue its efforts, but it would not promise to buy more than $3.6 million worth of snubbers through 1979. Barry said this modification of the development contract was unjustified. It continued to try to develop snubbers. The extent of its progress is in dispute, but there is considerable evidence that it fell further behind its production schedules.

At the end of May, 1977, Grinnell and Pacific agreed further that Grinnell would buy $6.9 million worth of Pacific's snubbers for 1978 and $5 million for 1979. Grinnell predicted snubber "needs" of $6.9 million for each of the two years. On July 5, 1977 and July 14, 1977, Grinnell finalized the agreements for 1978 and 1979 by issuing purchase orders in these amounts. Pacific granted the special 30 percent/25percent price discounts; and the contracts contained the special cancellation clause.

In June, 1977, Grinnell told Barry that their collaboration was at an end. Barry looked for other potential snubber buyers and then **[**6]** abandoned its snubber efforts. **[*230]** Subsequently, Barry brought this lawsuit against Pacific (and against Grinnell, as well, although Barry and Grinnell have reached a settlement). Barry charged that Pacific's efforts to sell snubbers to Grinnell and the terms of its contracts violated *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and *Section 3* of the Clayton Act, *15 U.S.C. § 14*. It added a claim that Pacific had tortiously interfered with Barry's snubber-development contract with Grinnell.

The district court found that Barry failed to establish that Pacific's conduct was improper. The court also found that Barry had breached its contract with Grinnell before Grinnell placed its 1977 order with Pacific (in late January, 1977). And, it found that Barry would not have been capable of supplying Grinnell in 1977-79 regardless. Barry appeals all these findings. We need not consider the latter two, however, for we find the district court's conclusion about the lawfulness of Pacific's behavior adequately supported. And that conclusion is dispositive.

II

Barry's central claim is that Pacific's conduct violates Sherman **[**7]** Act *§ 2*, which ***HN1***[] makes it unlawful to "monopolize . . . any part of the trade or commerce among the several States." *15 U.S.C. § 2*. ***HN2***[] Monopolization has two elements: first, the "possession of monopoly power in the relevant market" and, second, the "acquisition or maintenance of that power" by other than such legitimate means as patents, "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). On this appeal, the parties do not dispute Pacific's monopoly power in the relevant market, which the district court identified as the domestic market for snubbers (whether mechanical or hydraulic). Nor do they dispute the legitimacy of Pacific's *acquisition* of this power. Whether its acquisition rested upon the fact that Pacific possessed an important mechanical snubber patent, upon a "superior product," or upon the "historic accident" that users began to find hydraulic **[**8]** snubbers unsatisfactory, no one alleges that Pacific acted unlawfully in acquiring its dominant position. Accepting these two assumptions, we turn to the issue that is in dispute, whether Pacific *maintained* its monopoly position against the threat of Barry's entry through improper means.

In this context, ***HN3***[] a practice, a method, a means, is "improper" if it is "exclusionary." United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954). To decide whether Pacific's conduct was exclusionary, we should ask whether its dealings with Grinnell went beyond the needs of ordinary business dealings, beyond the ambit of ordinary business skill, and "unnecessarily excluded competition" from the snubber market. Greyhound Computer Corp. v. International Business Machines Corp., 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied*, *434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 (1978)*. Professors Areeda and Turner have put the matter nicely: " **[**9]** ***HN4***[] 'Exclusionary' conduct is conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power." 3 P. Areeda and D. Turner, ***Antitrust Law*** para. 626 at 83 (1978). Was Pacific's conduct reasonable in light of its business needs or did it unreasonably restrict competition? *California Computer Products,* Inc. v. International Business Machines Corp., 613 F.2d 727, 735-36 (9th Cir. 1979). Barry points to three specific aspects of Pacific's conduct -- its offer of special discounts to Grinnell, its insistence on a long-term large-volume contract, and its inclusion of the special non-cancellation clause -- which it claims show that Pacific acted in an exclusionary manner.

A

Barry first attacks the special 30 percent/25 percent discounts that Pacific granted Grinnell. It argues that Pacific's **[*231]** discounted prices were unreasonably low. This argument founders, however, on the district court finding that these prices, while lower than normal, nonetheless **[**10]** generated revenues more than sufficient to cover the total cost of producing the goods to which they applied. Barry does not attack that finding; but, instead, it argues that price cutting by a monopolist may still prove unlawful, even if prices remain above total cost. While some circuits have accepted a form of Barry's argument, *see, e.g.,* Transamerica Computer Co. v. International Business Machines Corp., 698 F.2d 1377 (9th Cir.), *cert. denied*, *464 U.S. 955, 52 U.S.L.W. 3343, 78 L. Ed. 2d 329, 104 S. Ct. 370 (1983)*; International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, *424 U.S. 943, 47 L. Ed. 2d 349, 96 S. Ct. 1411 (1976)*, we do not.

To understand the basis of our disagreement, one must ask why the Sherman Act ever forbids price cutting. After all, lower prices help consumers. The competitive marketplace that the antitrust laws encourage and protect is characterized by firms willing and able to cut prices in order to take customers from their rivals. And, in an economy with a significant number of concentrated industries, price cutting limits the **[**11]** ability of large firms to exercise their "market power," *see* J. Bain, *Industrial Organization* ch. 5 (2d ed. 1968); F. Scherer, *Industrial Market Structure and Economic Performance* 56-70, 222-25 (2d ed. 1980); at a minimum it likely moves "concentrated market" prices in the "right" direction -- towards the level they would reach under competitive conditions. See 2 P. Areeda & D. Turner, ***Antitrust Law*** para. 404; J. Bain, *supra*, at 118-23; F. Scherer, *supra*, ch. 5. Thus, ***HN5***[] a legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risk interference with one of the Sherman Act's most basic objectives: the low price levels that one would find in well-functioning competitive markets. *See, e.g.,* National Society of Professional Engineers v. United States, 435 U.S. 679, 692-96, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978); MCI Communications Corp. v. American Telephone and Telegraph Co., 708 F.2d 1081, 1114 (7th Cir.), *cert. denied*, *464 U.S. 891, 52 U.S.L.W. 3291, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*; **[**12]** 1 P. Areeda and D. Turner, ***Antitrust Law*** paras. 103-05, 111-12.

Despite these considerations, courts have reasoned that it is sometimes possible to identify circumstances in which a price cut will make consumers worse off, not better off. *See, e.g.,* Northeastern Telephone Co. v. American Telephone and Telegraph Co., 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, *455 U.S. 943, 71 L. Ed. 2d 654, 102 S.*

Ct. 1438 (1982). Suppose, for example, a firm cuts prices to unsustainably low levels -- prices below "incremental" costs. Suppose it drives competitors out of business, and later on it raises prices to levels higher than it could have sustained had it competitors remained in the market. Without special circumstances there is little to be said in economic or competitive terms for such a price cut. Yet, how often firms engage in such "predatory" price cutting, whether they ever do so, and precisely when, is all much disputed -- a dispute that is not surprising given the difficulties of measuring costs, discerning intent, and predicting future market conditions. *See, e.g.*, Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 Antitrust L. & Econ. Rev. 105 (1971); **[**13]** McGee, *Predatory Pricing Revisited*, 23 J.L. & Econ. 289 (1980); Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. Chi. L. Rev. 506, 516-17 (1974); F. Scherer, *supra*, at 335-40.

Despite this dispute, there is general agreement that a profit-maximizing firm might sometimes find it rational to engage in predatory pricing; it might do so if it knows (1) that it can cut prices deeply enough to outlast and to drive away all competitors, and (2) that it can then raise prices high enough to recoup lost profits (and then some) before new competitors again enter the market. *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act* , 88 Harv. L. Rev. 697, 698-99 (1975) [hereafter cited as Areeda & Turner, *Predatory Pricing*]. There is also general agreement that the antitrust courts' major task **[*232]** is to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting activity. *See* P. Areeda & D. Turner, ***Antitrust Law*** paras. **[**14]** 711.1a-b, 714.1b, 714.5 (1982 Supp.). See also Paul L. Joskow & Alvin K. Klevorick, A Framework for Analyzing Predatory Pricing Policy, 89 Yale L.J. 213 (1979).

Barry, of course, suggests that Pacific's price cut is a "goat", arguing that Pacific "intended" to drive Barry from the market place. Some courts have written as if one might look to a firm's "intent to harm" to separate "good" from "bad." *See, e.g., D.E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1435-36 (6th Cir. 1983)*; *Forster Manufacturing Co. v. FTC, 335 F.2d 47 (1st Cir. 1964)*, *cert. denied*, *380 U.S. 906, 85 S. Ct. 887, 13 L. Ed. 2d 794 (1965)*. But "intent to harm" without more offers too vague a standard in a world where executives may think no further than "Let's get more business," and long-term effects on consumers depend in large measure on competitors' responses. *See* Zerbe & Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 Tex. L. Rev. 655, 659-677 (1982). Moreover, if the search for intent means a search for documents or statements specifically reciting the likelihood **[**15]** of anticompetitive consequences or of subsequent opportunities to inflate prices, the knowledgeable firm will simply refrain from overt description. If it is meant to refer to a set of objective economic conditions that allow the court to "infer" improper intent, *see, e.g., D.E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d at 1436*; *cf. O. Hommel Corp. v. Ferro Corp., 659 F.2d 340, 347 (3rd Cir. 1981)*, *cert. denied*, *455 U.S. 1017, 72 L. Ed. 2d 134, 102 S. Ct. 1711 (1982)*, then, using Occam's razor, we can slice "intent" away. Thus, most courts now find their standard, not in intent, but in the relation of the suspect price to the firm's costs. And, despite the absence of any perfect touchstone, ***HN6***[] modern antitrust courts look to the relation of price to "avoidable" or "incremental" costs as a way of segregating price cuts that are "suspect" from those that are not. *See, e.g., Northeastern Telephone Co. v. American Telephone and Telegraph Co., 651 F.2d at 86-91*; *cf. Americana Industries, Inc. v. Wometco de Puerto Rico, Inc., 556 F.2d 625, 628 (1st Cir. 1977)*; **[**16]** *see generally* Areeda & Turner, *Predatory Pricing*.

One can understand the intuitive idea behind this test by supposing, for example, that a firm charges prices that fail to cover these "avoidable" or "incremental" costs -- the costs that the firm would save by not producing the additional product it can sell at that price. Suppose further that the firm cannot show that this low price is "promotional," *e.g.* a "free sample." Nor can it show that it expects costs to fall when sales increase. Then one would know that the firm cannot rationally plan to maintain this low price; if it does not expect to raise its price, it would do better to discontinue production. Moreover, equally efficient competitors cannot permanently match this low price and stay in business. Further, competitive industries are typically characterized by prices that are roughly equal to, not below, "incremental" costs. *See* F. Scherer, *supra*, at 13-14; Areeda & Turner, *Predatory Pricing* at 702-03, 712. At a minimum, one would wonder why this firm would cut prices on "incremental production" below its "avoidable" costs unless it later expected to raise its prices and recoup its losses. When **[**17]** prices exceed incremental costs, one cannot argue that they must rise for the firm to stay in business. Nor will such prices have a tendency to exclude or eliminate equally efficient competitors. Moreover, a price *cut* that leaves prices above incremental costs was probably moving prices in the "right" direction -- towards the competitive norm. *See* J. Bain, *supra*, at 14; Areeda & Turner, *Predatory Pricing*, at 704-07. These considerations have typically led courts to question, and often to forbid, price cuts below "incremental costs," (or "avoidable costs"), while allowing those where the resulting price is higher. *See, e.g.,* *Northeastern Telephone Co. v. American Telephone and Telegraph Co., 651 F.2d at 88*; *International Air Industries, Inc. v. American Excelsior Co., 517 F.2d at 723-24*; *cf. William Inglis & Sons* ***[*233]*** *Baking Co. v. ITT Continental Baking Co., Inc. , 668 F.2d 1014, 1035-36 (9th Cir. 1981)* (price below average variable cost supports "inference" of predatory pricing), *cert. denied*, *459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61, 103 S. Ct. 58 (1982)*.

In fact, the use of **[**18]** cost-based standards is more complicated than this brief discussion suggests. But, we need not explore here the arguments about how best to measure "incremental" or "avoidable" costs (*e.g.*, whether "average variable cost" is an appropriate surrogate). Nor need we consider the theoretical difficulties that arise when prices fall *between* "incremental costs" and "average (total) costs," a circumstance that can arise either when production is at a level below full capacity and the firm lowers prices to levels that do not cover a "fair share" of fixed costs or when a plant is pushed beyond its "full" capacity at prices that do not cover the specially high costs of the extraordinary production levels. *See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d at 1034-36*; *Pacific Engineering and Production Co. v. Kerr-McGee Corp., 551 F.2d 790, 795-97* (10th Cir.), *cert. denied*, *434 U.S. 879, 54 L. Ed. 2d 160, 98 S. Ct. 234 (1977)*; Areeda & Turner, *Predatory Pricing*, at 709-12; Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976); Zerbe & Cooper, **[**19]** *supra*, at 681-84. Here we have a price that exceeds *both* "average cost" and "incremental cost" -- that exceeds cost however plausibly measured. And as to those prices, "virtually every court and commentator agrees" that they are lawful, "perhaps conclusively, but at least presumptively." P. Areeda & D. Turner, ***Antitrust Law*** para. 711.1c at 118 (1982 Supp.).

Barry points, however, to a possible exception to this rule -- an "exception" created by the Ninth Circuit making certain price cuts unlawful even when the resulting revenues exceed total costs. In *Inglis*, that circuit held that a price cut is unlawful if

> the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power.

668 F.2d at 1035. In the Ninth Circuit's view, prices below "average variable costs" (a surrogate for "incremental costs") produce a presumption of "predatory pricing." ***HN7***[] When prices exceed "average variable cost," but are "below average **[**20]** total cost," the plaintiff must prove by a preponderance of the evidence that the defendant's pricing policy depends on its exclusionary or disciplinary tendency. And, in a case like this one -- a case that the Ninth Circuit would describe as "prices above average total cost" -- the plaintiff can still win if it proves "by clear and convincing evidence -- *i.e.*, that it is highly probably true -- that the defendant's pricing policy was predatory," in the sense defined in *Inglis.* *Transamerica Computer Co. v. International Business Machines Corp., 698 F.2d at 1388*.

The virtue of the Ninth Circuit test is that it recognizes an economic circumstance in which even "above total cost" price cutting might not be procompetitive and might, in theory hurt the consumer. *See* *Transamerica Computer Corp. v. International Business Machines Corp., 698 F.2d at 1387*. For instance, if a dominant firm's costs are lower than its competitors', it could use an "above cost" price cut to drive out competition, and then later raise prices to levels higher than they otherwise would be. Moreover, if the price cut meant *less* profit for the firm *unless* (1) it **[**21]** drove out competitors *and* (2) higher prices later followed, the cut might be viewed as lying outside the range of normal, desirable, competitive processes. Even though such a price cut would only injure or eliminate firms that were less efficient than the price-cutters, one could argue that, other things being equal, their continued presence helps the competitive process (say, by constraining price rises) and may lead to greater efficiency in the future. Why should the antitrust laws not forbid this potentially harmful behavior? Indeed, economists have identified this type of pricing behavior (and certain other forms of above-cost pricing behavior) as potentially harmful, *see, e.g.*, Brodley & Hay, *Predatory Pricing: Competing* ***[*234]*** *Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 743-46 (1981); Scherer, *supra* (discussing other, more complex anticompetitive pricing strategies involving above-cost prices); Williamson, *Predatory Pricing: A Strategic Welfare Analysis*, 87 Yale L. J. 284 (1977) (same).

Nonetheless, while technical economic discussion helps to inform the antitrust laws, those laws cannot **[**22]** precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. Thus, despite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing, are economically justified, the courts have held them unlawful per se, concluding that the administrative virtues of simplicity outweigh the occasional "economic" loss. *See* *United States v. Trenton Potteries Co., 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927)* (horizontal price fixing); *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)* (same); *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)* (vertical price fixing); *see also* *National Society of Professional Engineers v. United States, 435 U.S. 679, 687-92, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*; **[**23]** Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226 (1960). Conversely, 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. Indeed, it is this risk that convinces us not to follow the Ninth Circuit's approach.

Thus, we believe we should not adopt the Ninth Circuit's exception because of the *combined effect* of the following considerations. For one thing, a price cut that ends up with a price exceeding total cost -- in all likelihood a cut made by a firm with market power -- is almost certainly moving price in the "right" direction (towards the level that would be set in a competitive marketplace). The antitrust laws very rarely reject such beneficial "birds in hand" for the sake of more speculative (future low-price) "birds in the bush." To do so opens the door to similar speculative claims that might seek to legitimate even the most settled unlawful practices. (Should a price-fixer be allowed to argue that a cartel will help weaker firms survive bad times, leaving them as a competitive force **[**24]** when times are good? Suppose the price-fixer offers to "prove it" by "clear and convincing evidence?" *See* *United States v. Socony-Vacuum Oil Co., 310 U.S. at 220-23*.)

For another thing, the scope of the Ninth Circuit's test is vague. Is it meant to include, for example, "limit pricing" -- the common practice of firms in concentrated industries not to price "too high" for fear of attracting new competition? *See* *Transamerica Computer Corp. v. International Business Machines Corp., 698 F.2d at 1387*; Areeda & Turner, *Predatory Pricing*, at 705-06. The "anticipated benefits" of such a price arguably depend "on its tendency to discipline or eliminate competition" thereby enhancing "the firm's long-term ability to reap the benefits of monopoly power." Does the test mean to include every common instance of a firm (with market power) deciding not to raise its prices? If it means to include either of these sorts of circumstances, the rule risks making of the antitrust laws a powerful force for price increases. But, if the rule does not mean to include these sorts of circumstance, which prices do, and which do not, fall within the test's proscription?

[25]** Further, even were the test more specific, it seems to us as a practical matter most difficult to distinguish in any particular case between a firm that is cutting price to "discipline" or to displace a rival and one cutting price "better to compete." No one would condemn a price cut designed to **[*235]** maximize profits in the short run, *i.e.*, by increasing sales at the lower price, not by destroying competition and then raising prices. But the general troubles surrounding proof of firm costs, *see, e.g.,* *Transamerica Computer Co. v. International Business Machines Corp., 698 F.2d at 1387*; P. Areeda & D. Turner, ***Antitrust Law*** paras. 711.1d, 715.2 (1982 Supp.), only hint at the difficulty of deciding whether or not a firm's price cut is profit-maximizing in the short-run, a determination that hinges not only on cost data, but also on elasticity of demand, competitors' responses to price shifts, and changes in unit costs with variations in production volume. Direct statements by firm executives concerning their expectations will probably not be found; and, one might ask, in light of uncertain and changing market conditions, how much will the firm itself **[**26]** know? One can foresee conflicting testimony by economic experts, with the eventual determination made, not by economists or accountants, but by a jury. Of course, one might claim that such are the dangers inherent in many antitrust cases. But the consequence of a mistake here is not simply to force a firm to forego legitimate business activity it wishes to pursue; rather, it is to penalize a procompetitive price cut, perhaps the most desirable activity (from an antitrust perspective) that can take place in a concentrated industry where prices typically exceed costs. *See* *United States v. Container Corporation of America, 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)*; *O. Hommel Co. v. Ferro Corp., 659 F.2d at 346-47*; *Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d at 796-97*; 2 P. Areeda & D. Turner, ***Antitrust Law*** paras. 404-05; J. Bain, *supra*, at 118-23; F. Scherer, *supra*, ch. 5.

Additionally, if private plaintiffs are allowed to attack the "above total cost disciplinary price," we are unlikely to lack for plaintiffs willing to make the effort. After all, even the most competitive of price **[**27]** cuts may hurt rivals; indeed, such may well be its object. And those rivals, if seriously damaged, may well bring suit, hoping or believing they can fit within the *Inglis/Transamerica* standard.

Finally, we ask ourselves what advice a lawyer, faced with the *Transamerica* rule, would have to give a client firm considering procompetitive price-cutting tactics in a concentrated industry. Would he not have to point out the risks of suit -- whether ultimately successful or not -- by an injured competitor claiming that the cut was "disciplinary?" Price cutting in concentrated industries seems sufficiently difficult to stimulate that we hesitate before embracing a rule that could, in practice, stabilize "tacit cartels" and further encourage interdependent pricing behavior. *See* 2 P. Areeda & D. Turner, ***Antitrust Law*** para. 404b3; F. Scherer, *supra*, at 190-93; Turner, *Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962); *cf.* Hay & Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J.L. & Econ. 13, 20-24 (1974). This risk could be minimized only if the conditions **[**28]** imposed by the words "clear and convincing evidence" were so stringent that the claim could almost never be proved. But then, one might ask, would the *Transamerica* "exception" be worth the trouble? *See* *Transamerica Computer Co. v. International Business Machines Corp., 698 F.2d at 1390-91* (Lucas, J., dissenting).

We reiterate that these considerations might not prove sufficient to make the difference were we dealing with a price that, although above average total costs, was *below* incremental costs -- a price that in the absence of special circumstances proves unsustainable. But, here we deal with a price that is *above* both incremental and total cost.

In sum, we believe that such above-cost price cuts are typically sustainable; that they are normally desirable (particularly in concentrated industries); that the "disciplinary cut" is difficult to distinguish in practice; that it, in any event, primarily injures only higher cost competitors; that its presence may well be "wrongly" asserted in a host of cases involving legitimate competition; and that to allow its assertion threatens to "chill" highly desirable procompetitive **[*236]** price cutting. **[**29]** For these reasons, we believe that a precedent allowing this type of attack on prices that exceed both incremental and average costs would more likely interfere with the procompetitive aims of the antitrust laws than further them. Hence, we conclude that ***HN8***[] the Sherman Act does not make unlawful prices that exceed both incremental and average costs.

Even if we are wrong, however, and *Inglis and Transamerica* contain the correct legal standard, Barry would fail. Barry has not demonstrated by "clear and convincing evidence" that Pacific offered Grinnell an additional 5 or 10 percent price discount only because it wished to keep Barry out of the market. Rather, Pacific testified that the additional discount was related to additional cost savings. Grinnell's firm order for snubbers in 1977 was larger than the total volume of Pacific sales of snubbers in any previous year. Pacific had excess snubber capacity. The price discount, by securing the firm order, allowed Pacific to operate this capacity more efficiently, saved Pacific money, and thereby produced more profit than a higher price (without **[**30]** the firm order) could have done, without regard to any impact on Barry. At least there is evidence this was so -- that this was the sort of price cut a firm would have made under competitive conditions in a fully competitive industry. And, the evidence in the record to this effect precludes the possibility of "clear and convincing evidence" to the contrary. Thus, even under the *Transamerica* test, Pacific's price cut would not be found anticompetitive or exclusionary.

B

Barry argues next that Pacific's "requirements contract" with Grinnell was exclusionary, that it was more restrictive of competition than legitimate business considerations could justify. The district court, however, disagreed. And so do we.

The antitrust problem that courts have found lurking in requirements contracts grows out of their tendency to "foreclose" other sellers from the market by "tying up" potential purchases of the buyer. Arguably, under certain circumstances substantial foreclosure might discourage sellers from entering, or seeking to sell in, a market at all, thereby reducing the amount of competition that would otherwise be available. Of course, the connection between "foreclosure" **[**31]** and lessened entry is somewhat distant, since it depends on how potential competitors perceive the foreclosure's likely effects on their opportunities. Moreover, ***HN9***[] virtually *every* contract to buy "forecloses" or "excludes" alternative sellers from some portion of the market, namely the portion consisting of what was bought. It is not surprising, then, that courts have judged the lawfulness of contracts to purchase not under per se rules but under a "rule of reason." *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 333, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*; *Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1036* (5th Cir.), *cert. denied*, *454 U.S. 860, 70 L. Ed. 2d 158, 102 S. Ct. 315 (1981)*; *United States v. American Can Co., 87 F. Supp. 18, 31 (N.D. Cal. 1949)*. And this is so whether those contracts involve a buyer's promise to buy "exclusively" from the seller, *see, e.g., Bob Maxfield, Inc. v. American Motors Corp., supra; American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1246-53 (3d Cir. 1975)*, **[**32]** a promise to buy all his "requirements" from the seller for a specified time, *see, e.g., Tampa Electric Co. v. Nashville Coal Co., supra*, or a promise to buy a large dollar amount, *see, e.g., Magnus Petroleum Co. v. Skelly Oil Co., 599 F.2d 196* (7th Cir.), *cert. denied*, *444 U.S. 916, 62 L. Ed. 2d 171, 100 S. Ct. 231 (1979)*; *White & White, Inc. v. American Hospital Supply Corp., 540 F. Supp. 951, 1032 (W.D. Mich. 1982)*. *See Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1374 (10th Cir. 1979)*; 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 732a. Thus, ***HN10***[] in determining "the probable effect of the contract on the relevant area of effective competition," *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. at 329*, we are to take into account both the extent of the foreclosure and the **[*237]** buyer's and seller's business justifications for the arrangement. *Id. at 333-34*. We must look both to the severity of the foreclosure (a fact which, other things being equal, **[**33]** suggests anticompetitive harm) and the strength of the justifications in determining whether the "size" of the contract to purchase is reasonable.

Barry would like to characterize the agreements before us as consisting of a Grinnell promise to buy all its snubber requirements from Pacific for three years. And, if Barry correctly describes Grinnell as accounting for half the snubber market, this characterization suggests a three-year "foreclosure" of 50 percent of the relevant market. In terms of the case law, this sounds like a significant foreclosure. *See, e.g., Standard Oil Co. v. United States, 337 U.S. 293, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)*; *Lessig v. Tidewater Oil Co., 327 F.2d 459, 468* (9th Cir.), *cert. denied*, *377 U.S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1046 (1964)*; *Mytinger & Casselberry, Inc. v. FTC, 112 U.S. App. D.C. 210, 301 F.2d 534 (D.C. Cir. 1962)*. But this description considerably overstates the size of the foreclosure and its likely anticompetitive effect for several reasons.

First, Grinnell did not actually promise to buy all its requirements from Pacific; it entered into a contract for **[**34]** a fixed dollar amount. ***HN11***[] There is "an important difference between a requirements' contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements." *Tampa Electric Co. v. Nashville Coal Co., 276 F.2d 766, 771 (6th Cir. 1960)*, *rev'd on other grounds*, *365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*. A true requirements contract flatly eliminates the buyer from the market for its duration; a fixed quantity contract leaves open the possibility that the buyer's needs will exceed his contractual commitment; he is free to purchase from others any excess amount that he may want. This flexibility is important here, for it left Grinnell the legal power to buy small (and then in 1979, larger) amounts from Barry should they have become available.

Second, the Grinnell-Pacific contract was not a single three-year agreement. The district court found that the contract consummated in late January, 1977, bound Grinnell to take $4.3 million worth of snubbers -- its **[**35]** estimated needs for the next twelve months. Grinnell then separately promised -- in May 1977 -- to buy $6.9 million worth of snubbers for 1978 (its estimated requirements) and $5 million for 1979 (considerably less than its estimated requirements). Even if we view the 1978 and 1979 purchases as a single agreement, the scope of this agreement's preclusive effect then extended over something less than Grinnell's expected requirements and lasted about two years.

Third, Grinnell's contract with Barry suggests that a snubber buyer typically places orders for snubbers well in advance of expected delivery. In fact, normally Grinnell would be required to place orders with Barry (once Barry developed the product) at least six months before delivery. Moreover, the record demonstrates the long delay that any new entrant would have to anticipate between the time it decided to enter the snubber market and the time it would be ready to deliver a product. Under these circumstances, a Grinnell decision to buy a year or two's worth of snubbers from Pacific *at one shot* instead of *from time to time* seems likely, as a practical matter, to have had, at most, limited anticompetitive effects.

[36]** At the same time, the record suggests the existence of legitimate business justifications for the agreements from the perspectives of both buyer and seller. For Grinnell, the contracts guaranteed a stable source of supply, and, perhaps, more important, they assured Grinnell a stable, favorable price. For Pacific, they allowed use of considerable excess snubber capacity; and they allowed production planning that was likely to lower costs. (At least Pacific executives testified as much and the record contains no refutation of this testimony.) Finally, Grinnell is not a small firm that Pacific could likely bully into accepting a contract that might foreclose new competition. **[*238]** *See Tampa Electric Co. v. Nashville Coal Co., 365 U.S. at 329*; *cf. Standard Oil Co. v. United States, 337 U.S. at 308*; *Lessig v. Tidewater Oil Co., 327 F.2d at 467*; *United States v. American Can Co., supra.* To the contrary, it was Grinnell, not Pacific, that sought the extensions for 1978 and 1979. Moreover, Grinnell had every interest in promoting new competition. It agreed to provide Barry with several hundred thousand dollars **[**37]** expressly to develop a new source of supply. Grinnell could have obtained snubbers without placing such large orders had it given up the "special" extra 5 to 10 percent price discount, a matter of a few hundred thousand dollars per year. Had Grinnell believed that the long-term nature of the contracts significantly interfered with new entry, or inhibited the development of a new source of supply, it is difficult to understand why it would have sought the agreements.

In sum, in light of the nature of the contracts and the market, their fairly short time period, their business justifications, the characteristics of the parties, and their likely motives as revealed by their business interests, we believe that the district court could reasonably have concluded they were not "exclusionary."

C

Barry also argues that the "noncancellation" clauses were exclusionary. The clauses stated that "quantities [mentioned in the contract] . . . are considered to be minimum with pricing based accordingly. For this reason, full cancellation charges would apply if all or any portion of the requirements were cancelled or rescheduled by ITT Grinnell beyond [the contract period]." Those clauses, **[**38]** as the parties (and, we think, as the district court) interpreted them, would require Grinnell to pay the *entire* price of the yearly order (*i.e.* $4.3 million for 1977, $6.9 million for 1978, etc.) whether Grinnell took all, some or none of the snubbers that the order covered. The noncancellation clause thus acted as a powerful economic incentive for Grinnell to stick to its bargain; and Barry says this incentive was "too powerful" to the point where it is "exclusionary."

Of course, ***HN12***[] the parties to a contract have a right to collect damages for breach. And, they can insert a liquidated damages provision in the contract as a measure of damages. *See U.C.C. § 2-718*. Yet, "the central objective behind the system of contract remedies is compensatory, not punitive." *Restatement (Second) of Contracts § 356 comment (a)* (1979). Thus, ***HN13***[] a liquidated damages provision is enforceable only if it "is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties **[**39]** of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty." *U.C.C. § 2-718(1)*. ***HN14***[] If the cancellation clause provides only for lawful liquidated damages, it is no more "exclusionary" than the underlying substantive agreement that it helps to enforce. But Barry argues that the cancellation clause is a "penalty" and that it therefore has no legitimate place in the substantive agreement. We shall assume for the sake of argument that Barry is correct. If so, the clause *in principle* might have an unjustified anticompetitive effect. It might discourage a buyer from pursuing a course of action otherwise open to him under the law of contracts, namely to breach the purchase agreement, to pay damages, and to buy from a new entrant instead. While the presence of the clause could not legally *forbid* this course of action -- as it would be unenforceable as a penalty at law -- its presence does still threaten the buyer with the lawsuit that would be needed to prove that it is **[**40]** unenforceable. And it is this threat, and the consequent *additional* deterrence to the "breach and pay damages" course of action that constitutes the "unreasonably anticompetitive" aspect of the clause. *Cf.* *United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 320, 344 (D. Mass. 1953)* (lease provisions deterring early terminations are exclusionary), *aff'd per curiam*, **[*239]** *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)*.

This argument, while logical, strikes us as of virtually no practical importance in this case. Even if one heroically assumed that Grinnell might have wished to breach and to buy elsewhere in 1977, 1978 or 1979, it is virtually impossible to believe that the presence of this clause could have stopped it from doing so. Given Grinnell's size and the competence of its legal staff, it is most unlikely to have been deterred by Pacific's assertion of unusually high damages resting upon a legally invalid provision in the contract. (And, if the provision is not legally invalid -- that is, if it does reasonably reflect Pacific's likely actual damages -- then it is not, from an antitrust perspective, unreasonable). **[**41]** This is simply to say that the anticompetitive consequence to which Barry might point is too remote, too speculative in the context of this case, to warrant classifying the clause as significantly anticompetitive. And, the district court's conclusion that its presence did not transform otherwise lawful purchase agreements into unlawful, exclusionary ones, is adequately supported.

III

If Pacific's challenged conduct is not "exclusionary," for purpose of Sherman Act *§ 2*, then a *fortiori*, it does not violate the other provisions of law that Barry cites. ***HN15***[] A monopolist's conduct that from a competitive point of view is unreasonable, is "exclusionary." *California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727, 735-36 (9th Cir. 1979)*; 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 626 at 83; *see* *United States v. United Shoe Machinery Corp., 110 F. Supp. at 342*. Thus, conduct that is not "exclusionary" is not "unreasonable." And we do not see how ordinarily that conduct could be forbidden by Sherman Act *§ 1*'s prohibition **[**42]** of "unreasonable" restraints of trade. *See* *Standard Oil Co. v. United States, 221 U.S. 1, 61-64, 55 L. Ed. 619, 31 S. Ct. 502 (1911)* (Sherman Act *§ 1*'s "restraint of trade" language interpreted according to "rule of reason"). We see no conduct here that is subject to any section 1-based rule of "per se" illegality. *See, e.g.,* *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)* (price fixing); *Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899)*, *aff'g* *85 F. 271 (6th Cir. 1898)* (market division). Barry cites *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979)*, *cert. denied*, *446 U.S. 983, 64 L. Ed. 2d 839, 100 S. Ct. 2964 (1980)*, in an effort to find precedent for application of a per se rule, but that case involved competitors who explicitly divided territories -- a circumstance absent here.

Nor can Barry show tortious interference with Barry's Grinnell contract. ***HN16***[] Under Massachusetts **[**43]** law, one essential element of the tort is that defendant's conduct be "either per se unlawful" or "conducted with malice." *Araserv, Inc. v. Bay State Harness Horse Racing and Breeding Association, Inc., 437 F. Supp. 1083, 1094 (D.Mass. 1977)* (quoting *Old Colony Donuts, Inc. v. American Broadcasting Companies, 368 F. Supp. 785, 787 (D. Mass. 1974))*. The only basis for claiming "per se" unlawfulness that we can find is "antitrust" unlawfulness -- a matter that we have disposed of.

Barry cannot show "malice" without showing that Pacific knew its conduct "would result in injury to [Barry's] contract rights." *Goldsmith v. Traveler Shoe Corp., 236 Mass. 111, 116, 127 N.E. 606 (1921)*; *cf.* *Beekman v. Marsters, 195 Mass. 205, 212, 80 N.E. 817 (1907)* (showing of knowledge of contract necessary to obviate showing of express malice). And the district court correctly found the evidence here insufficient. The trial court found that, although Pacific officers became aware, by September, 1976, of the existence of an agreement between Barry and Grinnell for the development of a mechanical snubber, they did not know the terms **[**44]** of that agreement. Moreover, the terms of the Barry-Grinnell contract permitted Grinnell to purchase from other suppliers if "Barry is unable to fulfill required delivery schedules." This provision at least arguably could have protected Grinnell **[*240]** from a breach of contract claim by Barry on account of Grinnell's purchases from Pacific; and the simple possibility that it would have done so precludes attribution to Pacific of *knowledge* that Grinnell's purchases from it would breach the Barry-Grinnell contract. Similarly, the trial court found that Barry was in breach at the time of the first Pacific-Grinnell agreement. Even if we assume purely for the sake of argument that it was wrong, the claim of breach is strong enough to preclude the requisite finding of *knowing* interference by Pacific. In short, while Pacific might have been aware that its sales to Grinnell would undermine Barry's prospects for its new line of snubbers, there was no basis for concluding that Pacific knew that those sales would interfere with Barry's contractual rights.

The judgment of the district court is

Affirmed.

M & H Tire Co. v. Hoosier Racing Tire Corp.

United States Court of Appeals for the First Circuit

May 3, 1984, Decided

No. 83-1379

Reporter
733 F.2d 973 *; 1984 U.S. App. LEXIS 22841 **; 1984-1 Trade Cas. (CCH) P65,975

M&H TIRE COMPANY, INC., Plaintiff, Appellee, v. HOOSIER RACING TIRE CORPORATION, ET AL., Defendants, Appellants

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Andrew A. Caffrey, U.S. District Judge].

Core Terms

tire, tracks, drivers, racing, rule of reason, sports, district court, testing, season, compound, manufacturers, horizontal, modified, brand, competitors, vertical, regulation, group boycott, auto racing, designated, collusion, promoters, sales, tire company, foreclosure, sanctioning, suppliers, boycott, engine, costs

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**

The term "per se illegal" identifies categories of conduct for which no exculpatory justification will be entertained by a court. The courts establish such categories after they have had enough exposure to a type of conduct to conclude that most of its manifestations are so pernicious that case-by-case inquiry into possible justifications is not worth the candle. Thereafter, the finding that particular conduct falls within a proscribed category serves as a heuristic, obviating any need to determine whether the conduct is in fact harmful. It follows that care must be taken that the challenged conduct fits into a proscribed category without distortion, for it is the similarity to past conduct whose harmfulness has been settled that allows the inference, without further inquiry, that this manifestation is harmful.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

HN2[] **Practices Governed by Per Se Rule, Boycotts**

Even when confronted with examples of conduct ordinarily considered "illegal per se," such as price fixing, the Supreme Court has eschewed per se analysis when the context was novel, and therefore outside the established categories of business behavior which experience has confirmed are anticompetitive and without redeeming virtue. A claim of boycott invites particular caution.

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**

The fact that a combining group is not drawn from people who compete economically among themselves is a further ground for rule of reason rather than per se analysis. Such a combination is less likely to have been generated by an anti-competitive design. Some other motive is at work which must be weighed against any incidental anti-competitive effects flowing from the combination.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

HN4[] **Practices Governed by Per Se Rule, Boycotts**

Horizontal activity among competitors is not an invariable prerequisite to per se treatment of a boycott. As a general rule, however, courts subject horizontal boycotts to per se analysis and vertical arrangements to a rule of reason.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN5[] **Per Se Rule & Rule of Reason, Per Se Violations**

"Horizontal" restraints are agreements between competitors at the same level of market structure, and "vertical" restraints are combinations of persons at different levels of the market structure such as manufacturers and distributors. Horizontal restraints alone have been characterized as naked restraints of trade with no purpose except stifling competition, and, therefore, per se violations of the Sherman Act. On the other hand, while vertical restrictions may reduce intrabrand competition by limiting the number of sellers of a particular product, competing for a given group of buyers, they also promote intrabrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products. They are, therefore, to be examined under the rule of reason standard.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > 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 > Per Se Violations

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN6[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

One of the classic examples of a per se violation of the Sherman Antitrust Act, *15 U.S.C.S. § 1* 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.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

HN7[] **Practices Governed by Per Se Rule, Boycotts**

A reason for denying per se treatment in a sports self-regulation context is that courts have been reluctant to employ a per se analysis when confronted with boycott-like conduct, and instead consider the challenged arrangement under a rule of reason.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

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

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN8[] **Practices Governed by Per Se Rule, Boycotts**

Per se treatment is not appropriate where a justification derived from the policy of another statute or otherwise requires the use of a rule of reason. Picking up on the use of "or otherwise," many courts have reasoned that in the sports area various agreed-upon procedures may be essential to survival, and have not subjected concerted activity by sports-related organizations to the group boycott per se rule.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

HN9[] **Practices Governed by Per Se Rule, Boycotts**

Most courts have limited per se treatment of group boycott-like activity in a sporting context to those situations in which a group of competitors at one level seek to protect themselves from competition by non-group members at the same level which is the classic horizontal group boycott case, and deny per se treatment if the facts do not fit this paradigm, using a rule of reason analysis instead.

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**

To employ a rule of reason analysis in a sports context the sports regulation must "pass" a three-part test that requires that there be: 1) a legislative mandate "or otherwise" for self-regulation; 2) that the collective action be intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary; and 3) that there are procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.

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**

If a regulation is adopted by an independent sanctioning organization with no financial stake in the outcome, a court will have maximum assurance that the regulation is to protect fair competition within the sport. But it does not follow that the absence of such an organization absolutely precludes either a rule of reason analysis, or a successful result under that analysis. The absence of a sanctioning organization may well indicate a greater need to show that the regulation in fact promotes a significant sports aim.

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Requirements Contracts

HN12[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Courts judge the lawfulness of requirements contracts under the rule of reason, and this is true even if the contract contains a promise to buy exclusively from the seller or obtain all requirements from a supplier for a specified length of time.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Requirements Contracts

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

HN13[] Market Definition, Relevant Market

There is a proper method of determining the probable effect of a requirements contract on competition in the relevant market. The court is to take into account both the extent of the foreclosure and the buyer's and seller's business justifications for the arrangement. The court must look both to the severity of the foreclosure and the strength of the justification in determining whether the "size" of the contract to purchase is reasonable.

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William F. Baxter, Assistant Attorney General, Wayne D. Collins, Deputy Assistant Attorney General, Barry Grossman, Department of Justice, and William J. Roberts, Department of Justice, for the United States of America, Amicus Curiae.

Timothy J. Dacey, with whom Gael Mahony, Richard S. Boskey, and Hill & Barlow, for Appellee.

Judges: Campbell, Chief Judge, Rosenn, * Senior Circuit Judge, and Bownes, Circuit Judge.

Opinion by: CAMPBELL

Opinion

[*974] CAMPBELL, Chief Judge.

* Of the Third Circuit, sitting by designation.

This appeal arises from a determination by the district court that Hoosier Racing Tire Corporation ("Hoosier"), acting in concert with four race tracks and several driving clubs, [1] violated *Section 1* of the Sherman Act. *M & H Tire Co. v. Hoosier Racing Tire Corp., 560 F. Supp. 591 (D. Mass. 1983)*. We reverse. The facts are set forth extensively in that opinion, and we repeat here only the more essential ones.

[2]** I.

The plaintiff, M & H Tire Co., Inc. ("M & H"), produces and sells racing tires. M & H filed suit after the defendant tracks and drivers had selected Hoosier, a rival, from among several producers including M & H, to be the sole tire supplier under a "single tire rule" for the "modified" class of auto racing at four tracks in the Northeast during the 1982 season. Initiated by certain promoters, the rule was proposed by the New England Drivers and Owners' Club ("NEDOC") and adopted at a meeting between NEDOC and the four tracks. NEDOC thereafter invited tire companies to submit sample low cost tires for testing and ran tests which resulted in the selection of a particular model of Hoosier as the sanctioned tire.

NEDOC is an unincorporated association composed primarily of drivers and car owners who race at Stafford, Seekonk, Riverside and Thompson speedways, the four tracks which initially adopted the rule. **[*975]** Because NEDOC members raced primarily (although not exclusively) at these four tracks, they sought acceptance of the tire rule there. NEDOC hoped to have the tracks adopt a single consistent rule rather than have its members confront different rules at each **[**3]** track at which they raced. However, while Riverside and Thompson initially agreed to implement the rule, they withdrew their support soon after, on advice of counsel, and are not defendants to this suit.

In addition to these four tracks, the record reveals at least 15 other tracks on the East Coast that conduct "modified" class auto racing on short oval tracks, and as many as 800 short oval tracks nationwide (though the record is not clear as to how many of these tracks conduct modified racing).

In auto racing there is no formal league as is found in sports such as football or baseball. However, there is a national racing organization, the National Association of Stock Car Auto Racing, Inc. ("NASCAR"), which had no connection with the challenged tire rule and is not a party to this lawsuit. As the district court found, NASCAR promulgates certain technical standards for modified race cars; it also sanctions and administers races at tracks that follow its rules; and it conducts a point fund for drivers who compile the best records in NASCAR sanctioned events. NASCAR sanctions the races at Stafford, Riverside and Thompson but not at Seekonk (although Seekonk follows NASCAR rules). **[**4]** The district court found that NASCAR "is not a recognized sanctioning organization" and that its rules "do not embody a complete regulatory scheme over the tracks as a whole, or even over all modified races at the tracks." Significantly, the NASCAR rules leave the tracks "free to promulgate regulations regarding the equipment used by competitors." There are no NASCAR regulations as to tire brands or compounds.

The function of the regional NEDOC group (not to be confused with the nationwide NASCAR just mentioned) is to negotiate with promoters on behalf of its member drivers and owners. It has also been a source of proposals for rules to be adopted by the tracks where its members race. The court found,

> Among the rules proposed were those regulating equipment such as gear and carburetor rules, as well as bans on the use of fuel injection and aluminum block engines. Rules such as these regulating equipment had the avowed purpose of enhancing participant equality.

The single tire rule at issue here was adopted in a meeting between the NEDOC rules committee and the promoters of Stafford, Seekonk, Riverside and Thompson race tracks held at the Howard Johnson's in **[**5]** Warwick, Rhode Island, on December 17, 1981. The NEDOC officials and the track promoters unanimously agreed that all cars in the modified division should use the Hoosier 13-inch budget tire for the 1982 season. Soon thereafter, as already noted, two of the tracks withdrew on advice of counsel; and their withdrawal was followed by

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[1] Hoosier's co-defendants are Stafford Springs Enterprises, Inc., Bristol County Stadium, Inc., A.R.C. Auto Racing Club, Inc., New England Drivers and Owners Club, and Bobby Summers. Throughout the opinion we refer to the co-defendants, except for Summers, collectively as "the tracks and drivers." We include Summers, a Hoosier dealer, in the term "Hoosier."

withdrawal of a third track (Stafford) six months later due to problems with the selected Hoosier tire. Only Seekonk continued to enforce the rule through the 1982 season.

Racing tires constitute a distinct market in interstate commerce -- they are different from ordinary passenger tires. In 1982, besides M & H and Hoosier, there were only two, or possibly three, regular producers of such tires. Traditionally, racing tires are sold directly to drivers and racers at trackside, from trucks, on the day of races, with one or another brand finding favor on the basis of its success in recent races, and with considerable competition taking place, to the extent that producers would constantly make improvements and would even introduce new tires during each season to improve sales.

In the early days of modified racing, the cars resembled stock passenger cars **[**6]** and used tires similar to street tires. But in recent times the costs of racing have escalated as the result of more complex engines, chassis, frames, and tires. Tires, **[*976]** and the compounds from which they are made, have become exceedingly sophisticated, calling for tire changes from race to race. Tire sizes among the faster tires have increased to a 15-inch tread, and they are softer, faster, less durable, and costlier. The cost of a single 15-inch modified tire in 1981 was $140 and by 1982 had risen to $170. To control these escalating costs, proposals were made by some of the tracks and promoters connected with this suit as well as others, from the early 1970's on, to require all competitors at a particular track to race for an entire season with a particular brand of tire. In 1978 Stafford promoter Yarrington tried to induce 20 Northeastern tracks to adopt such a rule, but was unsuccessful in persuading, among other, NEDOC's membership. There is evidence, however, that in the period 1979-1982 a number of Northeastern tracks other than defendants had single tire rules in effect.

The tracks and drivers here assert that they adopted a single tire rule for two purposes. **[**7]** First, to control the steadily increasing cost of auto racing, which threatened to reduce the field of (mostly amateur) participants, and second to promote greater parity among the competing cars. The cost savings goal was to be achieved by specifying a low cost 13-inch "budget" tire in the $90-$100 range, and the parity goal was to be achieved by designating a single permissible tire brand to insure, to the maximum extent possible, that all drivers were racing on a single rubber compound. One driver explained his reasons for wanting to race on a single compound as follows:

> Well, it took a lot of weight off your shoulders, you might say, wondering during the week, making phone calls as to which compound is going to be the best, or was it a hot setup, and trying to track down the tires. You could concentrate on racing, having fun, which is what the sport is all about, I think.
>
> So the competition, you could go there with a track tire, you knew everybody was on the same tire, which we were very competitive, and we were having a good time and enjoying racing. When you get tire compound to worry about it is just an added thing, added expense. Who needs it?

The **[**8]** district court did not dispute these assertions. It made no finding that the rule was adopted for other, perhaps ulterior, reasons. It found that there was no evidence of collusion between the drivers and tracks and the selected tire producer, Hoosier.

Nonetheless, the district court ruled that the defendants, by adopting and implementing a single tire rule, had conducted a group boycott of M & H, which was unlawful per se. The court additionally found that the purpose of the tire rule was "unmistakably" to fix maximum prices for racing tires. And even assuming the single tire rule was not illegal per se, the district court held that the rule was invalid under a rule of reason analysis. The court permanently enjoined the tracks and drivers from passing or enforcing a "single brand tire rule which designates one compound, one manufacturer, and one tire price." *See* Section 16 of the Clayton Act, *15 U.S.C. § 26 (1982)*. The court also found that "M & H would have obtained approximately 45 percent of those Hoosier sales [made under the single tire rule], at a gross profit of $30 per tire equalling $24,597." After trebling the damages, the court awarded M & H $73,791.

On **[**9]** appeal, Hoosier and the tracks and drivers contend that the district court erred in finding a per se violation of the Sherman Act. And looking at the single tire rule under the rule of reason, they contend that no anti-competitive effect in a defined relevant market was established. Rather, the rule is justified in their view as a reasonable form of sports self-regulation designed to ensure participant parity and competitive equivalency.

II. ILLEGALITY PER SE

We shall first consider the district court's determination that the single tire rule constituted a group boycott of M & H, and, as such, was illegal per se. The **[*977]** district court reached this result even while acknowledging that the facts "do not fit the traditional parameters of horizontal group boycott activity." *560 F. Supp. at 601*. We agree that the facts do not present a classic group boycott, *see* *Allied International, Inc. v. International Longshoremen's Association, AFL-CIO, 640 F.2d 1368, 1380 (1st Cir. 1981)*, but, unlike the lower court, believe this to be a major stumbling block to per se analysis. *See* Sullivan, *Antitrust* §§ 88-91 (1977).

A. *Being Vertical, Not Horizontal, the Alleged* **[**10]** *Boycott Invites Rule of Reason Analysis*

HN1[] The term "per se illegal" identifies categories of conduct for which no exculpatory justification will be entertained by a court. The courts establish such categories after they have had enough exposure to a type of conduct to conclude that most of its manifestations are so pernicious that case-by-case inquiry into possible justifications is not worth the candle. *See* *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958)*. Thereafter, the finding that particular conduct falls within a proscribed category serves as a heuristic, obviating any need to determine whether the conduct is in fact harmful. It follows that care must be taken that the challenged conduct fits into a proscribed category without distortion, for it is the similarity to past conduct whose harmfulness has been settled that allows the inference, without further inquiry, that this manifestation is harmful.

Thus ***HN2***[] even when confronted with examples of conduct ordinarily considered "illegal per se," such as price fixing, the Supreme Court has eschewed per se analysis when the context was novel, and therefore outside the established categories of business behavior **[**11]** which experience had confirmed were anticompetitive and without redeeming virtue. *See* *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)*. A claim of boycott, such as we have here, invites particular caution: "boycotts are not a unitary phenomenon," *St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 543 (1978)* (quoting P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974)). There has been much debate over the extent to which per se treatment of them is appropriate outside the traditional horizontal group boycott situation. *See, e.g.*, Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Colum. L. Rev. 685 (1979).

Because Hoosier did not join with other tire manufacturers against M & H, the single tire rule clearly fell outside the classic horizontal group boycott paradigm. *See* *Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941)* (horizontal collaboration among clothing suppliers determined illegal per se); *Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600 (1914)* (horizontal collaboration among lumber retailers considered per se illegal). In **[**12]** both *Fashion* and *Eastern States*, competitors formed groups to protect themselves from competition from non-group members, and to limit competition among themselves, at the same level of competition. In *Fashion* clothing suppliers got together with other clothing suppliers and put pressure on retailers, and in *Eastern States* lumber retailers got together with lumber retailers and put pressure on wholesalers. Here, there is no suggestion of complicity between Hoosier and other tire manufacturers: Hoosier did not join with other tire manufacturers and put pressure on any group in order to limit competition among tire manufacturers or to protect a group of tire manufacturers from "non-group" tire makers.

M & H would find horizontal activity from the fact that the drivers agreed among themselves and the tracks agreed among themselves. But this would take us well beyond the *Fashion* or *Eastern States* paradigm. The drivers are not in economic competition with one another and while they are specifying the parameters within **[*978]** which they will compete *on the race track*, what is missing is any effect upon *economic* competition among the drivers as was **[**13]** present in *Fashion* and *Eastern States*. While the tracks may be economic competitors in some sense, the rule does not limit economic competition among them either. [2]

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[2] ***HN3***[] The fact, as here, that the combining group is not drawn from people who compete economically among themselves, is a further ground for rule of reason rather than per se analysis: such a combination is less likely to have been generated by an anti-competitive design -- some other motive is at work which must be weighed against any incidental anti-competitive effects flowing from the combination.

To be sure, ***HN4***[] horizontal activity among competitors is not an invariable prerequisite to per se treatment of a boycott, *see* Sullivan, *Antitrust* at p.223 n.1. There are exceptions, *see, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)* which we discuss *infra*. As a general rule, however, courts subject horizontal boycotts to per se analysis and vertical arrangements to a rule of reason, and we are confronted **[**14]** here with a vertical arrangement only. The Second Circuit has explained the distinction as follows:

> It is important to distinguish between ***HN5***[] "horizontal" restraints, *i.e.*, agreements between competitors at the same level of market structure, and "vertical" restraints, *i.e.*, combinations of persons at different levels of the market structure such as manufacturers and distributors. . . . Horizontal restraints alone have been characterized as "naked restraints of trade with no purpose except stifling competition," . . . and, therefore, *per se* violations of the Sherman Act. On the other hand, while vertical restrictions may reduce intrabrand competition by limiting the number of sellers of a particular product, competing for a given group of buyers, they also promote intrabrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products. . . They are, therefore, to be examined under the *rule of reason* standard.

Oreck Corporation v. Whirlpool Corporation, 579 F.2d 126, 131 (2d Cir. 1978) (en banc), *cert. denied*, *439 U.S. 946 (1979)* (citations omitted). The tire rule fits this characterization of **[**15]** a vertical restraint as a combination of persons at different levels of the market structure. M & H is complaining essentially that the drivers (the purchasers of tires) agreed with Hoosier (a seller of tires) and that the tracks enforced the arrangement. Such an agreement is best characterized as vertical.

The Second Circuit has stuck with the horizontal-vertical distinction, *see Borger v. Yamaha International Corporation, 625 F.2d 390 (2d Cir. 1980)*, and this distinction has been employed in other circuits. *See, e.g., Gough v. Rossmoor Corporation, 585 F.2d 381 (9th Cir. 1978)*, *cert. denied*, *440 U.S. 936 (1979)*. And, the Supreme Court has seemingly gone along with the distinction at least up to the point of a case such as Klor's, infra. Compare *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)* (rule of reason applied to vertical territorial restriction placed on retailers by manufacturers) *and Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961)* (vertical exclusive dealing contracts analyzed under rule of reason) *with Fashion* (per se treatment given to horizontal arrangement) and *Eastern States* (same), *supra*. In *United **[**16]** States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972)*, the Court said:

> ***HN6***[] One of the classic examples of a *per se* violation of *§ 1* 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.*, **[*979]** manufacturers and distributors, which are termed vertical restraints.

We recognize that some courts have found that certain restraints which are vertical in form may be horizontal in nature or effect, *see, e.g., Cernuto, Incorporated v. United States Cabinet Corporation, 595 F.2d 164, 167 & n.15 (3d Cir. 1979)*, and thus deserve per se treatment (*United States v. Topco* could be viewed as such a case). The restraint here is not, however, of that sort. We also recognize that the majority of cases which employ a rule of reason analysis when confronted with a vertical restraint involve a manufacturer-distributor relationship. But the very novelty of the present situation is one of the main arguments against **[**17]** a per se approach. The fact that this case does not fit this familiar pattern is not a reason to turn to per se analysis, but is rather a factor favoring the rule of reason.

B. *The Klor's Case is Not Grounds for Per Se Analysis*

M & H argues that the single tire rule should receive per se treatment on the basis of *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)*, which involved a vertical arrangement. In that case, Broadway-Hale, a department store, conspired with the manufacturers and distributors of well-known brands, such as General Electric, RCA and Zenith, either to refuse to sell merchandise to its competitor, Klor's, or only to sell to Klor's at discriminatorily high prices and unfavorable terms. Although there was no horizontal agreement between

Broadway-Hale and other retail merchants, the Court found the vertical agreement between Broadway-Hale and its suppliers sufficient, and ruled the boycott illegal per se.

The district court and M & H would cast Hoosier in the place of Broadway-Hale, and would cast the tracks and drivers in the place of Broadway-Hale's suppliers. Hoosier's position cannot, however, be equated with Broadway-Hale's. The **[**18]** tracks and drivers invited tire companies to submit bids and to supply tires for testing. M & H, McCreary, Goodyear, and Hoosier (virtually all the extant suppliers of racing tires) responded. After competitive testing, the tracks and drivers selected Hoosier. Although the district court criticized various aspects of the tests, *see infra*, it also found that there was no collusion and it is clear the testing was not merely a sham, with Hoosier the predetermined winner. Hoosier did not instigate the rule nor did it conspire with the tracks and drivers to be selected. This is not a situation, comparable to that in *Klor's*, where Hoosier was found to have orchestrated the single tire rule in an effort to drive M & H out of business. Rather the object of the single tire rule was related to defendants' bona fide sports objectives. And M & H had a chance that year, and would presumably have chances in later years, to be selected as the winning tire for use under the rule. Unlike Broadway-Hale, Hoosier's conduct consisted of successfully competing for the right to supply tires for the 1982 season, and not of baldly seeking to drive a competitor out of business.

It is important, **[**19]** in this connection, to distinguish between a disappointed competitor and the object of an illegal boycott. [3] *See, e.g., Joseph E. Seagrams & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969)*, *cert. denied*, *396 U.S. 1062 (1970)*; *Instant Delivery Corp. v. City Stores Company, 284 F. Supp. 941 (E.D. Pa. 1968)*. In *Instant Delivery* the court observed,

> . . . In each of those cases [*e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., supra*] the aim and purpose of the group boycott or refusal to deal was either to compel the object of the boycott to adopt a certain standard of trade practice, or to exclude him from competition.
>
> In the case at bar, the only "refusal to deal" with Instant was that inherent in the selection of some other carrier to **[*980]** perform the consolidated delivery service. The "exclusion" was a by-product of the decision to reinstate consolidated delivery which necessarily involves the use of one carrier. . . . I find nothing in this record to evidence an intent to discriminate against or to exclude Instant. . . . Instant is a disappointed competitor, not the object of an illegal boycott.

Id. ***[**20]*** *at 947*.

The single tire rule at issue here was not adopted to discipline M & H or to drive M & H out of business or indeed for any anti-competitive motive whatever. The " exclusion" of M & H from the four tracks was a by-product of a sports-oriented decision to have all drivers at those tracks race on a single compound, in order to insure greater equality between race participants as well as a less expensive sport. And the evidence indicates, as M & H properly conceded in argument, that specifying a single brand was the only feasible method to insure that a single rubber compound was being raced on.

C. *Promulgation of the Single Tire Rule in a Sports Regulation Context Further Militates Against Per Se Treatment*

HN7[🡅] A further reason for denying per se treatment here is that the single tire rule was promulgated in a sports self-regulation **[**21]** context -- an area in which courts have been reluctant to employ a per se analysis when confronted with boycott-like conduct, and instead consider the challenged arrangement under a rule of reason. *See, e.g., Brenner v. World Boxing Council, 675 F.2d 445, 454-55* (2d Cir.), *cert. denied*, *103 S. Ct. 79 (1982)* (group boycott claim not subjected to per se analysis). The Supreme Court has stated that ***HN8***[🡅] per se treatment is not appropriate where a "justification derived from the policy of another statute *or otherwise*" requires the use of a rule of reason. *Silver v. New York Stock Exchange, 373 U.S. 341, 348-49 (1963)* (emphasis added). Picking up on the Court's use of "or otherwise," many courts have reasoned that in the sports area various agreed-upon procedures

[3] Although M & H was not selected for use under this single tire rule, M & H sold tires under single tire rules at several other tracks in the Northeast during the 1982 season.

may be essential to survival, *see, e.g., Hatley v. American Quarter Horse Association, 552 F.2d 646, 652 (5th Cir. 1977)*, and have not subjected concerted activity by sports-related organizations to the group boycott per se rule. [4] ***HN9***[] Most courts have limited per se treatment of group boycott-like activity in a sporting context to those situations in which a group of competitors at one level seek to protect themselves **[**22]** from competition by non-group members at the same level -- the classic horizontal group boycott case, *Smith v. Pro Football, Inc., 593 F.2d 1173, 1177-79 (D.C. Cir. 1978)*, and deny per se treatment if the facts do not fit this paradigm, using a rule of reason analysis instead. *See Brenner, 675 F.2d at 454* (collecting cases). Here, the facts do not fit this paradigm as Hoosier is not a member of a group whose members' objective is to insulate themselves from competition, nor is there any evidence that Hoosier participated in the tire testing with the purpose of excluding M & H from the market. Hoosier participated to win the bid, and M & H's exclusion was incidental.

Some courts have refused ***HN10***[] to employ a rule of reason analysis in a sports context unless first convinced **[**23]** that the sports regulation "passes" a three-part test articulated in *Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971)*. The district court adopted this approach here. It screened the single tire rule under *Denver Rockets* criteria, finding it deficient and hence unworthy of rule of reason analysis.

We need not determine whether, as a general matter, pre-screening under *Denver Rockets* criteria is desirable as a prerequisite to rule of reason analysis, or **[*981]** whether, instead, use of that criteria should await introduction as a part of the rule of reason analysis. Even viewing the *Denver Rockets* factors as necessary prerequisites to rule of reason analysis, we believe the district court was mistaken in thinking the single tire rule "failed" the test.

The *Denver Rockets* test requires that there be 1) a legislative mandate "or otherwise" for self-regulation; 2) that the collective action be intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary; and 3) that there are procedural safeguards which assure **[**24]** that the restraint is not arbitrary and which furnishes a basis for judicial review.

The district court stated that the single tire rule failed this test for several reasons. First, the court determined that the objective of the rule was to fix prices, and that price fixing cannot be a proper objective of sports regulation even if designed to achieve the admittedly legitimate goal of achieving competitive equality. Second, the court said that elimination of intrabrand competition is not a legitimate form of sports self-regulation. Third, the court found the single tire rule deficient because it was not adopted by an independent sanctioning organization interested in the sport as a whole. Lastly, the court found that the procedures followed by the tracks and drivers in choosing Hoosier lacked procedural fairness.

Turning first to the court's finding of price fixing, we agree that if the tracks and drivers were engaged in actual price fixing, this would be inconsistent with 2(a) and perhaps other aspects of the *Denver Rockets* test. (Indeed, price fixing would be a reason quite apart from *Denver Rockets* to strike down this rule.) We do not believe the challenged arrangement **[**25]** can properly be viewed, however, as an attempt to fix prices in the sense that that term is used in ***antitrust law***. The district court's error, we believe, was to lump all modified class racing tires together into a single category. Prior to the 1982 season, the drivers were purchasing the fastest tires they could afford, which meant that they were selecting high-cost, 15-inch tires that sold for around $140 apiece in 1981 (and would have cost as much as $170 in 1982). The single tire rule was designed to shift drivers from a 15-inch high-cost tire to a budget 13-inch tire which commonly sold for between $90-$100 apiece. M & H's own economic expert, Dr. Dalton, testified that the two types of tires were different:

> The impact of the group that you have referred to resulted in a lower price, as I mentioned, and a short term for a product that was different than that which was run generally in the open market.

M & H concedes in their brief that the products are different. *Brief for the Appellee* at p.13.

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[4] The fact of concerted activity by the tracks and drivers does not, standing alone, require per se treatment. *See, e.g., Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813* (9th Cir.), *cert. denied*, ***456 U.S. 1011 (1982)***.

The tracks and drivers were *not* attempting to fix the prices of high quality 15-inch tires, for which the free market had set prices close to $170, at **[**26]** the much lower price of $90-$100. Rather, the tracks and drivers simply asked the tire companies to supply them with budget 13-inch tires in the $90-$100 category. The tire companies then told the tracks and drivers what tires they were offering in that price range. The tracks and drivers were not demanding that the tire companies sell them any particular tire at a price below market -- *i.e.*, they were not asking to be sold a $150 tire for $90. To the extent that any price break was offered, it merely reflected a permissible volume discount of a few dollars per tire, which the tire companies may have extended in the hope of increasing the chance at winning the bid. For these reasons we do not perceive the single tire rule as an attempt to artificially hold down the price of a particular product, a practice condemned by the Supreme Court in *Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)*. All the rule attempted to do -- like a rule specifying the use of certain low cost engine components -- was to counteract the natural tendency of racers, if left unregulated, to buy the latest, state-of-the-art **[*982]** equipment, which cost more to manufacture and hence **[**27]** more to sell.

Although the district court recognized the legitimacy of attempting to achieve competitive equivalency among racers, it said it was "not aware of any case that has approved the elimination of intrabrand competition as a legitimate form of sports self-regulation." If intrabrand competition had truly been eliminated, there might be cause for concern, but nothing so drastic occurred here. First, Hoosier was selected after non-collusive, [5] competitive -- if unsophisticated, *see infra* -- testing of various brands. Second, the court found that the rule was limited to the 1982 season, and there is no evidence to suggest that the tracks and drivers would not have conducted another competitive test to select a track tire for the 1983 season. A single racing season does not seem an unreasonably long period to tie up a relatively small portion of the racing tire market.

[28]** Finally, the district court was clearly erroneous in its finding that the four defendant tracks comprised 100 percent of the relevant market and that even after two tracks suspended the rule, M & H was still foreclosed from 50 percent of the market. We do not see how the relevant market can be said to comprise only the four tracks that adopted the rule. In the Northeast alone, there are at least 15 other tracks which feature modified short oval racing. While racing tires constitute a separate market from ordinary street tires used on passenger cars, racing tires are sold nationwide. The president of M & H testified that his company sold racing tires "nationally, as well as overseas." Even if the relevant market were considered only short oval modified racing tires, as the president of M & H testified, M & H increased its sales of such tires from $52,000 in 1981, the year before the rule, to approximately $250,000 in 1982, the year that the rule was in effect. [6] Some of these M & H sales were made at

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[5] The district court expressly found "there was no evidence of collusion [*i.e.*, between Hoosier and the other defendants] in this case," although it felt the practices here "increase[d] the opportunities for collusion."

[6] While the president of M & H estimated his company's sale of modified tires as $52,000 in 1981 and $250,000 in 1982, a more precise estimate is contained in M & H's answers to interrogatories introduced into evidence at the end of trial:

> M & H sales records are not broken down by geographic area or category. However, by reviewing invoices, M & H has calculated that it had the following sales in the Northeast:

Total

Modified

1980

$207,051.88

$ 36,119.01

1981

183,226.05

52,965.39

1982 to date

other tracks at which M & H had been designated for use under a single tire rule. In light of this information contained in the record, it seems fanciful to suggest that the **[**29]** *relevant* market was limited only to the tracks that adopted the tire rule at issue here.

[30]** M & H has not shown, therefore, nor does the record reveal, any significant market foreclosure; nor was any foreclosure for an unreasonably long time. Thus, it is simply not accurate to say that the single tire rule "eliminated" intrabrand competition.

With respect to the district court's view that sports regulations *must* be promulgated by an "independent sanctioning organization interested in the sport as a whole," the assumption seems extreme. We recognize that ***HN11***[] if a regulation is adopted by an independent sanctioning organization with no financial stake in the outcome, a court will have maximum assurance that the **[*983]** regulation is to protect fair competition within the sport. But it does not follow that the absence of such an organization absolutely precludes either a rule of reason analysis, or a successful result under that analysis. The absence of a sanctioning organization may well indicate a greater need to show that the regulation in fact promotes a significant sports aim, but that is a different matter.

In rejecting rule of reason analysis, the district court also cited an absence of "procedural fairness" in selecting the Hoosier tire. The court said **[**31]** that the notice given to tire manufacturers of the tests held in the fall of 1981 was inadequate. It found that manufacturers were not notified of key criteria used in judging the tires. It also found that the test procedures themselves were hit or miss, failed to account for relevant variables, and were not adequately recorded. Additionally NEDOC's surviving records were insufficient to satisfy the court as to why NEDOC thought Hoosier was superior.

We cannot agree with the district court that the record shows significant procedural unfairness; and insofar as the court felt that the tests were simply unsophisticated or unscientific we doubt the materiality of those weaknesses.

635,796.21

346,981.84

According to this estimate, M & H increased its sales of modified tires by sevenfold while the tire rule was in effect. M & H's total tire sales for the above years were:

1980

$1,816,109.08

1981

2,033,090.56

1982

2,066,766.90/August 31, 1982

There is no estimate for M & H's total modified sales worldwide. These figures demonstrate that the tire rule did not prevent M & H from selling modified racing tires, and the magnitude of the sales refutes any claim that the rule foreclosed any significant portion of the market to which M & H sold modified racing tires. These figures strongly suggest that limiting the relevant market to the four tracks that adopted the rule at issue here was clearly wrong.

With respect to advance notice, it appears from the record that all companies were given essentially the same notice and, perhaps more importantly, all four interested companies participated in both tests. On January 24, 1981, NEDOC solicited proposals from all interested tire companies, including M & H, expressing interest in a tire rule, gave the McCreary Y-3 tire as an example of the kind of tire they were interested in, and asked for bids. On September 6 (or perhaps October 3, the record is unclear), **[**32]** the first round of tire testing was conducted and M & H, McCreary, Goodyear, and Hoosier participated, although M & H felt that it received overly short advance notice of the test. On October 1 the NEDOC rules committee interviewed company representatives from M & H, McCreary, Goodyear, and Hoosier, concerning such things as cost and availability. On November 7 a second round of testing took place in which all the companies participated and as to which there is no complaint as to notice. The NEDOC records of the tests show that products from each company were tested, lap times recorded, and general impressions of the drivers doing the testing were noted. After tentative selection of Hoosier, representatives of NEDOC traveled to Hoosier's plant in Indiana to make sure that Hoosier's manufacturing facility could supply the number of tires needed. We think these processes were scarcely so deficient as to fall below the minimum standards of fairness called for in these circumstances.

We, of course, do not quarrel with the court's findings that the tests were, in effect, unsophisticated and poorly done, and the data poorly preserved. This would be highly material to any claim of **[**33]** collusion, bias or bad faith. However, the court found no evidence of collusion, and there is no claim of bias or bad faith. As the products from each tire company were considered without favoritism or bias, we do not think it critical whether the testing was truly scientific or resulted in selection of the objectively "best" tire.

We recognize that one of the evils of group boycott activity is that a private group may arrogate to itself quasi-judicial powers, a normally public function. *Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941)*. In those situations where private groups are permitted to exercise such public powers, they may be required to afford fair and appropriate procedures. In *Silver v. New York Stock Exchange*, for example, the Court permitted the stock exchange to discipline and expel users of the exchange facilities, but required the exchange to proceed in a fair manner with **[*984]** basic procedural safeguard. Similarly, when sports leagues have been allowed to exercise quasi-judicial powers with respect to disciplining of players or revoking of eligibility status for tournaments, more elaborate procedures have been employed than were **[**34]** afforded the tire companies here. *See, e.g., Brenner v. World Boxing Council, 675 F.2d 445 (2d Cir. 1982)*; *Deesen v. Professional Golfers' Association of America, 358 F.2d 165* (9th Cir.), *cert. denied*, *385 U.S. 846 (1966)*.

However, the decision making involved in selecting a tire scarcely calls for elaborate quasi-judicial procedures like those suitable in cases of penalties, discipline, or suspension. The decision called for here is essentially one of business judgment. The question is not what is the "best" tire in some objective sense, but what is the tire the racers actually prefer. To the extent that procedures are required, they are simply those that are reasonable to help assure that the selection is made non-collusively and with equal consideration among the tires of different producers. We discern no duty to provide an absolutely objective or scientific basis for decision. In the present case, the evidence is clear that defendants solicited and received tires from all interested companies for testing, and that, in good faith they conducted a form of testing. As a result, they selected a tire which in good faith they felt was best for their particular purposes. **[**35]** We believe that these procedures were sufficient, whatever their shortcomings in terms of scientific or objective analysis, to meet the *Denver Rockets* standard in these circumstances.

We conclude that the district court erred in holding that the *Denver Rockets* test, if it applies, stands as a barrier to rule of reason analysis here.

III. RULE OF REASON

Having held that per se analysis is unwarranted, we turn to the district court's alternative holding that the single tire rule fails rule of reason scrutiny. While the question is close, we believe that the court erred in finding a Sherman Act violation under rule of reason analysis. First, we explain why we believe the single tire rule passes rule of reason examination, and later we address some of the specific concerns expressed by the district court.

A. *The Single Tire Rule Passes Rule of Reason Scrutiny*

If the tracks and drivers' only goal had been to control the increasing cost of racing so that the number of participants would not dwindle, we assume there would have been no legal objection to some procedure like the following: The tracks and drivers could have asked tire manufacturers to supply them with **[**36]** the model numbers of budget tires which the manufacturers would be willing to sell for between, say, $90-$105 each. The tracks and drivers could then have conditioned the rights of the dealers and manufacturers to sell the tires at the specified price throughout the racing season and to sell to all drivers who wished to purchase. Such a scheme would have reduced the cost of auto racing and yet allowed competition among manufacturers. Here, of course, the competition would be to see which company could make the best "budget" tire rather than who could make the best tire regardless of price; but we detect no infirmity in such a scheme.

The justification for the single *brand* tire rule must come, if at all, from the desire of the tracks and drivers to promote competition and parity among participants by requiring that all drivers race on a single rubber compound. M & H has conceded that the only practicable method of insuring that drivers are racing on the same rubber compound is to specify a single tire brand. [7] Even then, there may be some **[*985]** variations between the production run of the same tire model. There are various technical reasons why different manufacturers **[**37]** could not be asked to make a tire to a given standard specification, which we see no point in exploring here. We take the parties' word that it cannot be done given present tire technology.

[38]** We turn next to what is our general premise, that the tracks and drivers have the power to set the parameters within which the racing competition will take place. [8] Thus they can establish such things as the permissible range of gear ratios, allowable engine sizes, allow or prohibit aluminum block engines, and so on. *See generally* Gunter Harz Sports, Inc. v. United States Tennis Association, 511 F. Supp. 1103 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981) (prohibition against double-string tennis racquets upheld); STP Corp. v. United States Auto Club, Inc., 286 F. Supp. 146 (S.D. Ind. 1968) (turbine engine specifications upheld). In auto racing, such standardization of equipment would tend to increase the importance of driving skills over equipment, and would surely be a legitimate goal. In the above examples, however, the drivers can, at least in theory, continue to select from a variety of manufacturers so long as the specifications are met. What makes the single tire rule controversial is the specification of a single manufacturer's tire in order to achieve the goal that a single rubber compound is used. The question narrows to whether the tracks and drivers **[**39]** can set the rubber compound parameters, as they have set other limitations, when setting this particular parameter has the effect of imposing some limits upon competition among tire makers. A collateral question is whether an available alternative scheme exists which would achieve the same goal of promoting participant parity while having a lesser effect on the market.

We are aware of no cases dealing with sports regulation that suggest an appropriate mode of analysis to answer the specific question whether a parameter can be set in a sports context which has an effect on market competition. We think, however, that cases dealing with requirements contracts are instructive, particularly where, as here, the tracks and drivers have essentially agreed to **[**40]** fill all their tire requirements for the 1982 season by purchasing

[7] At argument counsel for M & H said:

> If you decide that all drivers have to race on identical tires, and identical in every respect, you probably need something like a single tire rule. And the reason is that although it's perfectly possible to have very detailed specifications for the construction of the tire, or the width, or the height, or the tire stagger, or the number of times you change a tire, or whether you're permitted to use special left side and right side tires, those things, which are problems in this area, can all be addressed by simple straightforward rules. But if you decide in advance that every driver has to race on exactly the same tire, you probably need a tire rule because as my client conceded and as most people familiar with this concede, the one step in tire manufacturing, the compounding -- the adding of the rubber compound to the carcass -- is a sort of a black art. And there isn't any quickly available tool to compare compound one with compound two as they come to the track. . . . Specifying one manufacturer is probably the only way that you can ensure that everybody races on the identical compound.

[8] By the same token, if football teams and owners "combine" to change the rules of the game to eliminate expensive equipment and generally to simplify the sport, we cannot conceive an antitrust violation simply because of the economic impact on suppliers.

budget tires from Hoosier. ***HN12***[] Courts judge the lawfulness of requirements contracts under the rule of reason, *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 333 (1961)*, and this is true even if the contract contains a promise to buy *exclusively* from the seller or obtain all requirements from a supplier for a specified length of time. *See* *Barry Wright Corporation v. ITT Grinnell Corporation, 724 F.2d 227, 236 (1st Cir. 1983)* (collecting cases). In *Barry Wright* we described the ***HN13***[] proper method of determining the probable effect of a requirements contract on competition in the relevant market:

> We are to take into account both the extent of the foreclosure and the buyer's and seller's business justifications for the arrangement. We must look both to the severity of the foreclosure (a fact which, other things being equal, suggest anticompetitive harm) and the strength **[*986]** of the justification in determining whether the "size" of the contract to purchase is reasonable.

Id. at 236-37 (citation omitted).

We begin the analysis outlined in *Barry Wright* with the observation **[**41]** that a single-supplier contract for a single racing season does not seem unreasonably long. Further, despite the district court's view that the rule foreclosed at first 100 percent and later 50 percent of the relevant market, the record suggests nothing approaching this sort of foreclosure. Section II, *supra*. Modified racing is carried on around the country at many other tracks. M & H sales of modified racing tires increased, at the very least, from approximately $52,000 in 1981 to $250,000 in 1982, *see supra* note 6 and accompanying text, suggesting that M & H was not prevented from selling its tires in the available market, to any great extent, by the rule.

Certainly, the rule did not prevent M & H from selling tires and getting driver feedback during 1982; thus, it would seem that M & H would be as capable of competing in 1983 for designation under the rule at issue here as it was in 1982. This is not a situation in which Hoosier had a monopoly on being designated as the required tire for use under a rule at all tracks conducting modified racing. The president of M & H testified that in 1982 M & H sold tires under a single tire rule at the Waterford racetrack in Connecticut, **[**42]** and at the Islip and Riverside racetracks in New York. In previous years M & H had sold tires under similar rules at Danbury and Islip. Thus, the single tire rule here did not result in M & H having to sit on the sidelines of the racing tire market for a whole season, without sales, in the hope of winning designation under a tire rule in 1983, as M & H suggests in its brief. There is nothing to indicate that in 1983 Hoosier could not have competed to be designated as the tire for use under a rule at the tracks where M & H was so designated in 1982, and vice versa. On a requirements contract form of analysis, we have great difficulty in perceiving any violation. This is particularly so where both the district court and the parties seem to agree that advancing participant parity is a reasonable goal.

Promotion of parity provides a sound business justification for the rule. In addition, the drivers can, it would seem, legitimately seek to obtain a stable, favorable price. *See* *Barry Wright, 724 F.2d at 237*. Further, as the drivers would presumably be purchasing in large quantity, Hoosier could afford to give a discount to reflect these increased sales (Hoosier in fact offered **[**43]** a price break of five dollars per tire and apparently was willing to go lower if asked); the increased certainty would perhaps also allow Hoosier to engage in production planning that could lower its costs. The combination of legitimate business justifications and the limited market foreclosure saves the rule.

It can be argued that the parity goal could have been achieved by less restrictive means, such as requiring use of a single brand for some time less than a whole season -- by specifying a single tire brand on a per month, per week, or even per race basis; or that if for a whole season, at least it should have been done on a per track basis, with each track using a different brand, rather than by a group of four tracks.

It might, however, seem impractical to require that single tire rules operate for less than a single racing season, particularly given the goals that the tracks and drivers sought to achieve here. It is obvious that the tracks and drivers were concerned not only that all competitors race on the "same" compound, but that the compound chosen offer a good combination of handling characteristics, speed, and so forth. If they had not been concerned about such **[**44]** matters, testing could have been replaced by a coin flip, or a tire could have been chosen on the basis of low price alone. While judgments concerning which tire offered the best combination may be somewhat subjective, and M & H complains that the criteria for testing was never made very explicit, these are judgments which **[*987]** the tracks and drivers were entitled to make.

It would also seem unrealistic to test for these characteristics on a weekly or monthly basis, and impossible to do so between races. This is particularly so here because the drivers had limited funds with which to conduct the tests. And, there would seem little utility interesting the same models of tires. It would only make sense to retest tires after design or compound changes had been introduced by a manufacturer. It does not seem unreasonable to test for the effects of such changes at the start of each racing season.

To some extent, structuring the rule on a per race, per week, or per month basis would also have undermined the cost savings goal. In part, the tracks and drivers selected a tire that they felt would be "repeatable," that is, usable in more than one race. To the extent that a driver **[**45]** had used a particular brand tire in a race and those tires were in suitable shape for another race, there would be, at least, the added initial expense to purchase another brand tire for the next race, be it a race held later the same day, or the following week, or whenever. Further, the drivers would have additional tires to transport and store until the next race at which they could be used. And, at the end of a racing season a driver might be stuck with four sets of used tires instead of one. Developments in the off-season might make such tires obsolete or otherwise not suitable for use at the tracks at which the drivers raced, and hence useless a year later.

These same types of problems would confront a driver who raced at the four tracks involved here, if those tracks each adopted a single tire rule for the whole season, but each specified a different model. Indeed, the very reason the drivers adopted the rule in concert with the four tracks is that these four tracks were the ones at which they most often raced. Many drivers would race at one track on a Friday evening, and another the following Saturday afternoon. Thus, the concerted action by tracks at which a common **[**46]** pool of drivers raced contributed to the cost savings goal sought by specifying an inexpensive tire. Further, there is a certain administrative convenience in conducting joint testing of tires; and, as mentioned above, there were limited funds for tire testing which were nearly expended by conducting joint tests. Thus, the possible less restrictive alternatives are more hypothetical than practical.

At least, in the absence of any demonstrated significant market foreclosure, we find no infirmity with the common sense approach to implementation of the single tire rule adopted by these tracks and drivers.

B. *Responses to Specific Concerns Raised by the District Court*

The district court determined that the single tire rule failed a rule of reason analysis because "the Sherman Act reflects a legislative judgment that competition will produce not only lower prices, but also better goods and services," *560 F. Supp. at 606*, and that the single tire rule lessened the incentive and opportunity to innovate as well as raising entry barriers and creating opportunity for collusion.

We perceive no reduction in the opportunity or incentive to innovate. First, Hoosier had an incentive **[**47]** to innovate because it presumably desired to be selected for use under the tire rule at issue here in 1983, and would also like to be selected as the track tire at tracks with tire rules that were currently using other brands. And, Hoosier would continue to innovate and develop tires for use at tracks that did not have tire rules. There was evidence that, as the 1982 season wore on, it became apparent that Hoosier tires had a tendency to come off wheel rims. If the rule had been allowed to continue, it would not be surprising if Hoosier had improved their tires before being considered as the tire for 1983, and there was evidence that Hoosier had begun to work on the problem in 1982.

Likewise, M & H was not deprived of any opportunity to innovate. Its tires (at least $250,000 worth) were being driven on other tracks, and M & H was able to receive any **[*988]** actual racing performance feedback that might be necessary to further innovations from the tracks at which it was designated and from the tracks that did not have single tire rules. Also these sales provided needed revenues during the 1982 season so that M & H could afford to innovate, test, and so forth. The tire rule **[**48]** did not force M & H to wait out a whole season before it could sell any tires.

As we stated earlier, the Hoosier tire rule passes a requirements contract form of analysis and thus we discern no appreciable market foreclosure or entry barrier problem. The expert testimony upon which the district court relied to find entry barriers appears premised on the incorrect assumption, *see* Section II, *supra*, that Hoosier had locked up between 50 percent and 100 percent of the relevant market, and M & H makes much of the fact in its brief that a tire producer may lose the annual selection process "and be foreclosed from selling his tires for an entire season." The simple answer to this is that no such market foreclosure occurred; M & H increased its sales of modified tires at least fivefold during 1982.

While the district court felt the rule might, in general, create an opportunity for collusion, it found that there was no evidence of collusion in this case. 560 F. Supp. at 606. And, the testimony of M & H's expert supports the finding of a lack of collusion in the tire market. We are reluctant to overturn a particular business arrangement while employing a rule of reason analysis **[**49]** on the basis of a "tendency" to promote collusion, when there is a well-supported finding of the absence of collusion.

The district court also stated that "the evidence at trial did not demonstrate that the Hoosier tire rule was essential to the survival of professional auto racing as a sport, or that, over time, such a rule would effectively cut costs at all." 560 F. Supp. at 607. First, we do not think the rule need be "essential" to the survival of the sport in order to carry justification. There is uncontroverted evidence that a number of unrelated tracks in the Northeast have adopted a single tire rule. This adds credibility to defendants' belief that such a rule was a proper solution to certain real problems in the sport. [9] A tendency towards over-sophistication of equipment coupled with escalating costs, which could drive out participants, is a problem people involved in a sport are entitled to address, and is sufficient, we think, to justify an attempted solution of this type. In other forms of racing, standardizing of equipment is commonplace -- for example, in "one-design" sailboat racing, identical boats, perhaps produced by a single supplier, are rigorously specified. **[**50]** Such an approach prevents the endless cost spiral invited when each competitor is allowed to design his own boat and provide equipment of his own choice. Second, the finding that there was **[*989]** no evidence that the tire rule would effectively cut costs at all seems clearly incorrect. The inference is compelling that requiring all drivers to use low cost tires will save them money.

[51]** The district court was concerned that a tire rule is not a reasonable approach to controlling the cost crisis in auto racing. "Alternative approaches to the cost crisis could include increased purses, objective specifications restricting engine performance, or some more reasonable approach to tire specifications." 560 F. Supp. at 607. If cost cutting were the only goal of the tire rule, a less restrictive approach might have been devised to control tire costs. We have already described one such theoretically possible approach, *supra*. However, there appears to be

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[9] The record contains testimony which shows that Hoosier did not have a monopoly on being designated for use under tire rules. The president of M & H testified that his company had been used as a track tire at several race tracks in 1979, 1981 and 1982. The following testimony from the promoter at Seekonk shows that even at a single track different companies supplied tires for use under tire rules in different classes of racing.

> A The modified class was on the Hoosier budget slick, the 13-inch and the Pro-stocks were on a Hoosier 11-inch economy slick. The street class had been on the same tire for five to six years. It is a recap tire supplied by Commercial Tire Company. The mini-stock competitors chose to use a used Goodyear. "Scrub tire" is what they call it. That is a slightly used tire that was imported, used on formula racing, and it has been available through them at a much-reduced cost. So I agreed to let them stay on that tire that was available to them.
>
> Q Now, sir, directing your attention to the Pro-stock class, when did you first institute a one-brand, one-tire rule in that class?
>
> A 1978.
>
> Q What brand of tire was the designated tire in that division in 1979, 1980 and 1981?
>
> A McCreary 9-inch slick.

The record reveals that discussion of and experimentation with tire rules was a widespread phenomenon. Not only were racers in classes other than modified using tire rules, but such rules were considered as early as 1972 by various groups as one way to control costs and increase parity.

no "more reasonable approach to tire specifications" if the goal is to have all drivers racing on a single tire compound.

To the district court's suggestion that costs be controlled by limiting engine performance, the answer seems to be that a number of such steps have been taken. Aluminum block engines have been prohibited, a gear rule was adopted, fuel injection was banned, and carburetor size was specified. The fact that the tire rule was not the sole element of cost control introduced, and that it was felt that such a rule was still needed in light of these other measures, indicates that the rule was adopted **[**52]** for bona fide reasons and that the cost savings motive was not merely a smoke screen to cover up improper designs by Hoosier. (We have already noted, additionally, the adoption of tire rules at some other, unrelated tracks.)

We cannot be confident that increased purses would solve the cost problem either. There was testimony to the effect that the tire rule would not greatly affect the order of finish among drivers, but that it would make the races "tighter" and "cheaper." One of the prime concerns in adopting a tire rule was to keep the field of participants from dwindling. If increasing costs were "controlled" only by offsetting them with increased purses, then a number of racers might still be forced to leave the sport for lack of sufficient winnings. Little or no "savings" would be passed on to them. This is so even though the whole field "shares" the purse because the majority of winnings still goes to the top finishers. The goal of preserving the spectacle of a large field of participants and promoting tighter races could not clearly be achieved by simply increasing the purses. And, the record does not show that the sport could bear increased purses, which presumably **[**53]** would have to be financed by either higher priced tickets or increased ticket sales.

We are satisfied that the conduct defendants engaged in was justified as a reasonable way to regulate and improve modified class auto racing, and that it did not in all the circumstances have anti-competitive ramifications so severe as to warrant a finding that it was illegal.

For the foregoing reasons the judgment of the district court is reversed.

Kartell v. Blue Shield

United States Court of Appeals for the First Circuit

November 28, 1984, Decided

Nos. 84-1241, 84-1290, 84-1303

Reporter

749 F.2d 922 *; 1984 U.S. App. LEXIS 16376 **; 1984-2 Trade Cas. (CCH) P66,300

JAMES P. KARTELL, M.D., ET AL., Plaintiffs, Appellees, v. BLUE SHIELD OF MASSACHUSETTS, INC., Defendant, Appellant; JAMES P. KARTELL, M.D., ET AL., Plaintiffs, Appellees, v. BLUE SHIELD OF MASSACHUSETTS, INC., ET AL., Defendants, Appellees. MASSACHUSETTS MEDICAL SOCIETY, ET AL., Intervenors/Plaintiffs, Appellants; JAMES P. KARTELL, M.D., ET AL., Plaintiffs, Appellees, v. BLUE SHIELD OF MASSACHUSETTS, INC., ET AL., Defendants, Appellees. COMMISSIONER OF INSURANCE, Intervenor/Defendant, Appellant

Prior History: [1]** CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Andrew A. Caffrey, U.S. District Judge].

Core Terms

prices, buyer, district court, billing, antitrust, market power, ban, anti trust law, subscribers, patients, insurer, buy, seller, competitors, bargain, reimbursement, regulation, charging, percent, courts, cases, predatory, reasons, health insurance, Sherman Act, horizontal, monopolist, suppliers, costs, low price

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN1[] **Antitrust & Trade Law, Sherman Act**

To find an unlawful restraint, the court looks at the accused company as if it were a "third force, " intervening in the marketplace in a manner that prevents willing buyers and sellers from independently coming together to strike price/quality bargains.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN2[] **Antitrust & Trade Law, Sherman Act**

An insurer may lawfully engage in the buying of goods and services needed to make the insured whole.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

Courts forbid an organization from buying a good or service in cases where the buyer is a "sham" organization seeking only to combine otherwise independent buyers in order to suppress their otherwise competitive instinct to bid up price.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Insurance Law > Claim, Contract & Practice Issues > Premiums > Refunds

HN4[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Courts generally approve of contracts in which those who directly provide goods or services to insureds have agreed to cap or forego completely additional charges to those insureds in return for direct payment by the insurer.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] Actual Monopolization, Anticompetitive & Predatory Practices

Antitrust laws interfere with a firm's freedom to set even uncompetitive prices only in special circumstances, where, for example, a price was below incremental cost. Such a "predatory" price harms competitors, cannot be maintained, and is unlikely to provide consumer benefits.

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

HN6[] Monopolies & Monopolization, Actual Monopolization

Mere monopoly pricing is not a violation of the Sherman Act. *15 U.S.C.S. § 2*. More than monopoly power is necessary to make the charging of a noncompetitive price unlawful.

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

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Monopolies & Monopolization, Actual Monopolization

Where a monopoly is unlawful, antitrust courts typically seek to change the market's structure, to break up or render impotent the monopoly power that violates the Sherman Act, *15 U.S.C.S. § 2*. Courts only rarely try to supervise the price bargain directly. And, where monopoly power is regulated, the regulator, not the court, bears the burden of determining whether prices are reasonable.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN8[] Actual Monopolization, Anticompetitive & Predatory Practices

Normally the choice of what to seek to buy and what to offer to pay is the buyer's. And, even if the buyer has monopoly power, an antitrust court (which might, in appropriate circumstances, restructure the market) will not interfere with a buyer's non-predatory determination of price.

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

HN9[] Monopolies & Monopolization, Actual Monopolization

A legitimate buyer is entitled to use its market power to keep prices down.

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

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Employer & Physician Covenants

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN10[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A horizontal agreement among competitors is typically unlawful because the competitors prevent themselves from making independent decisions about the terms as to which they will bargain.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

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

HN11[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

The unlawfulness of a horizontal agreement does not necessarily depend upon the undesirability of the contractual term as to which competitors agree not to compete.

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

HN12[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A buyer, as well as a seller, can possess significant market power; and courts have held that agreements to fix prices -- whether maximum or minimum -- are unlawful.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[] **Public Enforcement, State Civil Actions**

Strict antitrust scrutiny is less likely to be necessary to prevent the unwarranted exercise of monopoly power where the price system at issue is one supervised by state regulators.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A firm generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

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Judges: Campbell, Chief Judge, Cowen, [*] Senior Circuit Judge, and Breyer, Circuit Judge.

Opinion by: BREYER

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[*] Of the U.S. Court of Appeals for the Federal Circuit, sitting by designation."

Opinion

[*923] BREYER, Circuit Judge

Blue Shield pays doctors for treating patients who are Blue Shield health insurance subscribers, but only if each doctor promises not to make any additional charge to the subscriber. The basic issue in this case is whether this Blue Shield practice -- called a "ban on balance billing" -- violates either Sherman Act *§ 1* forbidding agreements "in restraint of trade," *15 U.S.C. § 1*, or Sherman Act *§ 2* forbidding "monopolization" and "attempts to monopolize," *id. § 2*. The district court, *582 F. Supp. 734 (D. Mass. 1984)*, held that the practice constituted an unreasonable restraint of trade in violation of *section 1*. We conclude that the practice does not violate either section of the Sherman Act; and we reverse the district court.

As the district court noted, the relevant facts are **[**3]** "not . . . generally . . . disputed." Blue Shield provides health insurance for physician services while its sister, Blue Cross, insures against hospital costs. The consumers of Blue Shield insurance, at least those who buy "full service" prepaid medical benefits, can see any "participating doctor," *i.e.*, a doctor who has entered into a standard Participating Physician's Agreement with Blue Shield. (If a doctor has not signed the Agreement, Blue Shield will reimburse him only if he provides emergency or out-of-state services.) Under the standard agreement, a participating doctor promises to accept as payment in full an amount determined by Blue Shield's "usual and customary charge" method of compensation. The district court found that the method has evolved, through the use of various "capping" devices, towards payment of a "fixed fee, " determined by Blue Shield, for each particular type of service. Blue Shield pays this amount directly to the doctor; the patient pays nothing out of his own pocket and therefore receives no reimbursement.

[*924] The district court also found that Blue Shield provides some form of health insurance to about 56 percent of the Massachusetts **[**4]** population. (About 45 percent has coverage carrying a "balance billing " ban.) If one subtracts from the total population universe those Massachusetts residents who rely on government sponsored health care (*e.g.*, Medicare or Medicaid), then Blue Shield (and Blue Cross) provide insurance coverage for about 74 percent of the rest, namely those Massachusetts residents who *privately* insure against health costs. (About 23 percent of that group have coverage with commercial insurers; and about 4 percent subscribe to Health Maintenance Organizations.) Virtually all practicing doctors agree to take Blue Shield subscribers as patients and to participate in its fee plan. Blue Shield payments made under that plan account for about 13 to 14 percent of all "physician practice revenue."

The district court found that, because of the large number of subscribers, doctors are under "heavy economic pressure" to take them as patients and to agree to Blue Shield's system for charging the cost of their care. The court believed that the effect of this payment system, when combined with Blue Shield's size and buying power, was to produce an unreasonably rigid and unjustifiably low set of prices. **[**5]** In the court's view, the fact that doctors cannot charge Blue Shield subscribers more than the Blue Shield payment-schedule amounts interferes with the doctors' freedom to set higher prices for more expensive services and discourages them from developing and offering patients more expensive (and perhaps qualitatively better) services. For these and related reasons, the district court held that Blue Shield's ban on "balance billing " unreasonably restrains trade, and thereby violates Sherman Act *§ 1*. Blue Shield appeals from this holding. The plaintiff doctors cross-appeal from other rulings of the district court in Blue Shield's favor.

On these appeals, the parties raise a host of issues not directly related to the antitrust merits, including the claim that a recently enacted state law, Mass. St. 1984, ch. 192, *§ 1*, renders the case moot by immunizing Blue Shield's "balance billing ban" from the reach of the antitrust laws. The "mootness" issue, however, is not a simple one. And even if we accepted the mootness claim, the new statute may not immunize the defendants from treble-damage liability for past conduct. In view of these legal and practical problems, and the fact that **[**6]** this case has been pending in the federal courts for more than seven years, we believe it simpler and more appropriate to proceed directly to the antitrust merits, which, on our view of the case, are dispositive.

I

We disagree with the district court because we do not believe that the facts that it found show an unreasonable restraint of trade. We can best explain our reasons by first discussing the basic antitrust issue in general terms, then turning to the specific, detailed arguments advanced by the parties, and finally noting several special reasons here that militate against a finding of liability.

A

We disagree with the district court's finding of "restraint." ***HN1***[] To find an unlawful restraint, one would have to look at Blue Shield as if it were a "third force, " intervening in the marketplace in a manner that prevents willing buyers and sellers from independently coming together to strike price/quality bargains. ***Antitrust law*** typically frowns upon behavior that impedes the striking of such independent bargains. The persuasive power of the district court's analysis disappears, however, **[**7]** once one looks at Blue Shield, not as an inhibitory "third force, " but as itself the purchaser of the doctors' services. *See Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 214, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)* (direct reimbursement to participating pharmacies for subscribers' drugs " merely [an] arrangement[] for the purchase of goods and services by Blue **[*925]** Shield"). ***Antitrust law*** rarely stops the buyer of a service from trying to determine the price or characteristics of the product that will be sold. Thus, the more closely Blue Shield's activities resemble, in essence, those of a purchaser, the less likely that they are unlawful.

Several circuits have held in antitrust cases that insurer activity closely analogous to that present here amounts to purchasing, albeit for the account of others. And, they have held that ***HN2***[] an insurer may lawfully engage in such buying of goods and services needed to make the insured whole. The Second **[**8]** Circuit has held lawful a Blue Shield plan requiring pharmacies to accept Blue Shield reimbursement as full payment for drugs they supply to Blue Shield subscribers. *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc., 675 F.2d 502 (2d Cir. 1982)*. The Third Circuit has allowed a hospital cost insurer (Blue Cross) to reimburse hospitals directly (and apparently completely) for services to subscribers. *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80* (3d Cir.), *cert. denied*, *414 U.S. 1093, 38 L. Ed. 2d 550, 94 S. Ct. 724 (1973)*. The Seventh Circuit has permitted auto insurance companies to furnish direct reimbursement to repair shops as payment for the repair services provided to policyholders. *Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F.2d 1195 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 1020, 72 L. Ed. 2d 138, 102 S. Ct. 1717 (1982)*.

At the same time, the facts before us are unlike those in cases where ***HN3***[] courts have forbidden an "organization" **[**9]** to buy a good or service -- cases in which the buyer was typically a "sham" organization seeking only to combine otherwise independent buyers in order to suppress their otherwise competitive instinct to bid up price. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)* (horizontal price-fixing by purchasers held *per se* illegal); *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)* (same); *National Macaroni Manufacturers Association v. Federal Trade Commission, 345 F.2d 421 (7th Cir. 1965)* (competitors in trade association fixing quantity of scarce component to be used in macaroni held *per se* illegal). No one here claims that Blue Shield is such a "sham" organization or anything other than a legitimate, independent medical cost insurer. *But cf. Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476 (4th Cir. 1980)* (Blue Shield found to be a combination, not of policyholders, but of *physicians*), *cert. denied*, *450 U.S. 916, 101 S. Ct. 1360, 67 L. Ed. 2d 342 (1981)*. **[**10]**

Once one accepts the fact that, from a commercial perspective, Blue Shield in essence "buys" medical services for the account of others, the reasoning underlying the Second, Third, and Seventh Circuit views indicates that the ban on balance billing is permissible. To understand that reasoning, consider some highly simplified examples. Suppose a father buys toys for his son -- toys the son picks out. Or suppose a landlord hires a painter to paint his tenant's apartment, to the tenant's specifications. Is it not obviously lawful for the father (the landlord) to make clear to the seller that the father (the landlord) is in charge and will pay the bill? Why can he not then forbid the seller to charge the child (the tenant) anything over and above what the father (the landlord) pays -- at least if the seller wants the buyer's business? To bring the example closer to home, suppose that a large manufacturing company hires doctors to treat its employees. Can it not insist that its doctors not charge those employees an additional sum over and above what the company agrees to pay them to do the job? In each of these instances, to refuse to allow the condition would disable the buyer **[**11]** from holding the seller to the price of the contract. Yet, if it is lawful for the buyer to buy for the third party in the first place, how can it be unlawful to bargain for a price term that will stick?

Given this argument, it is not surprising the courts have unanimously upheld contracts **[*926]** analogous in various degrees to the one at issue here -- ***HN4***[] contracts in which those who directly provide goods or services to insureds have agreed to cap or forego completely additional charges to those insureds in return for direct payment by the insurer. In addition to *Medical Arts* and *Travelers, supra*, see *Royal Drug Co. v. Group Life and Health Ins. Co., 737 F.2d 1433 (5th Cir. 1984)* ($2 cap on balance billing for drugs); *Webster County Memorial Hospital, Inc. v. United Mine Workers, 175 U.S. App. D.C. 392, 536 F.2d 419 (D.C. Cir. 1976)* (hospital agrees to ban on balance billing in exchange for direct payment by union trust fund); *Proctor v. State Farm Mutual Auto Insurance Co., 218 U.S. App. D.C. 289, 675 F.2d 308, 337 (D.C. Cir. 1982)* **[**12]** (auto repair shops agree to provide repairs at rate set by insurance company), *cert. denied*, *459 U.S. 839, 103 S. Ct. 86, 74 L. Ed. 2d 81 (1982)*; *Sausalito Pharmacy, Inc. v. Blue Shield of California, 544 F. Supp. 230 (N.D. Cal. 1981)*, *aff'd per curiam*, *677 F.2d 47* (9th Cir.) (cap on balance billing by participating pharmacies), *cert. denied*, *459 U.S. 1016, 74 L. Ed. 2d 510, 103 S. Ct. 376 (1982)*; *Feldman v. Health Care Service Corp., 562 F. Supp. 941 (N.D. Ill. 1982)* (same); *Pennsylvania Dental Association v. Medical Service Association of Pennsylvania, 574 F. Supp. 457 (M.D. Pa. 1983)*, *aff'd* *745 F.2d 248 (3rd Cir. 1984)* (ban on balance billing for dental services); *Michigan State Podiatry Association v. Blue Cross and Blue Shield of Michigan*, 1982-2 Trade Cas. (CCH) para. 64,801 (E.D. Mich. 1982); *Blue Cross and Blue Shield of Michigan, Inc. v. Michigan Association of Psychotherapy Clinics, Inc.*, 1980-2 Trade Cas. (CCH) para. 63,351 (E.D. Mich. 1980); *Davidowitz v. San Diego County Dental Society*, 1983-1 Trade Cas. (CCH) para. 65,231 (S.D. Cal. 1983). **[**13]** Scholarly commentators believe that these cases were correctly decided. *See, e.g.*, P. Areeda, *Antitrust Analysis* 530-31 (1981) ("It is difficult to see what could make [such an] arrangement anticompetitive"). *See also* Comment, 75 Nw. U.L. Rev. 506 (1980).

Two arguments might be made in an effort to distinguish these cases. First, the doctors may claim that Blue Shield is not, in essence, a buyer. Traditionally, doctors have opposed financial arrangements that involved the "selling" of their services to anyone but the patient. *See* Comment, 63 Yale L.J. 938, 978-80 (1954). And medical associations in the past sometimes have argued that selling services to third parties or related "corporate practice " might interfere with the absolute ethical obligation that a doctor owes to the patient. *Id.*, (citing, *e.g.,* AMA, Principles of Medical Ethics, ch. 3, art. 5, § 4). Medical associations have not, however, opposed reimbursement by third party insurers, such as Blue Shield, a fact that arguably suggests an important distinction between "insurance reimbursement " and "purchasing."

In our view, however, any such distinction is irrelevant **[**14]** for antitrust purposes. The relevant antitrust facts are that Blue Shield pays the bill and seeks to set the amount of the charge. Those facts led other courts in similar circumstances to treat insurers as if they were "buyers." The same facts convince us that Blue Shield's activities here are *like* those of a buyer. Whether for ethical, medical, or related professional purposes Blue Shield is, or is not, considered a buyer is beside the point. We here consider only one specific argued application of the antitrust laws and we do not suggest how Blue Shield ought to be characterized in any other context.

Second, the doctors seek to distinguish these precedents by pointing to an important district court finding either not present or not discussed in depth in these other cases. The district court here found that Blue Shield is a buyer with significant "market power " -- i.e., the power to force prices below the level that a freely competitive market would otherwise set. They argue that Blue Shield's "market power " makes a significant difference. We do not agree.

At the outset, we note that Blue Shield disputes the existence of significant "market power. " It points out that **[**15]** the district court relied heavily upon participation by 99 percent of all Massachusetts doctors in **[*927]** Blue Shield's program, as "prov[ing] . . . Blue Shield's economic power." But, Blue Shield says, this by itself proves little. Participating in Blue Shield's program does not stop doctors from taking other patients or from charging those other patients what they like. As long as Blue Shield's rates are even marginally remunerative, 99 percent of all doctors might sign up with Blue Shield if it had only ten policyholders or ten thousand instead of several million.

Blue Shield adds that the record does not prove the existence of the single harm most likely to accompany the existence of market power on the buying side of the market, namely lower seller output. *See* P. Areeda, *supra* at 343 n. 20; R. Posner, *Antitrust*, 5-14, 91-3 (1974). Indeed, here the district court found that the supply of doctors in Massachusetts has "increased steadily during the past decade." Blue Shield also claims that whatever power it possesses arises from its ability as an "expert" to prevent doctors from charging unknowledgeable patients *more* than a free (and informed) market **[**16]** price. *See generally* Comment, 75 Nw. U.L. Rev., *supra*.

On the other hand, several doctors testified that low prices discouraged them from introducing new highly desirable medical techniques. And, they argue that fully informed patients would have wanted to pay more for those techniques had they been allowed to do so.

To resolve this argument about the existence of market power -- an issue hotly debated by the expert economists who testified at trial -- would force us to evaluate a record that the district court described as "two competing mountains of mostly meaningless papers." Rather than do so, we shall assume that Blue Shield possesses significant market power. We shall also assume, but purely for the sake of argument, that Blue Shield uses that power to obtain "lower than competitive " prices.

We next ask whether Blue Shield's assumed market power makes a significant legal difference. As a matter of pure logic, to distinguish the examples previously mentioned one must accept at least one of the following three propositions: One must believe either (1) that the law forbids a buyer with market power to bargain for "uncompetitive" or "unreasonable" prices, or (2) **[**17]** that such a buyer cannot buy for the account of others, or (3) that there is some relevant difference between obtaining such price for oneself and obtaining that price for others for whom one can lawfully buy. In our view, each of these propositions is false, as a matter either of law or of logic.

First, the ***HN5***[] antitrust laws interfere with a firm's freedom to set even uncompetitive prices only in special circumstances, where, for example, a price was below incremental cost. Such a "predatory" price harms competitors, cannot be maintained, and is unlikely to provide consumer benefits. *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983)*. *Cf.* *United States v. Aluminum Co. of America, 148 F.2d 416, 437-438 (2d Cir. 1945)* (vertically-integrated aluminum monopolist cannot both charge an unreasonably high price for ingots *and* set a fabricated product price too low for competing fabricators to survive). Ordinarily, however, even a monopolist is free to exploit whatever market power it may possess when that exploitation takes the form of **[**18]** charging uncompetitive prices. As Professor Areeda puts it, ***HN6***[] "Mere monopoly pricing is not a violation of the Sherman Act." P. Areeda, ***Antitrust Law*** § 710 (Supp. 1982). The Second Circuit has recently held that "more than monopoly power is necessary to make the charging of a noncompetitive price unlawful." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. *Cf.* *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

The reasons underlying this principle include a judicial reluctance to deprive the lawful monopolist (say a patent monopolist) of its lawful rewards, and a judicial recognition of the practical difficulties of determining what is a "reasonable," or "competitive," price. *See* 2 P. Areeda & D. Turner, ***Antitrust Law*** §§ 512-14 (1978); 3 *id.* **[*928]** para. 710; R. Bork, *The Antitrust Paradox*, 125-29 (1978). As the Supreme Court stated in a different context,

> The **[**19]** reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. . . . 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 organizations and a choice between rival philosophies.

United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 71 L. Ed. 700, 47 S. Ct. 377 (1927). Thus, ***HN7***[] where a monopoly is unlawful, antitrust courts typically seek to change the market's structure, "to break up or render impotent the monopoly power which violates the Act." *United States v. Aluminum Co. of America, 91 F. Supp. 333, 334 (S.D.N.Y. 1950)* (citing *Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128-29, 92 L. Ed. 1245, 68 S. Ct. 947 (1948))*. *See also* *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*. **[**20]** Courts only rarely try to supervise the price bargain directly. 3 P. Areeda & D. Turner, *supra*, para. 710 n. 2. *Cf.* *United States v. Glaxo Group Ltd., 410 U.S. 52, 35 L. Ed. 2d 104, 93 S. Ct. 861 (1973)* (ordering compulsory patent licensing "at reasonable charges"). And, where monopoly power is regulated, the regulator, not the court, bears the burden of determining whether prices are reasonable. *See, e.g.*, Mass. Gen. Laws ch. 164, §§ 93-94 (state regulation of gas and electric rates).

The district court did not suggest here that the prices subject to the "balance billing " ban were "predatory." Nor (with one possible exception, see slip op. pp. 30-32) do the parties point to evidence of any price below anyone's "incremental cost. " *Cf.* *Barry Wright Corp. v. ITT Grinnell Corp., supra.* Rather, the district court suggested that Blue Shield's prices were "uncompetitively low, " "unreasonably low, " lower than the doctors might have charged to individual patients lacking market power. That is to say, Blue Shield obtained prices that reflected its market power. For the reasons just mentioned then, if Blue Shield had simply purchased those **[**21]** services for itself, the prices paid, in and of themselves, would not have amounted to a violation of the antitrust laws. *Berkey Photo, Inc. v. Eastman Kodak Co., supra*; 3 P. Areeda & D. Turner, *supra*, para. 710.

Second, as we previously mentioned, there is no law forbidding a legitimate insurance company from itself buying the goods or services needed to make its customer whole. The cases that we have cited are unanimous in allowing such arrangements. The rising costs of medical care, the possibility that patients cannot readily evaluate (as competitive buyers) competing offers of medical service, the desirability of lowering insurance costs and premiums, the availability of state regulation to prevent abuse -- all convince us that we ought not create new potentially far-reaching law on the subject. And, the parties have not seriously argued to the contrary.

Third, to reject the first two propositions is, as a matter of logic, to reject the third. If it is lawful for a monopoly buyer to buy for the account of another, how can it be unlawful for him to insist that no additional charge be made to that other? To hold to the contrary is, in practice, to deny **[**22]** the buyer the right to buy for others, for the seller would then be free to obtain a different price from those others by threatening to withhold the service. This reasoning seems sound whether or not the buyer has "market power. "

In essence, then, the lawfulness of the term in question stems from the fact that it is an essential part of the price bargain between buyer and seller. Whether or not that price bargain is, in fact, reasonable is, legally speaking, beside the point, even in the case of a monopolist. As Blue Shield stresses in its brief, health maintenance organizations, independent practice associations, and preferred provider organizations **[*929]** all routinely agree with doctors that the doctors will accept payment from the plan as payment in full for services rendered to subscribers. We can find no relevant analytical distinction between this type of purchasing decision and the practice before us -- even on the assumption that Blue Shield possesses market power.

B

We now consider more closely the specific arguments raised by the district court and the parties to show that Blue Shield's "balance billing ban " is anticompetitive in practice. The Rodkey plaintiffs' **[**23]** brief sets forth in summary form the following allegedly harmful effects of the ban:

(1) Price competition among physicians for services covered by Blue Shield's service benefit policies is "virtually eliminated."

(2) Doctor's prices have tended to cluster around Blue Shield's "maximum price levels."

(3) Doctors wanting to compete by offering innovative or "premium" services are inhibited from doing so because Blue Shield's pricing structure assumes that physicians' services are fungible and mandates the same price ceilings for virtually all physicians.

(4) Doctors just entering practice are discouraged from doing so by particularly low levels of Blue Shield reimbursement.

(5) Blue Shield's low prices lead doctors to charge higher prices to others.

(6) Blue Shield discourages doctors from charging others low prices by insisting that its subscribers be given the benefit of any such low prices.

(7) Blue Shield's pricing system discourages doctors from trying out more expensive services that could bring about lower total medical costs, *e.g.*, a "colonoscopy with polypectomy," an expensive service that is nonetheless cheaper than the surgery that would otherwise be needed **[**24]** to cure the patient.

(8) Blue Shield, by reason of its pricing practices, has been able to attract more subscribers, extending its "competitive edge" over other health insurers, and increasing its dominance in the health insurance business.

The first seven of these arguments attack the price term in the agreement between Blue Shield and the doctors. To argue that Blue Shield's pricing system is insufficiently sensitive to service differences, or that it encourages high costs, or does not give the patients what they really need, or to claim that the buyer is making a bad decision is like arguing that the buyer of a fleet of taxicabs ought to buy several different models, or allow the seller to vary color or horsepower or gearshift because doing so either will better satisfy those passengers who use the fleet's services, or will in the long run encourage quality and innovation in automobile manufacture. The short -- and conclusive -- answer to these arguments is that ***HN8***[] normally the choice of what to seek to buy and what to offer to pay is the buyer's. And, even if the buyer has monopoly power, **[**25]** an antitrust court (which might, in appropriate circumstances, restructure the market) will not interfere with a buyer's (nonpredatory) determination of price.

Thus, the arguments that Blue Shield's payments for doctors' services are "too low" are disposed of by our discussion at slip op. pp. 16-18, *supra*. ***HN9***[] A legitimate buyer is entitled to use its market power to keep prices down. The claim that Blue Shield's price scheme is "too rigid" because it ignores qualitative differences among physicians is properly addressed to Blue Shield or to a regulator, not to a court. There is no suggestion that Blue Shield's fee schedule reflects, for example, an effort by, say, one group of doctors to stop other doctors from competing with them. *Cf. Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, supra.* Here, Blue Shield and the doctors "sit on opposite sides of the bargaining table," *Royal Drug Co. v. Group Life & Health Insurance Co., 737 F.2d at 1438*. And Blue Shield seems simply to be acting **[*930]** "as every rational enterprise **[**26]** does, *i.e.*, [to] get the best deal possible," *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d at 84*. The first seven adverse consequences to which appellees point are the result of this unilateral behavior.

Plaintiffs' eighth argument focuses on the health insurance business: Blue Shield's "ban on balance billing, " by attracting more subscribers, augments its share of the health insurance business, thereby enabling it to secure still lower doctor charges. This argument, however, comes down to saying that Blue Shield can attract more subscribers because it can charge them less. If Blue Shield is free to insist upon a lower doctor charge, it should be free to pass those savings along to its subscribers in the form of lower prices. This conclusion does not rest upon a judgment about the reasonableness of the doctor charge. A monopolist who charges his customers a high price is free to pay his suppliers more, thereby attracting higher quality raw materials. Considered in and of itself, higher quality, like lower price, is good -- even if it helps the monopolist maintain his market power through "superior skill, foresight and industry. **[**27]** " *See United States v. Aluminum Co. of America, 148 F.2d at 429*.

Finally, the district court rested its decision in large part upon the Supreme Court's recent case, *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. *Maricopa*, however, involved a *horizontal* agreement among competing doctors about what to charge. ***HN10***[] A horizontal agreement among competitors is typically unlawful because the competitors prevent themselves from making *independent* decisions about the terms as to which they will bargain. Competitors cannot *agree*, for example, to insist that their contracts with sellers contain arbitration clauses, even though each individual competitor can make up his own mind to insist upon such a term in any, or all, of his contracts. *United States v. First National Pictures, Inc., 282 U.S. 44, 75 L. Ed.*

151, 51 S. Ct. 45 (1930); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 75 L. Ed. 145, 51 S. Ct. 42 (1930). **[**28]** ***HN11***[] The unlawfulness of the agreement does not necessarily depend upon the undesirability of the contractual term as to which competitors agree not to compete.

The district court saw a similarity between the horizontal agreement cases and this one in the fact that Blue Shield can extract an "uncompetitive price" from doctors while the *Maricopa* court feared that "price-fixing" by competitors might bring about uncompetitive prices. But, the antitrust problems at issue when a single firm sets a price -- whether, when, and how courts can identify and control an individual exercise of alleged market power -- are very different from those associated with agreements by competitors to limit independent decision-making. A decision about the latter is not strong precedent for a case involving only the former. *Maricopa* is simply not on point. Nor, for similar reasons, is National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948, 52 U.S.L.W. 4928 (1984), another "horizontal agreement" case cited by the doctors.

C

Three additional circumstances militate strongly here against any effort by an antitrust court to supervise **[**29]** the Blue Shield/physician price bargain. These three considerations convince us to apply mainstream antitrust doctrine, which allows a buyer or seller freedom to bargain for price, rather than to seek analogies with more unusual cases that do not.

First, the prices at issue here are low prices, not high prices. *See* Comment, 75 Nw. L. Rev. at 522-23. Of course, ***HN12***[] a buyer, as well as a seller, can possess significant market power; and courts have held that *agreements* to fix prices -- whether maximum or minimum -- are unlawful. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951); Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869, **[*931]** (1968). Nonetheless, the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high*, not too low. *See* R. Bork, *supra*, at 61-2. And, the relevant economic considerations may be very different when low prices, rather than high prices, are at issue. These facts **[**30]** suggest that courts at least should be cautious -- reluctant to condemn too speedily -- an arrangement that, on its face, appears to bring low price benefits to the consumer. *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d at 231-34.

Second, the subject matter of the present agreement -- medical costs -- is an area of great complexity where more than solely economic values are at stake. How to provide affordable, high quality medical care is much debated. And, many different solutions -- ranging from stricter regulation to greater reliance on competing service organizations -- have been proposed. *See* Clark, "Why Does Health Care Regulation Fail?" 41 Md. L. Rev. 1 (1981); A. Enthovin, *Health Plan* (1980). This fact, too, warrants judicial hesitancy to interfere.

Third, the price system here at issue is one supervised by state regulators. See Kartell v. Blue Shield of Massachusetts, Inc., 384 Mass. 409, 422, 425 N.E.2d 313 (1981). While that fact does not automatically carry with it antitrust immunity, *see* Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976), it **[**31]** suggests that ***HN13***[] strict antitrust scrutiny is less likely to be necessary to prevent the unwarranted exercise of monopoly power. Of course, administrative regulation is a highly imperfect process. But, regulation by judicial decree is not necessarily preferable.

These general considerations do not dictate our result in this case. They do, however, counsel us against departing from present law or extending it to authorize increased judicial supervision of the buyer/seller price bargain. Like the court in *Feldman v. Health Care Corp.*, we see "no need to blaze new trails," 562 F. Supp. at 946. Without such pioneering, we do not believe the antitrust laws forbid Blue Shield's "balance billing " practice. Contrary to the district court's conclusion, the practice does not constitute an unreasonable restraint of trade. And, the same reasons that lead us to this conclusion also lead us to agree with the district court that the practice does not constitute monopolization or an attempt to monopolize. *See* 3 P. Areeda & D. Turner, *supra*, para. 626 at 83.

III

We turn **[**32]** now to four issues that the plaintiff doctors raise in their cross-appeal from other rulings of the district court -- rulings that dismissed various parts of their case against Blue Shield (and against Blue Cross, Blue Shield's sister organization). The fact that we have found Blue Shield's ban on balance billing to be lawful simplifies the issues on the cross-appeal and virtually determines an outcome in defendants' favor.

First, the doctors argue that the district court wrongly dismissed their claim that Blue Shield's refusal to reimburse nonparticipating doctors (except for emergency or out-of-state services) violate the ***antitrust law***. The district court found that Blue Shield's actions were immunized from antitrust attack by a prong of the "state action" doctrine which removes actions required (or forbidden) by state laws from the scope of the federal antitrust laws. *See* *Hoover v. Ronwin, 466 U.S. 558, 80 L. Ed. 2d 590, 104 S. Ct. 1989, 52 U.S.L.W. 4535 (1984)*. The Massachusetts Supreme Judicial Court has held that state law, namely *Mass. Gen. Laws ch. 176B, § 7* prohibits Blue Shield from generally reimbursing nonparticipating doctors, *Kartell v. Blue Shield of Massachusetts, Inc., 384 Mass. 409, 423, 425 N.E.2d 313 (1981)*. **[**33]**

The doctors here argue that Massachusetts state law cannot immunize Blue Shield's conduct because the relevant Massachusetts state law is preempted by federal pension law -- the Employment Retirement Income Security Act ("ERISA"), *29 U.S.C. §§ 1001-1381* -- and it is therefore without legal effect. We need not trace **[*932]** the labyrinthine path of this preemption argument, however, for we uphold the district court's ruling for a simpler reason. Since there is no relevant factual dispute, we have examined the legal merits of the doctors' substantive antitrust claim. We conclude that the facts to which they point do not make out a violation of the antitrust laws. No trier of fact, whether judge or jury, could properly find in their favor.

The doctors charge that Blue Shield simply refuses to deal with doctors who do not agree to participate in its program. The doctors strongly argued that this "refusal to deal " helped Blue Shield implement its ban on balance billing. Were that ban unlawful, the "refusal to deal " conceivably could have been found unlawful, too, as an unjustified means towards that unlawful end. If the ban is lawful, however, the **[**34]** "refusal to deal " charge must rise, or fall, on its own. And, on its own, it runs squarely into basic ***antitrust law*** that ***HN14***[] a firm "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite, 465 U.S. at 761*; *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. There is nothing special here to take this case outside the general rule. There is neither evidence of a horizontal conspiracy nor any charge that Blue Shield agreed with one of its competitors not to deal with nonparticipating doctors. *Cf.* *Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941)* (horizontal agreement to boycott certain customers held illegal). Any participation by Blue Cross in Blue Shield's decision is beside the point, for Blue Cross (a hospital cost insurer) does not compete with Blue Shield, nor does it maintain any relevant balance billing ban of its own. Thus, its (alleged) participation **[**35]** does not compromise in any relevant way the *independence* of Blue Shield's dealing decisions (any more than, say, a hypothetical Blue Shield meeting with a business consultant). *Cf.* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731, 52 U.S.L.W. 4821, 4825 (U.S. 1984)*. In a nutshell, Blue Shield's independent determination of the terms on which it will deal, of the customers to whom it will sell, and of the suppliers from whom it will purchase is a manifestation of the competitive process, not an effort to suppress or to destroy that process. *Cf.* *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)* ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

Second, the doctors charge that Blue Shield engaged in "predatory" pricing behavior. And, they point to one instance, allegedly supported by the record, when Blue Shield charged a lower price for insurance than a competitor (a firm called GISC), and it later turned **[**36]** out that Blue Shield lost money on the policies. The district court held that the injury suffered as a result of any such predatory conduct, occurred only in the market for insurance; and the doctors did not have a sufficiently direct interest in competitive injuries in that market to give them "standing" to complain of anticompetitive activity there.

On this appeal, the doctors challenge the court's ruling denying them standing to assert this Sherman Act *§ 2* claim. Like their first challenge, their argument would be far stronger had they prevailed on the "balance billing " claim. Then, one might have accepted their claim that this single instance of "predatory pricing" was part and parcel of a bundle of anticompetitive activities designed to give Blue Shield significant market power in the medical insurance business. *See* Plaintiffs' First Amended Complaint, para. 18. And, anticompetitive activities that significantly lessen competition in that business can harm not only other insurance firms, 2 P. Areeda & D. Turner, *supra* para. 340a, but also customers of insurance firms, *id.* para. 337, and suppliers of insurance firms (such as doctors), *id.* paras. 338-39. **[**37]** These harms, plaintiffs assert, were great enough, and direct **[*933]** enough, to confer on suppliers (such as doctors) standing to complain of the anticompetitive conduct in a lawsuit and to seek equitable relief.

Once the "balance billing " claim is eliminated, however, the doctors' argument lacks plausibility. They can no longer argue that insurance prices that reflect Blue Shield's "balance billing " rule are automatically unlawful. The "predatory pricing" charge must stand on its own, and to succeed it requires a showing that the price was below "incremental cost" (or the equivalent). *See* *Barry Wright Corp. v. ITT Grinnell Corp., supra.* The only evidence to which the doctors can now point is the single, isolated instance in respect to GISC. GISC accounted for less than 0.1 percent of the health insurance market. Thus, even if the "predatory pricing" charge is true in respect to GISC, there is no evidence that the charged conduct could lead to any significant increase in Blue Shield's market power. Under these circumstances the possibility of injury to a supplier is simply too remote and indirect to allow a supplier to bring suit. Were the suit one **[**38]** for treble damages, the supplier's injury would be far too indirect to confer standing, *see* *Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (standing to assert treble-damages claim under § 4 of Clayton Act denied where plaintiff's injury was "indirect" and chain of causation tenuous). Although standing rules for an injunctive action under § 16 of the Clayton Act are more liberal, plaintiffs still must show that the charged conduct threatens them with harm. *Hawaii v. Standard Oil Co., 405 U.S. 251, 260-62, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*; 2 P. Areeda & D. Turner, *supra*, paras. 328a, 335e. Plaintiffs cannot show this in respect to the GISC type of conduct. Thus, without the support of a "balance billing " claim, the doctors cannot obtain a reversal of the district court's ruling that they lacked standing to complain of "predatory pricing."

Third, the doctors attack the district court's dismissal of their claims against Blue Cross. Massachusetts state law expressly authorizes Blue Cross and Blue Shield to contract with each other "for the **[**39]** joint administration of their business and for joint and co-operative writing and issuing of certificates." *Mass. Gen. Laws ch. 176A, § 5*; *see also id.*, ch. 176B, § 3. The district court therefore found that the "state action" doctrine and the McCarran-Ferguson antitrust exemption for the "business of insurance," *15 U.S.C. §§ 1011 et seq.*, immunized Blue Cross's challenged conduct from antitrust scrutiny. Again, we need not accept the doctors' invitation to enter the legal thickets that surround these doctrines, for, with the demise of their "balance billing " claim, the doctors are no longer able to make any plausible charge of a substantive antitrust violation. Once the ban on "balance billing " is seen as permissible, the doctors' allegation against Blue Cross amounts to a claim that it conspired or agreed with Blue Shield to achieve a *lawful* objective, not an unlawful one. Blue Cross, concededly, is not a competitor of Blue Shield. There is no claim that the fact of agreement, in and of itself, inhibits any otherwise independently competitive action. *Cf.* *Fashion Originators' Guild of America v. Federal Trade Commission, supra.* **[**40]** Under these circumstances, the agreements violate no principle of ***antitrust law*** of which we are aware. Even were the agreements subject to substantive antitrust scrutiny, the doctors have failed to show us anything about them that would allow a finding of unlawfulness.

Fourth, and finally, the doctors assert that Blue Shield "has engaged in coercive attacks designed to intimidate and retaliate against physicians" -- evidently those who oppose the ban on balance billing. As far as we can tell from the briefs, however, the activities that the doctors allege do not make out independent violations of the antitrust laws, once one accepts the fact that Blue Shield's balance billing rule is lawful. Even viewed in a light most generous to plaintiffs, the conduct they complain of at most might amount to minor business **[*934]** torts, which lie beyond the purview of the antitrust laws, *see* 3 P. Areeda & D. Turner, *supra* para. 626d.

For these reasons, the district court's finding that the ban on balance billing is unlawful is reversed, and the district court's injunction is vacated. In all other respects the order of the district court is affirmed.

[Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.](#)

United States Court of Appeals for the First Circuit

February 6, 1985, Decided

No. 84-1194

Reporter

754 F.2d 404 *; 1985 U.S. App. LEXIS 28962 **; 1985-1 Trade Cas. (CCH) P66,400; 1 Fed. R. Serv. 3d (Callaghan) 70; 77 A.L.R. Fed. 465

CIA. PETROLERA CARIBE, INC., Plaintiff, Appellant, v. ARCO CARIBBEAN, INC., et al., Defendants, Appellees

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, Jaime Pieras, Jr., U.S. District Judge.

Core Terms

divestiture, injunctive relief, dissolution, merger, Clayton Act, district court, injunction, defendants', summary judgment, oral argument, antitrust, cases, legislative history, hearings, gasoline, summary judgment motion, private plaintiff, remarks, reply brief, parties, equitable remedy, Sherman Act, remedies, plain language, conditions, floor, anti trust law, anticompetitive, principles, dissolve

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] **Antitrust & Trade Law, Clayton Act**

See *§ 16* of the Clayton Act, *15 U.S.C.S. § 26*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

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

HN2[] **Clayton Act, Claims**

A claim under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, requires an injury to "business or property" that *§ 16* of the Clayton Act, *16 U.S.C.S. § 26*, omits. The United States Supreme Court notes that, by contrast, *§ 16* provides that any individual threatened with injury by an antitrust violation may sue for injunctive relief against violations of the antitrust laws. Plainly, Congress empowered a broader range of plaintiffs to bring *§ 16* actions because the standards to be met are less exacting than those under § 4; under *§ 16*, a plaintiff need show only a threat of injury rather than an accrued injury.

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 > 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

HN3[] **Remedies, Damages**

Section 16 of the Clayton Act, *15 U.S.C.S. § 26*, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury; the plaintiff need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

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

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

HN4[] **Summary Judgment, Entitlement as Matter of Law**

To withstand a motion for summary judgment, a plaintiff is not required to plead additional matters and submit supporting proof more exacting than that ultimately required for judgment in its favor.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN5[] **Private Actions, Standing**

The principles of standing determine whether a particular plaintiff is the type of person the law intends to protect against the harm of which he complains.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Timing of Motions & Responses

HN6[] **Summary Judgment, Motions for Summary Judgment**

Fed. R. Civ. P. 56(c) states that a motion for summary judgment is to be served at least 10 days prior to the hearing. Under the requirements of *Fed. R. Civ. P. 6(d)*, if an affidavit is used to support a motion, it must be served with the motion.

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

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

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

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

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Timing of Motions & Responses

HN7[] **Supporting Materials, Affidavits**

The party adverse to the motion has a more extensive period for filing affidavits, viz., prior to the day of hearing it may serve opposing affidavits. Although *Fed. R. Civ. P. 56* does not create an explicit timetable for replies, the purpose of *Fed. R. Civ. P. 56(c)* is to allow a party to have a meaningful opportunity to challenge a summary judgment motion.

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

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN8[] **Supporting Materials, Affidavits**

While *Fed. R. Civ. P. 6(b)* allows "for cause shown" a discretionary enlargement of time, this discretion must not be exercised in a manner that prejudices the other party's substantial rights.

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

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

HN9[] **Summary Judgment, Entitlement as Matter of Law**

On motions for summary judgment, the indulgence required at both the trial and appellate levels mandates the court to review the record and draw all inferences in the light most favorable to the nonmoving party.

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

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

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

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

HN10[] **Supporting Materials, Affidavits**

Fed. R. Civ. P. 56(c) provides that an adverse party may file affidavits prior to the day of hearing. *Fed. R. Civ. P. 6(d)* restates this requirement with the modification that the court may "permit" an opposing party's affidavit to be served at some other time.

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

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Timing of Motions & Responses

HN11[] **Standards of Review, Abuse of Discretion**

A district court's refusal to accept a late affidavit is reviewable only for abuse of discretion.

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

HN12[] **Pleadings, Time Limitations**

The rules are structured to provide the nonmovant with substantially more time for filing affidavits than moving parties.

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

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > Oral Arguments

HN13[] Summary Judgment, Supporting Materials

See *Fed. R. Civ. P. 56(c)*.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > Oral Arguments

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

HN14[] Judges, Discretionary Powers

Ordinarily, it is appropriate to hear oral argument before rendering summary judgment. But, the trial court has wide latitude in this regard. Where affidavits, depositions, and other documentary material indicate that the only issue is a question of law, and where the briefs have adequately developed the relevant legal arguments, it is not error to deny oral argument consistent with the district court's local rules.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

HN15[] Summary Judgment, Entitlement as Matter of Law

The standard for granting summary judgment is well established. Summary judgment is appropriate only when the pleadings and other submissions show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In reviewing a grant of summary judgment, an appellate court must view the record in the light most favorable to the party opposing the motion, and indulge all inferences favorable to that party.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Governments > Legislation > Effect & Operation > Retrospective Operation

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > General Overview

Civil Procedure > Appeals > Standards of Review > Prejudicial Errors

Governments > Legislation > Effect & Operation > Prospective Operation

HN16[] **Remedies, Damages**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, is retrospective in orientation; it seeks to remedy the past by penalizing wrongdoers with treble damages, thereby deterring other wrongdoing. Accordingly, § 4 makes awards available only to injured parties, and measures the award by a multiple of the injury actually proved. By contrast, *§ 16* of the Clayton Act, *15 U.S.C.S. § 26*, is prospective and prophylactic, allowing injunctive relief upon demonstration of a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

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 > Clayton Act > Remedies > Injunctions

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

HN17[] **Costs & Attorney Fees, Clayton Act**

Private parties may sue to enforce the antitrust laws, including the substantive provisions of the Sherman and Clayton Acts, under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, and *§ 16* of the Clayton Act, *15 U.S.C.S. § 26*. Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, offers the successful private litigant treble damages, costs, and attorney's fees upon proving measurable injuries actually sustained. *Section 16* of the Clayton Act, *15 U.S.C.S. § 26*, by contrast, provides injunctive relief to any person, firm, corporation, or association against threatened loss or damage by a violation of the antitrust laws. *Section 16* has recently been amended to provide attorney's fees and costs to a prevailing plaintiff who receives injunctive relief.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN18[] **Private Actions, Standing**

See *15 U.S.C.S. § 26*.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Governments > Legislation > Interpretation

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN19[] **Remedies, Injunctions**

Under *§ 16* of the Clayton Act, *15 U.S.C.S. § 26*, "injunctive relief" is made available when and under the same conditions as injunctive relief against threatened conduct is granted by courts of equity. Significantly, the statute states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order. Nothing on the face of the statute suggests a congressional intent to limit the types of injunctions a court may order. Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief.

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN20[] **Preliminary Considerations, Equity**

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. Equity is the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

Civil Procedure > Preliminary Considerations > Equity > Relief

HN21[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. 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. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN22[] **Antitrust & Trade Law, Clayton Act**

Although Congress may intervene and guide or control the exercise of the courts' discretion, the plain language of *§ 16* of the Clayton Act, *15 U.S.C.S. § 26*, fails to indicate by either a clear and valid legislative command, or even a veiled suggestion, any intended limitation of the types of injunctive relief available to private litigants under *§ 16*. Nor does the court find any indication of an intention to limit the district court's inherent powers of equity.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN23[] **Clayton Act, Remedies**

The United States Court of Appeals for the First Circuit believes Congress intended that courts should fashion their injunctions by exercising sound discretion according to the exigencies of the particular situation before them, which is to allow courts their "traditional equitable discretion." It is reasonable to hypothesize that, in some aggravated cases, the threatened or actual injury to the market and a litigant will not cease unless the acquiring corporation is required to divest itself of its acquisition. The plain language of *§ 16* of the Clayton Act, *15 U.S.C.S. § 26*, does not suggest that Congress intended to exempt from the district court's equity jurisdiction the power to order divestiture in appropriate cases brought by private plaintiffs.

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

HN24[] **Legislation, Interpretation**

A court is specifically charged to interpret a remedial statute generously.

Governments > Legislation > Interpretation

HN25[] **Legislation, Interpretation**

The antitrust laws are of necessity statements of general principle. They must be given meaning on a case-by-case basis. It is impossible for a legislature to devise codes so all-encompassing as to predict every case to which the general principles should apply. So, too, with antitrust remedies. There is a danger in permitting the pronouncements of statesmen long deceased to control the contemporary meaning of statutes that are almost an economic constitution for the country's complex national economy.

Governments > Legislation > Interpretation

HN26[] **Legislation, Interpretation**

A court possesses inherent powers of equity regardless of whether equitable remedies are expressly authorized under the statute. To hold Congress to have restricted these powers, a clear and valid legislative command must be identified.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN27[] **Remedies, Injunctions**

Section 16 of the Clayton Act, *15 U.S.C.S. § 26*, requires that injunctive relief for private plaintiffs be dispensed 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.

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN28[] **Private Actions, Prioritizing Resources & Organization for Intellectual Property Act**

The purpose of giving private parties treble-damages and injunctive relief was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws. *Section 16* of the Clayton Act, *15 U.S.C.S. § 26*, should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords (injunctive relief), 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. Its availability should be conditioned by the necessities of the public interest which Congress sought to protect.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

Mergers & Acquisitions Law > Antitrust > General Overview

HN29[] **Antitrust & Trade Law, Clayton Act**

An order to divest stock or assets acquired in effecting a combination is one of the most effective kinds of remedies available to combat mergers that have, or threaten to have, anticompetitive consequences.

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN30[] **Preliminary Considerations, Equity**

Divestiture is the most important of the antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of the court's mind when a violation has been found.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN31[] **Clayton Act, Remedies**

Under the Clayton Act, courts have always possessed the power to prohibit a merger through a preliminary injunction. It is a logical extension of that power to divorce the partners to a merger at a later time when anticompetitive effects of the merger are, if not actually felt, considerably more imminent.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > General Overview

HN32[] **Antitrust & Trade Law, Sherman Act**

It is contrary to equitable principles to permit some defendants to maintain an illegal market share merely because they were able to merge before any of their competitors could prevent it. This places a premium on gamesmanship and stealth, and allows anticompetitive mergers to be treated differently on the basis of the speed and skill with which the merger is consummated.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN33[] **Antitrust & Trade Law, Clayton Act**

A range of injunctive relief is possible and, like all equitable remedies, the relief ordered is highly dependent upon the proof adduced at trial.

Counsel: Celso E. Lopez, with whom Carlos F. Lopez, was on brief, for Appellant.

Max K. Jamison, with whom Alvaro R. Calderon, Jr., and Calderon, Rosa-Silva & Vargas, were on brief, for Appellees.

Judges: Coffin and Bownes, Circuit Judges, and Selya, [*] District Judge.

Opinion by: BOWNES

Opinion

[*406] BOWNES, Circuit Judge:

In this antitrust action, plaintiff-appellant Cia. Petrolera Caribe, Inc. (Caribe) appeals entry of summary judgment in favor of defendants Arco Carribean, Inc. (Arco), U.S.A. Petroleum Corp. (USAP), Isla Petroleum Corporation (Isla), and Gasolinas de Puerto Rico (GPR). The complaint alleges that USAP's acquisition of Arco's Puerto Rican assets violated §§ 7 and 8 of the Clayton Act, *15 U.S.C. §§ 18*, *19*, and *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. Although the complaint originally requested both damages and injunctive relief, Caribe abandoned the request for damages in the district court and asked only for an injunctive remedy, particularly divestiture, pursuant to *§ 16* **[**2]** of the Clayton Act, *15 U.S.C. § 26*.

Caribe challenges three rulings of law by the district court. It first claims that the district court erred in ruling that it lacked standing to bring the action because it had not been and would not be injured as a proximate result of the alleged antitrust violations. Second, Caribe contends that the court erred in holding that the specific injunctive remedy it sought -- divestiture -- is not available to a private litigant such as Caribe. Finally, plaintiff contends that disputed relevant and material facts rendered summary judgment inappropriate.

Caribe also forwards as error two procedural rulings: the district court's acceptance and reliance upon affidavits and a reply brief submitted by the defendants on their motion for summary judgment despite the court's refusal to accept plaintiff's affidavit or to allow it an opportunity to reply; and, the district court's refusal to allow oral argument on summary judgment.

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[*] Of the District of Rhode Island, sitting by designation.

We first discuss whether plaintiff has "standing" for maintaining this suit. Because we conclude that it does, we then review plaintiff's procedural claims. We next examine the propriety of awarding summary judgment on liability **[**3]** in favor of defendants, and conclude with a discussion of why we believe plaintiff's remedies include divestiture.

I. BACKGROUND

We recount the facts in the light most favorable to the plaintiff, against whom summary judgment was entered. Caribe is in the wholesale and retail gasoline business. It wholesales refined gasoline to a small chain of service stations in Puerto Rico it owns and operates. Defendant USAP is an oil company headquartered in the continental United States that bought the Puerto Rican assets of Arco Carribean, Inc., a subsidiary of the multinational oil company Atlantic Richfield, Inc. This acquisition constitutes the merger contested here. Prior to this acquisition, USAP's only participation in the Puerto Rican gasoline market was through its wholly owned subsidiary, GPR. GPR owns and operates a number of service stations in Puerto Rico. As part of the merger plan formulated by USAP, another wholly owned subsidiary, Isla, was created. Isla's purpose was to take title to the Puerto Rican assets of Arco Carribean and to continue the management and operation of the former Arco stations. After consummation of the merger in July 1981, Isla became the wholesaler **[**4]** of gasoline not only to the former Arco (now Isla) service stations but also to those operated by GPR. Neither GPR nor Isla markets gasoline outside Puerto Rico.

Caribe entered the gasoline market in Puerto Rico in 1979 and slowly but steadily expanded its operations. By mid-1981, it was operating twenty-four stations and was planning an additional eight. It appears that most of these stations served rural and less populous regions of Puerto Rico. At its highest point, Caribe's market share was 1.1%. Caribe claims that because of the merger, a trend toward greater concentration in the market has occurred, lessening competition and threatening the survival of the smaller companies **[*407]** including itself. It alleges that it will be "squeezed" out of the market by the oligopolist firms. It further claims that the increase in market share of the top five has increased their market power, and consequently their ability to dictate the conditions for doing business to the smaller companies. Caribe believes the inevitable result will be harm to consumers in the form of price hikes. Caribe asserts that the harm to itself resulting from this concentration of market power is affirmatively **[**5]** shown by its inability to expand beyond the hinterlands of Puerto Rico into the more populous metropolitan areas. It also claims that increased market concentration, in conjunction with other barriers to entry, effectively prevents the entrance of other competitors into the market.

Immediately preceding the merger, the Puerto Rican gasoline market also included seven multinational, vertically integrated companies: Texaco, Esso, Shell, Gulf, Mobil, Chevron and Arco. [1] The first four of these firms plus GPR controlled 77% of the market at the time of the merger but, after the merger, their proportion rose to a high of 83%. GPR's own market share rose from 5.29% to 9.33% after its merger with the former Arco subsidiary. Caribe's market share at that time was 0.4%.

II. STANDING UNDER *§ 16*

Caribe's claims for injunctive relief are based on *§ 16* of the Clayton Act, *15 U.S.C. § 26*, which reads **[**6]** in pertinent part:

> ***HN1***[] 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, under the rules governing such proceedings . . . .

The district court held, without more, that Caribe lacked standing "on all causes of action because it has not been, and will not be, damaged as a result of any conduct alleged in its complaint."

Although the complaint would never serve as a model for antitrust pleadings, it does specifically invoke *§ 16* of the Clayton Act in paragraph one. In Count I, paragraph 12b, it is alleged that the merger will "materially impair the

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[1] At oral argument, we were informed that the Puerto Rican assets of Gulf and Chevron have recently been merged.

competitive effectiveness of Plaintiff and others that were and are now competing with ARCO and the buyer." In Count II, paragraph 15, it is alleged that the objective of the merger was to "restrain[] and prevent[] plaintiff and others from exercising an essential and **[**7]** necessary part of their lawful trade or business in interstate trade or commerce." Paragraph 17 in Count II also alleges "plaintiff has lost customers, patronage and trade and has been prevented and detered [*sic*] from continuing and expanding and increasing its business as otherwise [*sic*] would have done." These bare bones allegations have been supplemented with additional facts through affidavits and depositions of record.

It appears that the district court erroneously applied the requirements of § 4 of the Clayton Act, *15 U.S.C. § 15*, which authorizes treble damages for antitrust violations, to plaintiff's request for *§ 16* injunctive relief. In *Hawaii v. Standard Oil Co., 405 U.S. 251, 260, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*, the Supreme Court noted an important difference between the requirements of *§ 16* and those of § 4. The Court pointed out that ***HN2***[] a § 4 claim requires an *injury* to "business or property" that *§ 16* omits. The Court noted that, by contrast, *§ 16* provides that "any individual *threatened with injury* by an antitrust violation may . . . sue for injunctive relief against violations of the antitrust laws . . . ." *Hawaii v. Standard* ***[**8]*** *Oil Co., 405 U.S. at 261* (emphasis added). Plainly, Congress empowered **[*408]** a broader range of plaintiffs to bring *§ 16* actions because the standards to be met are less exacting than those under § 4; under *§ 16*, a plaintiff need show only a threat of injury rather than an accrued injury.

The Court's remarks in *Hawaii* reaffirm its conclusions in *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*, a case more nearly on point. The Court took to task the court of appeals for vacating a portion of an injunction because it believed that

> Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, ***HN3***[] for *§ 16* of the Clayton Act, *15 U.S.C. § 26*, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and *authorizes injunctive relief upon the demonstration of "threatened" injury . . .; he need only demonstrate a significant threat of injury* from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

[9]** *Id. at 130* (citations omitted; emphasis added). Although this was an enunciation of the standard a plaintiff must satisfy for an injunction to issue after trial, it applies here because ***HN4***[] to withstand a motion for summary judgment, a plaintiff is not required to plead additional matters and submit supporting proof more exacting than that ultimately required for judgment in its favor.

As we have recently observed, ***HN5***[] "the principles of standing determine whether a particular plaintiff is the type of person the law intends to protect against the harm of which he complains." *Ozonoff v. Berzak, 744 F.2d 224, 227 (1st Cir. 1984)*. We cannot conceive of a more appropriate plaintiff to challenge defendants' merger. [2] Caribe is a direct competitor of defendants in the refined gasoline market. The gravamen of its complaint is that defendants' merger tends to lessen competition and to yield a greater concentration of firms within that market. Caribe acknowledges that it has not sustained an actual measurable injury in the short term flowing from the merger, but it correctly claims that this is not required for a *§ 16* action; its allegations that the refined gasoline market has been harmed **[**10]** by these putative antitrust violations and that it will likely be "squeezed" out of the market in the foreseeable future because of defendants' actions are sufficient. Accordingly, we rule that Caribe has alleged sufficient facts showing it "'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979)*, and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a

[2] Because the plaintiff in this action is within the "core" of possible plaintiffs under *§ 16*, we have no need to examine the outer limits of standing under this section, and this discussion should not be interpreted as adumbrating requirements that must be met by all *§ 16* plaintiffs.

favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 41, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976)*." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982)* (footnote omitted). None of the prudential considerations we summarized in *Ozonoff* counsel otherwise. *See* *Ozonoff v. Berzak, 744 F.2d 224*, slip op. at 8-9. Caribe is a proper plaintiff to bring this action.

[11]** III. PROCEDURAL CLAIMS

A. *The Reply Brief and Affidavits*

Faced with a motion for partial summary judgment filed by plaintiff Caribe and a cross-motion for summary judgment filed by defendants, the district court established a timetable at a pretrial conference on November 7, 1983, and restated it in an **[*409]** order dated November 14. All motions for summary judgment were to be filed by November 15 and the hearing on the cross-motions was scheduled for December 19.

The announced timetable notwithstanding, on the day of hearing, both plaintiff and defendants arrived at the courthouse with additional papers pertaining to the cross-motions. Defendants, prior to the hearing, went to the clerk of court's office and filed a reply brief and affidavits. Plaintiff proceeded to the hearing and sought to file in open court affidavits supporting its opposition to defendants' motion for summary judgment. According to the clerk's minutes of the proceeding (no transcript is available), short statements were heard from each of the parties prior to the court's announcement of its decision to grant defendants' motion for summary judgment. Plaintiff requested permission to file **[**12]** affidavits but the court refused to accept them. Defendants then informed the court that they had filed a reply to plaintiff's opposition to summary judgment, but the court did not amend its earlier ruling rejecting plaintiff's affidavits or strike defendants' reply. Plaintiff claims that by this action, the court transgressed the requirements of *Federal Rules of Civil Procedure 6(d)* and *56(c)*, and that it was fundamentally unfair to allow defendants' papers, but not its own, to be filed on the day of hearing. Further, Caribe claims that once it accepted defendants' reply brief and affidavits, the court should have granted it time to respond to these papers before considering and ruling on the motions for summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure ***HN6***[] states that a motion for summary judgment is to be served at least ten days prior to the hearing. Under the requirements of *Rule 6(d)*, if an affidavit is used to support a motion, it must be served with the motion. *Accord* *In re Stone, 588 F.2d 1316, 1321 (10th Cir. 1978)*; *Mont Vernon Preservation Society v. Clements, 415 F. Supp. 141, 143 (D. N.H. 1976)*; *see also* Moore's Federal Practice para. 56.14[1] **[**13]** at 56-358. ***HN7***[] The party adverse to the motion has a more extensive period for filing affidavits, *viz.*, "prior to the day of hearing [it] may serve opposing affidavits." Although *Rule 56* does not create an explicit timetable for replies, the "purpose of *Rule 56(c)* is to allow a party to have a meaningful opportunity to challenge a summary judgment motion." *Indiana Port Comm'n. v. Bethlehem Steel Corp., 702 F.2d 107, 111 (7th Cir. 1983)*; *Winbourne v. Eastern Airlines, Inc., 632 F.2d 219, 223 (2d Cir. 1980)*.

In this case, defendants filed a reply brief and supporting affidavits which contained *new evidence*; one affidavit was by defendants' expert, Dr. Freyre, which set forth an analysis of the most recent data from the Puerto Rican Energy Department, and concluded that increased concentration and lessened competition had not occurred as a result of defendants' merger. ***HN8***[] While *Federal Rule of Civil Procedure 6(b)* allows "for cause shown" a discretionary enlargement of time, this discretion must not be exercised in a manner that prejudices the other party's substantial rights. The defendants here not only failed to show cause for not serving the affidavits with their motion, **[**14]** or at least by November 15, the date all motions for summary judgment were to be served, but the late affidavits plainly prejudiced plaintiff. As Judge Aldrich has explained, "there is a substantial difference between accepting matters at the hearing which show that an issue of fact exists, and taking evidence in support of the motion at the last minute when there is no opportunity to rebut." *Chan Wing Cheung v. Hamilton, 298 F.2d 459, 460 (1st Cir. 1962)*. Defendants' affidavits and attachments filed on December 19, the day of hearing, should not have been considered. *Cf. Jones v. Menard, 559 F.2d 1282 (5th Cir. 1977)* (moving party's affidavit could not be served during oral argument on motion instead of being served prior to the date of hearing).

For similar reasons, we believe defendants' reply brief was also improperly before the court below. At oral argument, plaintiff informed us that it had requested an opportunity to respond to defendants' **[*410]** reply brief, which it had received by hand on the day of hearing contrary to *Rule 56(c)*. The district court refused to grant an opportunity to respond. The court then granted defendants' motion for summary judgment and **[**15]** stated that it was already drafting an opinion. When the opinion issued, it relied heavily on defendants' reply brief and supporting affidavits and even incorporated verbatim a number of consecutive pages directly from defendants' brief. Although a busy trial judge is entitled to obtain assistance from the parties, this heavy reliance on the moving party's brief and affidavits suggests that the district court failed to accord the nonmovant's papers the indulgence required. *Cf. Cuthbertson v. Biggers Brothers, Inc., 702 F.2d 454, 459 (4th Cir. 1983)* (extensive verbatim use of party's proposed findings of fact undercuts appearance of disinterested court). ***HN9***[] On motions for summary judgment, the indulgence required at both the trial and appellate levels mandates the court to review the record and draw all inferences in the light most favorable to the nonmoving party. *Adickes v. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*; *Metropolitan Life Insurance Co. v. Ditmore, 729 F.2d 1, 4 (1st Cir. 1984)*; *Stepanischen v. Merchants Despatch Transportation Co., 722 F.2d 922, 928 (1st Cir. 1983)*.

We believe that as the nonmoving party, Caribe should have **[**16]** had an opportunity to examine and reply to the moving party's papers before the court considered them in its decision process. This conclusion is especially required here because in its reply brief, the defendants advanced new reasons justifying summary judgment in their favor and relied on the untimely filed affidavits. Moreover, reply briefs were not authorized for either party under the district court's timetable. The district court therefore had two choices when it was informed that defendants had filed a reply brief: it could strike the brief or grant plaintiff as the nonmoving party the opportunity to respond to it. Certainly, after discovering that use of the information contained in the tardily served brief and affidavit would be helpful to its opinion, the district court should then have provided the nonmoving party with an opportunity to respond.

Whether the plaintiff as adverse party was entitled to have its affidavit accepted by the court presents a somewhat different question. As already noted, ***HN10***[] *Rule 56(c)* provides that an adverse party may file affidavits "prior to the day of hearing." *Rule 6(d)* restates this requirement with the modification that the court may "permit" **[**17]** an opposing party's affidavit "to be served at some other time." ***HN11***[] A district court's refusal to accept a late affidavit is reviewable only for abuse of discretion. *Accord* *Alghanim v. Boeing Co., 477 F.2d 143, 148-9 (9th Cir. 1973)*. While the district court is not required to accommodate additional untimely submissions, we think that the trial court abused its discretion by allowing defendants' tardy submissions but declining to accept plaintiff's where neither party showed cause for the delay. ***HN12***[] The rules are structured to provide the nonmovant with substantially more time for filing affidavits than moving parties. Where no cause for the delay is shown by either party, we cannot discern any reason for the district court's reversal of the indulgence structurally provided to the nonmoving party by the Federal Rules. *Accord id.* (where moving party filed his affidavits two days after his motion, this is legitimate factor to be considered in determining whether court had abused its discretion in not allowing an extension of time for plaintiff to file affidavits in opposition). Accordingly, in evaluating the grant of summary judgment, we shall utilize only those portions of the court's **[**18]** opinion that do not rely on defendants' reply brief, affidavits, and other attachments. In this way, we deprive the defendants of the benefit of the procedural error. [3]

[*411] B. *Oral Argument*

Oral argument on the cross-motions for summary judgment was calendared and the parties arrived prepared, but at the start of the hearing the district judge announced his decision in favor of defendants and declined to hear oral argument. Caribe urges us to hold that the district court erred in not having oral argument on defendants' motion for summary judgment. Inasmuch as we have concluded that the grant of summary judgment was wrong on the merits of the motion, this procedural **[**19]** point may well be academic. But, the matter arises with sufficient frequency in the trial courts that we believe a general statement of our views would be beneficial.

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[3] We must also note that the defendants were not alone in disregarding the Federal Rules of Civil Procedure. Our review of the record reveals that Caribe, too, was far from scrupulous in following the Rules. The cavalier attitude of the parties towards the Federal Rules of Civil Procedure and the court's orders cannot be condoned.

Rule 56(c) is again our text. It states in pertinent part: ***HN13***[] "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." *Fed. R. Civ. P. 56(c)*. We note that at least five circuits have held that the rule's reference to a "hearing" does not necessarily imply oral argument; a matter can be heard simply on the papers. The Third, Fourth, Seventh, Eighth, and District of Columbia Circuits have held that oral argument may be dispensed with in appropriate circumstances. *See Spark v. Catholic University, 167 U.S. App. D.C. 56, 510 F.2d 1277, 1280 (D.C. Cir. 1975)*; *Ailshire v. Darnell, 508 F.2d 526 (8th Cir. 1974)*; *Season-All Industries, Inc., v. Turkiye, 425 F.2d 34, 39 (3d Cir. 1970)*; *United States Fidelity & Guaranty Co. v. Lawrenson, 334 F.2d 464, 466-67* (4th Cir.), *cert. denied*, *379 U.S. 869, 13 L. Ed. 2d 71, 85 S. Ct. 141 (1964)*; *Sarelas v. Porikos, 320 F.2d 827 (7th Cir. 1963)*, *cert. denied*, **[**20]** *375 U.S. 985, 11 L. Ed. 2d 473, 84 S. Ct. 519 (1964)*; *cf.* *Hazen v. Southern Hills National Bank of Tulsa, 414 F.2d 778, 780 (10th Cir. 1969)* (holding oral argument not required on motions in general unless a local rule provides otherwise). These circuits decline to displace the local rules promulgated under *Federal Rule of Civil Procedure 78* that governs the submission and determination of motions without oral argument. *Cf. United States v. One 1974 Porsche 911-S, 682 F.2d 283, 286-87 (1st Cir. 1982)* (burden is on parties to request oral argument pursuant to local rules and, if not requested, argument is waived); *but see Dredge Corp. v. Penny, 338 F.2d 456, 462 (9th Cir. 1964)*.

We think this rule is sound. As those courts have recognized, ***HN14***[] ordinarily it is appropriate to hear oral argument before rendering summary judgment. But, the trial court has wide latitude in this regard. Where affidavits, depositions, and other documentary material indicate that the only issue is a question of law, and where the briefs have adequately developed the relevant legal arguments, it is not error to deny oral argument consistent with the district court's local rules. This antitrust action, **[**21]** however, as the next section will elaborate, presented a number of critical factual and fact-law questions. Given the posture of the case, we need not rule that it was error to refuse to grant oral argument. But, the case underscores the wisdom of hearing oral argument on motions bottomed on difficult questions of law and alleged questions of fact. It is likely that oral argument here would have highlighted the obstacles to a supportable summary judgment decision and resulted in the denial of the motion.

IV. SUMMARY JUDGMENT

HN15[] The standard for granting summary judgment is well established. Summary judgment is appropriate only when the pleadings and other submissions show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In reviewing a grant of summary judgment, we must view the record in the light most favorable to the party opposing the motion, and indulge all inferences favorable to that party. *Adickes v. Kress & Co., 398 U.S. at 157*; *Stepanischen v. Merchants Despatch Transportation Co., 722 F.2d at 928*. Applying **[*412]** this standard, we find that there were disputed material **[**22]** issues of fact and that the court erred in its application of the law, which it adopted from defendants' brief. [4] Although these reasons are sufficient unto themselves for reversing the grant of summary judgment, the record also shows that the district court failed to grant plaintiff all favorable inferences suggested by the evidence and, instead, *weighed* the conflicting evidence, and did so in the light most favorable to the moving party.

The parties continually differed regarding a number of crucial facts at issue. They also bitterly contested the appropriate inferences to be drawn from the facts on which they were agreed. Examples of controverted facts and inferences include: whether competition has been increased or decreased by the merger; whether the Isla-GPR merger was an attempt **[**23]** to monopolize the gasoline market; whether gasoline is a homogenous product; whether it is likely Caribe will be "squeezed" from the market and, if so, whether this would be fairly traceable to the merger; whether the post-merger market share of Isla-GPR is sufficient to allow it to diminish competition; what the appropriate time frame is for analyzing the effects of the merger on the gasoline market; what the barriers to entry into this market are; and whether these barriers are significant deterrents to new entries. [5] Rather than denying the motion, the district court acted as a trier of fact. It assessed the challenged merger's impact upon competition in the

[4] We note that, even if the defendants' late-filed affidavits are factored into the *Rule 56* equation, the calculus remains unchanged; genuine issues of material fact nonetheless appear distinctly and in some abundance.

[5] One of the few facts about which the parties did not disagree was the relevant geographic market -- the island of Puerto Rico. Some disagreement may exist, however, on the existence of relevant geographic submarkets.

gasoline market, it evaluated the statistical data available, and it compared and weighed the parties' expert testimony regarding a number of the other issues. This was not appropriate in ruling on a motion for summary judgment.

[24]** We now turn to the central error of law. Although the law governing each of the substantive claims must be applied with reference to the remedy requested, *see, e.g., Brunswick Corp. v. Pueblo Bowl-O Mat, 429 U.S. 477, 486, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1979)*, the district court made use of the wrong remedial law. The sole remedy requested by Caribe was injunctive relief pursuant to Clayton Act *§ 16*, yet the district court utilized the legal standards governing the recovery of treble damages under Clayton Act § 4. This was prejudicial error because the standards for relief under § 4 are substantially more stringent than those under *§ 16*. ***HN16***[] Section 4 is retrospective in orientation; it seeks to remedy the past by penalizing wrongdoers with treble damages, thereby deterring other wrongdoing. *Id. at 485*. Accordingly, § 4 "makes awards available only to *injured parties*, and measures the award by a multiple of the injury actually proved." *Id.* By contrast, *§ 16* is prospective and prophylactic, allowing injunctive relief upon demonstration of "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to **[**25]** continue or recur." *Zenith Radio Corp. v. Hazeltine, 395 U.S. at 130*. As we emphasized in our earlier discussion of plaintiff's "standing," the district court cannot require plaintiff to show *fact* of injury, *id.*, in an action under *§ 16*. Summary judgment, therefore, was not and could not have been properly granted on the Sherman Act *§ 1* and *§ 2* claims and the Clayton Act § 7 claim.

Although the grant of summary judgment for defendants on the Clayton Act § 8 claim alleging that some of the defendant corporations have interlocking directorates is a closer question, that ruling must also be reversed. The district court held that § 8 did not apply because "the corporations Isla and GPR are separate entities in form only and [] they are truly **[*413]** one merged corporation. There is no evidence to the contrary . . . ." Caribe correctly points out that some contrary evidence may be found in an affidavit of Nelson Capote, chief operating officer of both GPR and Isla, dated October 31, 1983. Mr. Capote states:

> At the time of the acquisition, GPR had its own middle management and lower organizational structure. ISLA, which was the Puerto Rican of [*sic* **[**26]**] ARCO Carribean, Inc., inhereted [*sic*] from it the existing middle management and lower organizational structure. For convenience of operation, I decided to maintain these two entities so as to be able to distinguish between the performance of each. . . .

The district court grounded its ruling partly on a stipulation that the corporations had merged, but we find no such stipulation in the record. What we do find is plaintiff's statement of material facts at issue, appended to docket entry 91, which alleges that defendants are separate entities for purposes of § 8 but a single entity for § 7.

We venture no opinion now as to whether plaintiff can have it both ways but, ordinarily, such a statement could not constitute a stipulation. It may well be that there was an oral stipulation by Caribe upon which the district court relied. On the record before us, however, we must set aside the summary judgment granted defendants on plaintiff's claim under § 8 of the Clayton Act.

It is possible that the factual dispute can be settled with stipulations such that the question becomes one of law. Because the parties failed to cite the law relevant to determining the question, **[**27]** we draw attention to, *inter alia, T.R.W., Inc. v. F.T.C., 647 F.2d 942 (9th Cir. 1981)* (proof that interlock has actual anticompetitive effect is not required); *Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614* (9th Cir.), *cert. denied*, *447 U.S. 906, 64 L. Ed. 2d 855, 100 S. Ct. 2988 (1980)* (where district court found that six entities owned and operated by one individual neither competed with each other nor represented themselves as competitors, no violation of Clayton Act § 8); *Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1205 (2d Cir. 1978)* (§ 8 does not prohibit interlocking directorships between parent companies whose subsidiaries are competitors); *Protectoseal Co. v. Barancik, 484 F.2d 585, 588-89 (7th Cir. 1973)* (Stevens, J.) (by § 8, Congress intended, *inter alia*, to prohibit interlocks between corporations that could not lawfully merge; § 8 has broader coverage than § 7); *In re Penn Central Securities Litigation, 367 F. Supp. 1158, 1168 (E.D. Pa. 1973)*; *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., 1966 Trade Cas. (CCH) P 71,678 at 82,065 (S.D.N.Y. 1966)*; and more generally to *Bankamerica Corp. v. United* ***[**28]*** *States, 462 U.S. 122, 103 S. Ct. 2266, 76 L. Ed. 2d 456, 51 U.S.L.W. 4685, 4687 (1983)*; *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 52 U.S.L.W. 4821, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*; *Borg Warner Corp.*, 3Trade Reg. Rep. (CCH) P 22,663 (FTC 1983); ABA Section on

Antitrust Law, ***Antitrust Law*** Developments (Second) 210-14 (1984); *Kramer, Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L.J. 1266 (1950). The court below should, upon renewed motions for summary judgment or at trial, as the case may be, study the issues in the afterlight of these authorities.

V. DIVESTITURE

We now turn to consider whether divestiture is excluded *per se* from the armory of equitable relief available to a district judge in *§ 16* cases. Caribe petitions solely for injunctive relief from defendants' antitrust violations and specifically requests an order directing USAP to divest itself of Isla Corporation, the former ARCO subsidiary. Caribe asserts that unless divestiture is ordered, the competitive conditions in the Puerto Rican retail gasoline market will be destroyed and the trend toward monopolization of the market will continue unabated. **[**29]** Such a result, it claims, would work a manifest detriment to Caribe and the other minority share companies.

[*414] The defendants contend that divestiture is not an authorized form of injunctive relief under *§ 16*, standing solely upon the analysis set forth in *International Telephone and Telegraph v. GTE Corp., 518 F.2d 913, 921 (9th Cir. 1975)* (hereinafter *I.T.T.*), and reaffirmed in *Calnetics v. Volkswagen of America, 532 F.2d 674 (9th Cir. 1975)*, *cert. denied*, *429 U.S. 940, 50 L. Ed. 2d 309, 97 S. Ct. 355 (1976)*. [6] In its cases, the Ninth Circuit decided that the statutory language of *§ 16* authorizing private plaintiffs to sue for and obtain "injunctive relief" was ambiguous. It then concluded on the basis of the legislative history of the Clayton Act that Congress had not intended divestiture as one of the equitable remedies available to private plaintiffs under *§ 16*.

[30]** Other courts, however, have concluded that divestiture is an available *§ 16* remedy. In *NBO Industries Companies, Inc. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975)*, *rev'd on other grounds sub nom.* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690*, the Third Circuit explicitly rejected both the Ninth Circuit's approach to the question and its conclusion, while deciding that divestiture was not an appropriate remedy in its case. Several district courts also provide support for Caribe's position. Most recently, in *Fuchs Sugars and Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636 (S.D.N.Y. 1975)*, and *Nasso Concrete Corp. v. DIC Concrete Corp., 467 F. Supp. 1016, 1025 (S.D.N.Y. 1979)*, divestiture was held to be a remedy available to private plaintiffs suing for injunctive relief. Preceding these rulings were four district court opinions that reached the same conclusion, excluding, of course, the district courts the Ninth Circuit reversed in the two cases cited above. *See* *Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76, 82 (N.D. Cal. 1972)* (divestiture available for Clayton Act § 7 violation); *Credit Bureau Reports* ***[**31]*** *v. Retail Credit Co., 358 F. Supp. 780, 797 (S.D. Tex. 1971)* (divestiture available under *§ 16* generally), *aff'd*, *476 F.2d 989, 992 (5th Cir. 1973)*; *Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120, 126-27 (N.D. Cal. 1970)* (same); *Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521, 526 (S.D.N.Y. 1965)* (same).

In view both of the split in authority, and of the long-range ramifications of a decision concerning the availability of divestiture as a potential remedy in a private antitrust suit, a comprehensive treatment of this question is necessary. Accordingly, our statutory construction of *§ 16* begins by recounting the general antitrust legislative background. We next turn to an analysis of the statute's plain language. Because the statutory language does not explicitly state whether Congress intended divestiture to be a remedy available to private plaintiffs, we examine the legislative history of the Clayton Act in some detail. We then consider the question in light of the goals the statutory language and legislative history enunciated. We conclude that *§ 16* encompasses divestiture.

A. *Legislative Background*

In 1890, as a result of widespread alarm **[**32]** over concentration and anticompetitive conditions in the transportation, fuel and beef industries, Congress passed the Sherman Act. It prohibits, *inter alia*, "every contract, combination, . . . or conspiracy in restraint of trade," and every monopolization or attempt to monopolize. *15 U.S.C. §§ 1*, *2 (1982)*. As the Supreme Court has observed,

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[6] The Sixth Circuit adopted summarily the Ninth Circuit's position in *Langenderfer v. S.E. Johnson Co., 729 F.2d 1050* (6th Cir.), *cert. denied*, ***469 U.S. 1036, 105 S. Ct. 510, 83 L. Ed. 2d 401, 53 U.S.L.W. 3403 (1984)***.

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing **[*415]** an environment conducive to the preservation of our democratic political and social institutions.

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). [7]

[33]** Despite the expansive language and broad remedial purposes of the Sherman Act, [8] it soon became apparent that the Act was an inadequate instrument for achieving some of the lofty goals Congress had identified. Chief among its deficiencies was its inability to obstruct and prohibit corporate integrations that could lead to future monopoly. To supplement the Sherman Act so as "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency," S. Rep. No. 698, 63d Cong., 2d Sess. (July 22, 1914) (Judiciary Committee), Congress passed the Clayton Act, *15 U.S.C. §§ 12-27*. Section 7 of the Clayton Act, *15 U.S.C. § 18*, which originally provided that no corporation engaged in commerce shall acquire directly or indirectly the whole or any part of the stock of another corporation where the effect of such acquisition is to lessen competition substantially or tend to create a monopoly, was subsequently amended to extend its reach still farther. In 1950, § 7 was amended to encompass the acquisition of assets as well as of stock, and to apply unequivocally both to mergers between actual competitors and to mergers effected vertically or by conglomerates whose effect may tend **[**34]** to lessen competition. *See 15 U.S.C. § 18 (1982)* as amended by Pub. L. No. 81-849, 64 Stat. 1125; *see also Brown Shoe Co. v. United States, 370 U.S. 294, 315-18, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*.

HN17[] Private parties may sue to enforce the antitrust laws, including the substantive provisions of the Sherman and Clayton Acts, under § 4 and *§ 16* of the Clayton Act. Section 4 offers the successful private litigant treble damages, costs, and attorney's fees upon proving measurable injuries actually sustained. *15 U.S.C. § 15*. *Section 16*, by contrast, provides injunctive relief to "any person, firm, corporation, or association . . . against threatened loss or damage by a violation of the antitrust laws. . . ." *15 U.S.C. § 26*. *Section 16* has **[**35]** recently been amended to provide attorney's fees and costs to a prevailing plaintiff who receives injunctive relief. *Id.* (as amended by Pub. L. 94-435 (1976)). Courts have long recognized that Congress intended private antitrust suits both to provide a remedy to injured parties when the government fails to act or is not able to provide an adequate remedy, and to enlist the business public as private attorneys general to aid the government in "achieving the broad social object of the statute." *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955)*; *see also Monarch Life Insurance Co. v. Loyal Protective Life Insurance Co., 326 F.2d 841, 845 (2d Cir. 1963)*, *cert. denied*, *376 U.S. 952, 11 L. Ed. 2d 971, 84 S. Ct. 968 (1964)*.

B. *Plain Language*

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[7] At the time his bill was called for discussion on the floor of the Senate, Senator Sherman identified the impetus of the legislation later to be known as the Sherman Act:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.

21 Cong. Rec. 2460 (daily ed. March 21, 1890). *See generally* Katzmann, *The Attenuation of Antitrust*, 2 Brookings Rev. 23, 23-25 (1984) ("Antitrust reflected the deep-rooted and persistent American fear that concentrated private power could undermine democratic government").

[8] Senator Sherman explained: "The first section, being a remedial statute, would be construed liberally, with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally. . . ." 21 Cong. Rec. 2456 (daily ed. March 21, 1890).

Our starting point in determining the scope of the injunctive relief available under **[*416]** *§ 16* is the statutory language. *North Haven Board of Education v. Bell, 456 U.S. 512, 520, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1981)*; *Consumer Product Safety Commission v. GTE Sylvania Corp., 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980)*. If the statutory language is unambiguous, in the absence **[**36]** of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Id.; Russello v. United States, 464 U.S. 16, 104 S. Ct. 296, 299, 78 L. Ed. 2d 17 (1983)*; *United States v. Turkette, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*. *Section 16* provides:

> ***HN18***[] 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*. . . .

15 U.S.C. § 26 (1982) (no amendment in pertinent part since original enactment) (emphasis added). The section further provides that a preliminary injunction may issue upon the posting of a bond if plaintiff shows the "danger of irreparable loss or damage is immediate. . . ." *Id.*

We are first struck by the broad language Congress employed ***HN19***[] in *§ 16*. "Injunctive relief" is made **[**37]** available "when and under the same conditions as injunctive relief against threatened conduct . . . is granted by courts of equity." *Id.* Significantly, the statute states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order. "'Nothing on the face of the statute suggests a congressional intent to limit [the types of injunctions a court may order].'" *Lewis v. United States, 445 U.S. 55, 60, 63 L. Ed. 2d 198, 100 S. Ct. 915 (1980)* (quoting *United States v. Culbert, 435 U.S. 371, 373, 55 L. Ed. 2d 349, 98 S. Ct. 1112 (1978))*. Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief.

The Supreme Court has described the principles of equity as derived from a "practice with a background of several hundred years of history." *Hecht Co. v. Bowles, 321 U.S. 321, 329, 88 L. Ed. 754, 64 S. Ct. 587 (1944)*. The Court has noted, ***HN20***[] "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." **[**38]** Equity is the instrument "for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Id., see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982)*. Because of the vital role of equity in our system of law,

> ***HN21***[] "this equitable jurisdiction *is not to be denied or limited in the absence of a clear and valid legislative command*. 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. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown v. Swann, [35 U.S.] 10 Pet. 497, 503 [9 L. Ed. 508]*."

Weinberger v. Romero-Barcelo, 456 U.S. at 313 (quoting *Porter v. Warner Holding Co., 328 U.S. 395, 398, 90 L. Ed. 1332, 66 S. Ct. 1086 (1946))* (emphasis added). This directive clarifies that onerous burden that must be discharged for us to restrict the district court's inherent equity powers; in either the plain language of the statute, **[**39]** or in authoritative legislative history, a "clear and valid legislative command" must be identified.

HN22[] Although "Congress may intervene and guide or control the exercise of the courts' **[*417]** discretion," [9] **[**41]** *Weinberger v. Romero-Barcelo, 456 U.S. at 313*; *see also Yakus v. United States, 321 U.S. 414, 441-42,*

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[9] The Supreme Court has noted a number of "instances in which Congress has regulated and restricted the power of the federal courts to grant injunctions." *Yakus v. United States, 321 U.S. 414, 442 n.8, 88 L. Ed. 834, 64 S. Ct. 660 (1944)*. *See, e.g.*,

88 L. Ed. 834, 64 S. Ct. 660 (1944), the plain language of § 16 fails to indicate by either "a clear and valid legislative command," Porter v. Warner Holding Co., 328 U.S. at 398, or even a veiled suggestion, any intended limitation of the types of injunctive relief available to private litigants under § 16. Nor do we find any indication of an intention to limit the district court's inherent powers of equity. [10] Accordingly, **HN23**[] we believe Congress intended that courts should fashion their injunctions by exercising sound discretion according to the exigencies of the particular situation before them, which is to allow courts their "traditional equitable discretion." Romero-Barcelo, 456 U.S. at 319. It is reasonable to hypothesize that, in some aggravated cases, the threatened or actual injury to the market and a litigant will not cease unless the acquiring corporation **[**40]** is required to divest itself of its acquisition. The plain language of § 16 does not suggest that Congress intended to exempt from the district court's equity jurisdiction the power to order divestiture in appropriate cases brought by private plaintiffs.

[42]** Our conclusion is fortified by comparing the language Congress utilized in granting the government the power to obtain equitable relief, § 15 of the Clayton Act, 15 U.S.C. § 25, to that used in § 16. Section 15 vests the government with the power "to institute proceedings in equity to prevent and restrain" violations of the antitrust laws and allows it to petition "that such violation . . . be enjoined or otherwise prohibited." 15 U.S.C. § 25. The predecessor statute to § 15, § 4 of the Sherman Act, contained language that the Congress reenacted virtually verbatim in § 15. The government's ability to seek and obtain divestiture or "dissolution" under this general language was clear by 1914, at the time the Clayton Act was passed. *See* ***[*418]*** United States v. American Tobacco Co., 221 U.S. 106, 55 L. Ed. 663, 31 S. Ct. 632 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911). That Congress knew of the use of these remedies by the government under this broadly-phrased language is clear from the discussion of these cases during the hearings and debate on the Clayton Act. *See infra* slip op. at 34.

We are unable to discern **[**43]** from the plain language of these statutes any intended distinction between the equitable remedies Congress provided to the government and those it provided to private plaintiffs. The Ninth Circuit, however, determined that "proceedings in equity" (§ 15) and "injunctive relief" (§ 16) were not coextensive in their embrace of divestiture and dissolution. I.T.T., 518 F.2d at 923-24. Although that opinion appears to concede that divestiture is within the ambit of "injunctive relief" as presently conceived and practiced, the Ninth Circuit

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> section 16 of the Judiciary Act of 1789, 1 Stat. 82, Judicial Code § 267, 28 U.S.C. § 384, denying relief in equity where there is adequate remedy at law; section 5 of the Act of March 2, 1973, 1 Stat. 334, Judicial Code § 265, 28 U.S.C. § 379, prohibiting injunction of state judicial proceedings; Act of March 2, 1867, 14 Stat. 475, 26 U.S.C. § 3653, prohibiting suits to enjoin collection or enforcement of federal taxes; the Johnson Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 41(1), restricting jurisdiction to enjoin orders of state bodies fixing utility rates; Act of Aug. 21, 1937, 50 Stat. 738, 28 U.S.C. § 41(1), similarly restricting jurisdiction to enjoin collection or enforcement of state taxes; section 17 of the Act of June 18, 1910, 36 Stat. 557 and § 3 of the Act of Aug. 24, 1937, 50 Stat. 752, 28 U.S.C. §§ 380 and 380(a), requiring the convening of a three-judge court for the granting of temporary injunctions in certain cases and allowing a temporary restraining order by one judge only to prevent irreparable injury; the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101-15, regulating the issue of injunctions in labor disputes and prohibiting their issue "contrary to the public policy" declared in the Act.

Id.

[10] At the time the Clayton Act was passed, a split in authority existed among the circuits regarding the availability of injunctive relief to a private party suing under the Sherman Act. Although the Sherman Act expressly conferred the power to initiate "proceedings in equity" for injunctive or other equitable relief only upon the government, the Sixth Circuit affirmed a case where the district court had granted a preliminary injunction to a private party pursuant to its inherent powers of equity. Through the injunction, the court had forbidden an acquiring corporation to vote the stock of its new acquisition, and then, after trial, had dissolved the injunction and dismissed the bill. *See* Bigelow v. Calumet & Hecla Mining Co., 155 F. 869 (W.D. Mich. 1907), *aff'd*, 167 F. 704 (6th Cir. 1909). The Second Circuit, however, held that injunctions were not available to private parties under the Sherman Act. *See* Greater New York Film Rental Co. v. Biograph Co., 203 F. 39 (2d Cir. 1913) (by implication). These cases, and the question whether inherent powers of equity were withdrawn from the courts under the Sherman Act, were discussed in the committee hearings. *See* Senate Hearings at 629-31 (issue and cases); House Hearings at 485-87 (case), 963-64 (issue but not cases). In view of these discussions, it is noteworthy that no exclusion of inherent powers of equity, or of certain kinds of injunctive relief, was included in the Clayton Act.

declined to take the currently recognized scope of possible injunctions as its guidepost for determining the kinds of remedies available under *§ 16*. It, instead, apparently believed that the proper inquiry was the meaning of the words employed in 1914, at the time of enactment. The Ninth Circuit identified what it considered to be a significant distinction between injunctive relief and dissolution or divestiture current at that time, and concluded that divestiture is not available under *§ 16*.

Although ascertaining the intent of Congress is a court's primary objective in construing a statute, we disagree with the Ninth Circuit's interpretive approach. **[**44]** We do not believe that a court can ignore the contemporary legal meaning and scope of words employed in statutes and base its interpretation of the plain language solely on what it surmises was the meaning of the words at the time of original enactment. *See generally* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980). Just as the concepts of "discrimination" and "equal protection of the laws" are susceptible of varying interpretations that change over time, *University of California v. Bakke, 438 U.S. 265, 284, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)* (Powell, J., announcing the judgment of the Court), so, too, are other words, such as "injunctive relief," that are invested with legal meaning. We must recognize, as Justice Holmes so perceptively stated, that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." *Towne v. Eisner, 245 U.S. 418, 425, 62 L. Ed. 372, 38 S. Ct. 158 (1918)*. Especially in view of the growth and change of equity powers and injunctive relief over the centuries, [11] and **[**45]** Congress' general authorization of "injunctive relief" with no restrictions or exceptions, we believe it is inappropriate to interpret this statute's language restrictively. ***HN24***[] We are, moreover, specifically charged to interpret a remedial statute generously. *See* *Gomez v. Toledo, 446 U.S. 635, 639, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980)*; *Doe v. Brookline, 722 F.2d 910, 919 (1st Cir. 1983)*. Because the Ninth Circuit based most of its determination of the 1914 meaning of "injunctive relief" on the comments made in the legislative history, we reserve our specific critique for our discussion of those materials. We now turn to that analysis.

C. *Legislative History*

The legislative history of the Clayton Act is voluminous, comprising approximately 3000 pages of committee reports, **[**46]** hearings, and debate. This unusual breadth of attention found its impetus in the widespread public perception that trusts and monopolistic corporations possessed excessive economic, political, and social power, and that government action in this area was necessary to remedy the problem. *See* Katzmann, *The Attenuation of Antitrust*, 2 Brookings Rev. 23, 23-25 **[*419]** (1984). The political significance of the issue is evinced by President Wilson's 1914 State of the Union address; his sole topic was to propose in general terms legislation to supplement the Sherman Act. 51 Cong. Rec. 1964-65 (daily ed. Jan. 20, 1914).

Following the President's address, a subcommittee of the House Judiciary Committee was appointed to draft legislation along the lines proposed by the President. That drafting process consumed approximately two weeks, and the result was styled a "tentative bill by Mr. Clayton." Although the Judiciary Committee reported one bill to the House, H. R. 15657, the subcommittee proposal was initially contained in three separate "committee print" bills which were published in newspapers throughout the country with an express invitation to the public, especially "businessmen," **[**47]** to testify at the House hearings or to otherwise contact committee members with comments. The bulk of the committee hearings and other commentary was devoted to four issues: determining what substantive offenses should be expressly prohibited; the proper reach of the interlocking directorates proscription; suggested restrictions on the use of federal injunctions against striking workers; and a reform of the criminal contempt process.

Before turning to our analysis of specific legislative materials, we must explore one additional interpretive problem. At no point in the legislative history of the Clayton Act do we find any use of the term "divestiture." Consequently, any inquiry into the intent of Congress regarding the availability of divestiture is at least one step removed; the

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[11] The evolution of judicial powers of equity was a subject before congressional committee hearings on the Clayton Act and its unsuccessful precursors. *See, e.g.*, Senate Hearings at 1091-95 (witness Samuel Gompers); 1130-1163.

inquiry must focus on other terms used at that time, such as "dissolution" and "partition," in an effort to ascertain the relationship between these concepts and "divestiture."

Defendants rely on the analysis set forth by the Ninth Circuit on this question. That court ruled that "the terms 'dissolution' and 'divestiture' are not interchangeable," *I.T.T.*, 518 F.2d at 923 n.49, but that "'dissolution' **[**48]** is the inclusive term and 'divestiture' is a subcategory." *Id. at 923*. The crux of this argument is found in the following passage:

> During the hearings on *§ 16*, the members of the House Judiciary Committee used "dissolution" to include the remedy of divestiture. Throughout the hearings references were made by members of the committee and witnesses to "dissolution of the trusts." One of the more frequently mentioned trusts whose "dissolution" was discussed was the Standard Oil Trust. The Committee was intimately familiar with the Supreme Court's decision "dissolving" the Standard Oil Trust. If any specific equitable remedy was in the minds of the members of the committee when they were considering the right to bring dissolution suits, then it was the remedy obtained by the government in the Standard Oil case.
> That remedy was divestiture. . . . In short, the dissolution of Standard Oil Co. of New Jersey was accomplished by an order that it divest itself of the stock of the subsidiary corporations. In that case, the Supreme Court used the term "dissolution" to refer to the remedy of divestiture.

Id. at 923-24 (footnotes omitted).

We agree with the Ninth Circuit **[**49]** that one starting point in understanding what Congress meant by the term "dissolution" is the antitrust experience in the opinion issued in *Standard Oil v. United States, 221 U.S. at 77-81*. But we would add that the companion opinion of *United States v. American Tobacco Co., 221 U.S. at 184-88*, the district court opinion and decree in *Standard Oil, 173 F. 177 (E.D. Mo. 1909)*, which the Supreme Court affirmed, and the order for relief on remand in *American Tobacco, 191 F. 371 (S.D.N.Y. 1911)*, also were explicit parts of this experience, figuring in congressional discussions on whether the power to order relief, and the relief actually ordered, was sufficient. [12] **[**50]** **[*420]** These cases were continually referred to both by Members of Congress and by witnesses when speaking of "dissolution." [13] To discern the meaning and scope of that term we look to the historical framework within which it was used. [14]

During the late nineteenth century, when monopolistic corporate power was at its height, state courts of equity, [15] and eventually federal courts, refashioned traditional equitable powers in order to do "complete justice" in the face of this new evil. The power to dissolve a partnership, upon petition of a partner, or to dissolve and wind up a corporation, evidently were the old equity powers gradually remolded into the antitrust power of dissolution. [16] This

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[12] *See e.g.*, 51 Cong. Rec. 9090 (daily ed. May 22, 1914) (remarks of Rep. Mitchell); at 9169 (daily ed. May 23, 1914) (remarks of Rep. Nelson); at 16326 (daily ed. Oct. 8, 1914) (remarks of Rep. Nelson); H.R. No. 627, 63d Cong., 2d Sess. 648, 652, 689-90 (remarks of witness Louis Brandeis); at 666 (Rep. Nelson) (1914) (hereinafter House Hearings).

[13] *See, e.g.*, the discussions identified in note 10 *supra*; House Hearings at 263 (Rep. Floyd); at 273 (Rep. Nelson); 331 (Rep. McCoy); 51 Cong. Rec. at 15821-23 (Sept. 28, 1914) (Sen. Reed); at 15864 (Sept. 29, 1914) (Sen. Reed); at 15864-5 (Sept. 29, 1914) (Sen. Overman).

[14] As Arthur Corbin observed, a "word appearing suddenly, in empty space and with no history, would express nothing at all. To be expressive of any meaning, all words must have a context and a history. . . ." 3 Corbin, Contracts 90 (1960).

[15] Injunctive relief had regularly been sought and awarded to private plaintiffs under state antitrust laws and in common law suits alleging restraint of trade and price fixing. *See, e.g., Gibbs v. Consolidated Gas, 130 U.S. 396, 32 L. Ed. 979, 9 S. Ct. 553 (1889)* (price fixing agreement).

was a period of judicial creativity in adapting the traditional tools of the court when necessary to achieve the **[**51]** statutory goals enunciated by the Sherman Act. [17]

[52]** The Supreme Court had explicitly approved the use of "dissolution" as a remedy available under § 4 of the Sherman Act in the *American Tobacco* and *Standard Oil* cases. In *American Tobacco*, the Court observed: "[this case] involves difficulties in the application of remedies greater than have been presented by any case involving the Antitrust Act which has been hitherto considered by this court." *American Tobacco Co., 221 U.S. at 185*. In stating the considerations which brought it to that conclusion, the Court observed that a "mere decree forbidding stock ownership by one part of the combination in another part . . . would afford no adequate measure of relief, since the ingredients of the combination would remain unaffected, and *by the very nature and character of their organization* would be able to continue the wrongful situation *which it is our duty to destroy." Id. at 185-86* (emphasis added). To achieve this goal, the Court noted that it might

> resort to one or the other of two general remedies -- *a*, the allowance of a permanent injunction *restraining the combination . . . from continuing to engage in interstate commerce until the illegal* **[**53]** *situation be cured, . . . or, b*, to direct the appointment of a receiver to take charge of the assets and property . . . of the combination . . . for the purpose of preventing a continued violation of the law, and thus *working out by a sale of the property of the combination*.

Id. at 186-187 (emphasis added). Rather than ordering either of these two means of effectuating a dissolution, the Court directed that, on remand, **[*421]** the trial court hear the parties and fashion a plan "of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law." *Id. at 187*.

We think this discussion in *American Tobacco* indicates that the Supreme Court envisioned a dissolution being accomplished in any of several ways. The combination's market power could effectively be dissolved by a prohibitory injunction forbidding the corporation from engaging in interstate commerce, with the result that the offending combination partitions itself, sells assets, or otherwise restricts itself in a manner that recreates a competitive market. Or, the court could take a more active **[**54]** role as by appointing a receiver to sell assets in such a manner as to restore market conditions. Or, in lieu of either of these two drastic remedies, the court could encourage the formulation of a consent decree under the direction of the court. All of these approaches may be called dissolutions -- dissolutions of market power, of combinations of assets, or of the corporation itself. Today, as then, we would say that dissolutions achieved through the use of any of these mechanisms were achieved by use of the injunctive power according to principles of equity, *see, e.g., United States v. Standard Oil Co., 173 F. 177, 192-93 (E.D. Mo. 1909)*, *aff'd*, *221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*; O. Fiss, The Civil Rights Injunction 10 (1978). Forcing a corporation to divest itself of some of its assets, as by a sale, is one means through which the remedy of dissolution could be achieved, but it plainly is not the only means. *See* Adams, *Dissolution, Divorcement, Divestiture: The Pyrric Victories of Antitrust*, 27 Ind. L.J. 1 n.1 (1951) ("The term 'dissolution' is generally used to refer to any situation where the dissolving of an illegal combination or association is **[**55]** involved, including the

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[16] During the House hearings, a famous antitrust lawyer of the day, Louis Brandeis, suggested remolding the power to order a "partition." Brandeis stated his belief that the courts already had this power -- the power to order the division and sale of assets -- but that it was doubted by some members of the judiciary, as evidenced by the *American Tobacco* opinion on remand, *see 191 F. 371 (S.D.N.Y. 1911)*, and was not utilized as broadly as it should. Brandeis proposed that Congress "educate" the courts and facilitate achievement of the antitrust goals by passing statutes specifically authorizing the use of this and other equitable powers in the antitrust context. *See* House Hearings at 652.

[17] Other traditional equitable tools, specifically the injunctive power, were refashioned for the purpose of quelling labor strikes and boycotts. *See generally* F. Frankfurter & N. Greene, *The Labor Injunction* (1930).

use of divestiture and divorcement as methods of achieving that end") (quoting Oppenheim, Cases on Federal Antitrust Laws 885 (1948)).

Moreover, when the Second Circuit, on remand in *American Tobacco*, fashioned relief according to what it conceived to be mandated by the Supreme Court's order for "dissolution," some members of Congress considered this not to be a dissolution in fact, but merely a "circuitous course" by which that end was not achieved. *See, e.g.*, 51 Cong. Rec. 16326 (daily ed. Oct. 8, 1914) (remarks of Rep. Nelson); 51 Cong. Rec. 15864 (daily ed. Sept. 29, 1914) (remarks of Sen. Reed). [18] These congressmen apparently equated dissolution with the complete destruction and reorganization of an offending corporation: a court should "cause all of its assets to be sold in such a manner . . . as to restore competition . . . fully and completely. . . ." 51 Cong. Rec. 16326 (daily ed. Oct. 8, 1914) (remarks of Rep. Nelson). Thus, even within Congress, there existed a difference of opinion as to what the remedy of dissolution entailed. [19] We, therefore, **[*422]** find the relationship between the terms "dissolution" and "divestiture" more **[**56]** complex than defendants would have it, and we cannot in good faith simply substitute the latter term for the former in reviewing the legislative history.

[57]** We now turn to an analysis of the legislative materials. It bears repeating that in order to limit or displace the meaning of a statute's plain language, authoritative legislative history that rises to the level of "a clearly expressed legislative intent" must be identified. *Consumer Products Safety Commission v. GTE Sylvania Corp., 447 U.S. at 108*; *United States v. Turkette, 452 U.S. at 580*. Moreover, to restrict a court's inherent powers of equity, we must have nothing less than "a clear and valid legislative command." *Weinberger v. Romero-Barcelo, 456 U.S. at 313*. Defendants' legislative arrows lack the velocity necessary to reach either mark.

1. Committee Reports

In reviewing the legislative process, we first look to see whether Congress specifically addressed the question in the official committee reports, which are entitled to substantial weight. The House Judiciary report does not speak to whether *§ 16* was meant to encompass dissolution or divestiture. Its explanation of *§ 16* essentially reiterates the

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[18] Evidently this perspective was shared by some officials in the Justice Department. *See* 51 Cong. Rec. 15864 (daily ed. Sept. 29, 1914) ("The fundamental weakness in the enforcement of the antitrust act in previous administrations was the failure to insist upon a real dissolution of monopolies and combinations which the courts had adjudged unlawful") (excerpt from Justice Dept. letter quoted by Sen. Reed).

[19] It appears that over the years the legal meaning of the concepts "dissolution" and "divestiture" has become somewhat more settled than in 1914, so much so that the Supreme Court has recently pronounced them to be to a "large degree interchangeable." *United States v. du Pont & Co., 366 U.S. 316, at 330 n.11, 6 L. Ed. 2d 318, 81 S. Ct. 1243 (1961)*. In reviewing the Court's cases, we found that the term "dissolution" tended to be used when ordering a remedy for violations of *§ 1* and *§ 2* of the Sherman Act, but not for Clayton Act § 7 violations. *See, e.g., United States v. Reading Co., 253 U.S. 26, 64 L. Ed. 760, 40 S. Ct. 425 (1920)* (dissolution); *United States v. Lehigh Valley R.R., 254 U.S. 255, 65 L. Ed. 253, 41 S. Ct. 104 (1920)* (same); *United States v. Southern Pacific Co., 259 U.S. 214, 66 L. Ed. 907, 42 S. Ct. 496 (1922)* (same). This was especially true for the older cases. "Divestitute" of some assets or interests was frequently ordered as a part of the remedy of dissolution, *see, e.g., United States v. Crescent Amusement Co., 323 U.S. 173, 189, 89 L. Ed. 160, 65 S. Ct. 254 (1944)* (Sherman Act *§§ 1*, *2*); *Schine Chain Theatres v. United States, 334 U.S. 110, 92 L. Ed. 1245, 68 S. Ct. 947 (1948)* (same); *International Boxing Club of New York v. United States, 358 U.S. 242, 3 L. Ed. 2d 270, 79 S. Ct. 245 (1959)* (same). These last three cases clarify that a distinction between the two terms was felt at one time. In *Schine Theatres*, the Court stated: "The plan does not provide for the dissolution of the Schine circuit through the separation of the several affiliated corporations as was done in [*Crescent Amusement*]. It keeps the circuit intact in that sense but requires Schine to sell certain theatres. . . . Schine is to be divested of more than 50 of its theatres." *334 U.S. at 126-27*. And again, our view that a "dissolution" tends to be ordered where monopolies and restraints of trade are found, and has as one of its essential elements a major judicial reorganization of the corporation, is supported by *International Boxing*. There, the Court ordered dissolution of the combination, recognizing that new corporations would be formed to handle the business formerly transacted by the combination. The Court further noted that "dissolution might well have the salutary effect of completely clearing new horizons that the trial judge was attempting to create in the boxing world, especially when effected *in conjunction with* the stock divestiture provision." *358 U.S. at 260-61* (emphasis added).

text of that provision and states that it was aimed at remedying a defect in prior law which had enabled private parties to recover damages but not injunctive **[**58]** relief. H. Rep. No. 627, 63d Cong., 2d Sess. 22 (1914) (hereinafter House Report). The report fails to identify any intended limits on the scope of injunctive relief available to private parties.

Somewhat more revealing is a House minority report from the Judiciary Committee, in which some committee members dissatisfied with the bill expressed their reservations about the broad scope of private relief authorized by *§ 16*: [20] **[**59]**

> The provision giving to any individual the right to enjoin any threatened loss or damage is a serious one. . . . The beginning of an investigation by the government on any complaint that a concern has violated the antitrust laws almost immediately to some extent affects his credit but not so seriously as an *injunction and perhaps receivership which might be brought by an individual*.

Minority Views, pt. 2 to H.R. 15637, H. Rep. No. 627, 63d Cong. 2d Sess. (1914) (emphasis added). The specific reference to receivership suggests that some committee members believed dissolution and corporate reorganization would fall within the scope of *§ 16* "injunctive relief." [21]

[*423] The report from the Senate Committee on the Judiciary does not shed much, if any, additional light on our particular inquiry. The report's preface announces that the bill's purpose "is only to supplement" the Sherman and other antitrust provisions. S. Rep. No. 698, **[**60]** 63d Cong., 2d Sess. 1 (1914) (hereinafter Senate Report). It "seeks to prohibit and make unlawful certain trade practices which, as a rule," are not presently illegal, "and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." *Id.* The Senate report then reproduced in its entirety the House report on the proposed Clayton Act.

The Senate committee proposed several amendments to the bill, including amendments to *§ 16*. In particular, the committee sought to make the injunctive relief section apply specifically to four named sections of the bill, "so that all doubt of the cumulative and not exclusive character of the remedy may be removed." [22] Plainly, none of this material evinces a congressional intention that *§ 16* injunctive relief have restrictions placed upon it beyond the principles traditionally governing a court sitting in equity.

[61]** 2. Floor Debates

The House began its consideration of H.R. 15657 in early May, 1914. 51 Cong. Rec. 8201 (daily ed. May 6, 1914). Although Representative Clayton, the chair of the House Judiciary Committee, did not participate in the floor debates, his coauthors of the bill, Representatives Carlin and Floyd, and other committee members were actively involved in explaining the bill to their colleagues. Committee Member McGillicuddy, on behalf of the committee, discussed the purpose of *§ 16*:

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[20] *Section 16*, *15 U.S.C. § 26*, was originally § 13 of the proposed Clayton Act. Although most of the legislative history speaks in terms of § 13, we shall avoid confusion by referring to the provision as *§ 16*.

[21] While the fears and doubts of the minority are not an authoritative guide to the construction of legislation, *see* *Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 394, 95 L. Ed. 1035, 71 S. Ct. 745 (1951)*, their report did comprise the only specific explanation of the meaning of the private injunction provision that was readily accessible to the whole Congress. Moreover, the Supreme Court has consistently favored the "presumably well considered and carefully prepared committee report" over informal or casual statements made in the course of the legislative process. *Id. at 396* (Jackson, J. concurring); *United States v. Auto Workers, 352 U.S. 567, 585, 1 L. Ed. 2d 563, 77 S. Ct. 529 (1957)*; *United States v. Public Utilities Commission, 345 U.S. 295, 97 L. Ed. 1020, 73 S. Ct. 706 (1953)*.

[22] The Senate committee also sought to delete the exception for common carriers the House had provided in *§ 16*, although it ultimately failed to do so.

> Under the [Sherman Act] any person injured in his business or property by acts in violation of the [Act] . . . is entitled to recover threefold damage whenever he is able to prove his case. There is no provision under the present law, however, to prevent threatened loss or damage even though it be irreparable. The practical effect of this is that a man would have to sit by and see his business ruined before he could take advantage of his remedy. In what condition is such a man to take up a long and costly lawsuit to defend his rights?
>
> The proposed bill solves this problem for the person, firm, or corporation threatened with loss or damage to property by *providing injunctive relief* **[**62]** *against the threatened act that will cause such loss or damage. Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy*.

51 Cong. Rec. 9261 (daily ed. May 26, 1914) (emphasis added). Representative McGillicuddy mentioned no limitations on the injunctive power either he or the committee understood to be implied by *§ 16*.

Later that same day, in response to criticism that the bill lacked substance, Representative Carlin took the floor in defense of the bill and said:

> First, we found that the Sherman law did not permit an injunction on petition of an individual. *The Government could enjoin a combination or trust*; and though an individual was standing face to face with destruction, though the monster of monopoly was knocking at his door, he would have to wait until destruction came, and then pursue his remedy at law for treble damages. So . . . the committee, proposed to place in this bill *a law which allows the individual to sue for equitable relief and to enjoin* monopoly when he is threatened with irreparable loss or damage.

[*424] *Id.* at 9270 (emphasis added). After drawing **[**63]** this express parallel between the government's and the individual's right to enjoin antitrust violations, Representative Carlin then outlined other protections for the individual contained in the bill. In particular, he named the right to use a governmentally obtained judgment as evidence in a private suit, and the suspension of the statute of limitations for individuals while a pertinent government suit is pending. All these remarks indicate a desire to provide the individual with effective remedies against anticompetitive practices, and to permit early intervention to protect a business and market. [23] The House passed the committee's bill without amendment.

[64]** As noted above, the Senate committee's bill contained a number of amendments differentiating it form the House bill. On the floor of the Senate, still more amendments were passed. One such amendment passed by the Senate, *§ 25*, is pertinent to our inquiry:

> That whenever a corporation shall acquire or consolidate the ownership or control of the plants, franchises or property of other corporations, copartnerships, 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

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[23] Representative Carlin then turned to clarify the relaxed standard for anticompetitive practices under the bill:

> The Sherman law in its operation is limited to three things: First, a contract or combination in the form of a trust or otherwise; second, a conspiracy in restraint of trade; third, an attempt to monopolize. There is nothing about competition in the Sherman law. There must be actual restraint of trade under the Sherman law to bring anyone under either its civil or criminal process.
>
> Under this bill there has to be only a lessening of competition. Competition may be lessened without restraint of trade. Competition may be lessened without attempt to monopolize. Competition may be lessened without conspiracy. It may be the natural effect of the putting together in close relationship through a holding company of two corporations that are natural competitors, or ought to be. Yet there would not be restraint. So instead of subtracting from the Sherman law, . . . we have added to the Sherman law a most effective rule by which the actions of these combinations in the future may be determined. . . .

51 Cong. Rec. 9271 (daily ed. May 26, 1914).

> such persons as will, in the opinion of the court, restore competition as fully and completely as it was before said 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 (daily ed. Sept. 29, 1914) (emphasis added). We note that the amendment was the only explicit proposal for the codification **[**65]** of the dissolution remedy, and that the amendment's plain language would not have restricted its availability to the government. The Senate approved this amendment and passed the bill. When the bill was returned to the House, a call was made for a conference committee to resolve the differences between the two bills. While this amendment was rejected by the conference committee and ultimately not enacted, we believe that it indicates greater conflict over the meaning of "dissolution" than the Ninth Circuit acknowledges. Plainly, a number of Senators appear to have connected "dissolution" with the winding up of a corporation, or its general termination. [24]

[66]** 3. Conference Committee Reports

Both the Senate and the House issued conference reports, but neither mentioned the Senate amendment except to note that **[*425]** the Senate "[recedes]." H. Rep. No. 1168, 63d Cong., 2d Sess. 1 (1914); S. Doc. No. 585, 63d Cong., 2d Sess. 3 (1914). It is unclear what inferences should be drawn from the conference's rejection of *§ 25*. One position that could be advanced is that because *§ 25* was rejected by the committee and ultimately not enacted, Congress explicitly rejected dissolution as a remedy available to private plaintiffs. Such an argument, however, fails to take into consideration that both the government and private plaintiffs would be swept within such an inferred intention because the amendment did not differentiate between types of plaintiffs. We would also note that rejection of *§ 25* has not obstructed the government from obtaining divestiture in appropriate cases. *See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *United States v. E.I. du Pont de Nemours, 353 U.S. 586, 1 L. Ed. 2d 1057, 77 S. Ct. 872 (1957)*. Because a significant number of substantive provisions were contained **[**67]** within *§ 25*, including, *inter alia*, the authorization of dissolution with no restrictions as to type of plaintiff, we apprehend no reason for assigning the rejection of the amendment to a congressional decision that dissolution should be restricted to the government's cases alone. This perspective receives additional support from a comparison between the Senate amendment and the alternative language pressed upon the conference committee. This alternative would have made it permissive rather than mandatory for a court to order the sale of all assets when a Sherman Act *§ 1* or *§ 2* violation was found, and would have restricted the availability of dissolution to the government. This alternative language, too, was rejected by the conference. *See* 51 Cong. Rec. 16325-26 (Oct. 8, 1914) (remarks of Rep. Nelson, conference committee member).

4. Floor Debates on the Conference Bill

Representative Floyd, one of the conference members, explained the conference bill to the House:

> Heretofore there has been *only one power that might enjoin an unlawful trust or monopoly in restraint of trade, and that was the Government of the United States*. . . .
>
> This provision in *§ **[**68]** 16* gives any individual, company, or corporation damaged in its property or business by the unlawful operations or actions of any corporation or combination the right to go into court and enjoin the doing of these unlawful acts. . . .

51 Cong. Rec. 16319 (Oct. 8, 1914) (emphasis added). We note that Representative Floyd reiterated the explicit parallel drawn between the government's power to obtain an injunction and that of the individual under *§ 16* of the

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[24] The author and prime proponent of the Senate amendment expressed his view of a dissolution:

> Wh[at] I propose [is] 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 (Sept. 29, 1914) (remarks of Sen. Reed).

Clayton Act, a point which had originally been elaborated by Representative Carlin during floor debates on the initial bill. Again, no distinction between the two authorizations was noted.

5. Committee Hearings

We review the committee hearings last because these are entitled to less weight than committee reports, *United States v. Auto Workers, 352 U.S. 567, 585, 1 L. Ed. 2d 563, 77 S. Ct. 529 (1957)*, and remarks on the floor by a bill's sponsor which are entitled to substantial weight. *North Haven Bd. of Educ. v. Bell, 456 U.S. at 526-27*; *FEA v. Algonquin SNG, Inc., 426 U.S. 548, 564, 49 L. Ed. 2d 49, 96 S. Ct. 2295 (1976)*.

When reviewed as a whole, only scant consideration was given in the hearings **[**69]** to the remedy provisions, or the judicial "machinery," of the proposed act. In House hearings that lasted over four months and filled over 2000 pages of record, the testimony relating specifically to the scope of *§ 16* is contained in approximately thirty pages. The Ninth Circuit accorded particular weight to an exchange between Representative Floyd and a witness who testified at the committee's request. The witness commented "when a private individual is allowed to begin a suit to dissolve a corporation, or an injunctive suit, the same kind of suit the Government may begin. . . ." H. Hearings on H.R. 15657, 63d Cong., 2d Sess. 842 (February 6, 1914) (hereinafter H. **[*426]** Hearings). Mr. Floyd, one of the members of the drafting subcommittee, responded:

> We did not intend by *section [16]* to give the individual the same power to dissolve the corporation that the Government has. . . . We discussed it very thoroughly among ourselves and decided he should not have [it].

Id. (remarks of Rep. Floyd).

We think the context of the remark belies any idea that the committee had arrived at an understanding about the intended scope of *§ 16*. Just a few days prior **[**70]** to the time this remark was made, a national invitation had been issued for citizens to comment on the bill and elaborate their views regarding its proper scope. On the day the comment was made, the hearings had been in session barely one week. It is difficult to believe that a committee intention had been formed at this early stage. This perception is borne out by the repeated inquiries committee members made of other witnesses on later dates regarding whether individuals should have a right to obtain the dissolution of an offending corporation. *See, e.g.*, House Hearings at 492 (Feb. 12, 1914); *id. at 666 (Feb. 16)*; *id. at 1183 (March 4)*. [25]

[71]** Additionally, a close reading of the Floyd remarks shows that he stated there was no intent to give the individual the *same* power to bring a suit to dissolve a corporation that the government was intended to possess. We cannot ascertain whether Representative Floyd intended that the individual should have the power to request and obtain dissolution in certain kinds of cases but not others, for instance, in especially egregious cases or upon more stringent proof than the government. Moreover, congressional members' comments during committee hearings while interviewing witnesses may indicate preliminary concerns and issues but generally are not weighted as representative of the intent of Congress embedded in the proposed statute eventually reported to the floor. Having considered these aspects of Representative Floyd's remarks, we hold them to be insufficiently reliable for a court to give them interpretive weight in construing *§ 16*. *See* *New England Power Co. v. New Hampshire, 455 U.S. 331, 342, 71 L. Ed. 2d 188, 102 S. Ct. 1096 (1982)* ("Reliance on such isolated statements of legislative history in

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[25] Our belief that Representative Floyd's comments cannot be taken as stating a Judiciary Committee intention regarding the scope of *§ 16* is supported by an exchange between Representative Floyd and a later witness. Floyd stated during the hearings on February 27, 1914, in reference to another proposed section "the purpose of these provisions as tentatively drafted. . . ." The next witness that day then begins his comments by referring to that clarification and stating, "but as that point has been disposed of by the committee, . . . it is unnecessary to discuss that phase." Representative Floyd responded: "I think it has not been disposed of, Mr. Harlan. There are 21 members of this Committee, and matters are not so easily disposed of. I simply made an explanation as one member of the subcommittee that had prepared the bill, as to my view of it. I would be very glad . . . if you would state your views. . . ." House Hearings at 1049-53.

divining the intent of Congress is an exercise fraught with hazards, and 'a **[**72]** step to be taken cautiously'") (quoting *Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 26, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977))*.

Finally, regardless what weight is accorded these remarks, we note that Representative Floyd rejected the individual's power to bring a suit for *dissolution* of a combination. As divestiture of an acquisition can be so different in degree of impact on a combination as to amount to a difference in kind, we cannot hold these remarks to indicate a proscription of divestiture.

We derive support for our analysis from *NBO Industries Treadway Companies, Inc. v. Brunswick Corp., 523 F.2d 262 (3rd Cir. 1975)*. There, the Third Circuit stated that while it was possible that members of the House committee assumed that *§ 16* did not create a private divestiture remedy, it doubted whether comments made during 1914 committee hearings should "control the contemporary application of a statute laying down a fundamental national economic policy." Rather, the court held

> **[*427]** ***HN25***[] the antitrust laws are of necessity statements of general principle. They must be given meaning on a case-by-case basis. It is impossible for a legislature to devise **[**73]** codes so all-encompassing as to predict every case to which the general principles should apply. So, too, with antitrust remedies. There is a danger in permitting the pronouncements of statesmen long deceased to control the contemporary meaning of statutes which are almost an economic constitution for our complex national economy.

NBO Industries, 523 F.2d at 278-79. This is especially so where the statements on which reliance is to be grounded lack indicia of reliability and authority, as do these remarks made near the inception of committee hearings, the import of which is controverted by other comments and materials. While the Third Circuit concluded that a rule of general application was not required in its case because less drastic remedies would adequately redress the violations, the court hypothesized that divestiture might be an appropriate injunctive remedy where the effect of a merger of two competitors would be to lessen competition. *Id. at 279*; *see also* *id. at 278 n.17* (collecting cases on the availability of divestiture under *§ 16*). Similarly, in *Fuchs Sugars and Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636 (S.D.N.Y. 1975)*, Judge Ward refused **[**74]** to grant a motion to dismiss on the grounds that divestiture was not available to a private plaintiff, and suggested that "belaboring inconclusive scraps of legislative history may be less worthwhile than examining the broad aim of the statutory scheme." *Id. at 639*. The court concluded that divestiture is a potential remedy for private parties suing under the Clayton Act.

We draw additional support for our position from the comments of Professors Areeda and Turner. In commenting on the Ninth Circuit's *I.T.T.* opinion, these scholars stated:

> The court also gave decisive weight to a colloquy in the course of hearings in a House committee on the Clayton Act in which a congressman asserted a distinction between dissolution on the one hand and injunctions on the other. *That fragment of legislative history 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*. Indeed, the court recognized that its conclusion deprived it of the natural and perhaps only effective remedy in the case before it. To hold a merger unlawful **[**75]** in a private suit while refusing to decree the undoing of that merger makes little sense in terms of antitrust policy.
>
> Fortunately, other courts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers. The existence of power to order divestiture is distinct from the appropriateness of decreeing it in a particular case. Nevertheless, *divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff*.

II P. Areeda & D. Turner, ***Antitrust Law*** § 328b (1978) (footnotes omitted; emphasis added).

In conclusion, the Ninth Circuit's interpretation of the legislative history, on which the defendant relies, can be stated as follows. In 1914, there was such a clearly demarked and uniformly understood division between the equitable remedies of dissolution and injunction that it must be found that by authorizing "injunctive relief" but not other equitable remedies, Congress [26] expressly and intentionally excluded **[*428]** the latter from the purview of *§ 16*. We summarize our response as follows.

[76]** First, ***HN26***[] a court possesses inherent powers of equity regardless of whether equitable remedies are expressly authorized under the statute. *Romero-Barcelo, 456 U.S. at 313*; *Doe v. Brookline, 722 F.2d 910, 917-18 (1st Cir. 1983)*. To hold Congress to have restricted these powers, a "clear and valid legislative command" must be identified. *Id.; Romero-Barcelo 456 U.S. at 313*. We do not believe that a technical distinction between two equitable remedies arguably current in 1914 rises to the level of a congressional command to restrict the court's inherent powers to secure "complete justice."

Second, we do not agree that "dissolution" and "injunctive relief" had unequivocal, or even generally agreed upon, definitions sufficient to conclude that injunctive relief was separate and distinct from dissolution. Indeed, the Supreme Court of that period, as now, appeared to view injunctions as one mechanism for bringing about a dissolution. *See American Tobacco Co., 221 U.S. at 186, 188*. Moreover, at that time traditional equitable remedies were being refashioned to combat antitrust violations and labor strikes, *see O*. Fiss, The Civil Rights Injunction 1-4, 10, 20-21 (1978), **[**77]** and thus, in this transitional period during which the law was grappling with the changes wrought by the accelerating industrialization of the nation, it is doubtful that a sharp distinction between the remolded dissolution remedy, and injunctive relief, was understood and intended by the Congress.

Third, unlike the Ninth Circuit, we do not believe that the term "injunctive relief" can be limited to what a court surmises was the meaning of the words at the time of the original statutory enactment. [27] The Clayton Act is a living statute; the current legal meaning and scope of its words cannot be ignored.

[78]** 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. [28] This principle has been understood and endorsed repeatedly

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[26] The Ninth Circuit explicitly holds this to be the House Judiciary Committee's view, and states that "whether Congress shared this intention is not subject to rigorous proof." *I.T.T.*, 518 F.2d at 922. But the opinion treats its view of the Committee's understanding *cum* intention as that of Congress, *viz.*, asking "whether by refusing to allow private 'dissolution' suits, Congress also refused to allow private 'divestiture' suits." *Id.*

[27] The problems inherent in that approach to statutory construction have been elaborated by Professor Brest:

> [such an interpreter] must determine what the adopters intended future interpreters to make of their substantive views. Even if she can learn how the adopters intended contemporary interpreters to construe the [statute], she cannot assume they intended the same canons to apply one or two hundred years later. Perhaps they wanted to bind the future as closely as possible to their own notions. Perhaps they intended a particular provision to be interpreted with increasing breadth as time went on. Or -- more likely than not -- the adopters may have had no intentions at all concerning these matters.

Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. at 220 (footnotes omitted). Although Professor Brest's comments were directed to constitutional interpretation, they are equally appropriate here. *See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 351, 359-60, 77 L. Ed. 825, 53 S. Ct. 471 (1933)* ("as a charter of freedom, the [Sherman Act] has a generality and adaptability comparable to that found to be desirable in constitutional provisions"); *NBO Industries v. Brunswick Corp., 523 F.2d 262, 298 (3d Cir. 1975)* (antitrust laws are almost an "economic constitution" for this nation), *rev'd on other grounds sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

[28] *See also Leh v. General Petroleum Corp., 382 U.S. 54, 59, 15 L. Ed. 2d 134, 86 S. Ct. 203 (1965)* ("effect must be given to the broad terms of the statute itself . . . read in the light of Congress' belief that private antitrust litigation is one of the surest

both by the federal judiciary, *see, e.g.,* *Gomez v. Toledo, 446 U.S. at 639* ***[*429]*** *(1980)*; *Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 53 L. Ed. 2d 320, 97 S. Ct. 2348 (1977)*; *Doe v. Brookline, 722 F.2d at 919*; *McComb v. Super-A Fertilizer Works, 165 F.2d 824 (1st Cir. 1948)*, and Congress, *see, e.g., supra* note 8, and it is therefore an especially reliable and legitimate canon of construction. The attempt to restrict "injunctive relief" to its putative meaning in 1914 collides head-on with this principle and must be rejected.

[79]** Our reliance on this principle of statutory construction here is especially appropriate because the Sherman and Clayton Acts were drafted in broad terms to defeat an evil that Congress knew could take many forms. The explanations of record offered by committee and conference members were equally broad and general, stressing the purpose for which the section had been drafted. On the floor of neither the Senate nor the House, nor in any committee report, is there a single reference to any limitations or restrictions on *§ 16* "injunctive relief" which would negate the plain language or the sponsors' broad explanations of the provision. Accordingly, we decline to engraft judicially a *per se* limitation on *§ 16* forbidding an order for divestiture.

D. *"Doing Equity" and Implementing the Goals of the Statute*

HN27[] *Section 16* requires that injunctive relief for private plaintiffs be dispensed "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*. In an important private action requesting injunctive relief, the Court clarified the important role of *§ 16*: **[**80]**

> ***HN28***[] The purpose of giving private parties treble-damages and injunctive relief was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws. . . . *Section 16* should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords [injunctive relief], 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." . . . Its availability should be "conditioned by the necessities of the public interest which Congress sought to protect."

Zenith Radio Corp. v. Hazeltine, 395 U.S. at 130-31.

HN29[] An order to divest stock or assets acquired in effecting a combination is one of the most effective kinds of remedies available to combat mergers that have, or threaten to have, anticompetitive consequences. *See, e.g., United States v. du Pont & Co., 366 U.S. at 326*; *I.T.T.*, 518 F.2d at 925. As the Supreme Court has observed:

> ***HN30***[] Divestiture is the most important of the antitrust remedies. It is simple, relatively easy to administer, and sure. It should always **[**81]** be in the forefront of the court's mind when a violation of § 7 has been found.

United States v. du Pont & Co., 353 U.S. at 597. *See also* *United States v. Greater Buffalo Press, 402 U.S. 549, 556, 29 L. Ed. 2d 170, 91 S. Ct. 1692 (1971)* ("Divestiture performs several functions, the foremost being the liquidation of the illegally acquired market power"). Although the Court was speaking of divestiture in the context of a suit brought by the government, we apprehend no reasons why the efficacy of divestiture as a remedy would not

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weapons for effective enforcement of the antitrust laws"); *Cabell v. Markham, 148 F.2d 737, 739* (2d Cir.) (L. Hand, J.) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"), *aff'd*, *326 U.S. 404, 90 L. Ed. 165, 66 S. Ct. 193 (1945)*.

hold as well in *§ 16* cases. Because we are concerned with "doing equity," efficacy concerns are relevant; the goal is to *"secur[e] complete* justice." *Brown v. Swann*, 10 Pet. at 503.

HN31[] Under the Clayton Act, courts have always possessed the power to prohibit a merger through a preliminary injunction. It is a logical extension of that power to divorce the partners to a merger at a later time when anticompetitive effects of the merger are, if not actually felt, considerably more imminent. Caribe here initially requested a preliminary injunction to prohibit the merger and backed that up with a petition for divestiture of the acquired **[**82]** company **[*430]** if it failed to achieve interlocutory relief. We cannot understand the logic of allowing a plaintiff, on the one hand, to obtain a congressionally intended result -- the prohibition of an anticompetitive merger -- on a showing that there will likely be market deterioration; but, on the other hand, if it fails to make the preliminary showing yet actually *proves* at trial that a merger is anticompetitive, obtain perhaps far less in that the same relief is barred.

HN32[] Moreover, it is contrary to equitable principles to permit some defendants to maintain an illegal market share merely because they were able to merge before any of their competitors could prevent it. This places a premium on gamesmanship and stealth, and allows anticompetitive mergers to be treated differently on the basis of the speed and skill with which the merger is consummated. Unfortunately, the public is also the loser under such an approach as it cannot bring its own suit except through the Justice Department and must rely on the adventitious suits of private plaintiffs to maintain competitive conditions. We can conceive of no valid reason for allowing the presence or absence of proof at an interlocutory **[**83]** stage in and of itself to determine whether the private enforcement of antitrust laws prohibiting anticompetitive mergers will be deprived of one of its most effective remedies. *See* Dexter & Peacock, *Private Divestiture Suits Under* Section 16 *of the Clayton Act*, 48 Tex. L. Rev. at 55.

Any determination regarding whether divestiture would be an appropriate remedy in this case is, of course, premature and we venture no suggestion regarding what remedy the trial court should order if Caribe prevails. ***HN33***[] A range of injunctive relief is possible and, like all equitable remedies, the relief ordered is highly dependent upon the proof adduced at trial. We note only that "the key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition." *United States v. du Pont & Co., 366 U.S. at 326*. We do not direct or constrain the district court's sound discretion as to how the public and private interests in effective enforcement of the antitrust laws can best be effectuated and refer the trial court both to traditional equitable principles and to those cases where the Supreme Court has applied those principles in an antitrust context.

[84]** *Reversed and remanded*.

Since the district court originally adopted so strong a position against the availability of the divestiture remedy, we think that this is a case where it would be easier all around, including for the judge himself (without any reflection on him), to have the case reassigned to a different trier. Costs to appellants.

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CVD, Inc. v. Raytheon Co.

United States Court of Appeals for the First Circuit

July 30, 1985, Decided

No. 84-1652

Reporter

769 F.2d 842 *; 1985 U.S. App. LEXIS 20974 **; 227 U.S.P.Q. (BNA) 7 ***; 1985-2 Trade Cas. (CCH) P66,717

CVD, INCORPORATED, ET AL., Plaintiffs, Appellees v. RAYTHEON COMPANY, Defendant and Third-Party Plaintiff, Appellant

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Walter Jay Skinner, U.S. District Judge].

Core Terms

trade secret, cvd, patent, antitrust, bad faith, anti trust law, secrets, royalties, damages, license, technology, no trade, manufacture, monopolize, hipping, zinc sulfide, licensee, license agreement, disclosure, zinc, chemical, restrain, selenide, vapor, district court, instructions, deposition, invention, district judge, jury verdict

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN1[] **Standards of Review, Clearly Erroneous Review**

The standard of review in setting aside a jury verdict is quite narrow. In order to set aside a verdict, and grant a new trial, the trial judge must find that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice. A jury verdict that is supported by the evidence may not be set aside simply because the trial judge or the appellate court would have reached a different result.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Ultimate Determination

HN2[] **Jury Trials, Province of Court & Jury**

When conflicting evidence is presented, from which contradictory inferences may be drawn, it is the role of the jury to make the ultimate determinations of fact.

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

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN3[] **Standards of Review, Abuse of Discretion**

It is basic that the appellate court will overturn the trial court's decision only if there has been an abuse of discretion.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN4[] **Standards of Review, Substantial Evidence**

The standard for granting a judgment non obstante veredicto (n.o.v.) is burdensome and narrow. A motion for judgment n.o.v. is properly granted only when, as a matter of law, no conclusion but one can be drawn. The question presented, therefore, is whether, after reviewing the evidence in the light most favorable to the plaintiffs, and drawing all reasonable inferences in their favor, there is sufficient evidence in the record to support the verdict.

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

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

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

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

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

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

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > General Overview

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

HN5[] **Regulated Practices, Intellectual Property**

In examining "bad faith" patent infringement claims, courts have balanced the public interest in free competition, as manifested in the antitrust laws, with the federal interest in the enforcement of the patent laws, and the *first amendment* interest in the free access to courts. The enforcement of a patent obtained by fraud may constitute monopolization or attempted monopolization in violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, provided the other elements of a monopolization claim are established. In evaluating actions brought under this theory, courts have protected the federal interests in patent law enforcement and the free access to the courts by requiring, in addition to the other necessary elements of an antitrust claim, clear and convincing evidence of fraud in asserting or pursuing patent infringement claims.

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

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

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

Patent Law > Infringement Actions > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Patent Law > Remedies > Damages > General Overview

HN6[] **Private Actions, Remedies**

A patentee who has a good faith belief in the validity of a patent will not be exposed to antitrust damages even if the patent proves to be invalid, or the infringement action unsuccessful.

Antitrust & Trade Law > Sherman Act > General Overview

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

Trade Secrets Law > Federal Versus State Law > Patent Law

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

There are, of course, significant differences between patent and trade secret protection. The scope of protectible trade secrets is far broader than the scope of patentable technology.

Trade Secrets Law > Trade Secret Determination Factors > Continuous Use

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Business Use

Trade Secrets Law > Protected Information > General Overview

Trade Secrets Law > Protected Information > Machines

Trade Secrets Law > Protected Information > Manufacturing Processes

HN8[] Trade Secret Determination Factors, Continuous Use

Under Massachusetts law, a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a process of manufacturing. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article.

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN9[] Congressional Duties & Powers, Copyright & Patent Clause

The basis for the federal patent system is found expressly in the Constitution. A patent confers a legal monopoly for a limited period of time. In return for the patent, the patentee must fully disclose the patented invention or process. After the expiration of the statutory period, the patentee loses all exclusive rights to the patent.

Trade Secrets Law > Protection of Secrecy > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

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

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Trade Secrets Law > Civil Actions > Defenses

Trade Secrets Law > Trade Secret Determination Factors > Ready Availability

Trade Secrets Law > Misappropriation Actions > Independent Development

Trade Secrets Law > Nonprotected Information > Public Domain

HN10[] Trade Secrets Law, Protection of Secrecy

The cornerstone of a trade secret is secrecy. Once a trade secret enters the public domain, the possessor's exclusive rights to the secret are lost. Moreover, unlike a patent, a trade secret affords no rights against the independent development of the same technology or knowledge by others.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Breach of Confidence > Lack of Good Faith

Trade Secrets Law > Federal Versus State Law > Patent Law

HN11[] **Trade Secrets & Unfair Competition, Trade Secrets**

As with patent law, the rationale behind state trade secret law is to encourage invention, and to provide innovators with protection for the fruits of their labors. In addition, trade secret law is intended to maintain and promote standards of commercial ethics and fair dealing.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Patent Law > Statutory Bars > Public Use Bar > General Overview

Trade Secrets Law > Breach of Contract > Licensing Agreements

HN12[] **Trade Secrets & Unfair Competition, Trade Secrets**

Generally, there is a significant public interest in the licensing of trade secrets. By licensing a trade secret, the licensor partially releases his monopoly position and effectively disseminates information. The result, it is hoped, is greater competition that will enure to the benefit of the public.

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

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

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

Patent Law > Subject Matter > Design Patents > General Overview

Trade Secrets Law > Breach of Contract > Licensing Agreements

Trade Secrets Law > Trade Secret Determination Factors > Property Rights

HN13[] **Bad Faith, Fraud & Nonuse, Bad Faith**

Like the holders of other intellectual property rights, possessors of trade secrets are entitled to assert their rights against would-be infringers and to defend their rights in court. Nevertheless, the assertion in bad faith of trade secret claims, that is, with the knowledge that no trade secrets exist, for the purpose of restraining competition does not further the policies of either the antitrust or the trade secrets laws. Thus, it seems clear that the assertion of a trade secret claim in bad faith, in an attempt to monopolize, can be a violation of the antitrust laws. Similarly, it is well established that an agreement which purports to license trade secrets, but in reality, is no more than a sham, or device designed to restrict competition, may violate the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

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

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

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

Trade Secrets Law > Trade Secret Determination Factors > General Overview

HN14[] **Sherman Act, Claims**

The proper balance between the antitrust laws and trade secrets law is achieved by requiring an antitrust plaintiff to prove, in addition to the other elements of an antitrust violation, by clear and convincing evidence, that the defendant asserted trade secrets with the knowledge that no trade secrets existed. In order to prove a contract or combination in restraint of trade in violation of the Sherman Act, *15 U.S.C.S. § 1*, the plaintiff must also prove that the defendant had market power in the relevant market, and the specific intent to restrain competition. To succeed in an attempted monopolization claim under the Sherman Act, *15 U.S.C.S. § 2*, the plaintiff must prove that the defendant had the specific intent to monopolize the relevant market, and a dangerous probability of success. A specific intent to monopolize or restrain competition can often be inferred from a finding of bad faith.

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

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

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

HN15[] **Bad Faith, Fraud & Nonuse, Bad Faith**

The threat of unfounded trade secrets litigation in bad faith is sufficient to constitute a cause of action under the antitrust laws, provided that the other essential elements of a violation are proven.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Protection of Secrecy > Reasonable Measures > General Overview

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

Trade Secrets Law > Trade Secret Determination Factors > Novelty

HN16[] **Trade Secrets & Unfair Competition, Trade Secrets**

The proof as to the existence of trade secrets and the defendant's bad faith in asserting them, if they did not exist, is necessarily intertwined. In order to be protected by law, a trade secret must be kept in secret. Heroic measures to ensure secrecy are not essential, but reasonable precautions must be taken to protect the information. Whether a trade secret exists depends in each case on the conduct of the parties and the nature of the information. Although the fact that a product is unique tends to prove that a trade secret exists, uniqueness without more is not commensurate with possession of a trade secret.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

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

HN17[] **Trade Secrets & Unfair Competition, Trade Secrets**

An employee upon terminating his employment may carry away and use the general skill or knowledge acquired during the course of the employment. This principle effectuates the public interest in labor mobility, promotes the employee's freedom to practice a profession, and freedom of competition.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN18[] **Antitrust & Trade Law, Sherman Act**

The policies expressed in the federal antitrust laws will override any agreement in contravention of those policies, regardless of the agreement's legality under private contract law.

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

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Ownership Rights > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

HN19[] **Inequitable Conduct, Anticompetitive Conduct**

The federal interest in the full and free use of ideas in the public domain will override state law in conflict with it.

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

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

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

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Trade Secrets Law > Federal Versus State Law > General Overview

HN20[] **Bad Faith, Fraud & Nonuse, Bad Faith**

Essentially, fraud under Massachusetts law is derived from the common law tort of deceit or misrepresentation. The assertion of claims in bad faith is a predatory practice under the antitrust laws. Under the antitrust laws, plaintiffs need not necessarily be deceived. They are often simply the victims of the predatory practices of a powerful competitor who seeks to restrain competition or monopolize the market. The assertion of trade secret claims in bad faith has been identified as a predatory practice. Thus, the behavior complained of is properly analyzed according to established principles of ***antitrust law***, rather than under a common law fraud theory of action. Reliance, therefore, is not an essential element to be proven.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

HN21[] **Price Discrimination, Defenses**

The defense of in pari delicto is not a defense to an antitrust complaint.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Sherman Act, Defenses**

An agreement between a plaintiff and a defendant clearly may serve as the basis of *15 U.S.C.S. § 1* complaint.

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

HN23[] **Private Actions, Remedies**

A plaintiff's complete, voluntary, and substantially equal participation in an allegedly illegal scheme precludes recovery for antitrust violations. The complete involvement defense is premised upon the equitable consideration of preventing a windfall gain from the plaintiff's own wrongdoing.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

Patent Law > Infringement Actions > Infringing Acts > Intent & Knowledge

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

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

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

Patent Law > Remedies > General Overview

Patent Law > Remedies > Damages > General Overview

HN24[] **Inequitable Conduct, Burdens of Proof**

A licensee must establish actual fraud on the part of the licensor against the licensee in order to recover back royalties. Under a less stringent standard, a licensee would have an incentive to delay challenging the patent, enjoying the competitive advantage of the license and avoiding the necessity of defending an infringement suit, secure in the knowledge that he could recoup his royalty cost later. Allowing recovery of back royalties for gross negligence or so-called "technical" fraud would inject undue uncertainty into the royalty system. An honest, though negligent, licensor could be subjected to ruinous liability after the licensee had received the benefits of the license.

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

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

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

HN25[] Private Actions, Standing

An antitrust plaintiff must prove more than injury causally related to an antitrust violation. A plaintiff must prove that its injury flowed from the anti-competitive nature of the defendant's acts. 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. The injury should reflect the anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause.

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

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 > Licenses

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

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

Patent Law > Remedies > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

HN26[] Bad Faith, Fraud & Nonuse, Bad Faith

While licensing offers may be considered as evidence of good faith, any offer to license a patent that it knew was invalid cannot preclude a finding of antitrust injury as a matter of law.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN27[] Jury Trials, Jury Instructions

Pursuant to *Fed. R. Civ. P. 51*, the failure to include the requested instruction cannot constitute reversible error. *Rule 51* in pertinent part provides that no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. *Rule 51* means what it says: the grounds for objection must be stated "distinctly" after the charge to give the judge an opportunity to correct his error. Reading a list of the numbers of the requested instructions is not sufficient to preserve an objection under *Rule 51*.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN28[] Jury Trials, Jury Instructions

The court should ask a jury to correct its verdict when the jury has failed to follow the court's instructions in returning a verdict.

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN29[] **Jury Instructions, Objections**

The jury is presumed to have followed the instructions of the court.

Counsel: Jack Brown, with whom Lawrence G.D. Scarborough, Bonnie P. Tucker, Victoria S. Lewis, Brown & Bain, P.A., Philip M. Cronin, Roger D. Matthews, Devra G. Bailin, Withington, Cross, Park & Groden, and Charles H. Resnick, were on brief for Appellant.

Blair L. Perry, with whom Hale and Dorr, was on brief for Appellees.

Judges: Coffin and Torruella, Circuit Judges, and Re, * Judge.

Opinion by: RE

Opinion

[*7]** **[*847]** RE, Chief Judge:

In this action, brought under the antitrust laws of the United States, defendant Raytheon Company (Raytheon) appeals from a judgment, entered pursuant to a special jury verdict, in the District Court for the District of **[***8]** Massachusetts. The judgment awarded plaintiff CVD, Inc. ("CVD") treble damages of $3,180, plus attorneys' fees and costs, granted plaintiffs declaratory relief, and dismissed the defendant's counterclaims.

The dispute between plaintiffs, CVD, Inc., Robert Donadio and Joseph Connolly, both **[**2]** former Raytheon employees, and defendant Raytheon pertains to the manufacture of zinc selenide (ZnSe) and zinc sulfide (ZnS) by a process known as chemical vapor deposition (cvd). On August 28, 1981, plaintiffs Donadio, Connolly, and CVD initiated this action, contending that defendant Raytheon attempted to monopolize the market for ZnSe and ZnS made by the cvd process, in violation of *15 U.S.C. § 2 (1982)*, and that a licensing agreement between the plaintiffs and Raytheon was an unreasonable restraint of interstate commerce and trade in violation of *15 U.S.C. § 1 (1982)*. The complaint sought damages and a declaratory judgment that the agreement between Raytheon and CVD, purporting to license the cvd process, was void and unenforceable. The defendant counterclaimed for breach of contract, misappropriation of trade secrets, breach of fiduciary duty, and violation of the Massachusetts consumer protection statute.

After a 27 day trial, in response to special interrogatories formulated by the court, the jury returned a verdict for the plaintiffs. Raytheon, who had previously moved for a directed verdict, filed motions for judgment notwithstanding **[**3]** the verdict, and for a new trial. These motions were denied, and judgment was entered for the plaintiffs. Defendant Raytheon thereupon filed a timely notice of appeal.

Raytheon asks this Court to order that, notwithstanding the verdict, judgment be entered for Raytheon on the ground that there was insufficient evidence to support the verdict of the jury. In the alternative, Raytheon urges that the verdict should be set aside, since, in its view, it is against the weight of the evidence. Raytheon also contends

* The Honorable Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

that the jury's finding of damages on the plaintiffs' antitrust claim should be set aside because the plaintiffs suffered no antitrust injury. In addition, Raytheon raises several subsidiary arguments that will be discussed in this opinion.

Since we find that the jury verdict was supported by sufficient evidence, and that Raytheon's contentions and other assertions of error are without merit, the judgment of the district court is affirmed.

Facts

Raytheon, a Delaware corporation with executive offices in Massachusetts, is a diversified company specializing in commercial and military electronics, materials and weapons. In 1959, plaintiff-appellee Donadio was hired as **[**4]** an engineer in the Advanced Materials Department at Raytheon. He was employed there until he resigned in the fall of 1979 in order to form CVD. Plaintiff-appellee Connolly was hired by Raytheon in 1972, and was employed there continuously until he also left to form CVD. Donadio and Connally had signed employment agreements promising to protect Raytheon's proprietary information. Both were involved in the manufacture of zinc selenide and zinc sulfide by chemical vapor deposition (ZnSe/cvd or ZnS/cvd). This process combines vaporized zinc solids with hydrogen sulfide or hydrogen selenide in specially modified, high-temperature (approximately **[*848]** 900 degrees centigrade) vacuum furnaces. The resulting solid materials are further processed into high precision optical materials which are used to make, among other things, infrared windows for lasers, high-speed aircraft, and missiles. These materials are the only suitable materials for certain demanding optical uses. Most of Raytheon's work on these materials had been done under contracts with the federal government. As part of its obligation under these contracts, Raytheon was required to provide periodic reports that detailed the **[**5]** technology and processes used in the production operation.

In the fall of 1979, Donadio informed his supervisor, Dr. James Pappis, the manager of the Advanced Materials Department, that he intended to leave Raytheon to start a new company to manufacture ZnS and ZnSe by the cvd process. Pappis replied that this would present legal difficulties in light of Donadio's employment agreement and Raytheon's trade secrets. The next day Pappis consulted with Leo Reynolds, a patent attorney with Raytheon, who spoke with Pappis briefly, and examined some drawings and the government reports for the purpose of determining whether the cvd process contained trade secrets.

The following day Donadio and Connolly met with Pappis, Reynolds, Joseph Pannone, the Patent Counsel for Raytheon, and another Raytheon executive. Reynolds told Donadio and Connolly that they could not manufacture ZnS and ZnSe by the cvd process without using Raytheon trade secrets. Although Donadio disputed Reynolds' assertion that trade secrets were involved, Reynolds threatened to sue if they began to manufacture ZnS/cvd or ZnSe/cvd without a license from Raytheon. Soon thereafter, Donadio and Connolly were asked to leave **[**6]** Raytheon.

After this meeting, Donadio retained an attorney, Jerry Cohen, who specialized in intellectual property. In discussions with Raytheon **[***9]** , Cohen took the position that there were no trade secrets in Raytheon's chemical vapor deposition process since the technology had been published in government reports, and, therefore, was in the public domain. Raytheon asserted, and later attempted to prove at trial, that important details were not included in the reports, and that, consequently, the reports were too vague to permit anyone to reproduce the cvd system. Cohen asked Reynolds for a list of what Raytheon claimed to be trade secrets. Reynolds refused to comply with the request on the ground he could not provide an "all-inclusive" list. At a later meeting, Reynolds read orally a list of claimed secrets but Cohen disputed all the items on the list.

In attempting to settle the dispute, Cohen proposed an agreement in which CVD would not be obligated to pay royalties if CVD could prove that no Raytheon trade secrets were used in its operations. This proposal was refused. Several other formulas for resolving the dispute were also discussed. Raytheon, however, held firm to its position **[**7]** that the plaintiffs could not manufacture ZnS/cvd or ZnSe/cvd without using Raytheon trade secrets, and insisted on a royalty rate based upon a flat percentage of revenue or volume for a ten-year period. Eventually, on February 15, 1980, an agreement was signed, providing for a 15% royalty on earnings for ZnSe and 8% for ZnS. No payments were ever made by CVD under the contract, however, and in 1981 plaintiffs filed the present action.

Standard of Review

HN1[] The standard of review in setting aside a jury verdict is quite narrow. In order to set aside a verdict, and grant a new trial, the trial judge must find that "the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice." *Coffran v. Hitchcock Clinic, Inc., 683 F.2d 5, 6* (1st Cir.), *cert. denied*, *459 U.S. 1087, 74 L. Ed. 2d 933, 103 S. Ct. 571 (1982)*; *Borras v. Sea-Land Service, Inc., 586 F.2d 881, 886-87 (1st Cir. 1978)*. A jury verdict that is supported by the evidence may not be set aside simply **[**8]** because the trial judge or the appellate court would have reached a different result. **[*849]** *See, e.g., Coffran, supra, 683 F.2d at 6*; *Borras, supra, 586 F.2d at 887*.

In this case, there is evidence which contradicts the plaintiffs' position. Nevertheless, the jury was not required to believe the defendant's evidence. *See Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 885 (1st Cir. 1966)*. *HN2*[] When conflicting evidence is presented, from which contradictory inferences may be drawn, it is the role of the jury to make the ultimate determinations of fact. *See, e.g., Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 9 (1st Cir. 1979)*, *cert. denied*, *446 U.S. 983, 100 S. Ct. 2964, 64 L. Ed. 2d 839 (1980)*.

After having heard 25 days of evidence presented at trial, the trial judge found sufficient evidence to support the verdict of the jury. *HN3*[] It is basic that the appellate court will overturn the **[**9]** trial court's decision only if there has been an abuse of discretion. *Coffran, supra, 683 F.2d at 6*.

HN4[] The standard for granting a judgment *non obstante veredicto* (n.o.v.) is even more burdensome and narrow. A motion for judgment n.o.v. "'is properly granted only when, as a matter of law, no conclusion but one can be drawn.'" *United States v. Articles of Drug Consisting of the Following*: *745 F.2d 105, 113 (1st Cir. 1984)*, *cert. denied sub nom. 470 U.S. 1004, 105 S. Ct. 1358, 84 L. Ed. 2d 379 (1985)* (quoting, *Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986, 990 (1st Cir. 1978))*. The question presented, therefore, is whether, after reviewing the evidence in the light most favorable to the plaintiffs, and drawing all reasonable inferences in their favor, there is sufficient evidence in the record to support the verdict. *Engine Specialties, Inc., supra, 605 F.2d at 9*; *Rios, supra, 575 F.2d at 990*. Since we find that there is sufficient evidence in the record to support the **[**10]** jury's verdict, we affirm the judgment of the district court.

Sherman Act

This case presents a difficult question pertaining to the interaction of the federal antitrust laws and state trade secrets law. Guidance in resolving these questions can be found in analogous, but not identical, issues presented in cases in which patent infringement suits have been brought in bad faith with an intent to restrain competition or monopolize. *See, e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)*; *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984)*, *cert. denied*, *469 U.S. 1190, 105 S. Ct. 963, 83 L. Ed. 2d 968 (1985)* (*Handgards II*); *Kearney & Trecker Corp. v. Cincinnati Milacron Inc., 562 F.2d 365 (6th Cir. 1977)*; *Rex Chainbelt, Inc. v. Harco Products, Inc., 512 F.2d 993* (9th Cir.), *cert. denied*, *423 U.S. 831, 46 L. Ed. 2d 49, 96 S. Ct. 52, 187 U.S.P.Q. (BNA) 416 (1975)*.

HN5[] In examining "bad faith" patent **[**11]** infringement claims, courts have balanced the public interest in free competition, as manifested in the antitrust laws, with the federal interest in the enforcement of the patent laws, and the *first amendment* interest in the free access to **[***10]** courts. *See, e.g., Walker Process, supra, 382 U.S. at 177-78*; *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 993-96 (9th Cir. 1979)*, *cert. denied*, *444 U.S. 1025, 100 S. Ct. 688, 62 L. Ed. 2d 659 (1980)* (*Handgards I*); *Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 424-25* (10th Cir.), *cert. denied*, *344 U.S. 837, 73 S. Ct. 46, 97 L. Ed. 651, 95 U.S.P.Q. (BNA) 417 (1952)*. In the *Walker Process* case, the Supreme Court held that the enforcement of a patent obtained by fraud may constitute monopolization or attempted monopolization in violation of *section 2* of the Sherman Act, provided the other elements of a monopolization claim are established. *382 U.S. at 177-78*. In evaluating actions brought under this theory, courts have protected the federal interests in patent law enforcement and the free access to the courts by requiring, in addition **[**12]** to the other necessary elements of an antitrust claim, "clear and convincing evidence" of fraud in asserting or pursuing patent infringement claims. *See, e.g., Handgards I, supra, 601 F.2d at 996*; *Norton Co. v.*

Carborundum Co., 530 F.2d 435, 444 (1st Cir. 1976); Cataphote Corp. v. DeSoto [*850] Chemical Coatings, Inc., 450 F.2d 769, 772 (9th Cir. 1971), *cert. denied*, *408 U.S. 929, 92 S. Ct. 2497, 33 L. Ed. 2d 341 (1972)*.

Hence, **HN6**[] a patentee who has a good faith belief in the validity of a patent will not be exposed to antitrust damages even if the patent proves to be invalid, or the infringement action unsuccessful. The requirement of clear and convincing evidence is intended to prevent a frustration of the patent laws. It also ensures the free access to the courts by allowing honest patentees to protect their patents without undue risk of incurring liability for asserting their rights.

HN7[] There are, of course, significant differences **[**13]** between patent and trade secret protection. The scope of protectible trade secrets is far broader than the scope of patentable technology. *See, e.g.,* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 486, 40 L. Ed. 2d 315, 94 S. Ct. 1879 (1974); Atlantic Wool Combing Co. v. Norfolk Mills, Inc., 357 F.2d 866, 869 (1st Cir. 1966). **HN8**[] Under Massachusetts law, a trade secret may consist of:

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be . . . a process of manufacturing . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article.

Eastern Marble Products Corp. v. Roman Marble, Inc., 372 Mass. 835, 364 N.E.2d 799, 801 (1977), *quoting*, *Restatement of Torts § 757 comment b*; J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc. 357 Mass. 728, 736, 260 N.E.2d 723, 729 (1970). **[**14]**

HN9[] The basis for the federal patent system is found expressly in the Constitution. *See* U.S. Const. art. I, § 8, cl. 8. A patent confers a legal monopoly for a limited period of time. In return for the patent, the patentee must fully disclose the patented invention or process. After the expiration of the statutory period, the patentee loses all exclusive rights to the patent. *See, e.g.,* Kewanee Oil Co., supra, 416 U.S. at 480-81.

HN10[] The cornerstone of a trade secret, however, is secrecy. Once a trade secret enters the public domain, the possessor's exclusive rights to the secret are lost. Moreover, unlike a patent, a trade secret affords no rights against the independent development of the same technology or knowledge by others. *See, e.g.,* Kewanee Oil Co., supra, 416 U.S. at 475-76; A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 714-15 (9th Cir. 1968).

[15]** **HN11**[] As with patent law, the rationale behind state trade secret law is to encourage invention, and to provide innovators with protection for the fruits of their labors. *See, e.g.,* Kewanee Oil Corp., supra, 416 U.S. at 481-85. In addition, trade secret law is intended to maintain and promote standards of commercial ethics and fair dealing. *Id.*

In this case, the court must resolve a dispute which brings into focus the tension between the antitrust laws and the public interest in the licensing of trade secrets. **HN12**[] Generally, there is a significant public interest in the licensing of trade secrets. By licensing a trade secret, the licensor partially releases his monopoly position and effectively disseminates information. *See* Kewanee Oil Co., supra, 416 U.S. at 486; A. & E. Plastik Pak, supra, 396 F.2d at 715. The result, it is hoped, is greater competition that will enure to the benefit of the public.

HN13[] Like the holders of other intellectual property **[**16]** rights, possessors of trade secrets are entitled to assert their rights against would-be infringers and to defend their rights in court. *See* Handgards I, supra, 601 F.2d at 993 (*citing* Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961), and United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 [*851] (1965)). Nevertheless, the assertion in bad faith of trade secret claims, that is, with the knowledge that no trade secrets exist, for the purpose of restraining competition does not further the policies of **[***11]** either the antitrust or the trade secrets laws. *Cf.* Handgards I, supra, 601 F.2d at 993; P. Areeda & D. Turner, 3 ***Antitrust Law***, § 708. Thus, it seems clear that the assertion of a trade secret claim in bad faith, in an attempt to monopolize, can be a violation of the antitrust laws. *See A. & E. Plastik Pak Co., supra, 396 F.2d at 715*. Similarly, it is well established that an agreement which purports to license trade secrets, but in reality, is no more than a sham, or device designed to restrict **[**17]** competition, may violate the antitrust laws. *A. & E. Plastik Pak Co., supra, 396 F.2d at 715*. *Cf. United States v. Imperial Chemical Industries, 100 F. Supp. 504, 592 (S.D.N.Y. 1951)*.

We believe that ***HN14***[] the proper balance between the antitrust laws and trade secrets law is achieved by requiring an antitrust plaintiff to prove, in addition to the other elements of an antitrust violation, by clear and convincing evidence, that the defendant asserted trade secrets with the knowledge that no trade secrets existed. In order to prove a contract or combination in restraint of trade in violation of *section 1* of the Sherman Act, the plaintiff must also prove that the defendant had market power in the relevant market, and the specific intent to restrain competition. To succeed in an attempted monopolization claim under *section 2* of the Sherman Act, the plaintiff must prove that the defendant had the specific intent to monopolize the relevant market, and a dangerous probability of success. As other courts have noted, a specific intent to monopolize or restrain competition **[**18]** can often be inferred from a finding of bad faith. *Handgards II, supra, 743 F.2d at 1293* (quoting *Handgards I, supra, 601 F.2d at 993 n. 13*).

This case differs from the *Walker Process* line of cases in that Raytheon did not actually initiate litigation against the plaintiffs. Instead, the evidence indicates that it used the threat of litigation to exact a licensing agreement from the plaintiffs. In this case, litigation with Raytheon would have proved ruinous to the newly formed corporation, and effectively foreclosed competition in the relevant market. Under these circumstances, we hold that ***HN15***[] the threat of unfounded trade secrets litigation in bad faith is sufficient to constitute a cause of action under the antitrust laws, provided that the other essential elements of a violation are proven.

Relevant Market

It is undisputed that, until CVD's formation, Raytheon was the only company in the world to produce for commercial sale zinc selenide or zinc sulfide by chemical vapor deposition. One other company, II-VI, Inc., produced small quantities **[**19]** of zinc selenide for its own use. Because of their low porosity and high purity, ZnSe and ZnS made by the chemical vapor deposition process are the only suitable materials for certain demanding optical uses. Specifically, because of its optical properties and its durability, zinc sulfide cvd is the only suitable material for use in 8-12 micron "forward looking infrared" windows on missiles and jet aircraft. Zinc selenide is the only suitable material for windows in high energy carbon dioxide lasers.

In answer to a special interrogatory, the jury found that the defendant Raytheon had market power as to both zinc sulfide and zinc selenide. This conclusion is amply supported by the evidence.

Trade Secrets and Bad Faith

HN16[] The proof as to the existence of trade secrets and the defendant's bad faith in asserting them, if they did not exist, is necessarily intertwined. As noted, in order to be protected by law, a trade secret must be kept in secret. *See U.S.M. Corp. v. Marson Fastener Corp., 379 Mass. 90, 98-99, 393 N.E.2d 895, 899 (1979)*; *J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc., 357 Mass. 728, 737, 260 N.E.2d 723, 730 (1970)*. **[**20]** Heroic measures to ensure secrecy are not essential, but reasonable precautions **[*852]** must be taken to protect the information. *See U.S.M. Corp., supra*, 397 Mass. at 97-98, 393 N.E. 2d at 900. Whether a trade secret exists depends in each case "on the conduct of the parties and the nature of the information." *Eastern Marble Products Corp. v. Roman Marble, Inc., 372 Mass. 835, 364 N.E.2d 799, 802 (1977)*; *Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 840, 282 N.E. 2d 921, 925 (1972)*. Although the fact that a product is unique tends to prove that a trade secret exists, *see Curtiss-Wright Corp. v. Edel-Brown Tool & Die Co., 381 Mass. 1, 11, 407 N.E.2d 319, 326 (1980)*, "uniqueness without more is not commensurate with possession of a trade secret." *Dynamics Research Corp. v. Analytic Sciences Corp., 9 Mass. App. Ct. 254, 400 N.E.2d 1274, 1286 (1980)*; *Laughlin Filter Corp. v. Bird Machine Co., 319 Mass. 287, 290, 65 N.E.2d 545, 546-47 (1946)*.

It is also "well settled that **[**21]** ***HN17***[] an employee upon terminating his employment may carry away and use the general skill or knowledge **[***12]** acquired during the course of the employment." *Junker v. Plummer, 320*

Mass. 76, 79, 67 N.E.2d 667, 669 (1946). *See* Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 839, 282 N.E. 2d 921, 924 (1972); Dynamics Research Corp. v. Analytic Sciences Corp., 9 Mass. App. Ct. 254, 400 N.E.2d 1274, 1282 (1980); *see generally*, 2 J. McCarthy, Trademarks and Unfair Competition § 29:16 (1973). This principle effectuates the public interest in labor mobility, promotes the employee's freedom to practice a profession, and freedom of competition. *See* Club Aluminum Co. v. Young, 263 Mass. 223, 225-27, 160 N.E. 804, 805-06 (1928); Dynamics Research Corp. v. Analytic Sciences Corp., 9 Mass. App. Ct. 254, 400 N.E.2d 1274, 1282 (1980).

The existence of trade secrets in Raytheon's ZnS/cvd and ZnSe/cvd manufacturing process depends upon the degree of public disclosure of the relevant information. It is the determination of this Court that the jury could have found sufficient evidence that the essential information **[**22]** contained in the cvd technology had entered the public domain, and, therefore, Raytheon possessed no trade secrets in this technology. Furthermore, there was sufficient evidence for the jury to find that Raytheon knew that no trade secrets existed. Hence, it was proper for the jury to conclude that Raytheon's assertion of trade secrets and exaction of the licensing agreement were in bad faith.

Specifically, upon the evidence presented, the jury could have found the following facts to support its conclusions. The process of chemical vapor deposition generally was well known in the scientific community. Raytheon regularly published schematics, diagrams, run conditions, and other detailed information related to the production of ZnS/cvd and ZnSe/cvd in periodic reports supplied to the government as part of Raytheon's contractual obligations. Although some of the reports were temporarily classified by the government for security purposes, all of these reports were available to the public by 1979. At trial, the plaintiffs demonstrated that nearly all the details originally claimed as trade secrets were published in the reports. There was also evidence that the details not specifically **[**23]** mentioned in the reports were either obvious or insignificant, or both.

In addition, Raytheon employees had published papers relating to cvd technology in scientific journals. Raytheon had also produced a film about this technology which was shown to a convention of engineers (and later to the jury). Photographs of the interior of the cvd furnace were published in various publications. Raytheon employees gave lectures and speeches on the technology to various groups, often accompanied by viewgraphs or slides of the equipment. Although access to the facility was limited, visitors were permitted to view the furnaces. Donadio testified that, based on the information disclosed to the public, a competent engineer could construct and operate a viable system for the production of zinc selenide or zinc sulfide through chemical vapor deposition. It is also noteworthy that the furnaces built by CVD were smaller than **[*853]** Raytheon's latest furnaces and differed in certain dimensions.

Notwithstanding the extent of this public disclosure, Raytheon argues that the information in the public domain was too vague and incomplete to enable anyone to reproduce the system without costly trial **[**24]** and error experimentation. Defendant presented expert testimony in support of this view. Nevertheless, the jury was not required to believe the defendant's evidence. *See* Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 885 (1st Cir. 1966). Although Donadio's testimony was consistent with his self-interest, it was nevertheless based upon his personal knowledge and expert opinion founded on over 20 years of experience in chemical vapor deposition. Moreover, on cross-examination, the defendant's experts admitted that many of the details claimed to be trade secrets would occur as logical, if not obvious, choices to a competent engineer designing a system. Under these circumstances, it is not for this Court to judge the credibility of witnesses. The jury, therefore, was entitled to, and apparently did, rely upon and give credence to the plaintiffs' evidence over that of the defendant.

Also significant, as to both the existence of trade secrets and the issue of bad faith, was Raytheon's failure to follow its own established procedures for the protection of trade secrets. For example, despite a written policy that all confidential drawings and documents were **[**25]** to be stamped with a restrictive legend warning of the document's confidential nature, none of the engineering drawings for the cvd furnaces was stamped or marked with any restrictive legend. Furthermore, there was no evidence that Donadio or Connolly took any engineering drawings with them when they left Raytheon. Indeed, there was evidence, albeit inconclusive, tending to suggest that Raytheon had altered drawings after the commencement of this litigation to conform to CVD drawings.

There was also sufficient evidence for the jury to conclude that Raytheon had made a policy decision not to protect at least certain aspects of the cvd process. For example, Raytheon's patent department instructed Raytheon's engineering personnel that an "invention **[***13]** disclosure should be submitted on every new or improved device, system, method or composition of matter . . . which is more than routine engineering." These forms were reviewed by a committee and a determination was made as to how they should be protected. The disclosures were then assigned a status code reflecting the committee's determination. Code 3 meant that the item should be protected as a trade secret. Code 2 indicated that a patent **[**26]** application would not be filed, and that the item was not to be protected as a trade secret. Items that were designated for protection as trade secrets were filed in a file section referred to as the "trade secrets drawer."

Evidence introduced at trial indicated that no invention disclosures relating to the manufacture of zinc selenide or zinc sulfide by the cvd process were ever designated for protection as a trade secret. Moreover, nothing related to ZnS/cvd or ZnSe/cvd was found in the "trade secrets drawer." It appears that the only invention disclosure relating to ZnSe/cvd was filed in 1973, prior to the development of Raytheon's more advanced furnaces. This disclosure was classified status code 2, *i.e.*, "Do not protect."

Raytheon introduced evidence tending to minimize the significance of these facts. Nevertheless, the jury could properly and fairly have drawn the inference that, since Raytheon did not follow its formalized procedures in protecting ZnS/cvd and ZnSe/cvd technology, it did not have the intention to maintain the technology as a trade secret.

Other evidence that would tend to prove bad faith includes the fact that Reynolds asserted trade secrets, and threatened **[**27]** litigation, after only a cursory investigation without thoroughly examining the majority of the government reports or the extent of public disclosure. Reynolds also refused to give Cohen a list of claimed secrets. From this, the jury could have inferred that **[*854]** Reynolds could not make such a list because he knew that there were no secrets. There was also testimony that Cohen pointed out to Reynolds that all the items Reynolds claimed were trade secrets at their January 22, 1980 meeting were in fact published in the government reports.

In short, the record reveals the extensive public disclosure, Raytheon's failure to follow its own procedures for trade secret protection, its refusal to specify trade secrets in asserting its claims or in the agreement, and its insistence on a flat ten-year term at 15% and 8% royalty rates. In light of these facts, the jury could have concluded that Raytheon knew it had no trade secrets, yet nevertheless asserted them in bad faith in order to restrain competition and monopolize the ZnS/cvd and ZnSe/cvd markets.

Hot Isostatic Pressing

Raytheon included in its counterclaim a cause of action for misappropriation of trade secrets related **[**28]** to the processing of zinc sulfide by hot isostatic pressing (hipping). Hot isostatic pressing involves subjecting a material to extremely high pressures of up to 30,000 pounds per square inch at a high temperature. Under the proper conditions, the process will improve the transparency of zinc sulfide, thereby enhancing its optical quality.

Raytheon alleges that CVD induced its hipping contractor, Industrial Materials Technology, Inc. (IMT), to reveal Raytheon's trade secrets in hipping, specifically its run conditions and its use of platinum foil to wrap the zinc sulfide. In response to a special interrogatory, the jury found that Raytheon had no trade secrets in the hipping process. Raytheon contends that it established this claim as a matter of law, and that it is therefore entitled to judgment n.o.v. or a new trial on this claim. The defendant also requested that the district court make findings pursuant to *Rule 49(a) of the Federal Rules of Civil Procedure*, and grant injunctive relief, which the district court refused.

Dr. Charles Willingham, a Raytheon employee, testified that Raytheon's use of platinum foil was unique and confidential. Raytheon also introduced evidence that **[**29]** IMT had made a common hipping run of Raytheon and CVD materials.

Donadio, however, testified that he had never requested either a common run with Ratheon or that IMT reveal Raytheon run conditions. He also testified that, basically, he relied on Dr. Peter Price, the president of IMT, who was a leading expert on hipping, to determine run conditions. The plaintiffs also presented evidence that, by 1979, hipping to improve transparency was well known in the scientific community.

Although Donadio and Connolly were aware that zinc sulfide was being hipped by Raytheon, they were never informed of specific run conditions while at Raytheon. The pressure and temperature levels of the hipping run were determined by IMT's capacity and zinc sulfide's chemical properties, respectively. The use of platinum foil, Donadio testified, was Dr. Price's suggestion. Melvin Mittnick, a former IMT employee, testified that IMT had used platinum foil wrap in hipping other types of materials.

In regard to the hipping issue, we also find that there was sufficient evidence to support the jury verdict. In response to the defendant's *Rule 49(a)* motion, the district judge found that the jury determination that **[**30]** Raytheon had **[***14]** no trade secrets in the hipping process precluded him from making further findings of fact or granting Raytheon any relief on this issue. Although he noted that he would have found that the use of platinum foil constituted a trade secret of Raytheon, he properly deferred to the jury's assessment of the evidence.

Reliance

Defendant Raytheon argues strenuously that reliance is a necessary element to establish a cause of action against it. Since the plaintiffs did not rely on any of Raytheon's misstatements, and entered into the agreement while represented by **[*855]** competent counsel, Raytheon contends that plaintiffs are precluded from relief. In an action to rescind the contract or recover damages on a theory of fraud, under Massachusetts law, this contention might have merit. *See* *Metropolitan Life Ins. Co. v. Ditmore, 729 F.2d 1, 4 (1st Cir. 1984)*; *Liberty Leather Corp. v. Callum, 653 F.2d 694, 699 (1st Cir. 1981)*; *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 577 F. Supp. 1281, 1287 (D.Mass. 1983)*. Nevertheless, it is clear that **[**31]** ***HN18***[] the policies expressed in the federal antitrust laws will override any agreement in contravention of those policies, regardless of the agreement's legality under private contract law. *See* *Simpson v. Union Oil Co., 377 U.S. 13, 18, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*; *Wegmann v. London, 648 F.2d 1072, 1074 (5th Cir. 1981)*; *Cf.* *Lear, Inc. v. Adkins, 395 U.S. 653, 23 L. Ed. 2d 610, 89 S. Ct. 1902 (1969)*.

It is also well established that ***HN19***[] the federal interest in the "full and free use of ideas in the public domain" will override state law in conflict with it. *Lear, Inc. v. Adkins, 395 U.S. 653, 668, 674, 23 L. Ed. 2d 610, 89 S. Ct. 1902 (1969)*. *Cf.* *Dynamics Research Corp. v. Analytic Sciences Corp., 9 Mass. App. Ct. 254, 278, 400 N.E.2d 1274, 1288 (1980)* (an "agreement which seeks to restrict the employee's right to use an alleged trade secret which is not such in fact or in law is unenforceable as against public policy").

In *Lear, Inc. v. Adkins, 395 U.S. 653, 23 L. Ed. 2d 610, 89 S. Ct. 1902 (1969)*, **[**32]** the Supreme Court held that the policies underlying the federal patent laws outweighed principles of state contract law when a patent licensee wished to challenge the validity of the licensed patent. Thus, the Court held that a licensee was not estopped from challenging the validity of its patent in court, and rescinding the licensing agreement if successful.

In this case, the jury found that Raytheon had no trade secrets in its cvd process. The jury further found that Raytheon knew it had no trade secrets, yet asserted their existence in order to exact a licensing agreement from CVD and restrain competition.

Donadio and Connolly testified that, although they believed that no trade secrets existed, they agreed to sign the licensing agreement with Raytheon because they had no alternative. Donadio testified that threatened litigation with Raytheon would have foreclosed them from obtaining financing for their new company. Thus, the plaintiffs testified, the threat of litigation with Raytheon would have effectively prevented them from entering into the business. Both men had been asked to resign from Raytheon and were unemployed. However, since they did not believe that Raytheon possessed **[**33]** any trade secrets, there was no evidence that they "relied" on any material misrepresentation in entering into the license. Nor do these facts establish duress to the extent that the plaintiffs were placed "'under the influence of fear as preclude[d] [them] from exercising free will and judgment.'" *See*

Coveney v. President & Trustees, 388 Mass. 16, 23, 445 N.E.2d 136, 140 (1983) (*quoting* *Avallone v. Elizabeth Arden Sales Corp., 344 Mass. 556, 561, 183 N.E.2d 496, 499 (1962))*.

HN20[] Essentially, fraud under Massachusetts law is derived from the common law tort of deceit or misrepresentation. The practice at issue in this case, the assertion of claims in bad faith, is a predatory practice under the antitrust laws. As a cause of action, it descends directly from the *Walker Process* case and its progeny. Under the antitrust laws, plaintiffs need not necessarily be deceived. They are often simply the victims of the predatory practices of a powerful competitor who seeks to restrain competition or monopolize the market. The assertion of trade secret claims **[**34]** in bad faith has been identified as a predatory practice. *See* *A. & E. Plastik Pak, supra, 396 F.2d at 715*. Thus, the behavior complained of in this case is properly analyzed according to established principles of ***antitrust law***, rather than under a common law fraud theory of action. Reliance, therefore, is not an essential element to be proven.

[*856] In *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)*, the Supreme Court held that ***HN21***[] the defense of *in pari delicto* is not a defense to an antitrust complaint. In that case, the Court held that the plaintiff-franchisees were not barred by their voluntary entry into the franchise agreements from maintaining an antitrust action against the defendant franchiser. The court found that:

> Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought **[**35]** the franchises enthusiastically but they did **[***15]** not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity.

Id. at 139 (emphasis added).

The defendant's conduct in this case presents a more sharply drawn example of overreaching. The plaintiffs objected strenuously to the terms of the agreement, and to the necessity for any license at all. Indeed, unlike the plaintiffs in the *Perma Life* case, who received substantial benefits in return for acquiescing to the agreements' allegedly anti-competitive terms, the plaintiffs here received no benefit from the agreement other than the right to use non-existent trade secrets and Raytheon's promise not to engage in bad-faith litigation.

It should be noted that in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, the Supreme Court partially overruled **[**36]** *Perma Life* to the extent that the *Perma Life* Court relied on an intra-enterprise conspiracy among a parent corporation and its subsidiaries as a "combination" in restraint of trade. The Court did not question its earlier rejection of the *in pari delicto* defense in antitrust actions, and specifically noted that the intra-enterprise conspiracy doctrine was not essential to the *Perma Life* decision and was "at most only an alternative holding." __U.S. at__, 104 S. Ct. at 2739. The *Copperweld* decision does not affect the conclusion that the doctrine of *in pari delicto* "is not to be recognized as a defense to an antitrust action." *Perma Life, supra, 392 U.S. at 140*. Indeed, the *Copperweld* Court reiterated that ***HN22***[] an agreement between a plaintiff and a defendant clearly may serve as the basis of *section 1* complaint. __U.S. at__ & n.9, *104 S. Ct. at 2738-39* & n.9.

Several courts have held that ***HN23***[] a plaintiff's complete, voluntary, **[**37]** and substantially equal participation in an allegedly illegal scheme precludes recovery for antitrust violations. *See, e.g.,* *THI-Hawaii, Inc. v. First Commerce Financial Corp. 627 F.2d 991, 995 (9th Cir. 1980)*; *Wilson P. Abraham Const. Corp. v. Texas Indus., Inc., 604 F.2d 897, 902 (5th Cir. 1979)*, *aff'd sub nom.* *451 U.S. 630, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)*; *Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 16 (4th Cir. 1971)*. The complete involvement defense is premised upon the "equitable consideration of preventing a windfall gain from the plaintiff's own wrongdoing." *THI-Hawaii, supra, 627 F.2d at 996*.

Although, in soliciting business, CVD held itself out as a licensee of Raytheon's proprietary technology, CVD's involvement cannot be said to be equal or complete. The evidence indicates that CVD vigorously protested the imposition of the licensing agreement only to be overwhelmed by a party in a superior bargaining position. Thus, the complete involvement defense is not applicable here. *Cf.* *Premier Elec. Constr. Co. v. Miller-Davis Co., 422 F.2d 1132, 1138* (7th **[**38]** Cir.), *cert. denied*, *400 U.S. 828, 91 S. Ct. 56, 27 L. Ed. 2d 58 (1970)*.

[*857] In support of its position, Raytheon cites *Transitron Electronic Corp. v. Hughes Aircraft Co., 649 F.2d 871 (1st Cir. 1981)*. In *Transitron*, this court considered whether a patent licensee could recover royalties already paid to a licensor when the licensing agreement is declared invalid. We held that ***HN24***[] a licensee must establish actual fraud on the part of the licensor against the licensee in order to recover back royalties. This holding was based upon "patent law policies and on the equities between licensor and licensee." Under a less stringent standard, a licensee would have "an incentive to delay challenging the patent, enjoying the competitive advantage of the license and avoiding the necessity of defending an infringement suit, secure in the knowledge that he could recoup his royalty cost later." *Id. at 875*. Allowing recovery of back royalties for gross negligence or so-called "technical" fraud would inject undue uncertainty into the royalty **[**39]** system. An honest, though negligent, licensor could be subjected to ruinous liability after the licensee had received the benefits of the license.

The present case is clearly distinguishable from *Transitron*. No royalties have been paid under the agreement. More significantly, in *Transitron* the district court found that the defendant had a "good faith belief" in the validity of the patent. *Id. at 878*. In this case, in addition to the essential elements of an antitrust claim, the jury found that Raytheon's assertion of trade secrets was in bad faith.

Raytheon also relies on *Aronson v. Quick Point Pencil Co., 440 U.S. 257, 59 L. Ed. 2d 296, 99 S. Ct. 1096 (1979)*. In *Aronson*, the defendant had invented a new form of keyholder and applied for a patent. While the patent application was pending, the defendant entered into a licensing agreement with the plaintiff relating to her design. The agreement provided that the plaintiff-licensee would pay royalties of 5% of gross sales for use of the defendant's design. In the event that a patent was not obtained within five years, the royalty was to be reduced to 2 1/2% of gross sales. After the **[**40]** patent application was rejected, the plaintiff sought a declaratory **[***16]** judgment that the royalty agreement was unenforceable.

The Supreme Court held that the agreement was not in conflict with federal patent law and was therefore valid and enforceable. The Court reasoned that the parties anticipated the risk that the patent would not issue, and specifically provided for this risk in the agreement. As consideration, the licensee received the benefit of inventor's new design immediately upon entering into the agreement, and was able to exploit the novelty of the device. The contract, the Court found, encouraged the federal interest in full disclosure of inventions or innovations. Therefore, the Court upheld the validity of the contract.

The *Aronson* case is clearly inapposite to the instant case. In *Aronson*, the parties, in good faith, made a bargain in which they considered and specifically provided for the risk of the patent application's failure. In return for the promise to pay royalties, the licensee was entitled to exploit immediately the licensor's novel invention. In this case, the plaintiff CVD received as consideration only Raytheon's forbearance from litigation, litigation **[**41]** that would have been conducted in bad faith. Since the jury found that Raytheon knew it had no trade secrets and that it asserted them in bad faith, there was no valid consideration for CVD's promise to pay royalties. The fact that CVD refused to pay any royalties under the agreement does not alter this result.

Antitrust Injury

As an additional defense, Raytheon argues that the plaintiffs did not suffer the type of injury that the antitrust laws were designed to prevent. *See* *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

[*858] In *Brunswick*, the Supreme Court explained that ***HN25***[] an antitrust plaintiff must prove more than injury causally related to an antitrust violation. A plaintiff must prove that its injury flowed from the anti-competitive nature of the defendant's acts:

> Plaintiffs must prove *antitrust* injury, which is to say **[**42]** injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. [100] at 125

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429 U.S. at 489, 97 S. Ct. at 697-698 (emphasis in original) (footnote omitted). *See Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 12 (1st Cir. 1979)*, *cert. denied*, *446 U.S. 983, 100 S. Ct. 2964, 64 L. Ed. 2d 839 (1980)*.

In effect, the evidence indicates that Raytheon gave Donadio and Connolly three choices: (1) defend a trade secrets infringement suit against Raytheon; (2) refrain from competing with Raytheon in the manufacture of ZnS/cvd and ZnSe/cvd; or (3) take a license from Raytheon for the use of alleged trade secrets. All of the choices would have had an adverse economic impact on the plaintiffs, as well as an anticompetitive effect. Indeed, the first two alternatives would have been fatal to CVD's existence **[**43]** as a viable concern. Since Raytheon asserted its claim in bad faith, with the intent to restrain competition, it is the type of offense the antitrust laws are designed to prevent. The injury to CVD, legal expenses incurred in attempting to resolve Raytheon's bad faith claims, reflects the anticompetitive effect of acts with an anticompetitive intent. *See Handgards II, supra, 743 F.2d at 1297*; *Kearney & Trecker Corp. v. Cincinnati Milacron, Inc., 562 F.2d 365, 374 (6th Cir. 1977)*.

In *Handgards II, supra*, an antitrust case based on the bad faith assertion of patent claims, the defendant argued that its earlier offers to license the plaintiff precluded a finding of antitrust injury. The Ninth Circuit rejected this contention finding that, ***HN26***[] while licensing offers may be considered as evidence of good faith, "any offer to license a patent that it knew was invalid cannot preclude a finding of antitrust injury as a matter of law." *Id. at 1295*. The court, therefore, upheld the award of legal fees expended in defending bad faith **[**44]** litigation as a proper element of antitrust damages.

The fact that the plaintiffs here succumbed to the defendant's pressure in order to establish themselves as a manufacturer of ZnS/cvd and ZnSe/cvd does not deprive them of standing under the antitrust laws. Thus, we find that the district court properly upheld the jury's award of $1,060 for legal expenses incurred in attempting to resolve the original dispute with Raytheon.

Instructions to the Jury

Raytheon also assigns as error the district judge's failure to instruct the jury that the inability of other firms to obtain comparable results in manufacturing ZnS/cvd and ZnSe/cvd is evidence that tends to show the existence of trade secrets in Raytheon's process and machinery. As indicated previously, the **[***17]** inability of competitors to reproduce a product or process tends to prove the existence of trade secrets. *See, e.g., Curtiss-Wright Corp., supra, 381 Mass. at 11, 407 N.E. 2d at 326*, *Eastern Marble, supra, 372 Mass. at 839, 364 N.E. 2d at 802*; *Junker v. Plummer, 320 Mass. 76, 78, 67 N.E.2d 667, 668 (1946)*. Nevertheless, counsel for Raytheon did not properly object to the **[**45]** omission of this instruction, and, therefore, ***HN27***[] pursuant to *Rule 51 of the Federal Rules of Civil Procedure*, the failure to include the requested instruction cannot constitute reversible error.

Rule 51 in pertinent part provides:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly **[*859]** the matter to which he objects and the grounds of his objection.

Fed. R. Civ. P. 51. "We have held that *Rule 51* means what it says: the grounds for objection must be stated 'distinctly' after the charge to give the judge an opportunity to correct his error." *Jordan v. United States Lines, Inc., 738 F.2d 48, 51 (1st Cir. 1984)*. *See* *Ouimette v. E.F. Hutton & Co., Inc., 740 F.2d 72, 75-76 (1st Cir. 1984)*; *McGrath v. Spirito, 733 F.2d 967, 968-69 (1st Cir. 1984)*. Reading a list of the numbers of the requested instructions is not sufficient to preserve an objection under *Rule 51*. *See* *Charles A. Wright, Inc. v. F. D. Rich Co., 354 F.2d 710, 713* **[**46]** (1st Cir.), *cert. denied*, *385 U.S. 890, 17 L. Ed. 2d 122, 87 S. Ct. 14 (1966)*. What occurred in this case illustrates the necessity of requiring a strict interpretation and adherence to this rule.

In this case, the trial judge indicated to counsel at a conference after the close of evidence that he intended to give Raytheon's requested instruction, number 12, over the plaintiffs' objection. The next day, however, the district judge did not mention this instruction in instructing the jury. When the district judge finished instructing the jury, he asked counsel for their objections. Counsel for Raytheon objected to, among other things, the court's failure to give requested instructions "12, 16, 17, 18, 19, 20, and 21 [which] refer to the duty of an employee not to disclose, irrespective of the trade secret category . . . confidential information." It is apparent that this objection did not state "distinctly" the matter to which counsel objected or "the grounds of his objection." Indeed, it indicated a basis entirely unrelated to its present objection. Thus, it is impossible for this Court on appeal to know whether the district judge reconsidered his original decision **[**47]** that this instruction was proper, or simply omitted this instruction through inadvertence. By failing to state distinctly the grounds of his objection, as required by *Rule 51*, counsel for Raytheon deprived the district judge of the opportunity to correct his instructions before the jury retired. Therefore, any resulting error cannot be the basis for a reversal on appeal.

Resubmission to the Jury

Raytheon also attacks the jury's damage award on the grounds that the damages interrogatory was improperly resubmitted to the jury after it returned an improper verdict, and that the district judge prejudiced Raytheon by informing the jury that the court would award attorney's fees if damages were awarded.

In response to the original damages interrogatory, the jury answered "Damages equal to all legal fees and court costs incurred in connection with this suit." The court indicated that this answer was not acceptable, and that the jury must reconsider and return with a proper reply. Raytheon's counsel objected to the resubmission to the jury, contending that the original answer should be construed as a finding of no damages. The court, however, found that the jury verdict was ambiguous **[**48]** in that the jury might have meant to include the $1,060 in legal fees, which related to the original trade secret claims in early 1980. The trial judge noted for the record that some jurors nodded affirmatively when he mentioned this in his resubmission instructions.

It is well-established that ***HN28***[] the court should ask a jury to correct its verdict when the jury has failed to follow the court's instructions in returning a verdict. *See, e.g.,* *Merchant v. Ruhle, 740 F.2d 86, 91 (1st Cir. 1984)*; *Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986, 990 (1st Cir. 1978)*. Since it was reasonable for the court to have construed the verdict as being ambiguous, it was properly resubmitted to the jury. The court's instructions upon resubmission were correct, and included the possibility of a finding of zero or no damages.

Finally, Raytheon argues that the damages award should be overturned because the jury was informed that the court would award attorneys' fees and treble damages if damages were awarded. **[*860]** The defendant made no objection at the trial. **[**49]** While it is generally not advisable to inform a jury of the treble damages or attorneys' fees provisions of the antitrust laws because of the danger that a jury may reduce a plaintiff's award to account for trebling, *see* *Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240, 1243 (5th Cir. 1974)*, *cert. denied sub nom. 420 U.S. 992, 95 S. Ct. 1427, 43 L. Ed. 2d 673 (1975)*, any error that may have occurred was not preserved by timely objection. This court **[***18]** has held that ***HN29***[] the jury is presumed to have followed the instructions of the court. *Kukuruza v. General Elec. Co., 510 F.2d 1208, 1218 (1st Cir. 1975)*. The district judge made it clear that legal fees were a matter for the court, and not within the discretion of the jury. In this case, the jury was given proper instructions and returned a proper verdict on resubmission. We, therefore, uphold the damages awarded to plaintiffs.

Conclusion

Our review of the record leads us to conclude that there was sufficient evidence to support the jury's findings of fact. The exaction of a **[**50]** licensing agreement through the bad faith assertion of trade secrets by a party in a far superior bargaining position with the intention of restraining competition and monopolizing the market is a violation of the antitrust laws. The damages awarded were a direct and foreseeable result of the anticompetitive conduct of the defendant, and, therefore, were proper.

Hence, we affirm the jury's verdict on the plaintiff's antitrust claims and the dismissal of the defendant's counterclaim. Each party shall pay its own costs on appeal. The appellees are awarded costs. The district court shall award a reasonable attorneys fee for services on appeal to the plaintiffs-appellees in accordance with *15 U.S.C. § 15*.

Turner v. Johnson & Johnson

United States Court of Appeals for the First Circuit

December 31, 1986

Nos. 86-1211, 86-1212

Reporter
809 F.2d 90 *; 1986 U.S. App. LEXIS 36602 **; 1986-2 Trade Cas. (CCH) P67,392

ROBERT B. TURNER, ET AL., Plaintiffs, Appellants, v. JOHNSON & JOHNSON, ET AL., Defendants, Appellees; ROBERT B. TURNER, ET AL., Plaintiffs, Appellees, v. JOHNSON & JOHNSON, ET AL., Defendants, Appellees; JOHNSON & JOHNSON and CHARLES M. HARTMAN, Defendants, Appellants

Prior History: [1]** APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, Hon. John J. McNaught, U.S. District Judge.

Core Terms

thermometer, patent, negotiations, plaintiffs', district court, electronic, parties, contractual, pulse-counting, fraud claim, reassign, alleged misrepresentation, new trial, fraudulent, promise, no obligation, antitrust, marketing, royalties, stock, side agreement, matter of law, disposable, omissions, misrepresentations, deceptive, display, terms

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN1[] **Judgment as Matter of Law, Judgment Notwithstanding Verdict**

The standard for setting aside a jury verdict is a rigorous one. The court may only do so if the facts and inferences, when viewed in the light most favorable to the party for whom the jury held, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN2[] **Contract Conditions & Provisions, Integration Clauses**

A party may not contract out of fraud.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Contracts Law > Contract Interpretation > General Overview

HN3[] **Affirmative Defenses, Fraud & Misrepresentation**

A balance must be struck between two competing values: contractual certainty and protecting innocent parties from fraud. The court must weigh the advantages of certainty in contractual relations against the harm and injustice that result from fraud.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Contracts Law > Contract Interpretation > General Overview

HN4[] **Affirmative Defenses, Fraud & Misrepresentation**

The threat to contractual certainty usually would outweigh the possible injustice of denying a claim of fraud.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN5[] **Fraud & Misrepresentation, Nondisclosure**

A mere nondisclosure is not actionable.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review

HN6[] **Trials, Judgment as Matter of Law**

To uphold a grant of a directed verdict, the court must find that, viewing the evidence and all reasonable inferences in favor of the opposing party, reasonable jurors could come to but one conclusion.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN7[] Regulated Practices, Trade Practices & Unfair Competition

A seller of a business lacks standing to sue for antitrust violations when its alleged injury was not antitrust injury; in other words, when the injury did not result from an unreasonable effect on competition as distinguished from its effect on a particular competitor.

Counsel: Joseph M. Alioto and Daniel R. Schulman with whom Gray, Plant, Mooty, Mooty & Bennett, Alioto & Alioto, Jerry Cohen, Cohen & Burg and Joseph S. Iandiorio were on briefs for Robert B. Turner, et al.

Frederick T. Davis with whom Lynn P. Freedman, Howard S. Schrader, Riemer & Braunstein and Patterson, Belknap, Webb & Tyler were on brief for Johnson & Johnson and Charles M. Hartman.

Judges: Coffin, Circuit Judge, Wisdom [*] and Aldrich, Senior Circuit Judges.

Opinion by: COFFIN

Opinion

[*92] COFFIN, Circuit Judge.

This case arises from defendant Johnson & Johnson's purchase of an electronic thermometer business from plaintiffs. A jury awarded plaintiffs $4 million on their claim of common law fraud arising from the sale, but the district court ruled or found for Johnson & Johnson and several of its executives on all other claims, including one for statutory fraud. Each side appeals the decisions adverse to them. We conclude that defendants are entitled to prevail on all but one aspect of the appeals, **[**2]** and as to this we remand for a new trial. [1]

I.

The essence of plaintiffs' claim is that they were induced into selling their thermometer business at far below its value by various misrepresentations and omissions made by Johnson & Johnson during the negotiations process. Plaintiffs claim that Johnson & Johnson defrauded them in order to eliminate plaintiffs' thermometer as a competitor to another thermometer in which Johnson & Johnson had an interest. We begin by examining in some detail the facts surrounding the transaction between the two parties.

Johnson & Johnson Acquires AMEC.

Plaintiffs are the three principals of American Medical Electronics Corporation (AMEC). Robert Turner, an inventor, founded AMEC in 1971 to manufacture and distribute an electronic thermometer called Meditemp. [2] Gordon Ramsey was AMEC's **[**3]** principal attorney, a corporate director, a shareholder and, at times, an officer. Charles Johnston is an investor who, in 1975, held a majority of AMEC's stock. **[*93]** These three men represented AMEC in its negotiations with Johnson & Johnson.

Johnson & Johnson, which sells a variety of disposable products to hospitals and doctors' offices through its patient care division, learned of Meditemp in September 1975 and explored the possibility of acquiring an interest in the product. By that time, AMEC was deeply in debt and unable to pay its bills, although it had a backlog of orders for

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[*] Of the Fifth Circuit, sitting by designation.

[1] The defendants in this appeal are the company and executive Charles M. Hartman. The jury found for Thomas E. Taylor, and the district court granted a judgment n.o.v. for Gene E. Hollen.

[2] Electronic thermometers provide digital displays of a patient's temperature.

the Meditemp thermometer. The parties engaged in extensive negotiations from January through June 1976. Their contact included face-to-face meetings, telephone calls, memos, and the exchange of several versions of a contract. A final agreement was signed on June 17, 1976.

The agreement provided plaintiffs with a lump sum cash payment of about **[**4]** $1 million, guaranteed minimum royalties of $300,000 paid out in $75,000 installments, and, if Johnson & Johnson marketed Meditemp, additional royalties on the sale of probe covers used with the thermometer. Johnson & Johnson also had the option, within a certain period of time, of reassigning the original assets to AMEC in lieu of the remaining royalty payments. Section 12.1 of the contract specified that Johnson & Johnson had no obligation to market Meditemp. That section stated, in part:

> J&J . . . makes no representation or warranty that it will market a thermometer hereunder, or, if J&J does market a thermometer hereunder or . . . that such product will be the exclusive means by which J&J attempts to enter or participate in the temperature-taking field. J&J shall not be obligated to use its best efforts in marketing a thermometer hereunder. All business decisions, including without limitation the design, manufacture, sale, price and promotion of a product or products marketed under this Agreement shall be within the sole discretion of J&J.

Section 12.2 stated that the company was not actively pursuing any other invention in the electronic thermometer field with **[**5]** two exceptions: the patient care division was attempting to develop a disposable probe for electronic thermometers and a subsidiary company was pursuing another electronic thermometer.

Johnson & Johnson began marketing Meditemp in mid-1978. In the fall of 1979, the patient care division decided to withdraw from the sale of Meditemp. Plaintiffs were notified and discussions ensued about the future of the Meditemp business, including whether plaintiffs or a third party would take it over. No agreement was reached, and in August 1980, Johnson & Johnson shut down the Meditemp plant despite demands from plaintiffs that Johnson & Johnson not do anything to interfere with Meditemp as a "going business." Johnson & Johnson assigned the original AMEC patents to plaintiffs, but withheld the physical assets as a setoff against the company's counterclaims in this lawsuit.

The Survalent Thermometer.

In 1974, a Johnson & Johnson subsidiary, Arbrook, Inc., had signed an option agreement for another electronic thermometer, called Survalent. Survalent is a large unit that uses a rechargeable battery and functions with a separate recharging unit. It is designed to be worn around the neck on **[**6]** a strap, allowing the numbers to be read easily by an observer. In these respects, Survalent resembles the IVAC thermometer, the leading electronic thermometer on the market. In contrast, Meditemp is a small, hand-held unit. Although Meditemp can be used with a neck strap, the digital display cannot be read by an observer while the unit is hanging around the neck because the display faces forward rather than up. Meditemp uses a disposable battery and has no separate recharging unit.

A similarity between the two thermometers emphasized by plaintiffs is the instruments' ability to allow nurses to monitor pulse rates while taking temperatures. This feature is possible because the digital display counts seconds during the 30-second interval in which the thermometer measures temperature.

Arbrook purchased Survalent in 1977 and began national distribution in January **[*94]** 1979, six months after Johnson & Johnson launched Meditemp. The Survalent project was dropped later in 1979.

The Patent Interference Proceeding.

In February 1976, a Johnson & Johnson patent attorney noticed an apparent overlap between one claim of the Meditemp patent and a claim in the Survalent patent **[**7]** application; the overlap related to the pulse-counting feature of the thermometers. At that time, the Meditemp patent had been issued but the Survalent patent was still in application form. The Johnson & Johnson attorney brought the overlap to the attention of Survalent's attorneys, and Survalent's owners subsequently requested a patent interference, an administrative proceeding in which the Patent Office would determine who invented the pulse-counting function first and thus who was entitled to hold a patent on it.

By the time the patent proceeding began, in March 1977, Johnson & Johnson owned both patents. The company hired separate teams of lawyers to litigate each side in the interference. Although the Survalent application had been filed first, the Meditemp patent was awarded priority.

The Alleged Fraud.

Although plaintiffs raise a number of alleged fraudulent statements and omissions in their brief to us, we confine our consideration to the four specific statements and the series of nondisclosures on which the case went to the jury. [3] These deceptive practices allegedly took place during negotiations leading up to the contract signing, and on the day of the closing. **[**8]**

These statements and nondisclosures are:

(1) That Johnson & Johnson would "(a) promote the sale of the Meditemp **[**9]** thermometer, (b) offer it to customers, and (c) educate health care professionals on how to use it."

(2) That Johnson & Johnson had no interest in any other thermometer, with the exception of Arbrook's interest in an "IVAC-type" thermometer.

(3) That the Survalent thermometer was an "IVAC-type" thermometer.

(4) That Johnson & Johnson corporate policy prevented it from paying royalties on foreign sales.

(5) That Johnson & Johnson failed to tell plaintiffs that Survalent had a pulse-counting feature, that Survalent infringed part of the Meditemp patent, that Johnson & Johnson intended to "manipulate the outcome of a patent proceeding which it created," and that Johnson & Johnson "intended to suppress Meditemp so that it wouldn't be competition for Survalent."

Procedural Background.

Plaintiffs brought suit in federal court in Massachusetts in November 1979, alleging fraud, breach of contract, deceptive practices under Mass. Gen. Laws Ann. ch. 93A, and violation of federal ***antitrust law***. The court dismissed the antitrust claim for lack of standing. A trial was held on the other claims, and the court directed a verdict for defendants on the contract claim at the conclusion **[**10]** of plaintiffs' case. The court, which heard plaintiffs' claim under chapter 93A, also found in favor of defendants on that issue. The jury returned a verdict for plaintiffs on the common law fraud claim, and awarded $4 million in damages. Although the court originally awarded prejudgment interest to plaintiffs, it later vacated that award.

[*95] Johnson & Johnson filed a motion for a new trial or judgment n.o.v., the denial of which is the basis of the company's appeal. Plaintiffs separately appeal the district court's rejection of their contract, antitrust, and chapter 93A claims, and the court's refusal to award prejudgment interest. *624 F. Supp. 830 (1985)*.

II.

We begin our legal analysis with Johnson & Johnson's assertion that the district court erred in denying the company's motion for judgment n.o.v. or new trial on the common law fraud claim. ***HN1***[] The standard for setting

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[3] As part of its instructions to the jury on the elements of a cause of action, the district court stated:

> "As I understand the alleged misrepresentations, and I interpret them from the complaint, the initial paper which instituted this action, they at least are alleged to be the following."

The court then listed the four alleged misrepresentations and the series of omissions described below. Plaintiffs objected to this instruction, claiming that the evidence showed other misrepresentations upon which the jury could base a finding of fraud. Although plaintiffs list a series of additional misrepresentations in their brief on appeal, they do not appeal the district court's limitation to the four misrepresentations and the series of omissions presented to the jury. We therefore consider the issue of whether the court properly limited the statements as outside the scope of this appeal.

aside a jury verdict is a rigorous one. We may do so only if "the facts and inferences, when viewed in the light most favorable to the party for whom the jury held, point so strongly and overwhelmingly **[**11]** in favor of the movant that a reasonable jury could not have arrived at this conclusion." *Chedd-Angier Production Co. v. Omni Publications International, 756 F.2d 930, 934 (1st Cir. 1985)*. Thus, we must find that no jury could reasonably find that all five elements of common law fraud were met with respect to the alleged misrepresentations and omissions. These elements are: (1) that the statement was knowingly false; (2) that Johnson & Johnson made the false statement with the intent to deceive; (3) that the statement was material to the plaintiffs' decision to sign the contract; (4) that the plaintiffs reasonably relied on the statement; and (5) that the plaintiffs were injured as a result of their reliance.

We conclude that only Johnson & Johnson's statements and omissions involving the Survalent thermometer could possibly meet the requirements for fraud, and thus were properly before the jury. The verdict must therefore be vacated, and a new trial held, because the jury's finding of fraud may have been based on others of the alleged misstatements or omissions. *Chedd-Angier*, 756 F.2d at 934 (new trial should be granted when "'material issues **[**12]** were improperly submitted to . . . the jury'"). We now turn to the alleged misrepresentations.

(1) *That the company actively would promote Meditemp*. The company's primary argument is that, as a matter of law, a jury may not find fraud when the alleged misrepresentations directly contradict the specific terms of a subsequently entered written contract between the parties. Johnson & Johnson's theory is that when the written contract refutes the alleged oral misrepresentations, there can be no reasonable reliance on those prior statements. Thus, in this case, because section 12.1 of the contract specifically provided that Johnson & Johnson had no obligation to market Meditemp, plaintiffs could not reasonably rely on an oral promise that the company actively would promote the thermometer.

Plaintiffs counter that the facts of this case fall within the holding of Massachusetts cases establishing that ***HN2***[] a party may not contract out of fraud. These cases involve the use of general disclaimers or integration clauses, *see, e.g., Bates v. Southgate, 308 Mass. 170, 31 N.E.2d 551 (1941)*; **[**13]** *Connelly v. Fellsway, 270 Mass. 386, 170 N.E. 467 (1930)*; oral assertions in the face of contractual silence, *see, e.g., Sandler v. Elliott, 335 Mass. 576, 580, 141 N.E.2d 367, 370 (1957)*; *New England Foundation Co. Inc. v. Elliott A. Watrous, Inc., 306 Mass. 177, 27 N.E.2d 756 (1940)*, or other ambiguous language that was susceptible to the plaintiff's interpretation establishing fraud, *see, e.g., Kilkus v. Shakman, 254 Mass. 274, 279, 150 N.E. 186 (1926)*. *See also V.S.H. Realty, Inc. v. Texaco, Inc., 757 F.2d 411, 418 (1st Cir. 1985)* (involving "as is" clause and applying Massachusetts law).

In *Bates*, the leading Massachusetts case on this subject, the Massachusetts Supreme Judicial Court expressly rejected the notion that "a contract must be held sacred regardless of the fraud of one of the parties in procuring it," *308 Mass. at 182*, but it also recognized that ***HN3***[] a balance must be struck between two competing values: contractual certainty and **[*96]** protecting innocent parties **[**14]** from fraud. The court stated:

> As a matter of principle it is necessary to weigh the advantages of certainty in contractual relations against the harm and injustice that result from fraud. . . . The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices. In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. . . . To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law.

Id.

We have no doubt that the balance shifts when the party asserting fraud is not seeking to avoid an ambiguous or deceptive "contractual device[]," but is trying to *reverse* the precise terms of an agreement. When a contract contains an "as is" clause or other ambiguous language, the agreement is to some extent left undefined, and the plaintiff's understanding of the agreement **[**15]** logically may be colored by the defendant's prior statements, fraudulent or otherwise. Moreover, there is nothing on the face of the contract to trigger alarm. In such a case, barring a fraud claim would, in effect, allow parties to contract out of fraud.

In contrast, a contractual provision flatly contradictory to prior oral assurances should cause most people -- and particularly experienced, knowledgeable businesspeople -- to pause. Moreover, if a jury is allowed to ignore contract provisions directly at odds with oral representations allegedly made during negotiations, the language of a contract simply would not matter anymore. Even if a sales contract provided that the product for sale is old, the buyer could claim that she purchased it only because the seller said it was new. Contracts would become no more than presumptive statements of the parties' intentions, instead of legally enforceable agreements. And the give-and-take of negotiations would become meaningless if, after making concessions in order to obtain other contractual protections, a knowledgeable party is later able to reclaim what it had given away by alleging that it had, in fact, relied not on the writing but **[**16]** on the prior oral statements. Thus, in weighing the competing interests, the Massachusetts Supreme Judicial Court undoubtedly would find that ***HN4***[] the threat to contractual certainty usually would outweigh the possible injustice of denying a claim of fraud. [4]

The complication in this case is that the facts fall somewhere in between a flat contradiction and a vague general disclaimer. Section 12.1 of the contract states only that Johnson & Johnson has no obligation to market Meditemp. It does not state that the company plans to shelve the product, which would be the direct contradiction to an alleged promise to actively market Meditemp. Thus, on the one hand, as in the case of an "as is" clause, there is no inherent conflict between the oral promise to promote the product and the written agreement imposing no obligation on Johnson & Johnson. Although **[**17]** Johnson & Johnson contractually had the right to shelve Meditemp, plaintiffs' understanding of the significance of that provision unquestionably could have been colored by an oral promise that, despite its lack of legal obligation, Johnson & Johnson intended to fully promote the product. On the other hand, this is not a situation where the complaining party had no notice that the deal was not as anticipated. Unlike a case involving an "as is" clause, plaintiffs here specifically negotiated the contested issue of whether Johnson & Johnson would promote Meditemp aggressively. In effect, section 12.1 of the contract states that even if Johnson & Johnson has misrepresented its plans, **[*97]** the parties have agreed that the AMEC principals will not have legal recourse on this particular point.

We are not without guidance in determining how the Massachusetts Supreme Judicial Court would view this type of fraud claim. In *Plumer v. Luce, 310 Mass. 789, 39 N.E.2d 961 (1942)*, the plaintiff transferred $17,000 worth of stock to the defendant. The plaintiff alleged that the defendant fraudulently misrepresented what he intended to do with the stock. She claimed that he **[**18]** promised to act as her broker, buying and selling stocks for her when, in fact, he intended to sell the stock and use the proceeds for his own living expenses. The letter of agreement she signed stated, however, in relevant part:

> Before you consent to accept my note for three years in consideration of the loan of $17,000 I want to be sure that you fully understand the implications of the transaction. . . . It is my intention, as you know, to use the moneys received from you in return for my note in the purchase and sale of stock. You must understand, however, that in the event that you decide to accept my note I shall be under no obligation so to do and if I do you will have no claim upon the stock itself but your sole claim will be against me personally for the repayment of the money which you loan me. In other words this transaction amounts to nothing more than a loan by you to me and my obligation to you created by this note will be solely a contractual relation. I want it further understood in the event that you decide to make me the loan that you are relying upon no representations other than are herein stated.

Id. at 794. In rejecting the **[**19]** plaintiff's fraud claim, the court stated:

> The contention of the plaintiff as to the alleged misrepresentation comes down to this: that she is now seeking to turn one of the terms of a proposed 'arrangement' into a misrepresentation of material facts upon which she had a right to rely, and did rely to her damage, so that she may have voided an entirely different contract that she made. The agreement that [plaintiff] signed may not read very much like what she says the proposed arrangement was, but . . . we are of opinion that she cannot rightly contend that one of the terms of a proposed

[4] Speculating on exceptions, however, would serve no present purpose.

> agreement that never came into existence can be used as a basis upon which to bring the case at bar within the case of [Bates v. Southgate, 308 Mass. 170, 31 N.E.2d 551](#).

We recognize that there are differences between *Plumer* and the present case. A party who signs an agreement like the one in *Plumer* containing an express disclaimer of the immediately preceding statement of intention perhaps should be deemed to have more notice of the other party's possible failure to do the intended act than the plaintiffs in the case before us, where the language of "no **[**20]** obligation" is not juxtaposed with the alleged misrepresentation. In addition, in *Plumer* the court noted that the plaintiff's conduct after signing the agreement tended to show that she considered the defendant's note as the basis of any claim, suggesting that she regarded the agreement that she signed as in effect.

Nevertheless, the situations are substantially similar. We therefore conclude that the Massachusetts Supreme Judicial Court would reject as a matter of law plaintiffs' fraud claim based on Johnson & Johnson's alleged promise to aggressively market Meditemp. Certainly in this case, where both parties were experienced in business and the contract was fully negotiated and voluntarily signed, plaintiffs may not raise as fraudulent any prior oral assertion inconsistent with a contract provision that specifically addressed the particular point at issue. While we do not condone misrepresentations in contract negotiations, we also reject the notion that courts or juries should rewrite a fully negotiated contractual agreement that so precisely sets out the rights and obligations of two sophisticated parties. We do not believe this rule of law awards undue protection against **[**21]** fraud claims. It means only that a knowledgeable buyer should not sign a contract **[*98]** that conflicts with his or her understanding of the agreement.

(2) *That Johnson & Johnson corporate policy prevented it from paying royalties on foreign sales*. We have no trouble concluding that, as a matter of law, this alleged misrepresentation could not have been material to plaintiffs' decision to enter the contract. It makes no sense to say that plaintiffs were induced to enter the contract by a statement that they would *not* receive a certain benefit. Even if the statement was false, it was not actionable as a fraudulent misrepresentation.

(3) *That Johnson & Johnson was pursuing only an "IVAC-type" thermometer*. [5] This statement is false only if Survalent's pulse-counting feature makes it incorrect to describe Survalent as an "IVAC-type" thermometer. The jury heard conflicting evidence on this point. For example, Johnson & Johnson's witness, Michael Dyer, stated that "IVAC-type" was understood in the industry to designate a large, battery-charged unit with a red light display that was designed to hang around the neck -- a description that accurately describes the Survalent **[**22]** thermometer. Glen Weinberg, a former Johnson & Johnson employee who worked on the Meditemp project while at the company, testified through deposition that he would assume that an "IVAC-type" thermometer would not have a pulse-counting feature. We reproduce a brief portion of his testimony:

> Q: "If you later found out that the thermometer that was described to you as an IVAC-type thermometer had a time temperature feature, would you feel that the thermometer had been accurately described to you?"
> Witness: "No."
> Q: "Why not?"
> Witness: "I would feel that a very important part of the description was left out. . . ."

Although the thermometers displayed to us at oral argument demonstrate that "IVAC-type" unquestionably is an accurate *physical* description of Survalent, as a contrast to Meditemp we can not say as a matter of law that such a description is not deceptive as a result of what it omits about the thermometer's other characteristics. The jury heard the conflicting testimony, viewed the thermometers, and may reasonably have concluded that, in the context of this case, the statement was false.

[23]** Defendants also fail to persuade us that, even if the statement arguably was false, there was no basis upon which a jury could find the other elements of fraud. We reject the notion that any contract provision negated either

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[5] In this discussion, we consider misrepresentations (2) and (3) as listed in Section I, *supra*. The allegedly fraudulent aspect of each of those misrepresentations is the description of the Arbrook thermometer, Survalent, as an "IVAC-type" thermometer. We therefore treat these two misrepresentations as one, as did the district court.

the materiality of the "IVAC-type" statement or reasonable reliance upon it. The contract did not state that Johnson & Johnson's other electronic thermometer contained a pulse-counting feature -- a statement that would directly contradict plaintiffs' alleged interpretation of the "IVAC-type" comment, and defeat reasonable reliance. Although the contract gave Johnson & Johnson the right to market "any" other thermometer, such a blanket provision is akin to the general disclaimers that are not impervious to fraud. A jury reasonably could find that plaintiffs entered the contract on the assumption that, and largely for the reason that, Meditemp was Johnson & Johnson's only electronic thermometer project that offered a pulse-counting feature, increasing the likelihood of Meditemp's success and assuring Johnson & Johnson's loyalty to it.

Defendants also contend that because the executive who made the "IVAC-type" comment, Mr. Hartman, provided plaintiffs with enough **[**24]** information to identify the thermometer at issue as the Survalent, there is no possible inference of an intent to deceive. But the statement was uttered at the closing, at a time when plaintiffs presumably were prepared to finally conclude a long-brewing deal. In those circumstances, **[*99]** we think a jury reasonably could infer that Mr. Hartman knew that the "IVAC-type" description, along with the additional information, would allay plaintiffs' concerns sufficiently for the moment, allowing the contract to be signed. Moreover, Mr. Hartman's provision of further information made it reasonable for plaintiffs to rely on his description of the other thermometer. In essence, Mr. Hartman was telling them, "It's an IVAC-type thermometer, and here's the specific information so you can confirm that."

In a broader attack on the element of intent, defendants argue that the evidence failed to show a rational motive for Johnson & Johnson to deceive plaintiffs, and that it is therefore improper to draw inferences of fraud from defendants' conduct. Plaintiffs primarily argued that Johnson & Johnson purchased Meditemp to eliminate it as a competitor to the Survalent thermometer. Johnson & Johnson **[**25]** argues that several undisputed facts establish the irrationality of this theory, including that the company spent several million dollars to market Meditemp; that Survalent was not purchased until well after Meditemp was acquired; and that the royalty arrangement with plaintiffs gave Johnson & Johnson every economic incentive to market Meditemp if it could do so profitably.

We think this a forceful argument, and we gave serious consideration to directing the district court to grant Johnson & Johnson a judgment n.o.v. on this basis, particularly since we are dubious that a jury would find fraud based solely on the one alleged misrepresentation that we deem actionable. We decided against doing so, however, for three reasons. First, the "IVAC-type" statement is a significant one in the context of the case. Second, even if it is implausible that Johnson & Johnson intended to completely suppress the Meditemp in favor of the Survalent, we think a reasonable jury conceivably could have found that Johnson & Johnson defrauded plaintiffs into selling their business at an unfair price so that Johnson & Johnson would be able to control the marketing of these potentially competing products. Finally, **[**26]** if we must err, we choose to do so on the side of preserving plaintiffs' right to a jury trial.

Notwithstanding our reluctance to take this case from the jury on this point, we would urge the district court on remand to consider Johnson & Johnson's argument on motive and, if Johnson & Johnson can rebut through affidavits our theory and any other proposed motive offered by plaintiffs, it should consider, if filed, a renewed motion for summary judgment. *Cf.* *Goldstein v. Kelleher, 728 F.2d 32, 39 (1st Cir. 1984)* (in considering directed verdict for defendant, plaintiff is entitled to "the benefit of every legitimate inference," but "such inferences may not rest on conjecture or speculation, but rather the evidence offered must make 'the existence of the fact to be inferred more probable than its nonexistence.'") (quoting *Carlson v. American Safety Equipment Corp., 528 F.2d 384, 386 (1st Cir. 1976)*.)

Finally, we have some doubt that plaintiffs can show that they were injured as a result of reliance on the alleged misrepresentation regarding Survalent. We think it insufficient for plaintiffs to produce statistics showing that their business was worth **[**27]** more than Johnson & Johnson paid for it. Rather, plaintiffs also need to demonstrate that if they knew Survalent had a pulse-counting feature, they would have demanded more money from Johnson & Johnson, and that Johnson & Johnson would have been likely to pay a higher sum. Or they would need to show that they would have chosen not to sell the business, and that, despite their financial problems, they would have earned more from their business than they received from Johnson & Johnson. Despite our doubts, we can not say that it is impossible for a jury focusing on this issue to find that Johnson & Johnson would have paid a higher figure.

(4) *The Alleged Nondisclosures*. It follows logically from our earlier holding on Johnson & Johnson's alleged promise to **[*100]** market Meditemp aggressively that the alleged failure to tell plaintiffs that Johnson & Johnson intended to suppress Meditemp is nonactionable. Similarly, our conclusion that Johnson & Johnson's "IVAC-type" statement about Survalent *is* susceptible to a finding of fraud means the company's failure to tell plaintiffs that Survalent had a pulse-counting feature also is actionable. We conclude that the other two alleged **[**28]** omissions -- relating to the Meditemp patent and the patent proceeding -- fall within the rule enunciated in *Nei v. Burley, 388 Mass. 307, 310, 446 N.E.2d 674 (1983)*, that ***HN5***[] a "mere nondisclosure" is not actionable. [6] Although an incomplete or partial statement may be the basis for fraud when only full disclosure would avoid deception, Johnson & Johnson made no reference to the status of either Meditemp or Survalent's patents. Thus, even if patent information would have been material to plaintiffs, Johnson & Johnson was under no obligation to reveal it.

To sum up our conclusion on the issue of **[**29]** common law fraud, we hold that, unless the district court rules out the possibility of fraudulent intent as a matter of law, a new trial must be held and the jurors may consider only whether plaintiffs were fraudulently induced into entering the agreement by the statement that Survalent was an "IVAC-type" thermometer and the converse failure to disclose that the Survalent had a pulse-counting feature.

III.

Plaintiffs contend that the district court erred in directing a verdict against them on their breach of contract claim. The contract that plaintiffs allege Johnson & Johnson breached was a side agreement executed at the closing on June 17, 1976. [7] This agreement, in the form of a letter, was keyed to paragraph 2.4 of the main contract, which provided that if Johnson & Johnson ever discontinued Meditemp, the company would have the option to reassign to AMEC the assets originally purchased, and to sell or convey to AMEC, upon mutually agreed terms, additional assets related to the marketing of Meditemp. Under the terms of the side agreement, Johnson & Johnson also agreed (1) to give AMEC 90 days advance written notice of any such reassignment of assets; (2) to consign to AMEC **[**30]** "key pieces of equipment necessary to manufacture electronic thermometers and disposable probe covers, for a period of 6 months commencing with the date of such reassignment;" and, during that six-month period, to "negotiate and attempt to reach an agreement on terms and conditions for the sale of such Additional Assets to AMEC." [8]

[31]** In ruling on defendants' motion for directed verdict, the district court stated "there is an insufficiency of evidence that has been presented by plaintiffs to allow a jury to find a breach of contract in this case" and held "as a matter of law that that theory of liability cannot be advanced to a jury." ***HN6***[] To uphold a grant of a directed verdict, we must find that, viewing the evidence and all reasonable inferences in favor of the opposing party, "'reasonable jurors could come to but one conclusion.'" *Gray v. New England Telephone and Telegraph Co., 792 F.2d 251, 253 (1st Cir. **[*101]** 1986)* (quoting *Goldstein v. Kelleher, 728 F.2d 32, 39 (1st Cir. 1984))*.

The relevant facts begin with Johnson & Johnson's decision on November 13, 1979 to phase out the Meditemp business. [9] Plaintiffs were told of the decision at a meeting three days later, and the information was confirmed in writing. At the November 16 meeting, the parties discussed Johnson & Johnson's options under section 2.4 of the

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[6] To the extent that failure to reveal that Survalent infringed part of the Meditemp patent is equivalent to the failure to disclose that Survalent had a pulse-counting feature, the alleged misrepresentation is covered by the alleged nondisclosure that we already have concluded is worthy of jury determination.

[7] At trial, plaintiffs argued three bases for a breach of contract claim: (1) violation of a provision in the main contract stating that all warranties and representations were true; (2) violation of the covenant of good faith and fair dealing; and (3) failure to abide by the side agreement. Plaintiffs apparently have abandoned the first two theories on appeal.

[8] Plaintiffs seem to argue that defendants also breached a contractual agreement to return a "going business" to them. It may well be that the provisions of the side letter agreement would be valuable to plaintiffs only in the event the Meditemp business still was viable at the time of the reassignment of assets, but the contract does not assure plaintiffs that Johnson & Johnson would be returning a "going business."

[9] The description of the events leading to the shutdown of the Meditemp business is drawn largely from defendants' brief. Plaintiffs do not suggest that the significant facts are inaccurate.

contract, which were either to pay off the remaining guaranteed royalties **[**32]** or to reassign the assets as described above. The parties also discussed the possibility of a joint effort to sell the Meditemp business to a third party. No decisions were made at that time.

On January 17, 1980 the parties met again, and they specifically acknowledged that the meeting constituted negotiations under section 2.4 of the agreement. The result of the meeting was an agreement to cooperate in trying to sell the Meditemp business to a third party by July 1, 1980, at which time Johnson & Johnson would begin the actual shutdown of the Meditemp plant.

No third party sale developed. On July 16, plaintiffs demanded immediate negotiations for the purchase of the "additional assets" related to marketing Meditemp. The next day, in a conference call, plaintiffs offered to dismiss this lawsuit in exchange for all such **[**33]** additional assets and "the nondisturbance of Meditemp thermometers in the field." Johnson & Johnson refused the offer, and also refused to reassign the assets as specified in section 2.4 until plaintiffs posted a surety bond sufficient to cover the amounts claimed in Johnson & Johnson's counterclaims in the instant lawsuit. [10] Another meeting was held on July 21, 1980, but again no deal was struck.

In August 1980, Johnson & Johnson began to shut down the Meditemp business. The district court denied plaintiffs' request for a temporary restraining order preventing Johnson & Johnson from closing the business, and Johnson & Johnson then bought back and disposed of Meditemp thermometers being used in hospitals. A number of items related to the business were disposed of at the Randolph town dump. In compliance with section 2.4 of the contract, Johnson & Johnson reassigned to AMEC patents and patent applications related to Meditemp. It also telecopied to plaintiffs **[**34]** a list of physical assets, including the original AMEC assets and additional Meditemp assets.

We believe that Johnson & Johnson technically violated the provisions of the side agreement by failing to reassign the original assets and to consign the other assets *before* the specified period of negotiations. But in light of the circumstances, we find no error in the district court's conclusion that plaintiffs failed to establish a viable claim for contract damages.

We note first that the side agreement was never raised by plaintiffs throughout the period of discussion over the future of the Meditemp business. Defendants admittedly forgot that the side agreement existed and it appears that plaintiffs also did not recall it until they began preparing for trial. In any case, we conclude that plaintiffs' failure to request the assets at the outset of the negotiations period, or at any time during the six-months from January to June 1980, means that the breach was not a material one. Thus, Johnson & Johnson's contract violations would have no impact on the validity of the contract as a whole. *See* A. Corbin, 4 *Corbin on Contracts* § 946 (1951) (contrasting "total breach" and **[**35]** "partial breach"). At best, plaintiffs would have a claim for damages resulting only from the failure to reassign and consign assets before, rather than after, the negotiations.

But we fail to see any injury stemming from breach of the side agreement **[*102]** provisions, and plaintiffs suggest none. Since plaintiffs never attempted to purchase the additional Meditemp assets during the negotiations period, Johnson & Johnson's failure to consign them to plaintiffs had no apparent impact. The only injury alleged by plaintiffs in their brief is the lost value of their business when it was turned over to Johnson & Johnson in 1976. While this may be the measure of damages for fraudulent inducement into the contract, such an injury has no relationship to the delayed assignment of assets. In short, plaintiffs failed to establish that Johnson & Johnson's technical breach of minor provisions of the agreement caused an compensable injury. *See* A. Corbin, 4 *Corbin on Contracts* § 946, at 813 ("If a contractor's failure of performance causes such slight harm that the courts will give no remedy therefor, adopting and applying the maxim *de minimis non curat lex*, it is proper to say **[**36]** that there has been no breach of duty"). [11]

IV.

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[10] These counterclaims were dismissed prior to trial.

[11] We suspect that plaintiffs' failure to prove a viable contract claim stems from their failure to formally plead such a claim. We decline, however, to consider defendants' argument that plaintiffs should be foreclosed from making this claim at all, and instead follow the district court's decision to consider the claim on the merits.

Plaintiffs also claim that, in light of the jury's finding of fraud, it was error for the district court to find for defendants on the claim under Mass. Gen. Laws Ann. ch. 93A. Plaintiffs argue that the *seventh amendment* required the district court to make the jury determination of fraud binding for purposes of the court's decision on the chapter 93A claim.

We decline plaintiffs' invitation to reconsider this issue, which we decided only last year in *Wallace Motor Sales, Inc. v. American Motors Sales Corp., 780 F.2d 1049 (1st Cir. 1985)*. We therefore find no error in the district court's conclusion that defendants **[**37]** did not violate chapter 93A. [12]

V.

Plaintiffs claim that the district court erred in dismissing their antitrust claims on the ground of standing. The court relied upon a line of cases, including one from the First Circuit, holding that ***HN7***[] a seller of a business lacks standing to sue for antitrust violations when its alleged injury was not "antitrust injury", in other words, when the injury did not result from an unreasonable effect on *competition* as distinguished from its effect on a particular competitor. *See A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir. 1980)*, *aff'g* *481 F. Supp. 1297 (D. Mass. 1980)*; *McDonald v. Johnson & Johnson, 722 F.2d 1370, 1373-79 (8th Cir. 1983)*, **[**38]** *cert. denied*, *469 U.S. 870, 105 S. Ct. 219, 83 L. Ed. 2d 149 (1984)*; *Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235* (6th Cir.), *cert. denied*, *454 U.S. 893, 70 L. Ed. 2d 207, 102 S. Ct. 388 (1981)*.

The alleged injury to plaintiffs here unquestionably flowed from the alleged fraud and not from suppressed competition in the electronic thermometer market. As in *A.D.M. Corp., 628 F.2d at 754*, "if the sale of assets had an effect on competition, it would have occurred whether or not appellant was harmed." In support of their argument, plaintiffs cite only the dissenting opinion in *McDonald v. Johnson & Johnson*. We see no reason in this case to depart from our own prior conclusion, however, and therefore affirm the dismissal of plaintiffs' antitrust claims.

VI.

Plaintiffs' final argument is that the district court erred in vacating its original award of prejudgment interest. We choose not to decide this issue of state law at this time. As noted above, in light of the limited claims of fraud that a jury may properly consider, we think it likely that defendants **[*103]** would prevail if a new trial is **[**39]** held. We therefore think it premature to interpret Massachusetts law. In the unfortunate event this case reappears before us, we will do so at that time. [13]

The judgment of the district court is affirmed in part, reversed in part, and remanded for a new trial. No costs.

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[12] Although we need not address this issue in light of our disposition of the fraud claim, the interests of judicial economy prompted us to dispose of it now rather than at the time of a possible later appeal.

[13] We do not consider defendants' argument on the amount of damages. In the event a new jury finds liability for fraud, it should reach its own determination of plaintiffs' damages. *See Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 500, 75 L. Ed. 1188, 51 S. Ct. 513 (1931)* ("Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.

Interface Group, Inc. v. Massachusetts Port Authority

United States Court of Appeals for the First Circuit

March 30, 1987

No. 86-1467

Reporter
816 F.2d 9 *; 1987 U.S. App. LEXIS 4014 **; 1987-1 Trade Cas. (CCH) P67,502

The Interface Group, Inc., Plaintiff, Appellant, v. Massachusetts Port Authority, Defendant, Appellee

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, Honorable Andrew A. Caffrey, U.S. District Judge.

Core Terms

antitrust, airport, private right of action, air carrier, Terminal, air, anti trust law, suggests, district court, facilities, immune, firms, Sherman Act, anticompetitive, municipality, travelers, purposes, courts, antitrust claim, manufacturer, monopolist, passenger, factors

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN1[] **Regulated Practices, Trade Practices & Unfair Competition**

"Unreasonableness" in ***antitrust law*** has a rather special meaning. It means that the anticompetitive consequences of a particular action or arrangement outweigh its legitimate business purposes. "Anticompetitive" also has a special meaning: it refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process, a process that aims to bring consumers the benefits of lower prices, better products, and more efficient production methods.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > 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

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Not all exclusive dealing contracts even by a monopolist are illegal. Because the arrangements often serve legitimate business purposes, courts apply a rule of reason in deciding whether particular instances violate the Sherman Act, *15 U.S.C.S. §§ 1* and *2*.

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 > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN3[] **Monopolies & Monopolization, Actual Monopolization**

The essential facilities doctrine aims to prevent a firm with monopoly power from extending that power from one stage of production to another, and from one market into another.

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

HN4[] **Monopolies & Monopolization, Actual Monopolization**

When a monopolist denies a competitor access to a facility it needs to compete, the denial is at least arguably "unreasonable" or "exclusionary" in the antitrust sense, and therefore unlawful.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN5[] **Parker State Action Doctrine, Local Governments & Private Parties**

The antitrust laws do not reach restraints of trade imposed by the state, rather than private parties.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

A municipality is immune only when it acts pursuant to a clearly articulated and affirmatively expressed state policy.

Governments > Legislation > Interpretation

HN7[] **Legislation, Interpretation**

The powers given to a state agent are to be liberally construed to effect the purposes of the legislation.

Administrative Law > Separation of Powers > Jurisdiction

HN8[] **Separation of Powers, Jurisdiction**

State administrative process is available to correct autonomy conduct involving ordinary errors of abuses in the administration of powers conferred by the state.

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

Transportation Law > Air & Space Transportation > Airports & Airways Development Act

Governments > Legislation > Statutory Remedies & Rights

Transportation Law > Air & Space Transportation > Airports > Head Taxes

HN9[] **Air & Space Transportation, Charters**

The government alone has the right to enforce 49 U.S.C.S. §§ 1349(a), 1513, and 2210; the statutes do not provide private parties with a "private right of action."

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Governments > Legislation > Interpretation

Governments > Legislation > Statutory Remedies & Rights

HN10[] **Federal & State Interrelationships, Federal Common Law**

In determining whether Congress meant to create a private right of action when it enacted a statute that is silent on the subject, the court should ask: first, is the plaintiff one of the class for whose especial benefit the statute was enacted -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Transportation Law > Air & Space Transportation > Airports & Airways Development Act

HN11[] **Air & Space Transportation, Airports & Airways Development Act**

See 49 U.S.C.S. § 1349(a).

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN12[] **Federal & State Interrelationships, Federal Common Law**

A private right of action should not be implied on the basis of the Cort factors alone.

Transportation Law > Air & Space Transportation > Airports & Airways Development Act

HN13[] **Air & Space Transportation, Airports & Airways Development Act**

See 49 U.S.C.S. § 2210.

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Airport & Airway Improvement Act

Governments > Legislation > Statutory Remedies & Rights

HN14[] **Air & Space Transportation, Airport & Airway Improvement Act**

That language of 49 U.S.C.S. § 2210 does not impose on airport developers a duty that arguably could run in favor of private plaintiffs. Rather, it imposes only the duty to give "assurances" to "the Secretary."

Tax Law > State & Local Taxes > Sales Taxes > General Overview

Transportation Law > Air & Space Transportation > Airports & Airways Development Act

Transportation Law > Air & Space Transportation > Airports > Head Taxes

HN15[] **State & Local Taxes, Sales Taxes**

See 49 U.S.C.S. § 1513.

Governments > Legislation > Statutory Remedies & Rights

Transportation Law > Air & Space Transportation > Airports & Airways Development Act

Transportation Law > Air & Space Transportation > Airports > Head Taxes

HN16[] **Legislation, Statutory Remedies & Rights**

The language of 49 U.S.C.S. § 1513 impliedly confers a private right of action.

Counsel: James C. Burling with whom Richard J. Innis, Mark G. Matuschak and Hale and Dorr were on brief for Appellant.

Allyn O. Kreps, William T. Drescher and Jones, Day, Reavis & Pogue on brief for Air Transport Association of America, Amicus Curiae.

Scott P. Lewis with whom Thane D. Scott, Anne L. Gero, Palmer & Dodge and Richard J. Lettieri, Massachusetts Port Authority, were on brief for Appellee.

Judges: Coffin, Breyer and Torruella, Circuit Judges.

Opinion by: BREYER

Opinion

[*10] Breyer, Circuit Judge.

The Massachusetts Port Authority (Massport), which operates Logan airport, will not let the appellant, a charter airline operator called The Interface Group, Inc. (Interface), use Logan's Terminal C. Interface, believing that Massport's refusal violates the federal antitrust laws, *15 U.S.C. §§ 1*, *2 (1982)*, and several federal aviation statutes, 49 U.S.C. App. §§ 1349(a), 1513, 2210 (1982), sued Massport in federal district court. Interface also asked the court to assume pendent jurisdiction over two state claims that parallel **[**2]** its antitrust claims. *Mass. Gen. L. ch. 93, §§ 4*, *5*; ch. 93A, *§ 2* (1985). The district court dismissed the entire complaint for failure to state a federal claim. *Fed. R. Civ. P. 12(b)(6)*. *631 F. Supp. 483*. Interface appeals this dismissal. With one exception, we believe the district court was correct.

I.

Interface's antitrust claims amount to an imaginative, but unsuccessful, effort to dress its facts in the wrong suit of legal clothes. The facts that it asserts, in essence, are the following: (1) Interface bought two L1011 aircraft from TWA to use for charter service during the winter; (2) it leased them back to TWA for TWA's use during the peak summer season; (3) TWA promised Interface that during the winter Interface could use TWA ground services; (4) Massport allows TWA to service itself at Terminal C; (5) Massport permits two other private companies (called "fixed base operators" or "FBOs") to sell ground services at Terminal E; and (6) Massport requires all nontenant charter carriers, such as Interface, to use Terminal E; they cannot use Terminal C.

Interface asserts that Massport's policy, at least as applied in this instance, is unreasonable. Interface's basic legal problem is that it is not **[**3]** seeking judicial review of an unreasonable regulation under the state Administrative Procedure Act (as counsel at oral argument agreed it might have done). *See* *Mass. Gen. L. ch. 30A, § 7* (1985). Rather, it has brought an antitrust claim. And ***HN1***[] "unreasonableness" in ***antitrust law*** has a rather special meaning. It means that the anticompetitive consequences of a particular action or arrangement outweigh its legitimate business purposes. *See* 7 P. Areeda, ***Antitrust Law*** para. 1500, at 362-63 (1986). "Anticompetitive" also has a special meaning: it refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process, *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*, a process that aims to bring consumers the benefits of lower prices, better products, and more efficient production methods. Once one recognizes these special meanings of the relevant terms, it becomes difficult, **[*11]** if not impossible, to see how the facts alleged in the complaint could make out a violation of the antitrust laws.

Interface says that Massport's requirement that it use Terminal E and the ground services provided there amounts to an unreasonable **[**4]** "exclusive dealing" arrangement between Massport and the FBOs, unlawful under Sherman Act *§ 1*. But ***HN2***[] "not all exclusive dealing contracts even by a monopolist are illegal." *Smith v. Northern Michigan Hospitals, Inc., 703 F.2d 942, 953 (6th Cir. 1983)*. Because the arrangements often serve legitimate business purposes, courts apply a rule of reason in deciding whether particular instances violate the Sherman Act. *See* *Brown v. Hansen Publications, Inc., 556 F.2d 969, 970-71 (9th Cir. 1977)* (noting that "exclusive dealing arrangements are not per se illegal" because they "may be procompetitive in purpose"); *cf.* *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)* (noting that vertical restrictions are presumptively governed by the rule of reason).

Exclusive dealing arrangements may *sometimes* be found unreasonable under the antitrust laws because they may place enough outlets, or sources of supply, in the hands of a single firm (or small group of firms) to make it difficult for new, potentially competing firms to penetrate the market. *See* 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 732, at 253 (1978). To put the matter more technically, **[**5]** the arrangements may "foreclose" outlets or supplies to potential entrants, thereby raising entry barriers. *Cf.* *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-29, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)* (applying the stricter standard of Clayton Act § 3). Higher entry barriers make it easier for existing firms to exploit whatever power they have to raise prices above the competitive level because they have less to fear from potential new entrants. Thus, for example, one might worry about long term exclusive dealing contracts between a small group of firms making most of the nation's light bulbs and the firms that make light bulb filaments; if potential light bulb manufacturers are deterred from entering the market by a fear that they will be unable to obtain filaments, the existing light bulb manufacturers may be able to keep prices high. *Cf.* *Standard Oil Co. v. United States, 337 U.S. 293, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)* (finding foreclosure of marketing outlets to be a *§ 1* violation).

The complaint before us, however, seems inadequate to raise an antitrust controversy. Certainly the kind of antitrust harm typically present in an unlawful exclusive dealing arrangement is missing here. Interface does not claim that **[**6]** the arrangement, by foreclosing entry into the FBO market, makes it easier for Massport to abuse its market power or more difficult for new firms to build competing airports. Nor does it allege any more exotic theory of antitrust harm. Even if we were to concoct on Interface's behalf an analogy between FBOs and dealers to which an important manufacturer assigns exclusive territories, we would not cure the deficiency, because a manufacturer is ordinarily free to decide just how many dealers it will place in any given geographic area. *See* *Packard Motor Car Co. v. Webster Motor Car Co., 100 U.S. App. D.C. 161, 243 F.2d 418* (D.C. Cir.), *cert. denied*, *355 U.S. 822, 78 S. Ct. 29, 2 L. Ed. 2d 38 (1957)*.

When there is no plausible connection between exclusive dealing and antitrust harm, courts have not hesitated to hold that dealing lawful. Thus, courts have explicitly permitted even private firms with effective monopoly control of a transportation facility to maintain exclusive dealing arrangements with even a single supplier. *See, e.g.,* *Donovan v. Pennsylvania Co., 199 U.S. 279, 50 L. Ed. 192, 26 S. Ct. 91 (1905)* (permitting a private railroad company to enter into an exclusive dealing arrangement with a single taxi company for provision of **[**7]** taxi services at the Chicago railroad station); *Export Liquor Sales, Inc. v. Ammex Warehouse Corp., 426 F.2d 251 (6th Cir. 1970)*, *cert. denied*, *400 U.S. 1000, 91 S. Ct. 460, 27 L. Ed. 2d 451 (1971)* (dismissing a *§ 2* claim challenging an exclusive lease between the Detroit & Canada Tunnel Corporation and a company selling **[*12]** duty-free liquor). We have found no case invalidating exclusive dealing arrangements in which the potential harm to competition (in the word's special antitrust sense) appeared as remote as a reasonable reading of the complaint suggests here. The cases Interface cites involved exclusive dealing arrangements with more obviously anticompetitive consequences. *See* *United States v. General Motors Corp., 384 U.S. 127, 144-45, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)* (finding a *§ 1* violation when manufacturer elicited agreements from dealers not to do business with discounters); *New York Airlines, Inc. v. Dukes County, 623 F. Supp. 1435, 1450-51 (D. Mass. 1985)* (finding a *§ 1* claim when plaintiff was excluded altogether from defendant's airport because of a threat by a competing airline to discontinue existing service).

The fact that Massport is a public rather than a private body makes any risk to competition **[**8]** yet more remote. Unlike a *private* owner, Massport does not directly profit from its ownership of Logan. *See* Opinion of the Justices, 334 Mass. 721, 734, 136 N.E.2d 223, 231 (1956). It therefore has no economic motive to protect its market power in the airport operating business or to enter into anticompetitive arrangements. Given the absence of plausible allegations suggesting that the case raises the kinds of antitrust concerns typically present in unlawful exclusive dealing cases, and given the complaint's failure to raise any novel theory of illegality, the complaint simply does not state an antitrust exclusive dealing claim. *See* Donovan, supra; Export Liquor Sales, supra; *cf.* Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1109-10 (7th Cir. 1984) ("The complaint does not in any way set forth facts to support the conclusion that [the replacement of a firm in an exclusive dealing contract] had any anticompetitive effect."), *cert. denied*, *470 U.S. 1054, 105 S. Ct. 1758, 84 L. Ed. 2d 821 (1985)*.

Interface's alternative antitrust theory suffers from similar problems. Interface says that Massport's failure to make Terminal C ground facilities available to it violates Sherman Act **[**9]** § 2's prohibition of monopolization. It argues that because Massport has a monopoly of the airport business, it must make "essential facilities" available to anyone who wishes to use them. This view of the essential facilities doctrine, however, considerably overstates its ***HN3***[] scope. The doctrine aims to prevent a firm with monopoly power from extending that power "from one stage of production to another, and from one market into another." MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, ***HN4***[] *464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*. When a monopolist denies a competitor access to a facility it needs to compete, the denial is at least arguably "unreasonable" or "exclusionary" in the antitrust sense, and therefore unlawful. *See, e.g.,* Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973) (finding a § 2 violation when Otter Tail refused to permit competing municipal power companies to use its electrical distribution system); *cf.* United States v. Terminal R.R. Association, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912) (holding that an association of railroads that controlled all the terminals in St. Louis could not exclude their competitors from those **[**10]** facilities). But it is difficult to see how denying a facility to one who, like Interface, is not an actual or potential competitor could enhance or reinforce the monopolist's market power. *See* P. Areeda & H. Hovenkamp, ***Antitrust Law*** paras. 736.2, 736.2e (Supp. 1986). If this is so in the case of a private monopolist, it is still more certain when the monopolist is a public agency, for the agency has neither the motive nor the need to solidify its monopoly position. Thus, we do not see how the facts alleged could make out the actual or potential injury to the competitive process necessary to show a violation of Sherman Act § 2.

Interface fails to state a claim under Sherman Act § 1 or § 2 for an alternative reason: in our view, Massport is immune from antitrust liability under the state action doctrine of Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943). *Parker* established that ***HN5***[] the antitrust **[*13]** laws do not reach restraints of trade imposed by the *state*, rather than private parties. In E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir.), *cert. denied*, *385 U.S. 947, 87 S. Ct. 320, 17 L. Ed. 2d 226 (1966)*, this court found that Massport's decision to lease space to only **[**11]** one FBO was not subject to antitrust scrutiny because "it was acting as an instrumentality or agency of the state." Id. at 55.

We realize that since our decision in *Wiggins*, the Supreme Court has tightened the immunity rules for certain kinds of state instrumentalities, namely municipalities, *see* Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978), but Massport continues to qualify for immunity. Even if Massport is not the "state" itself, it at least is equivalent to a municipality. The Supreme Judicial Court has explicitly recognized that Massport resembles a municipal corporation and that Massport "is in no sense a private or business corporation." Opinion of the Justices, 334 Mass. at 734, 136 N.E.2d at 231. Massport also possesses such typical governmental attributes as the power of eminent domain, rulemaking authority, bonding authority, and tax exempt status. *See* Mass. Gen. L. Ann. ch. 91 App., §§ 1-3, 1-4, 1-8, 1-9, 1-17; *cf.* Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority, 801 F.2d 1286 (11th Cir. 1986) (citing these powers as reasons for finding that the Authority was akin to a municipality).

Moreover, **[**12]** Massport satisfies Lafayette's rule that ***HN6***[] a municipality is immune only when it acts pursuant to a "clearly articulated and affirmatively expressed" state policy. Lafayette, 435 U.S. at 410. Massachusetts has authorized Massport "to contract with any person . . . desiring the use of any part of [Logan

Airport] . . . to fix the terms, conditions, rents and rates or charges for such use . . .," Mass. Gen. L. Ann. ch. 91 App., § 1-14, and to "establish rules and regulations for the use of [Logan]." *Id.* at § 1-3. ***HN7***[] These powers, like the rest of Massport's authorizing legislation, are to be "liberally construed to effect the purposes" of the legislation. *Id.* at § 1-27. Setting policies that govern which airlines are to use which terminals, where and how they are to be serviced, and whether or when they can taxi from one terminal to another, lies close to the heart of Massport's basic purpose. Thus, the state has *clearly* indicated that Massport may engage in the activities here in question. *See* *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42-44, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*.

Of course, one might argue to the contrary that technically Massachusetts did not delegate to Massport **[**13]** the authority to make *unreasonable* rules, and Interface has alleged that Massport's rules are "unreasonable" (in the ordinary, not the special antitrust, sense of the word). But this argument does not persuade us that Massport loses its antitrust immunity. If Massport's lawful activity in this area falls outside the Sherman Act, the fact that the activity may be (not obviously) unlawful under state law (for reasons having nothing to do with antitrust) cannot make a legal difference for the purposes of antitrust immunity. To hold otherwise would impose the antitrust laws' treble damage liability upon agencies that may have done no more than to misjudge difficult questions of state law or make administrative errors having nothing to do with antitrust policy. It would force antitrust courts to review state administrative law disputes.

> We should not lightly assume that Lafayette's authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for "authority" in the full administrative law sense.

P. Areeda & H. Hovenkamp, **[**14]** *supra*, para. 212.3, at 104. A Congress that intended to permit states to authorize potentially anticompetitive activity would not have left outside that area of autonomy conduct involving "'ordinary' errors or abuses in the administration of powers conferred by the state." *Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985)* (quoting Areeda, **[*14]** "Antitrust Immunity for 'State Action' After *Lafayette*," ***HN8***[] 95 Harv. L. Rev. 435, 453 (1981)). State administrative process is available to correct this kind of mistake. *See id.; Scott v. Sioux City, 736 F.2d 1207, 1215-16 (8th Cir. 1984)*, *cert. denied*, *471 U.S. 1003, 85 L. Ed. 2d 158, 105 S. Ct. 1864 (1985)*.

In sum, *Wiggins* remains good law. And even were Massport not immune, the complaint would fail to state an antitrust claim. The district court therefore properly dismissed Interface's antitrust claims.

II.

Interface also claims that Massport violated three federal aviation statutes, 49 U.S.C. App. §§ 1349(a), 1513, and 2210. The district court dismissed these claims on the ground that ***HN9***[] the government alone has the right to enforce these statutes; the statutes do not provide private parties such as Interface with a "private right of action." In **[**15]** two instances we agree with the district court; in one instance (49 U.S.C. App. § 1513) we do not.

A.

In *Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975)*, the Supreme Court set forth criteria to help courts decide whether Congress meant to create a private right of action when it enacted a statute that is silent on the subject. *See* *N.A.A.C.P. v. Pierce, 817 F.2d 149 (1st Cir. 1987)*. The Supreme Court said ***HN10***[] that we should ask:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted). We first ask these questions about 49 U.S.C. App. § **[**16]** 1349(a), which provides in relevant part:

> **HN11**[] No federal funds . . . shall be expended . . . . for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Secretary of Transportation that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense.
> . . . There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.

The statutory language weighs slightly against appellants with respect to Cort's "especial benefit" test. We concede that the language about "exclusive rights," taken alone, supports the view that the statute (or at least the last sentence) aims at the "especial benefit" of those who operate planes as contrasted with those who fly as passengers in them. But the statutory provision taken as a whole suggests that Congress sought to benefit the public at large, not carriers in particular. *See Montauk-Caribbean **[**17]** Airways, Inc. v. Hope, 784 F.2d 91, 97 (2d Cir. 1986)*; *New York Airlines, 623 F. Supp. at 1448*; *Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667, 673 (N.D. Ga. 1982)*, *aff'd without opinion*, *729 F.2d 1467 (11th Cir. 1984)*.

The evidence weighs more strongly against appellant with respect to *Cort*'s second, "legislative intent," inquiry. There is nothing in the legislative history that suggests any intent to create a private right of action. At the same time, the statute as a whole provides an administrative and judicial enforcement scheme that suggests at least some Congressional wish for an element of administrative expertise at the enforcement stage, an expertise that **[*15]** tends to be lost when private parties can enforce the statute directly in federal court. This latter view is reinforced by the reference to the Secretary of Transportation in the first quoted sentence and by the fact that Congress created an express private right of right of action elsewhere in related provisions of the statute, but not here. *See* 49 U.S.C. App. § 1487 (1982) (creating a private right of action for violations of § 1371(a) of the same Act). Thus, if anything, **[**18]** the statute manifests legislative intent to deny, not to grant, a private right of action.

Although the third and fourth *Cort* factors better serve Interface's claim, these are minor factors that, here, cannot make a legal difference. Indeed, the Supreme court has said **HN12**[] that a private right of action should not be implied on the basis of these factors alone. *See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979)*; *Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979)*. We therefore agree with those courts that have held that § 1349(a) does not create a private right of action. *See Pumpkin Air, Inc. v. Addison, 608 F. Supp. 787, 794 (N.D. Tex. 1985)*; *IFC Aviation, Inc. v. Massachusetts Port Authority*, No. 84-1945-T, slip op. (D. Mass. May 22, 1985); *Guthrie v. Genesee County, 494 F. Supp. 950, 960 (W.D.N.Y. 1980)*. The sole case holding the contrary, *Niswonger v. American Aviation, Inc., 411 F. Supp. 763 (E.D. Tenn. 1975)*, *aff'd. mem. 529 F.2d 526 (6th Cir. 1976)*, was decided before the Supreme Court decision in *Cort v. Ash.*

B.

Interface claims that Massport has violated 49 U.S.C. App. § 2210. That **[**19]** provision reads as follows:

> **HN13**[] As a condition precedent to approval of an airport development project . . . the Secretary shall receive assurances . . . that --
> (1) . . . (A) each air carrier using such airport . . . shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport facilities, subject to reasonable classifications such as tenants or nontenants . . ., and (C) each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized to serve any such air carrier at such airport. . . .

We see two relevant differences between this statute and 49 U.S.C. App. § 1349(a). First, the statute's language suggests more strongly that it was "enacted" for the "especial benefit" of air carriers such as Interface. Second (and conversely), the statute's language also suggests more strongly that Congress had in mind an alternative enforcement scheme inconsistent with a private right of action. ***HN14***[] That language does **[**20]** not impose on airport developers a duty that arguably could run in favor of private plaintiffs. Rather, it imposes only the duty to give "assurances" to "the Secretary." The view that Congress intended to enact an exclusively administrative enforcement scheme is reinforced by legislative history that refers only to the right of air carriers "to consult" with the Secretary. *See* H. R. Rep. No. 594, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 1600, 1614; H. R. Conf. Rep. No. 1292, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 1638, 1648. For this reason, we believe that Congress did not intend to create a private right of action under § 2210. *See* *Arrow Airways, Inc. v. Dade County, 749 F.2d 1489 (11th Cir. 1985)*; *IFC Aviation*, No. 84-1945-T, slip op. at 2; *Hill Aircraft, 561 F. Supp. at 671-73* (discussing § 2210's predecessor).

C.

Interface also says that Massport assesses, on flights departing through terminal E, a charge that amounts to nearly $ 10 per passenger flown. Interface claims that this charge violates the Anti-Head-Tax **[*16]** Act, 49 U.S.C. App. § 1513. The statute says

> ***HN15***[] (a) No state (or political subdivision **[**21]** thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .
> (b) . . . nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

In this case, we find that ***HN16***[] the statute impliedly confers on Interface a private right of action.

The primary beneficiaries of this statute are obviously air travelers, not air carriers. Still, by prohibiting the levying of taxes on the *carriage of persons*, the statute at least in some instances gives air carriers a "benefit" that is "especial," at least when compared with the benefit conferred on the general public. The ban on head taxes means that air carriers will neither have to face diminished demand for costlier services nor have to absorb all or part of the charge by reducing ticket prices. *Cf.* *Indianapolis Airport **[**22]** Authority v. American Airlines, Inc., 733 F.2d 1262, 1267 (7th Cir. 1984)* ("Whether airline or passenger ultimately bears the cost of an airport fee depends on the conditions of supply and demand rather than on who is assessed the charge."). Given the close relation between traveler and carrier, it seems reasonable to give some weight to this "especial benefit."

Moreover, the second, third, and fourth *Cort* factors also support implication of a private right of action. With respect to the "legislative intent" to permit private enforcement actions, the absence of the word "Secretary" from the statute suggests that Congress did not consider it especially important to employ administrative expertise in the statute's enforcement. This suggestion is reinforced by the fact that Congress did not provide the extensive administrative and judicial enforcement scheme for § 1513 that it created for §§ 1349(a) and 2210. Moreover, the legislative history of § 1513 suggests that Congress viewed air carriers as a kind of surrogate for air passengers. Congress realized, for example, that in banning taxes on the carriage of persons, and thereby directly benefiting air carriers, it simultaneously **[**23]** protected air travelers from paying a tax "passed through" to their tickets. *See* S. Rep. No. 12, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Admin. News 1434, 1451. Because the amount of tax imposed on each passenger is ordinarily small, individual travelers may prove unwilling to take the time and trouble to determine whether the tax is unlawful. A carrier, on the other hand, will often have a significant financial incentive, and the expertise needed, to enforce the statute. Thus, private enforcement would further the purposes of § 1513. Finally, the area is one especially suited for federal action, in that the statute itself seeks to prohibit certain activity by the States. Because all four *Cort* factors argue to some degree in favor of the existence of a private right of action, we conclude that in this instance the Congress intended to grant a private right of action. *See* *Indianapolis Airport Authority, 733 F.2d 1262* (assuming without discussion that a private right of action exists under § 1513); *American Airlines, Inc. v. Philadelphia, 414 F. Supp. 1226 (E.D. Pa. 1976)* (same).

III.

On appeal, Interface also asserted several new claims. It **[**24]** alleged that Massport's actions violate the Supremacy and *Commerce Clauses of the United States Constitution*. Because these constitutional claims were not raised below, we will not consider them here. *See* *United States v. State Tax Commission, 481 F.2d 963, 976 (1st Cir. 1973)*; *Securities & Exchange Commission v. Milner, 474 F.2d 162, 166 (1st Cir. 1973)*. For the same reason, we also will not consider Interface's claims under *42 U.S.C. § 1983 (1982)*. *See* *Dobb v. Baker, 505 F.2d 1041, 1044 (1st Cir. 1974)*.

[*17] IV.

In sum, with the exception of the claim under 49 U.S.C. § 1513, we affirm the district court's dismissal of Interface's claims. The judgment of the district court with respect to § 1513 is vacated, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

Clamp-All Corp. v. Cast Iron Soil Pipe Inst.

United States Court of Appeals for the First Circuit

June 30, 1988

No. 87-1697

Reporter
851 F.2d 478 *; 1988 U.S. App. LEXIS 8940 **; 7 U.S.P.Q.2D (BNA) 1429 ***; 1988-1 Trade Cas. (CCH) P68,115

Clamp-All Corporation, Plaintiff, Appellant, v. Cast Iron Soil Pipe Institute, et al., Defendants, Appellees

Prior History: **[**1]** Appeal from the United States District Court for the District of Massachusetts, Hon. Rya W. Zobel, U.S. District Judge.

Disposition: Affirmed.

Core Terms

couplings, prices, products, pipe, firms, competitors, practices, hubless, costs, price list, specification, anticompetitive, district court, certifying, advertisement, charges, anti trust law, low price, predatory, consists, standard-setting, interdependent, monopolization, manufacturers, unlawfully, antitrust, trademark, benefits, helps, sales

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN1[] **Actual Monopolization, Anticompetitive & Predatory Practices**

"Predatory pricing" occurs when a firm sets its prices temporarily below its costs, with the hope that the low price will drive a competitor out of business, after which the "predatory" firm will raise its prices so high that it will recoup its temporary losses and earn additional profit, all before new firms, attracted by the high prices, enter its market and force prices down.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN2[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Ordinarily the measure of a "predatory price" is price below "incremental cost," where the addition to total cost (to the firm) of producing and selling additional output would exceed the return from selling that additional output.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The Sherman Act prohibits agreements, and the courts almost uniformly hold, at least in the pricing area, that individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under *Section 1* of the Sherman Act.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN4[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A "basing point" pricing scheme essentially amounts to a device that could help a group of firms in a concentrated industry "police" interdependent pricing practices, practices that help them keep prices above competitive levels without the need for any formal price agreement.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] **Actual Monopolization, Anticompetitive & Predatory Practices**

"Basing point pricing" systems have normally been found unlawful.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > Elements

HN6[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The only important element for a court to examine at the request of a competitor is the low price. Where a plaintiff does not show that the low price is unlawfully low, there is no reason to believe the low price is not self sustaining, there is no reason to believe it requires "external financing," and there is no reason to believe that any "price fixing" on any other products has anything significant to do with the matter.

Antitrust & Trade Law > Sherman Act > 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 > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

The "rule of reason" limits the Sherman Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications, though certain anticompetitive practices, such as price fixing, so typically lack justification as to be per se unreasonable.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN8[] **Antitrust & Trade Law, Sherman Act**

"Anticompetitive" has a special antitrust meaning. It refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. And, the law assesses both harms and benefits in light of the Sherman Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods.

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

HN9[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Activity that harms competitors because it lowers production or distribution costs or provides a better product carries with it an overriding justification.

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

HN10[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

There could be special circumstances, showing, in an individual case, that the standard setting serves no legitimate purpose, or that it is unnecessarily harmful. But the plaintiff would have to show the existence of such circumstances.

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

HN11[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

In deciding an antitrust claim, courts must take account of the importance of permitting parties to express their views freely before regulatory authorities.

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

HN12[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition, but efforts to influence private standard-setting organizations may violate antitrust laws.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN13[] **Consumer Protection, False Advertising**

The law does not automatically require a firm to publish unfavorable test results.

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

HN14[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

All members of an industry should be eligible for membership in a trade association, but membership can be limited to those operating at a certain level in the distribution chain.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN15[] **Monopolies & Monopolization, Actual Monopolization**

A plaintiff must show "exclusionary conduct" in respect to its monopolization or attempted monopolization claims.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

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

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

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

HN16[] **False Designation of Origin, Elements of False Designation of Origin**

See the Lanham Act § 43, 15 U.S.C.S. § 1125(a).

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HN17[] **False Designation of Origin, Palming Off**

The First Circuit narrowly interprets the Lanham Act to apply only to those sorts of unfair business practices or false statements that are of the same economic nature as those which involve infringement or other improper use of trade-marks, e.g., palming off one's goods as those of another.

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Judges: Campbell, Chief Judge, Breyer and Selya, Circuit Judges.

Opinion by: BREYER

Opinion

[*1430]** **[*481]** BREYER, Circuit Judge.

The plaintiff in this antitrust action, Clamp-All Corporation, sued the Cast Iron Soil Pipe Institute ("CISPI") and several of its members, charging that they had unlawfully restrained trade in (or monopolized or attempted to monopolize) **[**2]** the sale of hubless pipe couplings by means of improper pricing, improper behavior in respect to "quality-certification" provided by state and private organizations, and other improper trade practices. 15 U.S.C. §§ 1 & 2 (1982), 15 U.S.C. § 1125(a) (1982). The district court granted defendants' motion for summary judgment on the pricing (and certain other) counts, and, after hearing all the plaintiff's evidence, directed a verdict in defendants' favor; the plaintiff appeals. We have examined the lengthy record and conclude that the district court was correct. No reasonable jury could have found facts sufficient to show a violation of the antitrust laws. We therefore affirm the court's judgment.

I

To understand this highly fact-based appeal, one must keep in mind the following background:

1. Hubless couplings are used to join segments of pipe, such as water pipe or sewer pipe.

2. Several different manufacturers have made, and still make, various kinds of pipe couplings. The old fashioned method of joining segments of pipe apparently was to make one end slightly larger than the other, and then to fit the small end of one segment into the large end of the other. The larger opening was **[**3]** called the "hub" and the smaller end the "spigot." We think they looked about like this:

[SEE ILLUSTRATION IN ORIGINAL]

The newer method of joining pipe segments keeps both ends the same size. A sleeve fits around the two ends to be joined and a metal band holds the sleeve in place.

3. CISPI is a trade association of *pipe* manufacturers, all of whom sell, and many of whom also make, a particular type of coupling known as a CISPI coupling. It consists of a simple sleeve of the sort described. It fits between lugs each placed a bit away from the end of each pipe segment (perhaps they help hold the sleeve in place). We think the CISPI coupling looks something like this:

[SEE ILLUSTRATION IN ORIGINAL]

CISPI introduced hubless couplings to the market in 1963. CISPI controlled the patent on its coupling until 1984, licensing CISPI members to make and sell it.

4. Clamp-All is one of several firms that make competing pipe couplings. The Clamp-All and CISPI couplings appear quite similar, but the list price of Clamp-All's coupling is typically four to five times that of CISPI's, and the Clamp-All coupling will outperform the CISPI coupling in certain respects: it is wider, which makes **[**4]** it **[*482]** more secure and enables it to withstand greater water pressure; it is made of more durable (and more expensive) materials; and it is somewhat easier to install.

5. Exactly what share of the total market for water pipe couplings (outside of Massachusetts) CISPI couplings account for is a matter in dispute. Everyone agrees that CISPI's share is large, but they agree, too, that several companies other than Clamp-All and CISPI members sell a significant number of couplings. Inside Massachusetts, where Clamp-All had a monopoly for several years because only its coupling met the state's performance standard, Clamp-All controls about 65 percent of the coupling market. **[***1431]**

Basically, Clamp-All charges that its relative lack of success outside Massachusetts is due to various anti-competitive (indeed, anti-Clamp-All) practices employed by CISPI members; otherwise, says Clamp-All, its sales record elsewhere would resemble its record in Massachusetts. The CISPI defendants deny all anti-competitive behavior; they add that Clamp-All's Massachusetts success reflects Clamp-All's own, partly successful, efforts to convince certifiers and regulators to keep the less expensive CISPI coupling out of the **[**5]** state.

Our concern here is with Clamp-All's charges, not CISPI's. We have proceeded to evaluate the legal merits of Clamp-All's many different claims as follows. First, we have read the record, marshalling the evidence in respect to each charge. Second, we have assumed a set of facts as favorable to Clamp-All, in respect to each charge, as the evidence will reasonably permit. *See* *Goldstein v. Kelleher, 728 F.2d 32, 39* (1st Cir.), *cert. denied*, *469 U.S. 852, 83 L. Ed. 2d 107, 105 S. Ct. 172 (1984)*. Third, we have determined, as a matter of law, *see* 2 P. Areeda & D. Turner, ***Antitrust Law*** para. 315b (1978) [hereafter Areeda & Turner], whether that version of the facts reveals a violation of the antitrust laws; whether, for example, it shows predatory pricing, *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, or an "unreasonable restraint of trade," *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*.

We conclude that the facts do not show an antitrust violation. To explain our conclusions, we shall group Clamp-All's many charges into three categories: those concerning pricing practices, those concerning CISPI efforts to influence certification **[**6]** standards, and those concerning allegedly unreasonable marketing practices.

II

The significant evidence that we have found in respect to CISPI's pricing practices consists of the following:

1. The defendants published identical list prices for various products including couplings. One defendant testified that the prices on the list established a "defined differential" among different sizes of pipe, couplings, and related equipment.

2. Two CISPI firms, Tyler and American Brass & Iron Foundry ('AB & I'), firms that were defendants in this case initially, but which were no longer defendants at the time of trial, had price lists that showed "returns" to the firm to be less than "costs." To be more specific, the Tyler price list, in respect to "hubless couplings," showed in the column entitled "Return FOB Taylor" ".67," and in the column entitled "average unit cost," the figure ".78." In respect to AB & I's couplings, the evidence was conflicting. Although the category marked "Sales" was lower than that marked "Cost," the category marked "Unit Price" was *higher* than that marked "Unit Cost."

3. Two witnesses testified that Tyler's president once said at a CISPI meeting in 1981 that Tyler, **[**7]** the industry price leader, would not raise its prices until Central Foundry went out of business. A month later, Central Foundry did go out of business; Tyler then raised its prices, and the other CISPI members followed Tyler's lead.

4. Clamp-All's expert testified that CISPI members gave discounts on a geographical **[*483]** basis, which discounts did not reflect delivery cost differences, but, rather, reflected a "multiple basing point pricing scheme."

We conclude that this evidence does not show unlawfully low prices, prices that could hurt Clamp-All. Clamp-All comes closer to showing unreasonably high CISPI prices, but any such showing may reflect no more than an industry concentrated enough for each firm to set prices "interdependently" (each firm, aware that competitors will quickly match price cuts, may keep its prices high); and higher than competitive prices help Clamp-All rather than hurt it. *See* Matsushita, 475 U.S. at 583. We now consider each of Clamp-All's pricing claims in greater detail.

a. Clamp-All suggests that this evidence shows unlawful "predatory pricing." As we explained in detail in *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983)*, **[**8]** however, ***HN1***[] "predatory pricing" occurs when a firm sets its prices temporarily below its costs, with the hope that the low price will drive a competitor out of business, after which the "predatory" firm will raise its prices so high that it will recoup its temporary losses and earn additional profit, all before new firms, attracted by the high prices, enter its market and force prices down. *Id. at 232-35*; *see* *Matsushita, 475 U.S. at 588-95*. We said that ***HN2***[] *ordinarily* the measure of a "predatory price" is price below "incremental cost." *Barry Wright, 724 F.2d at 232-33*. That is to say, the addition to total cost (to the firm) of producing and selling additional output would exceed the return from selling that additional output.

The evidence in the record is insufficient to show such pricing by defendants here. For **[***1432]** one thing, the product price lists from Tyler and AB & I contain no explanation about what the numbers on them mean. Indeed, Tyler's list refers to a vast number of different products and contains many products in respect to which the number in the "NET FOB" column is lower than that in the "AVERAGE UNIT COST" column. Yet, the plaintiffs do not argue that Tyler was **[**9]** pricing large numbers of its products, including such products as thumbscrews, seal gaskets, seal lubricants, plugs, and something called a "No-hub San Tee," at predatory levels. Perhaps the list shows that Tyler, like a hardware store owner, keeps records that allocate certain costs (such as rent or electricity) among related products proportionately, but then Tyler recovers different amounts of those costs from the sales of different products. (A hardware store owner does not set prices to recover precisely the same percentage of his rent from the sale of each bolt, garden tool, or lightbulb; rather, he sets prices so that he recovers the totality of his overhead from the totality of all his sales with different products likely making different contributions.) Be that as it may, we do not see how a jury could know, without more precise evidence or an explanation, what either Tyler's or AB & I's price lists show, nor do we see how it could rest a conclusion of "price below incremental cost" on a few such unexplained lists alone. Nor does plaintiff correct the evidentiary deficiency by pointing to Tyler's president's remark at the 1981 CISPI meeting, for that remark (and subsequent **[**10]** conduct) simply shows (at best) a price increase after the demise of a competitor; it does not significantly help show that the relevant prices were unlawfully low to begin with.

For another thing, neither Tyler nor AB & I were defendants at the time of trial. Thus, plaintiff had to use this price list evidence to show that *other* firms set prices below *their* incremental costs. The fact that hubless couplings were simple products with similar costs may tend to show that Tyler's and AB & I's cost/price ratios and defendants' were the same. But, the equally important facts that Tyler and AB & I made many related products; that many costs of producing these products were likely related (*e.g.*, shared overhead); that present defendants produced a *different* mix of products; and that each of their product by product cost relationships (*e.g.*, comparative shares of overhead or other common costs) were therefore likely **[*484]** different from Tyler's and AB & I's, together make Tyler's and AB & I's price lists close to worthless as evidence that any of these *other* firms (the present defendants) priced couplings below its own incremental costs. The district court correctly concluded that **[**11]** a jury could not find, without impermissible speculation, that these defendants priced couplings below their costs, whether defined as "incremental costs" or any other arguably appropriate cost measure.

b. Appellant, taking an opposite tack, next argues that identical price lists and testimony about a "defined differential" indicate an agreement among CISPI defendants to fix prices, presumably higher than competitive prices. (The defendants, selling identical products, would not need to *agree* to keep prices low; a price cut by any one of them would likely force the others to follow.) Of course, any such agreement, by keeping coupling prices *up*, would likely help the plaintiff, not hurt it. *See* Matsushita, 475 U.S. at 583.

This is not to say that the evidence here would permit a jury to find any such agreement. Even if one assumes that the similar prices on the lists do not simply reflect ordinary forces of competition at work among firms selling virtually identical products, the price lists still show no more than what defendants concede: that each firm, acting individually, copied the price list of the industry leader. A firm in a concentrated industry typically has reason **[**12]** to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry. *See* 6 Areeda & Turner paras. 1432-33. And, the fact that the CISPI firms often set prices that deviated from their price lists helps support the inference that the similarity of price lists reflects *individual* decisions to copy, rather than any more formal pricing agreement.

Courts have noted that ***HN3***[] the Sherman Act prohibits *agreements*, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act. *See, e.g.,* Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2nd Cir. 1987); North Carolina v. Chas. Pfizer & Co., 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd*, 537 F.2d 67 (4th Cir.), *cert.* ***[**13]*** *denied*, *429 U.S. 870, 97 S. Ct. 183, 50 L. Ed. 2d 150 (1976)*; 6 Areeda & Turner para. 1433; *cf.* Aubin v. Fudala, 782 F.2d 280, 286 (1st Cir. 1983) (similar analysis in criminal conspiracy context **[***1433]**). That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for "interdependent" pricing. How does one order a firm to set its prices *without regard* to the likely reactions of its competitors? *See* 6 Areeda & Turner paras. 1432-33; 3 Areeda & Turner para. 840. The district court pointed out that the evidence here, consisting of little more than the price lists, would not permit a finding of more than such individual, interdependent, price setting. We agree.

c. Appellant points to the testimony of its expert, who said that the price lists show an agreement to follow ***HN4***[] a "basing point" pricing scheme. Such a scheme essentially amounts to a device that could help a group of firms in a concentrated industry "police" interdependent pricing practices, practices that help them keep prices above competitive levels without the need for any formal price agreement. As just mentioned, in principle, each firm in such an industry may set its **[**14]** prices knowing that a price cut would be quickly matched by others; each would also know that stable high prices, maintained by all firms, would benefit all. But, the problem for such firms (at least in principle) is that each also knows that for it alone the best of all possible worlds is to attract customers through a small price cut *not matched* **[*485]** by the others. Since *all* know this, how can they keep each other from cutting prices? How can they guarantee that industry prices stay high? How can they prevent the forces of competition from breaking out, with one or another firm yielding to the temptation to cut its own prices while hoping the others will *not match* the low price? Each firm realizes that any formal communication with its competitors about such matters could lead to antitrust prosecution and a finding of a traditional agreement. But each fears that, without such communication, its competitors will "chisel" on the tacit pricing arrangement, perhaps through secret or selective price cuts (which from the public's point of view should be encouraged). *See* *United States v. Container Corp. of America, 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)*.

In principle, "basing point pricing" **[**15]** is a practice that might help firms stop (what from the public's perspective would be desirable) "chiseling." It does so when firms in the industry typically sell many different, related products, in many different geographical markets, all at different prices, a fact that makes it that much more difficult for each firm to know whether its competitors may be "chiseling," say, by "swallowing" some of the freight costs. A "basing point" pricing system involves all firms charging identical freight costs (irrespective of plant location or actual freight costs) to any point in the United States. The "freight prices" charged are those that a railroad or trucker would set from a single, fixed location (say Chicago), not from where each plant is actually located. Such a system makes it far easier for each firm to know the "freight cost" that a competitor is "supposed" to charge its customers, thereby making it easier for each firm to detect whether a competitor is charging a particular customer a lower price for the product. To that extent, "basing point pricing" helps each firm detect "chiselers"; it lessens the fear of each that others may be "chiseling"; and it thereby helps them all maintain **[**16]** prices above competitive levels. (It also tends to permit firms to release "safely" any "competitive impulse," by selling, at greater expense and with less profit, to more distant locations all without changing the apparent price of the product, thereby helping further reinforce the stability of an industry's "high price" practices.) For these reasons, ***HN5***[] "basing point pricing" systems have normally been found unlawful. *See* 6 Areeda & Turner para. 1435f; *Federal Trade Commission v. Cement Institute, 333 U.S. 683, 92 L. Ed. 1010, 68 S. Ct. 793 (1948)*. Indeed, in the case of "basing point pricing," unlike simple "interdependent price setting," agencies, believing they can devise an appropriate remedy, have forbidden the practices even when the firms adopt it "interdependently," without any traditional agreement (perhaps through gradual, tacit evolution in the industry). *See* *Triangle Conduit & Cable Co. v. Federal Trade Commission, 168 F.2d 175 (7th Cir. 1948)*, *aff'd by an equally divided Court sub nom. Clayton Mark & Co. v. Federal Trade Commission, 336 U.S. 956, 93 L. Ed. 1110, 69 S. Ct. 888 (1949)* (Federal Trade Commission held basing point pricing unlawful even though there was no *agreement*).

Our description of **[**17]** "basing point pricing," while simplified, is sufficient to show that the evils of the practice lie in its tendency to help firms keep prices high, not low. Thus, if such a practice existed in respect to couplings, it kept CISPI prices *high*, making it easier for Clamp-All to compete. Clamp-All cannot base its damage suit upon a scheme that *helps* it sell its product. *Matsushita, 475 U.S. at 583*.

d. Finally, Clamp-All adds together its first and second theories. It argues that the defendants behaved unlawfully by agreeing to charge high prices on some products, and then used the proceeds of their high price sales to finance below cost coupling prices. The short answer to this claim, however, is that ***HN6***[] the only important element here for a **[***1434]** court to examine at the request of a competitor is the *low* price. If that price is unlawfully low, if, for example, it is a predatory price, it does not ordinarily matter whether the money to pay for the resulting temporary loss comes **[*486]** from a bank account, a legacy, a lottery prize, or the proceeds of a price-fixing conspiracy in respect to another product; regardless of financing source, the practice would be unlawful. Where, however, **[**18]** as here, a plaintiff does not show that the low price is unlawfully low, there is no reason to believe the low price is not self sustaining, there is no reason to believe it requires 'external financing,' and there is no reason to believe that any "price fixing" on any other products has anything significant to do with the matter. *See* *Shore Gas and Oil Co. v. Humble Oil & Refining Co., 224 F. Supp. 922, 926-27 (D.N.J. 1963)*. We do not see how a dubious kind of "financing source" could, in and of itself, convert a lawful low price into an unlawful one.

III

We turn next to Clamp-All's claims that the CISPI defendants agreed to engage in certain unreasonably anticompetitive activities, in violation of Sherman Act *§ 1*. In evaluating these claims, one must keep in mind the special antitrust meaning of the terms "reasonable" and "unreasonable," a meaning that draws its content from the basic objectives of ***antitrust law***'s "rule of reason." The Supreme Court adopted the "rule of reason" in order to provide an intellectually, administratively, and legally satisfactory way to limit the Sherman Act's broad language, which, if taken literally, might forbid all agreements, good and bad, **[**19]** that were in any sense at all "in restraint of trade." *See* *United States v. Trans-Missouri Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897)*. Chief Justice White pointed out (with only slight exaggeration) that without some such limitation, the Sherman Act might be taken as forbidding virtually "every conceivable contract or combination . . . anywhere in the whole field of human activity." *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*. ***HN7***[] The "rule of reason" limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications, 7 Areeda & Turner para. 1500 at 362-63, though certain anticompetitive practices, such as price fixing, so typically lack justification as to be *per se* unreasonable. 7 Areeda & Turner para. 1509.

HN8[] "Anticompetitive", too, has a special meaning. It refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. *Brown Shoe Co. v. United States, 370 U.S. 294, 319-20, 328-34, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *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)*. And, the **[**20]** law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods. *See* *Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9, 11-12 (1st Cir. 1987)*; 7 Areeda & Turner para. 1502.

The joint practices and agreements that appellant attacks here are not *per se* unreasonable. Thus, appellant must show that the likely anticompetitive effects of these practices outweigh their business justifications, or at least that the defendants might achieve any legitimate business objectives in a significantly less restrictive way. 7 Areeda & Turner para. 1505b.

A

Clamp-All's major attack concerns CISPI's promulgation of a standard called the 310 Designation. That standard is entitled

Specifications for

> CAST IRON SOIL PIPE INSTITUTE'S APPROVED COUPLING FOR USE IN CONNECTION WITH HUBLESS CAST IRON SOIL PIPE AND FITTINGS FOR SANITARY STORM DRAIN, WASTE AND VENT PIPING APPLICATIONS

The specification consists of several pages of detail. It also states,

> Several different types of hubless joints or couplings are available **[**21]** for use in hubless cast iron systems. . . . It is the purpose of this specification . . . to furnish **[*487]** information as to the approved characteristics of one of such type couplings which is approved by the Institute [CISPI].

And, it states on the first page,

> Members of the Institute who are licensed to use the Institute's Collective Mark CI NO-HUB and who sell hubless couplings manufactured by or for them which conform fully to this Specification may indicate their membership in the Institute and their conformance with this Specification by marking such couplings with the Institute's Collective Mark CI NO-HUB.

CISPI successfully persuaded various private standard-setting bodies, as well as state and local plumbing code authorities, to make reference to the 310 Designation as the kind **[***1435]** of coupling that would meet their respective standards.

a. Appellants seem to say that CISPI's very promulgation of this standard and its efforts to secure its adoption by certifying authorities amounts to an unreasonable restraint of trade. We do not see how that can be so. The standard, in specifying what counts as a CISPI coupling, provides a relatively cheap and effective way for a manufacturer **[**22]** or a buyer to determine whether a particular coupling is, in fact, (generically considered) a

CISPI coupling. The adoption by certifiers helps users quickly and effectively determine that a particular coupling (which meets CISPI standards) also meets state, local, or private certifiers' standards of acceptability. The *joint* specification development, promulgation, and adoption efforts would seem less expensive than having each member of CISPI make duplicative efforts. On its face, the joint development and promulgation of the specification would seem to save money by providing information to makers and to buyers less expensively and more effectively than without the standard. It may also help to assure product quality. If such activity, in and of itself, were to hurt Clamp-All by making it more difficult for Clamp-All to compete, Clamp-All would suffer injury only as a result of the defendants' joint efforts having lowered information costs or created a better product. *See* *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 558 & n. 19 (1st Cir. 1974)*. And, *that* kind of harm is not "unreasonably anticompetitive." It brings about the very benefits **[**23]** that the antitrust laws seek to promote. That is to say, ***HN9***[] activity that harms competitors because it lowers production or distribution costs or provides a better product carries with it an overriding justification.

Of course, what we have just written is true of 'legitimate' standard-setting activity. *See* *Whitten, 508 F.2d at 558 n. 19*. ***HN10***[] There could be special circumstances, showing, in an individual case, that the standard setting at issue serves no legitimate purpose, or that it is unnecessarily harmful. *Id.* (antitrust claim stated if market participant who establishes proprietary specifications coerces a standard-setting organization or conspires with it to get the specification officially adopted, or if it prevents competitors from competing for approval). But the plaintiff would have to show the existence of such circumstances; and, the plaintiff has not done so here. The best it can do is point to the word "approved" in the specification ("it is the purpose of this specification . . . to furnish information as to the approved characteristics of one of such type couplings which is approved by the Institute.") and to argue that that single word might mislead users into thinking **[**24]** that CISPI is a disinterested certifying organization, providing "approvals" for all hubless couplings, thereby hurting Clamp-All, unless, as Clamp-All seems to argue, CISPI considered Clamp-All's coupling for "approval" as well, *see* *Radiant Burners, Inc. v. Peoples Gas Light & Coke, 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)*; 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation*, § 6I.01 (1988); Wachtel, "Products Standards and Certification Programs," 13 *Antitrust Bull.* 1, 13 (1968).

The dispositive answer to this argument is that the record contains no significant evidence that the word "approved" misled anyone. The specification itself makes clear what it is, a specification that applies to *CISPI-type* hubless couplings, **[*488]** not to *all* hubless couplings. It contains no other language that might make one think that CISPI was some kind of general certifying organization. Buyers of hubless couplings are builders, plumbers, or contractors -- reasonably sophisticated users -- and there is no testimony that any of them was fooled. Plaintiff's best evidence consists of a comment by its expert that "people who normally use these things . . . could easily be misled," but, on cross examination, **[**25]** that same expert conceded that he had not talked to normal coupling users in forming that particular opinion. In our view, that opinion alone, so lacking in foundation, cannot take the issue of "being fooled" to the jury. And, if CISPI was not (or at least was not thought to be) a general certifying organization, why must it develop a specification for, or somehow "certify," a competitor's quite different product? After all, General Motors need not certify the quality of a Toyota, nor need a group of film producers certify the quality of competing live television programs.

b. Clamp-All argues that CISPI defendants prevented an important "standard-setting and approval-granting" organization, the American Society of Sanitary Engineers ("ASSE"), from approving a hubless coupling performance standard that would have benefitted Clamp-All. In theory, one can understand how joint activity of the kind Clamp-All alleges could be unreasonably anticompetitive. Suppose, for example, the ASSE was about to adopt a performance standard that both CISPI and Clamp-All could have met; suppose further that ASSE's adoption of such a standard would have led to the adoption of a similar standard by hosts **[**26]** of local and state regulatory, and private certifying authorities. Then Clamp-All simply could have pointed to the standard (and **[***1436]** its compliance) to show a contractor that its product was approved, just as CISPI does in states that have referenced the 310 Designation. If CISPI prevented the adoption of such a standard, it *may* have acted unreasonably.

The key word here, however, is "may." Certifiers may reasonably believe that they can do their job properly (a job that benefits consumers) only if all interested parties are allowed to present proposals, frankly present their views, and vote. Thus, we do not see how plaintiff could succeed on its antitrust claim unless (at a minimum) CISPI *both* prevented ASSE from adopting a national performance standard that would have benefitted Clamp-All *and* did so through the use of unfair, or improper practices or procedures. *See* Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (2nd Cir.) (antitrust claim stated where defendant conspired with other steel companies to block the approval of plaintiff's product by a national certifying organization; defendant acted within the letter of the organization's rules, but **[**27]** violated their spirit by paying for and packing a meeting with voters who had little to no professional interest in the subject matter), *aff'd*, 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) (affirming denial of *Noerr-Pennington* immunity for defendant's effort to influence *private* standard-setting organization; dismissing certiorari in respect to whether defendant's conduct was an unreasonable restraint of trade). ***HN11***[] In deciding whether this is so, courts must take account of the importance of permitting parties to express their views freely before regulatory authorities. *See* Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965) ***HN12***[] ("Joint efforts to influence *public* officials do not violate the antitrust laws even though intended to eliminate competition" (emphasis added)); *cf.* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) (efforts to influence *private* standard-setting organizations *may* violate antitrust laws).

The record here does not contain evidence sufficient to warrant presenting Clamp-All's **[**28]** claim to the jury. It shows that in 1979, at Clamp-All's request, the ASSE formed a subcommittee to write a hubless coupling standard. Clamp-All proposed a four-tier standard (rating couplings by their ability to withstand varying levels **[*489]** of water pressure). Initially, when only one CISPI representative was present, the subcommittee recommended a three-tier standard (which was also beneficial to Clamp-All). CISPI then decided to offer a single tier standard, which both the CISPI and Clamp-All couplings would have met. It wrote its members and urged them to attend the next meeting. At that next meeting, with six CISPI members attending out of a total of sixteen, the subcommittee changed its mind and voted for CISPI's proposed standard. The ASSE eventually decided not to accept its subcommittee's recommendation, and it took no further action.

We can find no concrete evidence in the record that CISPI acted improperly. The record here is unlike that in *Indian Head*, where the defendant "packed" the meeting by hiring lay voters in numbers that unfairly gave it overrepresentation. Nor is there concrete evidence that the submission of CISPI's proposal caused (or even influenced) ASSE's **[**29]** decision not to adopt any standard. Clamp-All points to a single statement by CISPI's general counsel that the CISPI one-tier proposal was "not really a performance standard." We do not see how that statement shows a significant abuse of ASSE's procedural standards or practices. Rather, as far as the record is concerned, CISPI acted within the letter and the spirit of the ASSE rules in presenting its proposal and urging its members to attend the meeting.

B

Clamp-All claims that the defendants have jointly engaged in several unreasonably anticompetitive "business practices." For the most part these claims amount to charges of state-law business torts, not violations of the federal antitrust laws. Whitten, 508 F.2d 547 at 560-62. We assume that point aside, however, for the sake of argument, and because of appellant's later Lanham Act claim, *see* pp. 491-92, *infra*. We have examined the evidence in respect to each alleged act, and we conclude that no reasonable jury could find a significant, unreasonably anticompetitive business practice that harmed Clamp-All.

a. Appellants say that CISPI marketed its trademarked pipe, fittings, and couplings together as a system, thereby deceptively **[**30]** suggesting that Clamp-All's coupling would not fit the system. The evidence appellant presented to show deception consisted of an advertisement that said:

> You cannot afford to use any other coupling but the CISPI stainless steel couplings for a COMPLETE CI NO-HUB system.

We have no reason to believe that CISPI's advertisement was significantly misleading **[***1437]** in the industry context. This language is of a kind characterized in *Whitten, 508 F.2d at 556*, as mere "sellers' talk." Moreover, CISPI aimed the advertisement at a technical audience, which would likely know enough not to find it significantly misleading in respect to whatever suggestion it might have made that Clamp-All's coupling would not fit the "system." (See the discussion under 'e' below.) We do not see how a jury, without more evidence than this vaguely worded advertisement, could find otherwise.

b. Appellant says that CISPI advertises its collective mark, CI NO-HUB, as a sign of quality, but, in fact, that advertising is deceptive because CISPI does not control the quality of the product. Clamp-All adds that there are "numerous examples of defective products bearing the CI NO-HUB trademark."

The record, however, **[**31]** contains only evidence of failures of CISPI *fittings* (curved pieces of pipe used to change the direction of the flow); it does not contain any evidence of any failure of any CISPI *coupling*. Appellant points to a Davidson Laboratory test as evidence, but that test shows that Clamp-All's more expensive coupling withstood strong water pressure more successfully than CISPI's; it did not show that CISPI's coupling was defective. Given the evidence, the logical links between "defective fittings," "no quality control," and "deceptive trademark use" in **[*490]** respect to coupling sales are too farfetched to warrant submission to the jury.

c. Clamp-All says that CISPI published test results favorable to its products but did not publish unfavorable test results. But ***HN13***[] the law, as far as we are aware, does not automatically require a firm to publish unfavorable test results.

Clamp-All adds that the favorable report -- the PTL report -- was misleading. The district court did not permit appellant to introduce that report, however, because it said the jury would not understand its significance without the help of an expert (and appellant had not designated an expert to testify about the report). We **[**32]** confess that we cannot understand the relevance of Clamp-All's complaint about the report. (It has something to do with the fact that the report explained that the ends of the pipes used in the test were "uncoated," but it did not explain that the ends were "machined off"). Our own inability to understand the relevance of Clamp-All contention leads us to conclude that the district court acted well within its powers in not admitting the report without expert explanation. *See* J. Weinstein & M. Berger, 3 *Weinstein's Evidence* para. 702[02] and cases cited at 702-9 n. 3 (1987).

d. Appellant says that CISPI members sometimes used the wrong trademark: they used the words "NO-HUB" instead of "CI NO-HUB." The only evidence that this is so, however, consisted of two of the defendants' price lists where the words "NO-HUB" appeared. The district court, noting that the lists contained all sorts of errors, concluded that this evidence would not permit a jury to find an intentional use of the wrong mark. We believe the court was correct.

e. Clamp-All says that CISPI improperly injured its reputation, first, by delivering (on several occasions during a six-month period) defective fittings to **[**33]** a site where contractors were using Clamp-All couplings, and second, by stating (at a press conference) that the Clamp-All coupling does not properly fit the CISPI system. The record presents uncontradicted evidence, however, that defective fittings are fairly common in the industry and that CISPI couplings tolerate common defects in the fittings, but Clamp-All couplings do not. That being so, a jury could not find, on the basis of this evidence, any deliberate plan to sabotage Clamp-All or its reputation, of a sort that could rise to the level of an antitrust violation. *See* *Whitten, 508 F.2d at 560-62*.

f. Clamp-All argues that CISPI should have allowed it to become a member. CISPI, however, is an association of pipe and fitting manufacturers, some, but not all, of whom also make CISPI couplings. Clamp-All does not make pipe or fittings (or, for that matter, CISPI couplings). There is, therefore, nothing unreasonable about CISPI's not accepting Clamp-All for membership. *See generally* 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 6I.02 (1988) ***HN14***[] (all members of an industry should be eligible for membership, but membership can be limited, for example, to "those **[**34]** operating at a certain level in the distribution chain").

We add two final points in respect to Clamp-All's antitrust claims. First, we cannot guarantee that we have found every bit of supporting evidence in the fourteen volumes of record. We have, however, examined the record with care, particularly those parts of it that the parties cited, and we are convinced there is no other evidence that could have made a difference to our conclusion. Second, appellant also brought charges of monopolization and attempted monopolization. *15 U.S.C. § 2 (1982)*. We have assumed, for the sake of argument, that CISPI manufacturers account for a large share of the coupling industry, but that they do not account for all, **[***1438]** or nearly all, its sales. (The district court properly refused to allow plaintiff's expert to present precise market share figures because that expert based his opinion significantly upon a few unmemorialized telephone calls, and estimated the reliability of his model as between "1 percent and 99 percent," *Fed. R. Evid. 403*; *see, e.g., American Bearing Company, Inc. v. Litton Industries, Inc., 540 F. Supp. 1163 (E.D. Pa. **[*491]** 1982)*, *aff'd*, *729 F.2d 943* (3rd Cir.), *cert. denied*, **[**35]** *469 U.S. 854, 83 L. Ed. 2d 112, 105 S. Ct. 178 (1984)*.) That being so, the same reasons that have led us to find appellant's case inadequate in respect to the unreasonableness (or anticompetitive tendencies) of its *§ 1* "anticompetitive practice" claims and its pricing claims, lead us to conclude that ***HN15***[] it could not show "exclusionary conduct" in respect to its monopolization or attempted monopolization claims. *See* 3 Areeda & Turner para. 626 at 83, *cited in* *Barry Wright, 724 F.2d at 230*.

IV

The appellant's complaint also asserted a violation of § 43 of the Lanham Act, *15 U.S.C. § 1125(a) (1982)*, which reads, in relevant part, as follows:

> ***HN16***[] Any person who shall affix, apply, or annex, or use in connection with any goods or services, a false designation of origin, or any false description or representation, . . . shall be liable to . . . any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

The complaint alleged that "defendants have used false descriptions or representations in connection with the sale of hubless couplings." The district court dismissed this count of the complaint on the ground that ***HN17***[] this circuit's previous opinions have narrowly **[**36]** interpreted the Lanham Act to apply only to those sorts of unfair business practices or false statements that "are of the same economic nature as those which involve infringement or other improper use of trade-marks," *e.g.*, palming off one's goods as those of another. *Samson Crane Co. v. Union National Sales, Inc., 87 F. Supp. 218, 222 (D. Mass. 1949)*, *aff'd per curiam*, *180 F.2d 896 (1st Cir. 1950)*; *see also* *Litton Systems, Inc. v. Whirlpool Corp., 728 F.2d 1423, 1444-45 (Fed. Cir. 1984)*; *Quabaug Rubber Co. v. Fabiano Shoe Co., 567 F.2d 154, 160 (1st Cir. 1977)* ("The basis for an action under this section is use of a mark in interstate commerce which is likely to cause confusion or to deceive purchasers concerning the *source* of the goods [(emphasis added)]").

Appellant concedes it cannot meet this standard. But it notes that other circuits have adopted more liberal views of the statute, some indicating that it in essence creates a private right of action for ordinary "false advertising." *See* *U-Haul International, Inc. v. Jartran, Inc., 681 F.2d 1159 (9th Cir. 1982)*; *Johnson & Johnson v. Carter-Wallace, Inc., 631 F.2d 186 (2nd Cir. **[**37]** 1980)*; *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649 (3rd Cir. 1954)*; *see generally* 2 J. McCarthy, *Trademark and Unfair Competition* § 27:4 (2nd ed. 1984). Appellant also points to cases where we have cast doubt on the validity of *Samson Crane. See* *Pignons S.A. de Mecanique v. Polaroid Corp., 657 F.2d 482 (1st Cir. 1981)* (plaintiff sought overturning of *Samson Crane*; court acknowledged merit of plaintiff's position, but declined to express an opinion); *Electronics Corporation of America v. Honeywell, Inc., 487 F.2d 513, 514 (1st Cir. 1973)* ("in relying on the district court opinion, we do not indicate necessary agreement with its conclusion that palming off is not an essential element of a Lanham Act claim"); *see also* *Camel Hair and Cashmere Institute of America, Inc. v. Associated Dry Goods, 799 F.2d 6 (1st Cir. 1986)* (harm is of traditional "protection of proprietary mark" variety, but does not involve palming off). Appellant asks us to reconsider the validity of *Samson Crane* in light of our, and other circuits', subsequent cases.

After examining the record, however, we have concluded that this is not an appropriate case **[**38]** in which to reconsider the validity of *Samson Crane*. Appellant had an opportunity to present its "false advertising" evidence in support of its antitrust claim, and we assume it did so. *See* pp. 489-90, *supra*. In light of that evidence, we believe it undesirable to prolong the case, for, even were we to reconsider *Samson Crane* and remand, it seems unlikely that appellant could win its action. We therefore continue to assume the validity of *Samson Crane*, and postpone its reconsideration for another day.

Finally, we affirm the pretrial dismissal of defendant American Brass & Iron **[*492]** Foundry on jurisdictional grounds for substantially the reasons noted by the district court. Appellant makes various other claims, which we find completely without merit. The judgment of the district court is

Affirmed.

Odishelidze v. Aetna Life & Casualty Co.

United States Court of Appeals for the First Circuit

August 3, 1988

No. 87-1901

Reporter

853 F.2d 21 *; 1988 U.S. App. LEXIS 10209 **; 1988-2 Trade Cas. (CCH) P68,167; 11 Fed. R. Serv. 3d (Callaghan) 1410

ALEXANDER ODISHELIDZE, Plaintiff, Appellant, v. AETNA LIFE & CASUALTY CO., ET AL., Defendants, Appellees

Prior History: [1]** Appeal from the United States District Court for the District of Puerto Rico, Hon. Jose Antonio Fuste, U.S. District Judge.

Core Terms

diversity jurisdiction, enterprise, employees, vacate, principal place of business, reconsideration motion, allegations, antitrust, district court, racketeering, subsidiaries

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

For purposes of *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, the activities of a corporation and its wholly owned subsidiaries are viewed as that of a single enterprise. Because unilateral action is not prohibited by *§ 1* of the Sherman Act, the actions of a parent corporation, its subsidiaries or sister corporations, and its employees cannot be considered concerted action. This rule applies to sister corporations owned by a third entity and to officers or employees of those corporations.

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

Torts > Vicarious Liability > Corporations > General Overview

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

HN2[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Under *18 U.S.C.S. § 1962(c)* the "person" alleged to be engaged in a racketeering activity (the defendant, that is) must be an entity distinct from the "enterprise." Under *§ 1962(c)* the enterprise is not liable. It is only a person, or one associated with an enterprise, not the enterprise itself, who can violate the provisions of the section.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > Business Entities

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

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

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

HN3[] **Citizenship, Business Entities**

Fed. R. Civ. P. 8(a)(1) requires a complaint to set forth a short and plain statement of the grounds upon which the court's jurisdiction depends. In a properly pleaded diversity action against a corporate defendant, plaintiff will advert to both factors set out in *28 U.S.C.S. § 1332(c)*, the place of incorporation and principal place of business.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

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

HN4[] **Pleadings, Amendment of Pleadings**

Although *Fed. R. Civ. P. 12(h)(3)* states that whenever it appears that the court lacks jurisdiction of the subject matter, the court shall dismiss the action, courts should heed the admonition of *Fed. R. Civ. P. 15* to allow amendments "freely" if it appears possible that plaintiff can correct the jurisdictional defect.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN5[] **Pleadings, Amendment of Pleadings**

Amendment to show that diversity jurisdiction actually exists, although defectively pleaded, is specifically allowed by *28 U.S.C.S. § 1653* which provides that defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts. This statute is normally construed liberally so as to avoid dismissals of complaints on technical grounds. Thus, such technical defects in jurisdictional pleadings usually are not fatal.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN6[] **Relief From Judgments, Altering & Amending Judgments**

Although a final judgment has already been entered dismissing the complaint, plaintiff is not barred from seeking to cure defective jurisdictional allegations where a motion for reconsideration and to vacate judgment was timely motion under *Fed. R. Civ. P. 60(b)*.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

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

HN7[] **Relief From Judgments, Altering & Amending Judgments**

A motion for relief from a final judgment pursuant to *Fed. R. Civ. P. 60(b)* is addressed to the discretion of the district court, may be granted only under exceptional circumstances, and may be reviewed only for abuse of discretion. In light of *28 U.S.C.S. § 1653*, amendment should be permitted, rather than dismissal, whenever it appears that a basis for federal jurisdiction can be stated. Where a motion for reconsideration and to vacate judgment includes the amendments necessary to correctly allege jurisdiction under *28 U.S.C.S. § 1332(c)*, and there unquestionably is diversity jurisdiction, it is an abuse of discretion for the district court to deny the motion for reconsideration and to vacate judgment.

Counsel: Harry Anduze Montano on brief for Appellant.

David P. Freedman, Edgar Cartagena-Santiago, Jorge I. Peirats, and O'Neill & Borges on brief, for Appellees.

Judges: Campbell, Chief Judge, Coffin and Selya, Circuit Judges.

Opinion by: PER CURIAM

Opinion

[*22] Appellant, Alexander Odishelidze, commenced an action in the district court for the District of Puerto Rico on November 18, 1985. He asserted jurisdiction pursuant to *28 U.S.C. §§ 1331* (federal question) and 1332 (diversity). He alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. § 1962(c)*, the Sherman Antitrust Act, *15 U.S.C. § 1*, and various state law claims. Odishelidze also asserted pendent jurisdiction regarding the state law claims. As defendants, Odishelidze named Aetna Life & Casualty Co., and its subsidiaries Aetna Variable Annuity Life Insurance Compana [sic] a.k.a. and/or d.b.a. Aetna Life Insurance and Annuity Company, Aetna Financial Services, Inc. and Aetna Life Insurance Company; in addition, he named as individual defendants William O. Bailey, Dean E. Wolcott, James **[**2]** R. Bailey, Thomas L. West and Stanley W. Thompson -- all officers or employees of the above corporations.

BACKGROUND

Odishelidze, a resident of Puerto Rico, was an exclusive general agent for Aetna in Puerto Rico from 1971 to 1976 and from 1978 until 1982. In 1981, as part of a reorganization of its operations, Aetna decided to close all of its general agencies throughout the country. As a result, Aetna, in 1982, terminated Odishelidze's general agency and offered him a position as the manager of a newly created office within Aetna -- the Puerto Rico Personal Financial Security Division Marketing Office. In this position, Odishelidze was an employee of Aetna. In 1984, Aetna decided to close the Puerto Rico marketing office. According to Aetna, it offered Odishelidze a position in Florida, but Odishelidze turned it down and was discharged. However, Odishelidze alleges that his employment was terminated in 1984 after he unsuccessfully attempted to secure adequate conditions for his San Juan office.

Basically, Odishelidze claims that Aetna accomplished the termination of the general agencies by fraudulent misrepresentations and inducements concerning salary and other benefits he would **[**3]** receive as an employee. He alleges that defendants conspired to deprive him of his "vested interests, property and contractual rights" as an exclusive agent. *See* Complaint, para. 14. This "concerted activity" allegedly was in restraint of trade because general agents were frozen out or boycotted while Aetna gained more control of the market. Odishelidze also claimed that this same behavior violated RICO because the fraudulent representations were "racketeering activities" carried out through use of the wires and mail, *see* *18 U.S.C. § 1961(1)(B)*, and harmed him in his business. *See id.* § 1964(c).

On May 8, 1986, Aetna moved to dismiss the complaint for, among other reasons not relevant here, failure to state a claim upon which relief could be granted. *See* *Fed.R.Civ.P. 12(b)(6)*. Aetna addressed both the state and federal claims in its *Rule 12(b)(6)* motion. On August 26, 1987, the district court dismissed the complaint. *Odishelidze v. Aetna Life & Casualty Co., 668 F. Supp. 94 (D.P.R. 1987)*. It found that Odishelidze had failed to state both a cognizable antitrust claim and an actionable civil RICO cause of action. It also found that diversity jurisdiction was lacking **[**4]** due to the averment in Odishelidze's complaint that "Aetna Life and Casualty Co. is a corporation organized and existing under the laws of the State of Connecticut, with its principal *place of business in Puerto Rico*." See *668 F. Supp. at 96 n. 2* (emphasis in **[*23]** original). [1] The court, therefore, did not consider the merits of the state law claims, dismissing them for lack of pendent jurisdiction. *Id. at 95, 99*. It also ordered the complaint dismissed "for failure to plead a cognizable claim under federal jurisdiction" and noted that the dismissal was "without prejudice of Odishelidze filing another action in the proper *local forum*." *Id. at 99* (emphasis added).

On September 15, 1987, Odishelidze filed a motion for reconsideration and to vacate judgment. In addition to rearguing his antitrust and RICO claims, he argued that diversity jurisdiction did in fact exist. He stated that the information in paragraph 3 of his complaint that Aetna Life & Casualty Co. had its principal place of business in "Puerto Rico" was a typographical error and that the paragraph was meant to read that **[**5]** the principal place of business of Aetna Life & Casualty Co., as with all the other corporate defendants, was in *Connecticut*, thereby creating proper diversity jurisdiction. The court denied this motion, without opinion, on September 23, 1987. On September 23, Odishelidze filed a timely notice of appeal both from the original dismissal of his complaint and the denial of his motion for reconsideration.

DISCUSSION

1. *The Federal Claims*

We affirm the dismissal of Odishelidze's antitrust and RICO claims. As for the antitrust claim, Odishelidze's failure to state a "contract, combination. . . or conspiracy" is obvious and fatal to his *§ 1* claim. [2] *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. *Copperweld* clearly rejected the

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[1] All the subsidiaries were noted to be citizens of Connecticut. *See* Complaint, paras. 3-6.

[2] *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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

intra-enterprise conspiracy doctrine. That is, ***HN1***[] for *§ 1* purposes, the activities of a corporation and its wholly owned subsidiaries are viewed as that of a single enterprise. *Id. at 771*. Because unilateral action is not prohibited by *§ 1* of the Sherman Act, *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, the actions of a parent corporation, its subsidiaries or sister corporations, and its **[**6]** employees cannot be considered concerted action. *See VII* P. Areeda, ***Antitrust Law*** paras. 1464(f), 1470 (1986) (*Copperweld* holding applies to sister corporations owned by a third entity and to officers or employees of those corporations, citing cases).

As for Odishelidze's RICO claim, it is clear that ***HN2***[] under *§ 1962(c)* [3] the "person" alleged to be engaged in a racketeering activity (the defendant, that is) must be an entity distinct from the "enterprise;" under *§ 1962(c)* the enterprise is not liable. *Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 29-30 (1st Cir. 1986)*. That is, the Aetna companies and their officers or employees (the named defendants) cannot be the entity that conducts its own affairs through a pattern of racketeering activity. *Id. at 30*. Throughout **[**7]** his brief and pleadings below, Odishelidze has continued to characterize the enterprise as Aetna and its subsidiaries and employees without specifically identifying a defendant, distinct from the enterprise, which conducted the enterprise's activities through a pattern of racketeering activity. For example, in paragraph 28 of his complaint, Odishelidze states:

> The defendant corporation and its named subsidiaries, its officers, directors, and employees, to wit: Aetna **[*24]** Life and Casualty Company; Aetna Variable Annuity Life Insurance Company; Aetna Financial Services, Inc.; Aetna Life Insurance Company; William O. Bailey; Dean E. Wolcott; James R. Bailey, Thomas L. West; Edward F. Dwight; Stanley W. Thompson and other [sic] agreed and entered as employees and agents of the defendant enterprise into a pattern of activities directed to defraud plaintiff. . . ."

As the court in *Schofield* stated, "'It is only a person, or one associated with an enterprise, not the enterprise itself, who can violate the provisions of the section.'" *Id. at 30* (quoting *Van Schaick v. Church of Scientology of California, 535 F. Supp. 1125, 1136 (D.Mass. 1982))*.

[8]** 2. *Diversity Jurisdiction*

HN3[] *Fed.R.Civ.P. 8(a)(1)* requires a complaint to set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." Under this standard, Odishelidze's complaint technically is defective because it erroneously designates the principal place of business of Aetna Life & Casualty Co. as Puerto Rico instead of Connecticut. [4] *See* *28 U.S.C. § 1332(c)*; *District of Columbia v. Transamerica Insurance Co., 254 U.S. App. D.C. 374, 797 F.2d 1041, 1043-44 (D.C. Cir. 1986)* (in a properly pleaded diversity action against a corporate defendant, plaintiff will advert to both factors set out in *§ 1332(c)* -- place of incorporation and principal place of business). ***HN4***[] Although *Fed.R.Civ.P. 12(h)(3)* states that "whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action," courts should heed the admonition of *Fed.R.Civ.P. 15* to allow amendments "freely" if it appears possible that plaintiff can correct the jurisdictional defect. *See* 3 J. Moore, *Moore's Federal Practice* para. 15.10 (2d ed. 1985) (footnote omitted).

[9]** Indeed, ***HN5***[] amendment to show that diversity jurisdiction actually exists, although defectively pleaded, is specifically allowed by *28 U.S.C. § 1653* which provides that "defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." *See Moore, supra*, para. 15.09, at 15-102. This statute is

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[3] *18 U.S.C. § 1962(c)* provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[4] Although not raised by the district court, the complaint also is defective as to the subsidiaries because Odishelidze states only that they are "citizens" of Connecticut and does not say where they are incorporated. *See* *28 U.S.C. § 1332(c)*.

normally construed liberally so as to avoid dismissals of complaints on technical grounds. *Topp v. CompAir, Inc., 814 F.2d 830, 832 n. 2 (1st Cir. 1987)* (citation omitted). Thus, such technical defects in jurisdictional pleadings usually are not fatal. *Id.*

HN6[] Even though a final judgment had already been entered dismissing Odishelidze's complaint, he is not barred from seeking to cure the defective jurisdictional allegations. *See Moore, supra*, para. 15.10. His motion for reconsideration and to vacate judgment was a timely motion under *Fed.R.Civ.P. 60(b)*. Although not designated as such, and although no formal request to amend was included in his motion, we will treat Odishelidze as having requested the court to vacate its judgment to allow him to cure the jurisdictional defects in his original complaint.

HN7[] "A motion for relief from a final judgment **[**10]** pursuant to *Rule 60(b)* is addressed to the discretion of the district court, *Dankese v. Defense Logistics Agency, 693 F.2d 13, 15 (1st Cir. 1982)*, may be granted only under exceptional circumstances, *Lepore v. Vidockler, 792 F.2d 272, 274 (1st Cir. 1986)*, and may be reviewed only for abuse of discretion, *Browder v. Illinois Department of Correction*, 434 U.S. [257, 263 n. 7, *98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)]*. . . ." *Rivera v. M/T Fossarina, 840 F.2d 152, 156 (1st Cir. 1988)*. In this situation, the *Rule 60(b)* motion must be considered in light of *28 U.S.C. § 1653*. *Averbach v. Rival Manufacturing Co., 809 F.2d 1016, 1019* (3d Cir.), *cert. denied*, *482 U.S. 915, 107 S. Ct. 3187, 96 L. Ed. 2d 675, 484 U.S. 822, 108 S. Ct. 83, 98 L. Ed. 2d 45 (1987)*. Indeed, amendment should be permitted, rather than dismissal, whenever it appears that a basis for federal jurisdiction can be stated by plaintiff. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1214 (1969).

[*25] Odishelidze's motion for reconsideration and to vacate judgment includes the amendments necessary to correctly allege jurisdiction under *§ 1332(c)*. He states in the motion that all the corporate defendants were incorporated in the state of Connecticut and have their principal **[**11]** places of business there. Moreover, defendants do not contest the amended jurisdictional allegations and have never argued that diversity jurisdiction does not exist in this case. Because there unquestionably is diversity jurisdiction, we find that it was an abuse of discretion for the district court to deny Odishelidze's motion for reconsideration and to vacate judgment. *Cf.* Moore, *supra*, para. 15.10, at 15-104 n. 2 (abuse of discretion to deny leave to amend on granting dismissal when plaintiff could have stated a claim, and cases cited).

Indeed, we find that a formal amendment of the complaint is not necessary at this stage. *See Wright & Miller, supra*, § 1214 (when court can readily recognize existence of diversity jurisdiction, amendment of complaint not always required) (footnote omitted). We therefore vacate both the district court's order denying Odishelidze's motion to reconsider the diversity issue and the judgment dismissing the complaint for failure to plead diversity jurisdiction. We affirm, however, the court's refusal to reconsider and vacate its judgment of dismissal of the antitrust and RICO claims. [5] The case is remanded to the district court with instructions to **[**12]** treat the defective allegations of diversity jurisdiction as cured and to consider the remaining state law claims.

So ordered.

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[5] Because of the view we take of the antitrust claim, *see* text *supra*, we need not address the district court's intimation, *668 F. Supp. at 97 n. 4*, concerning the scope of the "business of insurance" for McCarran-Ferguson Act purposes. We take no view of whether or not that term embraces matters germane to insurer-agent relationships. *See Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 224-25, 59 L. Ed. 2d 261, 99 S. Ct. 1067 n. 32 (1979)* (leaving question open); *Thompson v. New York Life Ins. Co., 644 F.2d 439, 443 (5th Cir. 1981)* (similar).

Grappone, Inc. v. Subaru of New England

United States Court of Appeals for the First Circuit

September 30, 1988

No. 87-1538

Reporter

858 F.2d 792 *; 1988 U.S. App. LEXIS 14073 **; 1988-2 Trade Cas. (CCH) P68,299

GRAPPONE, INC., Plaintiff, Appellee, v. SUBARU OF NEW ENGLAND, INC., Defendant, Appellant

Prior History: **[**1]** Appeal from the United States District Court for the District of New Hampshire, [Hon. Shane Devine, U.S. District Judge].

Core Terms

market power, Seller, tie, buyers, dealer, percent, tying product, spare parts, prices, sales, anticompetitive, market share, tied product, antitrust, customers, imports, per se rule, Sherman Act, distributor, anti-tying, consumers, protested, effects, hurt

LexisNexis® Headnotes

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

HN1[] **Tying Arrangements, Clayton Act**

Regardless of whether a plaintiff charges a violation of the Sherman Act § 1 or the Clayton Act § 3, a "tying arrangement" is unlawful where (1) the seller has "market power" in the tying product, (2) the tie links "two separate products," and (3) the tie forecloses a "not insubstantial" amount of potential sales for the "tied" product.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws exist to protect the competitive process itself, not individual firms. The antitrust laws protect the competitive process in order to help individual consumers by bringing them the benefits of low, economically efficient prices, efficient production methods, and innovation.

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

HN3[] **Regulated Practices, Market Definition**

Market power is the power to raise price above the levels that would be charged in a competitive market.

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

Securities Law > Blue Sky Laws > Offers & Sales

HN4[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A seller, possessing significant market power with respect to Product A, may cause anticompetitive harm by tying as follows: by reducing the price of Product A slightly, or by otherwise not fully exploiting its power with respect to Product A, the seller may induce the buyer to accept the tie; by doing so, the seller may build a strong market position in Product B, and that position in Product B, in turn, may increase its power to charge high prices in respect to Product A. If a monopolist of patented can-closing machinery, for example, insists, as a condition of selling his machines, that their purchasers buy his cans, he will likely soon have a monopoly in cans as well as machines. And, that fact, the fact that he controls both cans and machines, may make his monopoly safer from competitive attack when his patent on the can-closing machinery expires. A new competitor would then have to enter both levels of the business, cans and machines, to deprive him of monopoly profits. And, this added security may enable the machinery monopolist to charge higher prices. The tie, by permitting the seller to extend its market power from one level to two, may thereby raise entry barriers, providing security that helps a monopolist-seller further harm the consumer.

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

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

For purposes of establishing a tying arrangement, "market power" means significant market power, more than the mere ability to raise price only slightly, or only on occasion, or only to a few of a seller's many customers. When the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, the per se rules do not apply. To show market power, the seller must have a significant market share or sell a unique, such as a patented, product for which there are not readily available substitutes. Market power means that the seller must be able to raise prices or impose burdensome terms on an "appreciable" number of buyers.

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Jay N. Varon with whom Dennis A. Henigan, Denise T. DiPersio, Foley & Lardner, Howard B. Myers and Myers, Jordan & Duffy were on brief for Appellee.

Judges: Coffin, Breyer and Selya, Circuit Judges.

Opinion by: BREYER

Opinion

[*793] BREYER, Circuit Judge.

Subaru of New England, Inc. (SNE), a regional Subaru distributor, appeals an antitrust treble damage award totalling $ 51,729.59, *534 F. Supp. 1282 (1982)*, (plus $ 200,590.18 costs and attorneys fees). The award rests upon the district court's determination that SNE, as a condition of making Subaru cars available to Grappone, Inc. (Grappone), a local automobile dealer, required Grappone to buy some spare Subaru parts. The court held that this conditioned sale constituted a "tying" arrangement, unlawful under *Section 1* of the Sherman Act, *15 U.S.C. § 1 (1982 & Supp. II 1984)*, and *Section 3* of the Clayton Act, *15 U.S.C. § 14 (1982)*. *Jefferson Parish Hospital* ***[**2]*** *District No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*; *International Salt Co., Inc. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*. SNE argues that the district court's determination of liability rests upon an overly mechanical, and legally erroneous, application of the law prohibiting tying. We agree; and, we reverse the judgment.

I

The basic facts are as follows: In 1973, SNE's supplier, Subaru of America (SOA), was worried that Subaru dealers had not had, and in 1974 might not have, enough spare parts to make repairs to recently purchased Subaru cars. After a review of past buyers' needs and consultation with Subaru headquarters in Japan, SOA made up a list of spare parts kits that it wished both regional distributors and local dealers to have on hand. In particular, it wanted each local dealer to have several "dealer's kits," each with 88 parts for the 1974 cars (plus a few parts for previous models) and also to have "supplemental kits," each with 44 spare parts, out of a total of approximately 4,000 to 5,000 different Subaru parts. SOA said that readily available spare parts would help Subaru sell its cars, which at that time (1973/74) accounted for a very small share of American, New **[**3]** England, and New Hampshire auto sales. In fact, in 1974, Subaru accounted for 3.4 percent of all auto *imports* in New Hampshire, 2.8 percent in New England, and 1.5 percent in the United States. (Our own research indicates that in 1974, imports accounted for 15.9 percent of all auto sales, which means that Subarus likely accounted for about one-quarter of one percent of auto sales in that year in the United States, and apparently under one percent of all auto sales in New England and New Hampshire. U.S. Dept. of Commerce, *Statistical Abstract of the United States 1988*, Chart No 992.)

As part of the "replacement part availability" effort, SNE (the regional distributor) told Grappone, Inc. (the local dealer) that it must have on hand, in 1974, two dealer kits and two supplemental kits. Grappone objected on the ground that the parts kits were overly inclusive. Grappone believed the combined kits should contain fewer parts and sell for about $ 2,000, instead of about $ 3,300, leaving it free to obtain the extra parts elsewhere. SNE insisted that Grappone take the kits, and it told Grappone that it could not have its allocation of Subaru cars in 1974 unless it did so. Although Grappone **[**4]** sold AMC, Pontiac, and Jeep cars, and (from another site) Toyotas and Peugeots (indeed the full name on the stationary is "Grappone Pontiac, Inc."), it wanted the Subarus as well. **[*794]** Grappone went 10 months without the new 1974 Subarus; it then agreed to take the kits; SNE accepted Grappone's July 1974 car order; and Grappone brought this lawsuit. After many legal events, which we need not recount, Grappone eventually won the verdict mentioned, on the basis of its tying claim. In our view, however, even that small victory was without adequate legal basis.

II

The case law has long indicated, ***HN1***[] regardless of whether a plaintiff charges a violation of Sherman Act *§ 1* or Clayton Act *§ 3*, that a "tying arrangement" is unlawful where (1) the seller has "market power" in the tying product, *Jefferson Parish, 466 U.S. at 17-18*; *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)* ("*Fortner I*"); (2) the tie links "two separate products," *Jefferson Parish, 466 U.S. at 18, 19-22*; *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613-14, 97 L. Ed. 1277, 73 S. Ct. 872*

(1953); and (3) the tie forecloses a "not insubstantial" amount of potential sales for the "tied" **[**5]** product, International Salt, 332 U.S. at 396 (Sherman Act § 1, Clayton Act § 3); *see also* Jefferson Parish, 466 U.S. at 16; Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 11, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958) (Sherman Act § 1); Wells Real Estate, Inc. v. Greater Lowell Board of Realtors, 850 F.2d 803, 814 (1st Cir. 1988). In our view, the plaintiffs in this case have failed to show the first of these essential elements.

1. We have reached our conclusions after examining with care the Supreme Court's recent analysis of tying arrangements in Jefferson Parish, supra. Although the Court divided 5-4 over whether courts should treat tying as unlawful *per se*, we read both majority and concurring opinions as accepting the following basic propositions.

First, in *Jefferson Parish*, as in previous cases, the Court recognizes that ***HN2***[] the antitrust laws exist to protect the competitive process itself, not individual firms. Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962); Will v. Comprehensive Accounting Co., 776 F.2d 665, 673-74 (7th Cir. 1985), *cert. denied*, *475 U.S. 1129, 90 L. Ed. 2d 201, 106 S. Ct. 1659 (1986)*. And, the antitrust laws protect the competitive process in order to **[**6]** help individual consumers by bringing them the benefits of low, economically efficient prices, efficient production methods, and innovation. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979); Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9, 10-11 (1st Cir. 1987); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 231, 234-35 (1st Cir. 1983).

Second, the Court recognized that, typically, the way in which tying may hurt the competitive process itself is by helping to maintain or to augment pre-existing ***HN3***[] market power, defined by the Court as the power to "raise[] [price] above the levels that would be charged in a competitive market." Jefferson Parish, 466 U.S. at 27 n.46.

Third, both the majority and minority opinions in *Jefferson Parish* recognized that tying's anticompetitive mechanism is not obvious. *Compare* Jefferson Parish, 466 U.S. at 11-12, 14-15 (recognizing some combined sales are consistent with rather than compromise "competitive ideal" of Sherman Act), and at 34, 35-36 (O'Connor, J., concurring) (need for "elaborate inquiry into . . . [tying's] economic effects") *with* International ***[**7]*** Salt, 332 U.S. at 396 ("the tendency of the [tying] arrangement to accomplishment of monopoly seems obvious"); Northern Pacific, 356 U.S. at 6 **[*795]** ("Where [tying] . . . conditions are successfully exacted[,] competition on the merits . . . is inevitably curbed."). Rather, to understand the harm that tying may cause requires a fairly subtle antitrust analysis. One cannot infer an automatic harm to the competitive process simply because a Seller refuses to sell Product A to a Buyer unless the Buyer also buys Product B. That is to say, a tie does not "obviously" hurt a Buyer by making it take a product it does not want. Indeed, the tie itself cannot *automatically*, in and of itself, force the Buyer to take an inferior Product B or to pay more than it wishes for that product. If the Seller does not have market power in respect to product A, it cannot force buyers to take a more expensive or less desirable Product B, for if the Seller tries to do so, buyers will simply turn elsewhere for Product A. If the Seller does have, and has been fully exercising, market power, it also cannot force buyers to take a more expensive or less desirable Product B, *unless* it provides buyers *equivalent* **[**8]** compensation by lowering the price of Product A (or maintaining Product A's price at a level lower than the Seller has the *power* to charge), for otherwise buyers, who were already paying as much as the Seller could charge them (with its degree of market power) would also likely switch to other sellers or discontinue use of Product A. *See* Jefferson Parish, 466 U.S. at 39 & n.8, 40 (O'Connor, J., concurring). This is simply to make the logical point that "fully exploited" buyers would not take a less desirable Product B without compensation, for otherwise they were not being "fully exploited." *See* id.; 3 P. Areeda and D. Turner, ***Antitrust Law*** para. 725b (1978 & Supp. 1987) (hereafter Areeda and Turner); *see, e.g.,* Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1213 (9th Cir. 1977) (buyers interested in *end* price of product). Scholars have elaborated and refined this logical point, taking account, for example, of the fact that sellers typically do not set individualized prices and that typically *some* buyers may have special preferences for a particular seller of even the most competitive product. *See, e.g.*, 2, 3 Areeda and Turner PP **[**9]** 409d, 410, 725e. The upshot (which the four concurring *Jefferson Parish* justices called "counterintuitive," 466 U.S. at 36) is that a 'tie' does not hurt the typical buyer in any *obvious* way; one needs a more refined analysis to find the harm. *See, e.g.*, P. Areeda, *Antitrust Analysis* para. 531(a) (3d ed. 1981); 3 Areeda and Turner paras. 725b, 733; R. Bork, *The Antitrust Paradox* 365-81 (1978); R. Markovits, "Tie-ins, Reciprocity, and the Leverage Theory," 76 Yale L. J. 1397 (1967); W. Bowman, Jr., "Tying Arrangements and the Leverage Problem," 67 Yale L. J. 19 (1957).

The *Jefferson Parish* Court provides that more refined analysis. The majority and concurrence recognized that ***HN4***[] a Seller, possessing significant market power with respect to Product A, may cause anticompetitive harm by tying as follows: by reducing the price of Product A slightly (or by otherwise not fully exploiting its power with respect to Product A), the Seller may induce the Buyer to accept the tie; by doing so, the Seller may build a strong market position in Product B, and *that position* in Product B, in turn, may increase its power to charge high prices in respect to Product A. If **[**10]** a monopolist of patented can-closing machinery, for example, insists, as a condition of selling his machines, that their purchasers buy his cans, he will likely soon have a monopoly in cans as well as machines. And, that fact -- the fact that he controls *both* cans and machines -- may make his monopoly safer from competitive attack when his patent on the can-closing machinery expires. A new competitor would then have to enter *both* levels of the business (cans and machines) to deprive him of monopoly profits. And, this added security may enable the machinery monopolist to charge higher prices. The tie, by permitting the Seller to extend its market power from one level to two, may thereby **[*796]** raise entry barriers, providing security that helps a monopolist-seller further harm the consumer. This point is made both by the *Jefferson Parish* majority, *466 U.S. at 14*, and the concurring justices, *id. at 36-37, 39*; *see also* 3 Areeda and Turner paras. 725h, 733e.

Of course, in such circumstances, tying would hurt the Buyer or consumer only when it first hurts firms seeking to sell the *tied* product. Only if the tie significantly reduces the opportunities to sell Product B, **[**11]** can the tie significantly increase the Seller's power in respect to Product B, and thereby (*i.e.*, by raising entry barriers) increase the Seller's power in respect to Product A. *See* *Jefferson Parish, 466 U.S. at 14, 18-25*. And, insofar as tying impedes "competition on the merits," discouraging the search for innovation or efficiency, it does so in the *tied* product markets. *Jefferson Parish, 466 U.S. at 14*; 3 Areeda and Turner para. 725g; *see, e.g.,* *ILC Peripherals Leasing Corp. v. International Business Machines Corp., 448 F. Supp. 228 (N.D. Cal. 1978)*, *aff'd per curiam sub nom.* *Memorex Corp. v. International Business Machines Corp., 636 F.2d 1188 (9th Cir. 1980)*, *cert. denied*, *452 U.S. 972, 69 L. Ed. 2d 983, 101 S. Ct. 3126 (1981)*.

The majority and minority opinions in *Jefferson Parish* disagree, not in respect to the nature of the link between tie and potential competitive harm, but in respect to the legal conclusions they would draw from the nature of this linkage. The minority would abandon the *per se* anti-tying rules and analyze tying under a "rule of reason"; it would prohibit tying only when, according to its "demonstrated economic effects[,] . . . [tying's] **[**12]** anticompetitive impact outweighs its contribution to efficiency." *Jefferson Parish, 466 U.S. at 41-42*. The majority would retain pre-existing *per se* rules; but it also breathes life into the screening function that the preconditions of those *per se* rules serve. The majority, for example, makes clear that ***HN5***[] by its requirement of "market power" it means *significant* market power -- more than the mere ability to raise price only slightly, or only on occasion, or only to a few of a seller's many customers. The *Jefferson Parish* Court makes this point through its negative holding: the fact that 30 percent of East Jefferson Hospital patients came from Jefferson Parish did *not* show that the Hospital, because of its geographical location, possessed market power in respect to those who lived in that parish. And, the Court suggests the same point through what it says: "when . . . the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product," the *per se* rules do not apply. *Jefferson Parish, 466 U.S. at 17-18*. To show market power, the seller **[**13]** must have a significant market share or sell a unique, such as a patented, product for which there are not readily available substitutes. *Id. at 16-17*; *see also* *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620 n.13, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)* ("*Fortner II*") (market power means seller must be able to raise price or impose burdensome terms on an "*appreciable*" number of buyers) (emphasis added).

That the "market power" hurdle is moderately high -- that it cannot ordinarily be surmounted simply by pointing to the fact of the tie itself or to a handful of objecting customers -- makes sense in light of the harms the anti-tying rules seek to avoid. After all, sellers typically set fairly uniform prices designed to attract a large number of buyers, not simply a handful of buyers who have some unusual and special preference for its products; a seller who has the power to raise prices only in respect to that special handful is a seller who cannot easily cause harm in *tied* product

[*797] markets; and therefore one who cannot easily harm consumers. Of course, virtually every seller of a branded product has *some* customers who especially prefer its product. But to permit **[**14]** that fact alone to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose. *See, e.g.,* *United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960)* ("tie" between equipment and installation aided success of system and growth of industry), *aff'd per curiam*, *365 U.S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806 (1961)*. Though some members of the Supreme Court might go further, the holding of *Jefferson Parish* convinces us that the entire Court means the "market power" requirement to be serious enough to screen out this class of harmless tie.

2. The plaintiffs here cannot meet the significant "market power" requirement of *Jefferson Parish*. They have not provided evidence that SNE could raise prices significantly above the competitive level; in fact, the evidence in the record indicates the contrary. For one thing, Subaru's market share, whether measured in terms of sales of all autos or of imports or in any other reasonable way, is miniscule. *See* *Kenworth of Boston, Inc. v. Paccar Financial Corp., 735 F.2d 622, 623-24 (1st Cir. 1984)* (tying product is Paccar trucks, relevant market is that for all heavy trucks); **[**15]** *Kingsport Motors, Inc. v. Chrysler Motors Corp., 644 F.2d 566, 571 (6th Cir. 1981)* (tying product is Dodge cars, relevant market is that for all medium priced automobiles sold in U.S.); *Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc., 475 F. Supp. 973, 986 (D. Mass. 1979)* (tying product is Toyotas, relevant market is that for all new foreign and domestic cars); *see also* *A. I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673, 675 (6th Cir. 1986)* (tying product is specialized computer equipment, relevant market is that for all small computers). National sales of Subarus during the relevant years (as suggested by the import figures in the record) were likely about a fraction of 1 percent of all autos sold. Subaru at most accounted for 3.4 percent of auto imports sold in New Hampshire in 1974. (The record contains references to something called "competition" cars, in respect to which SNE's 1974 market share was, at most, two or three percentage points higher (a maximum of 5.6 percent in the New Hampshire market.)) If the fact that Jefferson Parish Hospital received 30 percent of all hospital patients living in East Jefferson Parish did **[**16]** *not* show market power, it is difficult to see how these far smaller figures could show the contrary here. *Cf.* *A. I. Root, 806 F.2d at 675* (2-4 percent market share insufficient); *Kenworth of Boston, 735 F.2d at 624* (18 percent share insufficient); *Phillips v. Crown Central Petroleum Corp., 602 F.2d 616, 629 (4th Cir. 1979)* (10 percent share "probably . . . very close to the minimum permissable"), *cert. denied*, *444 U.S. 1074, 62 L. Ed. 2d 756, 100 S. Ct. 1021 (1980)*; U.S. Dept. of Justice, *Vertical Restraint Guidelines* § 5.3 (1985) (market shares less than 30 percent treated as insufficient), *quoted in* *Will, 776 F.2d at 672*. Were we to try to measure SNE's market share, in terms of the market for auto franchises, the plaintiff fares no better. *See* *Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342, 1346-47 (9th Cir. 1987)* (where franchise agreement required spare parts to be purchased from distributor, tying product market is that for automobile dealerships). The record shows that Subaru was but one of many automobile franchisors, and that Grappone itself held not only Subaru, but also AMC, Pontiac, Jeep, Toyota, and Peugeot franchises.

For another thing, Grappone **[**17]** concedes that out of 64 Subaru dealers who accepted the parts kits, only three seriously protested SNE's efforts to require purchase of the kits. As far as the record is concerned, the remaining 61 may well have believed SNE's explanation, presented at a meeting where even a protesting dealer admitted that SNE "drummed up" interest in the kits, that the kits would help maintain customer satisfaction; the dealers then would have wished to obtain both cars and kits. Supp. App. at 70. And given the plausible business reason **[*798]** for accepting both products, their having done so without protest makes that acceptance virtually worthless as evidence of SNE's market power. *See* *Fortner II, supra* (acceptance of competitive deal is not evidence of coerced tie). Those few instances in which protests suggest that SNE took advantage of a special preference for its product cannot by themselves demonstrate significant SNE market power -- the power to coerce an "appreciable" number of buyers. *See* *Fortner II, 429 U.S. at 618 n.10, 620 n.13* (to show market power, plaintiff must show that "an *appreciable number*" of buyers accepted the tie in "the absence of other explanations for the[ir] willingness **[**18]** . . . to purchase the package") (emphasis added).

Further, the amount of money that best measures the extent to which SNE may have coerced Grappone -- the extra amount of charge for the kits -- was small. It amounted to the $ 1,000 worth of "unnecessary" parts in each of two combined kits supplied for one year. Given the fact that Grappone could expect to sell about 24 Subarus in 1974 according to the district court's findings, SNE's ability to extract so small an amount of "extra" money by itself shows very little power, even in respect to Grappone, particularly given the fact that Grappone distributed many other cars as well. Given Subaru's tiny market share, why, if SNE or Subaru sought to raise prices significantly or to impose other serious barriers, would Grappone (which calls itself "Grappone Pontiac") not simply have allocated more time, space, and effort to selling its AMC, Pontiac, Jeep, Toyota, and Peugeot cars instead of Subarus?

Finally, plaintiff has made no showing that Subarus had any special or unique features, such as patents or copyrights, that might demonstrate market power. *See* Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1341-42 (9th Cir. 1984), **[**19]** *cert. denied*, 473 U.S. 908, 87 L. Ed. 2d 657, 105 S. Ct. 3534 (1985); *cf.* Jefferson Parish, 466 U.S. at 16-17. The most one can say is that Subaru has a brand name and sells through "authorized" Subaru dealers. But, we find no Supreme Court case law suggesting that such features by themselves are sufficient to show "market power." They do not automatically demonstrate any "economic" or "cost advantage" or any other advantage "not shared by . . . competitors," Fortner II, 429 U.S. at 620-21 (quoting in part Fortner I, 394 U.S. at 505 n.2), particularly in an industry where many larger competing firms all do business in this way. Will, 776 F.2d at 672 (no uniqueness argument unless plaintiff shows barrier preventing rivals from offering same package at same cost); Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 426-27 (5th Cir. 1978) (same), *cert. denied*, *444 U.S. 831, 62 L. Ed. 2d 39, 100 S. Ct. 59 (1979)*; *cf.* Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1224-25 (3rd Cir.) (proof of coercion needed, otherwise factors "inherent" in voluntary franchise agreement would suffice to show tie), *cert. denied*, *429 U.S. 823, 50 L. Ed. 2d 84, 97 S. Ct. 74 (1976)*. Grappone points to Digidyne, supra, as contrary authority, but in that **[**20]** case the Ninth Circuit found a tying product, a computer operating system, "unique" because (1) it was copyrighted, and (2) many of its buyers had previously invested millions of dollars in software design that worked only with that system. We find no directly analogous circumstances here. Grappone does not offer similar evidence of such large dealer investments in Subaru dealerships by those who protested the tie; Grappone's multiple brand representation suggests the contrary, at least for some significant number of franchisees; and, given the strong competition by other brands, we do not see how such dealer investment (if it existed) could easily translate into Subaru market power of a kind that, through tying, could ultimately lead to higher than competitive prices for consumers. Regardless, the product here in question, unlike that in *Digidyne*, is not copyrighted; and therefore does not benefit from whatever legal market power "uniqueness" a copyright still offers in the tying contest. *Cf.* Jefferson Parish, 466 U.S. at 16-17.

[*799] III

Without the use of *per se* rules the plaintiff cannot show a violation of the antitrust laws, for the "tie's" anticompetitive effects do not **[**21]** outweigh its legitimate (here procompetitive) business justifications. Jefferson Parish at 31. *See* 7 Areeda & Turner § 1500, at 362-63. For one thing, the record does not demonstrate an actual anticompetitive effect in the *tied* product market. *See* slip op. pp. 14-16, *supra*. Rather, the district court found a *potential* effect. It said that, without the tie, replacement dealers capable of supplying some of the parts *might* decide to design those spare parts themselves and to enter the "Subaru part" replacement market. But, we could find no evidence (and given the tiny numbers it is unreasonable to think) that any decision by others to enter that market for a year was likely or that their failure to do so could have had a *significant* anticompetitive impact. That any such effect was of little significance is reinforced by Grappone's claim that some of the extra parts were unnecessary; to that extent, anticompetitive impact is impossible, for purchases from SNE could not have replaced purchases from any other actual, or potential, SNE competitor. Jefferson Parish, 466 U.S. at 16 ("when a purchaser is 'forced' to buy a product he would not have otherwise bought **[**22]** even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available . . . has been foreclosed"). Indeed, we are not certain whether the evidence of *tied product harm* would have been strong enough to invoke *per se* anti-tying rules even had our decision in respect to the tying product been different (though we need not decide the matter). *See* Jefferson Parish, 466 U.S. at 22 (*per se* anti-tying rules apply only where the plaintiff can "identify a distinct product market in which it is efficient to offer [the tied product] separately from [the tying product]"). We are certain, however, that the tie shows no more than trivial effects when judged under a "rule of reason."

For another thing, the record contains evidence of legitimate, procompetitive, business justifications for the tie. The parties refer to portions of the record that indicate that SOA, the American Subaru importer, developed its spare parts package only after dealers complained of part supply shortages that made it more difficult to build a market for Subarus. An executive from one of Subaru's oldest **[**23]** distributors also testified without contradiction that such parts supply problems had cut Renault's sales of 100,000 per year in the 1960's to 5,000 to 6,000 by 1977. And, the district court found the availability of sufficient spare parts "basic" to the successful marketing of automobiles. SOA determined which particular spare parts customers had needed in the first year after purchase, and which spare parts had not been readily available. It used this list to develop its spare parts kits. SNE insisted that kits be available only for the first year after the cars were sold. In other words, the record indicates that Subaru was a small firm attempting to break into the industry; it shows that the tie plausibly served the procompetitive purpose of helping the firm develop or maintain sales. Given the absence of serious anticompetitive impact, this evidence of justification is sufficient to qualify the agreement as lawful under a rule of reason (a question that the district court did not directly consider). Indeed, it is conceivable (though we need not decide), that the "tie" was "efficient" enough a way to do business that the agreement could have escaped *per se* condemnation under **[**24]** the lines of cases that have created certain exceptions to the *per se* rule where economic, or procompetitive justifications are particularly strong. *See, e.g., Jerrold Electronics Corp., supra; Will, 776 F.2d at 672-74* (package sale); *see also Jefferson Parish, 466 U.S. at 22* (applying *per se* tying rules only where "it is efficient" to offer the tied and tying products separately); *International Salt Co., Inc., 332 U.S. at 397* (lessor can impose "reasonable restrictions . . . to minimize maintenance **[*800]** burdens and to assure satisfactory operations").

For these reasons, we conclude that the plaintiff has failed to prove that the *per se* anti-tying rules apply in this case; nor has the plaintiff shown a trade practice, the anticompetitive effects of which outweigh its legitimate business justifications. The judgment of the district court is

Reversed.
